

HANDBOOK

Handbook on European law relating to asylum, borders and immigration

Edition 2020



COUNCIL OF EUROPE



The manuscript for the third edition of this handbook was completed in July 2020. It was originally published in five languages in December 2020. This third edition incorporates the changes to the EU acquis in the field of asylum, borders and immigration, as well as developments in European case law since 2014. The first edition was published in four languages in 2013, followed by the second edition in 2014. Future updates of this handbook will become available on the European Union Agency for Fundamental Rights (FRA) webpage at: <http://fra.europa.eu/en/theme/asylum-migration-borders> and on the European Court of Human Rights (ECTHR) webpage at: www.echr.coe.int under 'Publications'.

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Foreword

Since 2011, the European Union (EU) Agency for Fundamental Rights, the Council of Europe and the European Court of Human Rights, have published handbooks on various fields of European law. This handbook provides an overview of the European legal standards relevant to asylum, borders and immigration, explaining both applicable Council of Europe and EU measures.

The handbook is intended for lawyers, judges, prosecutors, border guards, immigration officials and others working with national authorities, as well as national human rights institutions, non-governmental organisations and other bodies that may be confronted with legal questions in the areas covered.

The Charter of Fundamental Rights of the EU became legally binding when the Lisbon Treaty entered into force in December 2009. It has the same legal value as the founding EU Treaties. 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.

Since we published the second edition of this handbook in 2014, there have been significant developments in European law relating to asylum, borders and immigration. For example, a number of adopted EU instruments upgrade or establish new large-scale EU information technology systems to manage migration. There have also been smaller legislative changes – for instance, in the Schengen *acquis* on borders, irregular migration and visas.

Similarly, the Court of Justice of the EU has clarified several legal questions emerging from the implementation of EU migration and asylum law in its ever-expanding case law. The European Court of Human Rights has also delivered a number of important judgments, notably in the area of reception conditions of asylum seekers. In light of such changes, the handbook required an update to ensure that its legal guidance remains accurate.

Improving the understanding of common principles developed in the case law of the two European courts, and in EU regulations and directives, is essential. Such understanding helps ensure that relevant European standards and safeguards are properly implemented and fundamental rights fully respected at national level. We hope this handbook will help to promote this important objective.

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Contents

FOREWORD	3
ABBREVIATIONS	11
HOW TO USE THIS HANDBOOK	14
INTRODUCTION	19
The Council of Europe	19
The European Union	21
The Charter of Fundamental Rights of the European Union	25
European Union accession to the European Convention on Human Rights	26
Key points	27
1 ACCESS TO THE TERRITORY AND TO PROCEDURES	29
Introduction	30
1.1. The Schengen visa regime	32
1.2. Preventing unauthorised entry	35
1.3. Entry bans and Schengen alerts	36
1.4. Checks at border-crossing points	39
1.5. Internal borders within the Schengen area	40
1.6. Local border traffic	41
1.7. Transit zones	43
1.8. Access to asylum	44
1.9. Push-backs and pull-backs at sea	46
Key points	48
2 LARGE-SCALE EU INFORMATION TECHNOLOGY SYSTEMS AND INTEROPERABILITY	49
Introduction	51
2.1. Large-scale EU information systems	52
2.1.1. European Asylum Dactyloscopy (Eurodac)	53
2.1.2. Visa Information System (VIS)	53
2.1.3. Schengen Information System (SIS)	54
2.1.4. Entry/Exit System (EES)	55
2.1.5. European Travel Authorisation and Information System (ETIAS)	56
2.1.6. European Criminal Records Information System on Third-Country Nationals (ECRIS-TCN)	56
2.1.7. Europol Information System (EIS)	57

2.2.	Interoperability	59
2.2.1.	Common Identity Repository	60
2.2.2.	European Search Portal	61
2.2.3.	Multiple-Identity Detector	61
2.2.4.	Shared Biometric Matching Service	61
2.3.	Oversight	62
2.4.	Purpose limitation, data minimisation and data accuracy	63
2.5.	Right to information	66
2.6.	Access to data	69
2.7.	Data transfers to third parties	72
2.8.	Data subjects' rights	73
	Key points	76
3	STATUS AND ASSOCIATED DOCUMENTATION	79
	Introduction	80
3.1.	Asylum seekers	81
3.2.	Recognised refugees and those recognised as being in need of subsidiary protection	83
3.3.	Victims of trafficking and of particularly exploitative labour conditions	84
3.4.	Persons affected by Rule 39 interim measures	86
3.5.	Migrants in an irregular situation	87
3.6.	Long-term residents	90
3.7.	Turkish nationals	92
3.8.	British nationals	95
3.9.	Third-country nationals who are family members of EEA or Swiss nationals	96
3.10.	Stateless persons and the loss of citizenship or documentation	97
	Key points	99
4	ASYLUM DETERMINATION AND BARRIERS TO REMOVAL: SUBSTANTIVE ISSUES	101
	Introduction	104
4.1.	The right to asylum and the principle of non- <i>refoulement</i>	104
4.1.1.	The nature of the risk under EU law	108
4.1.2.	The nature of the risk under the ECHR	111
4.1.3.	Assessment of risk	117
4.1.4.	Sufficiency of protection	120
4.1.5.	Internal relocation	123
4.1.6.	Safety elsewhere	124
4.1.7.	Exclusion from international protection	127
4.1.8.	Cessation of international protection	129

4.2.	Collective expulsion	131
4.3.	Barriers to expulsion based on other human rights grounds	133
4.4.	Third-country nationals who enjoy a higher degree of protection from removal	135
4.4.1.	Long-term residents	136
4.4.2.	Third-country national family members of EEA and Swiss nationals	136
4.4.3.	Turkish nationals	138
	Key points	139
5	PROCEDURAL SAFEGUARDS AND LEGAL SUPPORT IN ASYLUM AND RETURN CASES	141
	Introduction	142
5.1.	Asylum procedures	143
5.1.1.	Interview, examination procedure and initial decision-making	143
5.1.2.	Right to an effective remedy	146
5.1.3.	Appeals with automatic suspensive effect	149
5.1.4.	Accelerated asylum procedures	152
5.2.	Dublin procedure	153
5.3.	Procedures relating to reception conditions of asylum seekers	159
5.4.	Return procedures	159
5.5.	Legal assistance in asylum and return procedures	162
5.5.1.	Legal assistance in asylum procedures	164
5.5.2.	Legal assistance in return procedures	164
5.5.3.	Legal assistance to challenge reception conditions	165
	Key points	166
6	PRIVATE AND FAMILY LIFE AND THE RIGHT TO MARRY	167
	Introduction	169
6.1.	The right to marry and to found a family	171
6.2.	Family regularisation	173
6.3.	Family reunification	182
6.4.	Maintaining the family – protection from expulsion	188
6.4.1.	Relationship breakdown	188
6.4.2.	Criminal convictions	189
	Key points	193
7	DETENTION AND RESTRICTIONS TO FREEDOM OF MOVEMENT	195
	Introduction	198
7.1.	Deprivation of liberty or restriction on the freedom of movement?	199
7.2.	Alternatives to detention	201

7.3.	Exhaustive list of exceptions to the right to liberty	203
7.3.1.	Detention to prevent an unauthorised entry into the country	206
7.3.2.	Detention pending removal or extradition	208
7.4.	Prescribed by law	211
7.5.	Necessity and proportionality	212
7.6.	Arbitrariness	213
7.6.1.	Good faith	214
7.6.2.	Due diligence	215
7.6.3.	Realistic prospect of removal	216
7.6.4.	Maximum length of detention	218
7.7.	Detention of individuals with specific needs	220
7.8.	Procedural safeguards	223
7.8.1.	Right to be given reasons	223
7.8.2.	Right to review of detention	225
7.9.	Detention conditions or regimes	227
7.10.	Compensation for unlawful detention	230
	Key points	231
8	FORCED RETURNS AND MANNER OF REMOVAL	233
	Introduction	234
8.1.	Carrying out removal: safe, dignified and humane	235
8.2.	Confidentiality	236
8.3.	Serious harm caused by restraint measures	237
8.4.	Investigations	240
	Key points	241
9	ECONOMIC AND SOCIAL RIGHTS	243
	Introduction	245
9.1.	Main sources of law	246
9.2.	Economic rights	249
9.2.1.	Family members of EEA and Swiss nationals	251
9.2.2.	Posted workers	252
9.2.3.	Blue Card holders, researchers and students	253
9.2.4.	Turkish nationals	254
9.2.5.	Long-term residents and beneficiaries of the Family Reunification Directive	255
9.2.6.	Nationals of other countries with association or cooperation agreements	256
9.2.7.	Asylum seekers and refugees	259
9.2.8.	Migrants in an irregular situation	260

9.3. Education	260
9.4. Housing	263
9.5. Healthcare	269
9.6. Social security and social assistance	272
Key points	277
10 PERSONS WITH SPECIFIC NEEDS	281
Introduction	282
10.1. Unaccompanied children	283
10.1.1. Reception and treatment	284
10.1.2. Age assessment	287
10.2. Victims of trafficking in human beings	289
10.3. Persons with disabilities	291
10.4. Victims of torture	292
10.5. Victims of gender-based violence	294
Key points	296
FURTHER READING	297
ONLINE SOURCES	305
LIST OF CASES	309
HOW TO FIND CASE LAW OF THE EUROPEAN COURTS	329
EU INSTRUMENTS AND SELECTED AGREEMENTS	335
ANNEX 1: APPLICABILITY OF EU REGULATIONS AND DIRECTIVES CITED IN THIS HANDBOOK	345
ANNEX 2: APPLICABILITY OF SELECTED COUNCIL OF EUROPE INSTRUMENTS	352
ANNEX 3: ACCEPTANCE OF ESC PROVISIONS	355
ANNEX 4: ACCEPTANCE OF SELECTED UN CONVENTIONS	359
ANNEX 5: COUNTRY CODES USED IN THE ANNEXES	361

Abbreviations

ACP	African, Caribbean and Pacific
BMS	shared Biometric Matching Service
CAT	United Nations Convention Against Torture
CETS	Council of Europe Treaty Series
CIR	Common Identity Repository
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 or Degrading Treatment or Punishment
DPA	Data protection authority
EASO	European Asylum Support Office
Frontex	European Border and Coast Guard Agency
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)
ECRIS-TCN	European Criminal Records Information System on Third-Country Nationals
ECSR	European Committee of Social Rights
EDPS	European Data Protection Supervisor
EEA	European Economic Area

EEA nationals	Nationals of one of the 27 EU Member States, Iceland, Liechtenstein and Norway
EEC	European Economic Community
EES	Entry/Exit System
EFTA	European Free Trade Association
EIS	Europol Information System
EPPO	European Public Prosecutors Office
ESC	European Social Charter
ESP	European Search Portal
ETIAS	European Travel Information and Authorisation System
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
eu-LISA	European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
Eurodac	European Asylum Dactyloscopy
Eurojust	European Union Agency for Criminal Justice Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
FRA	European Union Agency for Fundamental Rights
GC	Grand Chamber
GDPR	General Data Protection Regulation
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IT	Information technology
MID	Multiple-Identity Detector

NGO	non-governmental organisation
PACE	Parliamentary Assembly of the Council of Europe
PPU	urgent preliminary ruling procedure
SAR	Search and Rescue
SFRY	Socialist Federal Republic of Yugoslavia
SIS	Schengen Information System
SOLAS	International Convention for the 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
VIS	Visa Information System

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 to whom the EU usually refers as third-country nationals, although that distinction is not relevant to 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 25 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, researchers, au pairs, seasonal workers and highly skilled workers, the EU has adopted common rules on their admission. However, some of the conditions provided in directives are optional or regulate certain 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. As of 1 February 2020, the United Kingdom withdrew from the European Union. The Withdrawal Agreement sets up a transition period until 31 December 2020 during which EU law continues to apply to the United Kingdom ⁽¹⁾. [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 (CoE). Each chapter

(1) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2020 L 29/7.

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 CoE 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 regulations and directives cited in this handbook' provides an overview of which states are bound by which legislation. It also shows that Denmark and Ireland 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 CoE member states are party to the ECHR, not all of them have signed or ratified all of the ECHR Protocols or are States Parties to the other CoE conventions mentioned in this handbook. [Annex 2](#) provides an overview of the applicability of selected CoE instruments, including the relevant Protocols to the ECHR.

Substantial differences also exist among the states that are party to the ESC. States joining the ESC system are allowed to decide whether or not 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 10 chapters covering the following issues:

- access to the territory and to procedures;
- large-scale EU information technology (IT) systems and interoperability;
- 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 to 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.

The handbook only covers legislation that is in force in July 2020. The reader should consider that EU legislation is frequently amended. Legislative amendments including the latest consolidated version of different pieces of EU legislation can be accessed via eur-lex.europa.eu. For example, on the Common European Asylum System, the European Commission tabled several legislative proposals in 2016 to revise all EU asylum law instruments listed under ‘EU law instruments and selected agreements’. These legislative proposals were still under review in July 2020.

The electronic version of the handbook contains hyperlinks to the case law of the two European courts and to EU legislation cited. Hyperlinks to EU law sources bring the reader to eur-lex.europa.eu overview pages, from which the reader can open the case or the piece of legislation in any available EU language.

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
	Nationals of the United Kingdom until the end of the transition period
Persons with rights derived from international agreements	Family members of citizens of the European Economic Area (EEA) and Switzerland
	Turkish nationals and their family members
	Nationals of third countries that have concluded bilateral or multilateral agreements with the EU (over 100 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
	Intra-corporate transferees
	Students
	Au pairs
	Seasonal workers
	Local border traffic permit holders
	Long-stay visa holders
Short-term visitors	Visa-free third-country nationals
	Visa-bound third-country nationals

Persons in need of protection	Asylum seekers
	Beneficiaries of subsidiary protection
	Beneficiaries of temporary protection
	Refugees
	Victims of human trafficking
Migrants in an irregular situation	Illegally staying third-country nationals
	Illegally staying third-country nationals whose removal has been postponed

NB: A third-country national may fall under more than one category.

Source: European Union Agency for Fundamental Rights (FRA), 2020



Introduction

This introduction will briefly explain the roles of the two European legal orders regulating migration. References to the Council of Europe legal system will primarily relate to the ECHR and the case law developed by the ECtHR and, where applicable, to the ESC. EU law is mainly presented through the relevant regulations and directives and the provisions of the Charter of Fundamental Rights of the European Union.

The Council of Europe

The CoE was formed in the aftermath of the Second World War to bring together the European states to promote the rule of law, democracy and human rights. As at July 2020, the CoE is composed of 47 member states, including all EU Member States.

In 1950, the CoE adopted the ECHR, which, under its Article 19, set up the ECtHR as a judicial mechanism to ensure that states observed their obligations under the Convention.

The ECtHR examines complaints from individuals, groups of individuals, NGOs or legal persons alleging violations of the Convention. It can also examine interstate cases brought by one or more CoE member states against another member state. An applicant before the ECtHR is not required to be a citizen or a lawful resident of one of the contracting states ⁽²⁾. Article 1 of the ECHR requires states to 'secure' the Convention rights to 'everyone within their jurisdiction'. In certain specific cases, the

⁽²⁾ The ECHR contains only a few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents (see, for example, Art. 5 (1) (f) of the ECHR; Arts. 2, 3 and 4 of Protocol No. 4 to the ECHR; and Art. 1 of Protocol No. 7 to the ECHR).

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 ⁽³⁾.

Migration issues have generated a vast body of case law from the ECtHR. This handbook presents selected examples. They mainly relate to Article 3 (prohibition of torture, inhuman and degrading treatment and punishment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 of the ECHR (right to an effective remedy). Article 13 of the ECHR requires states to provide a domestic 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 a margin of appreciation. The ECtHR does not replace independent and impartial domestic courts when these have carefully examined the facts, applying the relevant human rights standards consistently with the ECHR and its case law, adequately balanced the applicant's personal interests against the more general public interest and reached conclusions that were 'neither arbitrary nor manifestly unreasonable' ⁽⁴⁾.

States have an international obligation to ensure that their officials comply with the ECHR. All CoE 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.

In 1961, the CoE adopted the ESC (revised in 1996) to guarantee fundamental social and economic rights. As at July 2020, 43 out of the 47 CoE member states had ratified the ESC ⁽⁵⁾. 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 at

⁽³⁾ ECtHR, *Matthews v. the United Kingdom* [GC], No. 24833/94, 18 February 1999, para. 32; ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], No. 45036/98, 30 June 2005, para. 153.

⁽⁴⁾ ECtHR, *Faruk Rooma Alam v. Denmark* (dec.), No. 33809/15, 6 June 2017, para. 35.

⁽⁵⁾ Thirty-four states are bound by the 1996 revised ESC and nine by the 1961 Charter. The ESC offers the possibility to States Parties to sign up to specific provisions only, subject to a certain minimum. Annex 3 provides an overview of the applicability of ESC provisions.

regular intervals; and the collective complaints procedure ⁽⁶⁾, 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.

The European Union

The EU comprises 27 Member States. 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 1968 ⁽⁷⁾, 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.

The European Economic Area (EEA) entered into force in 1994. Nationals of non-EU Member States that are part of the EEA – namely Iceland, Liechtenstein and Norway – have the same free movement rights as EU nationals ⁽⁸⁾. Similarly, based

⁽⁶⁾ The complaints procedure is optional (as opposed to the reporting procedure) and, as at July 2020, had been accepted by 15 states that are party to the ESC.

⁽⁷⁾ Council Regulation (EEC) No. 1612/68, 15 October 1968.

⁽⁸⁾ Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of Persons, Services and Capital, OJ 1994 L1/3.

on a special agreement concluded with the EU on 21 June 1999 ⁽⁹⁾, Swiss nationals enjoy a right to move and settle in the EU. Iceland, Liechtenstein, Norway and Switzerland are 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.

Turkish nationals 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') ⁽¹⁰⁾. As a result, those Turkish nationals 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 9, [Section 9.2.6](#)), but none of those are as wide-ranging as the Ankara Agreement.

With the withdrawal of the United Kingdom from the European Union, British nationals are third-country nationals since 1 February 2020. The Withdrawal Agreement sets up a transition period until 31 December 2020, subject to prolongation, during which the United Kingdom remains bound by EU law ⁽¹¹⁾. All EU law provisions described in this handbook will continue to apply to the United Kingdom until the end of the transition period. Until then, British nationals are treated in the same way as other EU nationals.

⁽⁹⁾ 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.

⁽¹⁰⁾ 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 L 293/3.

⁽¹¹⁾ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2020 L 29/7, Arts. 126–127.

The Treaty of Maastricht entered into force in 1993 and created the 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 intergovernmental level – became part of the EU legal order. The rules relating to border management continue to evolve and develop in the context of the Schengen Borders Code (Regulation (EU) 2016/399). In 2004, the EU created Frontex (formally called the European Border and Coast Guard Agency since 2016) to assist EU Member States in the management of the external borders of the Union.

Since the Treaty of Rome in 1957, successive treaty amendments have enlarged the jurisdiction of the European Communities, now the EU, in issues affecting migration; the Treaty of Amsterdam gave the EU new powers 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 powers in the field of integration of third-country nationals.

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* (see [Annex 1](#)).

Over the past decades, 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) ⁽¹²⁾. The CJEU is entrusted with a number of powers. On the one hand, the Court has the right to decide on the validity of EU acts and on failures

⁽¹²⁾ 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.

to act by the EU institutions under EU and relevant international law, as well as to decide on infringements of EU law by EU Member States. On the other hand, the CJEU retains exclusive authority to ensure 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 restricted⁽¹³⁾.

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 the 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 rulings in the *Francovich* case⁽¹⁴⁾, 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 the validity of an EU provision, national courts can – and must in certain cases⁽¹⁵⁾ – 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⁽¹⁶⁾.

⁽¹³⁾ This, for example, was the case in ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [GC], 3 September 2008; as well as CJEU, C-274/12 P, *Telefonica SA v. European Commission* [GC], 19 December 2013.

⁽¹⁴⁾ ECJ, Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci and Others v. Italian Republic*, 19 November 1991; ECJ, Case C-479/93, *Andrea Francovich v. Italian Republic*, 9 November 1995.

⁽¹⁵⁾ According to Art. 267 (3) of the TFEU, this obligation always arises for courts against whose decisions there is no judicial remedy under national law and also for other courts whenever a preliminary reference concerns the validity of an EU provision and there are grounds to consider that the challenge is well founded (see, for example, ECJ, Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 22 October 1987).

⁽¹⁶⁾ See Statute of the Court of Justice, Protocol No. 3, Art. 23a; and Rules of Procedure of the Court of Justice, Arts. 107–114. For a better overview of cases that might be subject to a PPU, see CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2018/C 257/01), 20 July 2018, para. 33: 'a national court or tribunal may, 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 EU law depends on the answer to the question referred for a preliminary ruling'.

The Charter of Fundamental Rights of the European Union

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 what are called the 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 ⁽¹⁷⁾.

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 Charter 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, soon thereafter stated that it would ensure the 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, making it legally binding with the same legal value as the Treaties. Besides EU institutions, EU Member States are also bound to comply with the Charter ‘when implementing EU law’ (Article 51 (1) of the Charter).

A protocol has been adopted interpreting the Charter in relation to Poland and the United Kingdom ⁽¹⁸⁾. In a 2011 migration case before the CJEU, the Court held that the main purpose of the 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 ⁽¹⁹⁾.

⁽¹⁷⁾ ECJ, Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 13 December 1979, para. 15.

⁽¹⁸⁾ TFEU, Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 2008 115/313.

⁽¹⁹⁾ 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* [GC], 21 December 2011.

Article 18 of the EU Charter 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 on returning 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*), as well as the prohibition of collective expulsion.

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 Charter stipulates that the minimum protection afforded by the Charter provisions is that provided by the ECHR; the EU may nevertheless apply a more generous interpretation of the rights than that put forward by the ECtHR.

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 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 ⁽²⁰⁾.

⁽²⁰⁾ 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; ECtHR, *Avotiņš v. Latvia* [GC], No. 17502/07, 23 May 2016.

The Lisbon Treaty contains a provision mandating the EU to join the ECHR as a party in its own right (Article 6 (2) of the TEU). Protocol No. 14 to the ECHR ⁽²¹⁾ 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.

Negotiations on a draft agreement on the accession of the EU to the ECHR started in 2010. The draft accession agreement consists of a package of texts necessary for the accession of the EU to the ECHR. It includes provisions on the scope of the accession, the adjustments needed to the ECHR text and system, the participation of the EU in the CoE bodies and its right to vote within the Committee of Ministers. In Opinion 2/13 ⁽²²⁾ of the CJEU on the draft agreement on the accession of the EU to the ECHR, the Court decided that the draft agreement was incompatible with the EU Treaties. The negotiations for the EU's accession to the ECHR are ongoing; however, they may take several years.

Key points

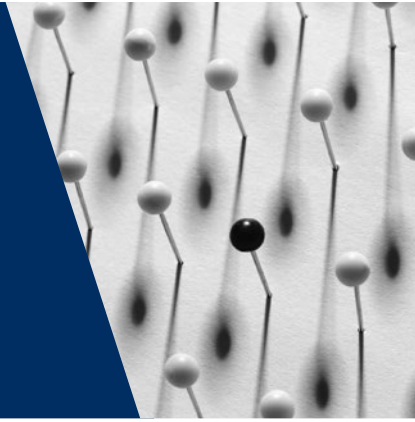
- Migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the ESC and other international obligations entered into by European states.
- Complaints against acts or omissions by a public authority violating the ECHR may be brought against any of the 47 member states of the CoE. These include all 27 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.

⁽²¹⁾ Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 2004, CETS No. 194.

⁽²²⁾ CJEU, Opinion 2/13, 18 December 2014.

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 (EU) 2018/1806 Visa Code, Regulation (EC) 810/2009 VIS Regulation, Regulation (EC) No. 767/2008	Schengen visa regime	
Carriers Sanctions Directive, 2001/51/EC Facilitation Directive, 2002/90/EC	Preventing unauthorised entry	
SIS Border Checks Regulation, Regulation (EU) 2018/1861 SIS Returns Regulation, Regulation (EU) 2018/1860 Return Directive, 2008/115/EC, Article 11	Schengen alerts and entry bans	ECHR, Article 2 of Protocol No. 4 (freedom of movement)
Schengen Borders Code, Regulation (EU) 2016/399	Border checks	
Schengen Borders Code, Regulation (EU) 2016/399, Title III	Internal borders	

EU	Issues covered	CoE
Return Directive, 2008/115/EC, Article 4 (4)	Transit zones	ECtHR, <i>Amuur v. France</i> , No. 19776/92, 1996, and <i>Z.A. and Others v. Russia</i> , No. 61411/15 and 3 others, 2017 (detention in transit zone found to be a deprivation of liberty) ECtHR, <i>Ilias and Ahmed v. Hungary</i> [GC], No. 47287/15, 2019 (states have jurisdiction over transit zones at land borders)
Local Border Traffic Regulation, Regulation (EC) No. 1931/2006	Local border traffic	
EU Charter, Article 18 (right to asylum) and Article 19 (protection in the event of removal, expulsion or extradition) Asylum Procedures Directive, 2013/32/EU	Asylum seekers	ECHR, Article 3 (prohibition of torture)
Schengen Borders Code, Regulation (EU) 2016/399, Articles 4 and 13 Sea Borders Regulation, Regulation (EU) No. 656/2014, Article 10	Push-backs and pull-backs at sea	
EU Charter, Article 47 (right to an effective remedy and to a fair trial) Asylum Procedures Directive, 2013/32/EU Schengen Borders Code, Regulation (EU) 2016/399, Article 14 (3) SIS Border Checks Regulation, Regulation (EU) 2018/1861, Article 54 Visa Code, Regulation (EC) No. 810/2009, Article 32 (3) and Article 34 (7)	Remedies	ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> [GC], No. 27765/09, 2012 (collective expulsion on the high seas) ECHR, Article 13 (right to an 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 rejecting persons at borders and returning them to states where they are 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 controls. The EU has also set up rules to prevent irregular entry. The European Border and Coast Guard Agency, Frontex, supports EU Member States in the management of EU external borders ⁽²³⁾. The agency provides technical and operational support through joint operations, through rapid border interventions at land, air or sea borders and by sending experts to migration management support teams deployed in EU Member States facing disproportionate migratory challenges. The European Border Surveillance System called 'Eurosur' serves as an information exchange system between the EU Member States and Frontex. By 2027, Frontex will have a standing corps of 10,000 operational staff to support EU Member States with border control and return tasks. When acting in the context of a joint operation or a rapid border intervention, EU Member States maintain responsibility for their acts and omissions.

As illustrated in Figure 1, the Schengen *acquis* applies to most EU Member States. It establishes a unified system of 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 4 of the [Schengen Borders Code](#) (Regulation (EU) No. 2016/399) prohibits the application of the code in a way that 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*.

⁽²³⁾ Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, OJ 2019 L 295/1.

The case law may, under certain circumstances, require states to allow the entry of an individual when it is a precondition for his or her exercise of certain Convention rights, in particular the right to family life ⁽²⁴⁾.

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 if they fulfil the conditions of the Schengen Borders Code (Article 6). They can only be excluded on grounds of public policy, public security or public health.

Under EU law, nationals from countries listed in Annex 1 to the [Visa List Regulation](#) (Regulation (EU) 2018/1806, 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. The website of the European Commission contains an up-to-date map with visa requirements for the Schengen area ⁽²⁵⁾. EU Member States cannot impose a visa requirement on the categories of 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 included in the 1970 Additional Protocol to the Ankara Agreement ⁽²⁶⁾.

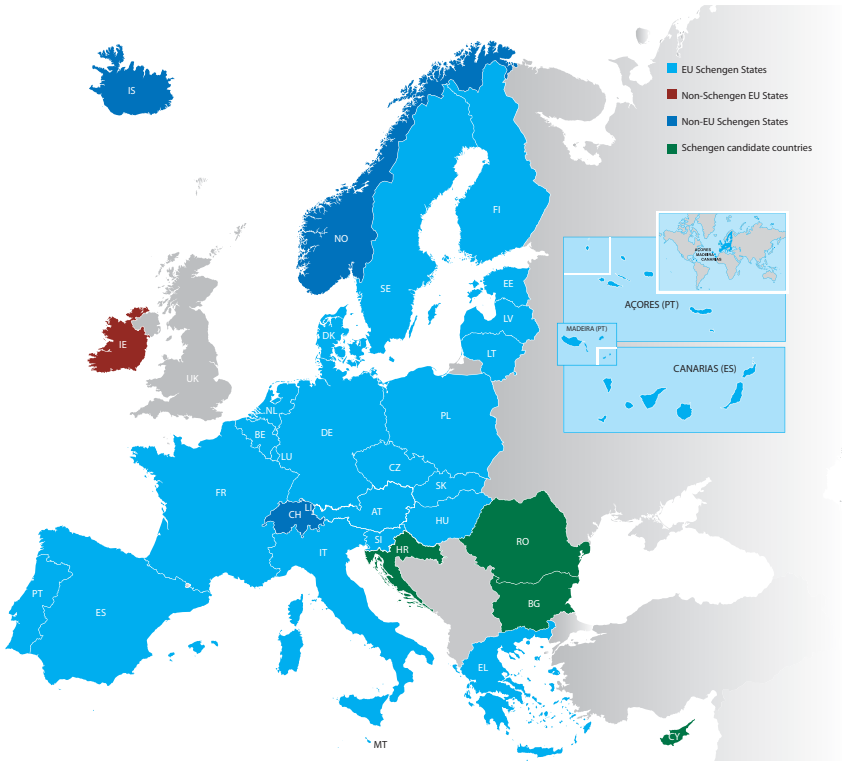
Personal information on short-term visa applicants is stored in the Visa Information System ([VIS Regulation \(EC\) No. 767/2008](#) as last amended by [Regulation \(EU\) 2019/817](#)), a central EU IT system that connects consulates and external border-crossing points.

⁽²⁴⁾ 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.

⁽²⁵⁾ [European Commission, Migration and Home Affairs, Visa policy.](#)

⁽²⁶⁾ [Additional Protocol to the Ankara Agreement, OJ 1972 L 293/3, Art. 41.](#)

Figure 1: Schengen area



Source: European Commission, Directorate-General of Migration and Home Affairs, 2020

Visits for up to 90 days in any 180-day period in states that are part of the Schengen area are subject to the [Visa Code](#) (Regulation (EC) No. 810/2009 as last amended by [Regulation \(EU\) 2019/1155](#)). In contrast, long-stay visas – which have a maximum period of validity of 1 year under [Regulation \(EU\) No. 265/2010](#) – are primarily the responsibility of individual states. Nationals who are exempted from a visa under the [Visa List Regulation](#) (Regulation (EU) 2018/1806) may require visas prior to their visit if coming for purposes other than a short visit. All visas must be obtained before travelling. Only specific categories of third-country nationals are exempt from this requirement.

Example: In the *Koushkaki* case ⁽²⁷⁾, the CJEU held that the authorities of a Member State cannot refuse to issue a Schengen visa to an applicant, unless one of the grounds for refusal listed in the Visa Code applies. The national authorities have, however, a wide discretion to ascertain this. A visa is to be refused where there is reasonable doubt of the applicant's intention to leave the territory of the Member States before the expiry of the visa. To determine if there is a reasonable doubt of that intention, the competent authorities must carry out an individual examination of the visa application that takes into account the general situation in the applicant's country of residence and the applicant's individual characteristics, inter alia his family, social and economic situation, whether he or she may have previously stayed legally or illegally in one of the Member States and his or her ties in his or her country of residence and in the Member States.

Example: In *X. and X.* ⁽²⁸⁾, a Syrian couple and their three children travelled to the Belgian embassy in Beirut (Lebanon) and applied for a visa with limited territorial validity on the basis of Article 25 (1) (a) of the Visa Code. The application was refused, as the intention of the applicants was to stay beyond 90 days and apply for asylum in Belgium. The CJEU ruled that, although the applicants formally submitted a visa application, their request fell outside the scope of the Visa Code. The Court noted that, in line with the Asylum Procedures Directive (2013/32/EU), applications for international protection were to be made in the territory of the EU Member States. Allowing the situation in the present case would be allowing third-country nationals to lodge visa applications to seek international protection. It further stated that the present case fell within the scope of national law, as no EU measure had been adopted on the basis of Article 79 (2) (a) of the TFEU on long-stay visas and residence permits on humanitarian grounds.

Under Article 32 (3) of the [Visa Code](#), negative visa decisions are subject to appeal.

⁽²⁷⁾ CJEU, C-84/12, *Rahmanian Koushkaki v. Bundesrepublik Deutschland* [GC], 19 December 2013.

⁽²⁸⁾ CJEU, C-638/16 PPU, *X. and X. v. État belge* [GC], 7 March 2017. In a similar case, the ECtHR held that the ECHR does not apply to visa applications submitted to embassies and consulates of the Contracting Parties (*M.N. and Others v. Belgium* [GC], No. 3599/18, 5 May 2020).

Example: In *El Hassani* ⁽²⁹⁾, the CJEU considered the case of a Moroccan national who submitted a Schengen visa application to visit his wife and son, who are Polish nationals. The application and the subsequent request for review were rejected on the ground of a lack of certainty of the intention of the applicant to leave Poland before the visa expired. The CJEU ruled that Article 32 (3) of the Visa Code on legal remedies must be interpreted as meaning that it requires EU Member States to provide for an appeal procedure against decisions refusing visas, the procedural rules for which are a matter for EU Member States' domestic laws. The Court stated that those proceedings must include judicial review.

Under Article 19 of the Convention implementing the Schengen Agreement ⁽³⁰⁾, third-country nationals who hold uniform visas may freely move within the whole Schengen area while their visas are still valid and as long as they fulfil the entry conditions related to their visa. According to Article 21, a residence permit accompanied by a travel document may under certain circumstances replace a visa. [Regulation \(EC\) No. 1030/2002](#) (as last amended by [Regulation \(EU\) 2017/1954](#)) lays down a uniform format for residence permits. Aliens not subject to a visa requirement may move freely within the Schengen territory for a maximum period of 90 days in any 180-day period, provided that they fulfil the entry conditions under the Schengen Borders Code ⁽³¹⁾.

1.2. Preventing unauthorised entry

Under EU law, the [Schengen Borders Code](#) requires that EU external borders be crossed only at designated border-crossing points. EU Member States are required to put in place an effective border surveillance system to prevent unauthorised entry, while fully respecting fundamental rights (Articles 4 and 13 of the Schengen Borders Code) (see also Sections 1.8 and 10.2).

Legislative measures have been taken to prevent unauthorised access to EU territory. The [Carriers Sanctions Directive](#) (2001/51/EC) provides for sanctions against carriers, such as airlines, that transport undocumented migrants into the EU.

⁽²⁹⁾ CJEU, C-403/16, *Soufiane El Hassani v. Minister Spraw Zagranicznych*, 13 December 2017.

⁽³⁰⁾ [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.

⁽³¹⁾ In line with [Regulation \(EU\) 2018/1240](#), as from 2021, visa-free travellers will require a valid European Travel Authorisation.

The [Facilitation 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. A ban is typically valid for a certain period of time and ensures that individuals who are considered dangerous or undesirable are not given a visa or otherwise admitted to the territory.

Under EU law, entry bans are entered into a database called the Schengen Information System (SIS), which the authorities of other Schengen states 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 Schengen State and then moving freely without border controls. Article 24 of the [SIS Border Checks Regulation](#) (EU) 2018/1861 lists two situations when a Member State must enter an alert for refusal of entry and stay in the SIS. The first case concerns alerts for third-country nationals about whom a Member State, after an individual assessment, has adopted a judicial or administrative decision concluding that that individual's presence on the Member State's territory poses a threat to public policy, to public security or to national security. The second case concerns persons against whom a return decision has been issued. Under Article 54 of the regulation, entry bans can be challenged.

Example: In the *M. et Mme Forabosco* case, the French Council of State (*Conseil d'État*) quashed the decision denying a visa to Mr Forabosco's wife, who was listed in 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 in the SIS database resulting from a negative asylum decision was an insufficient reason for refusing a French long-stay visa ⁽³²⁾.

⁽³²⁾ France, Council of State (*Conseil d'État*), *M. et Mme Forabosco*, No. 190384, 9 June 1999.

Example: In the *M. Hicham B* case, the French Council of State ordered a temporary suspension of a decision to expel an alien because he had been listed in 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 ⁽³³⁾.

For those individuals subject to an entry ban made in the context of a return decision under Article 3 (6) of the [Return Directive](#) (2008/115/EC), the ban should normally not extend beyond 5 years ⁽³⁴⁾.

Example: In *Ouhrami* ⁽³⁵⁾, the CJEU clarified the distinction between a return decision and an entry ban. The Court stated that, until a person's obligation to return is complied with, the 'illegal stay' of the person is governed by the return decision. Once the person leaves the territory of the Member State, the entry ban starts producing its legal effects and the starting point of the duration of the entry ban must be calculated from the date on which the returnee actually left the EU territory.

Under the [SIS Returns Regulation](#) (Regulation (EU) 2018/1860), the return decision itself will also be recorded in the SIS, once preparatory work has been completed. If another Member State wishes to grant or extend a residence permit or long-stay visa to a person subject to a return decision accompanied by an entry ban, it must consult the Member State concerned.

Entry bans issued outside the scope of the SIS Border Checks Regulation and 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 or not 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 parliamentary assembly in France. This was discussed in detail at the October 2011 meeting of

⁽³³⁾ France, Council of State (*Conseil d'État*), *M. Hicham B*, No. 344411, 24 November 2010.

⁽³⁴⁾ CJEU, C-297/12, *Criminal proceedings against Gjoko Filev and Adnan Osmani*, 19 September 2013.

⁽³⁵⁾ CJEU, C-225/16, *Criminal proceedings against Mossa Ouhrami*, 26 July 2017.

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 ⁽³⁶⁾.

Under the ECHR, listing someone in the SIS database is an action taken by an individual member state within the scope of EU law. Therefore, 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 ⁽³⁷⁾, a Romanian citizen whose name had been listed in 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 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 Chamber decision concerning registration in 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.

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

Example: The case of *Nada v. Switzerland* ⁽³⁸⁾ 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 counterterrorism 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 counterterrorism 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

⁽³⁶⁾ Council of Europe, Parliamentary Assembly, *Resolution 1894 (2012) on the inadmissibility of restrictions on freedom of movement as punishment for political positions*, adopted on 29 June 2012.

⁽³⁷⁾ ECtHR, *Dalea v. France* (dec.), No. 964/07, 2 February 2010.

⁽³⁸⁾ ECtHR, *Nada v. Switzerland* [GC], No. 10593/08, 12 September 2012.

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.

Travel bans must respect the right to leave any country as set out in Article 2 of Protocol No. 4 to the ECHR.

Example: The *Stamose v. Bulgaria* ⁽³⁹⁾ case concerned a Bulgarian national upon whom the Bulgarian authorities imposed a 2-year travel ban on account of breaches of the US immigration laws. Assessing for the first time if a travel ban designed to prevent breaches of domestic or foreign immigration laws was compatible with Article 2 of Protocol No. 4 to the ECHR, the ECtHR found that a blanket and indiscriminate measure prohibiting the applicant from travelling to every foreign country on account of the breach of the immigration law of one particular country was not proportionate.

1.4. Checks at border-crossing points

Under EU law, to cross the EU's external borders, third-country nationals must fulfil the conditions for entry or exit. If entry is refused, authorities must issue a decision stating the precise reasons for the refusal (Article 14 of the [Schengen Borders Code](#)). Under Article 14 (3) of the Schengen Borders Code, persons refused entry have a right to appeal. More favourable rules for crossing the EU external borders exist for third-country nationals who enjoy free movement rights (Articles 3 and 8 (6)).

Article 4 of the Schengen Borders Code requires that border control tasks be carried out with full respect for human dignity ⁽⁴⁰⁾. Checks at border-crossing points must be carried out in a way that does not discriminate against a person on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. A mechanism has been set up to evaluate and monitor the application of the Schengen *acquis*, including respect for fundamental rights in this context ([Regulation \(EU\) No. 1053/2013](#)).

⁽³⁹⁾ ECtHR, *Stamose v. Bulgaria*, No. 29713/05, 27 November 2012.

⁽⁴⁰⁾ See CJEU, C-23/12, *Mohamad Zakaria*, 17 January 2013.

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 ⁽⁴¹⁾.

In the case of *Ranjit Singh v. France*, the UN Human Rights Committee considered that obliging 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). It did not accept 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 ⁽⁴²⁾.

1.5. Internal borders within the Schengen area

Under EU law, the [Schengen Borders Code](#) (Regulation (EU) 2016/399) abolished internal border controls within the Schengen area, except for exceptional cases (Title III, Chapter II). The CJEU has held that states cannot conduct surveillance at internal borders that has an equivalent effect to border checks ⁽⁴³⁾. Surveillance, including through electronic means, of internal Schengen borders is allowed when based on evidence of irregular residence, but it is subject to certain limitations, such as intensity and frequency ⁽⁴⁴⁾.

⁽⁴¹⁾ ECtHR, *Phull v. France* (dec.), No. 35753/03, 11 January 2005; ECtHR, *El Morsli v. France* (dec.), No. 15585/06, 4 March 2008.

⁽⁴²⁾ UN Human Rights Committee, *Ranjit Singh v. France*, Communications Nos. 1876/2000 and 1876/2009, views of 22 July 2011, para. 8.4. See also, UN Human Rights Committee, *Mann Singh v. France*, Communication No. 1928/2010, views of 19 July 2013.

⁽⁴³⁾ CJEU, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Selim Abdeli* [GC], 22 June 2010, para. 74.

⁽⁴⁴⁾ CJEU, C-278/12 PPU, *Atiqullah Adil v. Minister voor Immigratie, Integratie en Asiel*, 19 July 2012.

Example: In *Bundesrepublik Deutschland v. Touring tours* ⁽⁴⁵⁾, the CJEU held that Article 21 of the Schengen Borders Code precludes national legislation that requires every coach transport undertaking that provides a cross-border service within the Schengen area to check passports and residence permits of passengers before they cross an internal border to prevent the transport of third-country nationals who are not in possession of travel documents. This would constitute checks within the territory of a Member State that are equivalent to border checks and is, therefore, prohibited.

When Member States exceptionally introduce temporary controls at the internal border, they are made public on the European Commission website ⁽⁴⁶⁾. The temporary introduction of border controls does not make an internal EU border into an external border.

Example: In *Arib* ⁽⁴⁷⁾, the CJEU considered whether or not an internal border where border controls were reintroduced pursuant to the Schengen Borders Code (Regulation (EU) 2016/399) could be equated to an external border for the purpose of the Return Directive (2008/115/EC). The CJEU noted that the Return Directive continues to apply if a Member State reintroduces border controls at its internal border. The Court ruled that the concepts of internal borders and external borders are mutually exclusive, and internal borders at which border controls are reinstated cannot be considered external borders. The CJEU concluded that opting out from the application of the directive in border cases does not cover the situation of migrants in an irregular situation who were apprehended at an internal border at which border controls have been reintroduced.

1.6. Local border traffic

Under EU law, the local border traffic regime (Regulation (EC) No. 1931/2006) constitutes a derogation from the general rules governing border control of persons crossing the external borders of the EU Member States. The criteria and conditions to be complied with for crossing an external land border are eased for residents in

⁽⁴⁵⁾ CJEU, Case C-412/17 and C-474/17, *Bundesrepublik Deutschland v. Touring tours und Travel GmbH and Sociedad de Transportes SA*, 13 December 2018.

⁽⁴⁶⁾ See European Commission, Migration and Home Affairs, *What we do, Policies, Schengen, Borders and Visas; Schengen Area, Temporary Reintroduction of Border Control*.

⁽⁴⁷⁾ CJEU, C-444/17, *Préfet des Pyrénées-Orientales v. Abdelaziz Arib* [GC], 19 March 2019.

a border area of a neighbouring third country, thus enhancing the EU's relationship with its neighbours. This regime ensures that the borders with the EU's neighbours are not a barrier to trade, social and cultural interchange or regional cooperation.

Under Article 4 of the Local Border Traffic Regulation, border residents who are in possession of a local border traffic permit can enter the neighbouring state when they hold a valid travel document and have no SIS alert that would prevent their entry into the Schengen area. Visas are not required, passports do not need to be stamped and no checks are carried out on the purpose of the journey or possession of means of subsistence. Holders of a local border traffic permit earn the right to an uninterrupted stay of up to 3 months (Article 5). The CJEU considered the question of stay for local border traffic permit holders.

Example: The *Shomodi* case ⁽⁴⁸⁾ concerned a Ukrainian national in possession of a local border traffic permit that authorised him to enter the border area of Hungary. Having stayed in the Schengen area for more than 3 months in a 6-month period, he was refused entry into Hungary. The CJEU distinguished between the limitation in time under the local border traffic regime and the Schengen limitation of 90 days in a 180-day period. The Court noted that the Local Border Traffic Regulation sets a limitation specific to uninterrupted stays, and the legislation does not suggest that the 3-month limitation must fall within one and the same 6-month period. The Court also clarified that the stay of the holder of a local border traffic permit is interrupted as soon as the person crosses back into the third country of residence, irrespective of the frequency of the crossings. Once the border resident re-enters the Schengen area, the maximum 3-month period will start anew.

Holders of the local border traffic permit can stay within the border area of the state, which extends not more than 30 km (in exceptional cases, 50 km) from the border. In the case of Kaliningrad (an exclave forming part of Russia), under [Regulation \(EU\) No. 1342/2011](#), the local border traffic regime covers the entire Kaliningrad region.

⁽⁴⁸⁾ CJEU, C-254/11, *Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v. Oskar Shomodi*, 21 March 2013.

1.7. 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 irregular border crossing. Their treatment cannot be less favourable than that of other migrants in an irregular situation, and the principle of non-*refoulement* must be respected at all times.

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

Example: In *Amuur v. France* ⁽⁴⁹⁾, 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.

Example: In *Z.A. and Others v. Russia* ⁽⁵⁰⁾, the applicants were held in the transit zone of a Russian airport. The Russian government argued that the applicants were not under Russian jurisdiction. However, the ECtHR disagreed and concluded that the applicants' confinement in the transit zone amounted to a *de facto* deprivation of liberty resulting in a violation of Article 5 (1) of the ECHR. The Court also found a violation of Article 3 of the ECHR, as the conditions at the transit zone were in a state that caused the applicants' mental suffering, undermined their dignity and humiliated them.

Example: In *Ilias and Ahmed v. Hungary* ⁽⁵¹⁾, the ECtHR reaffirmed that transit zones established at land borders fall under Hungarian jurisdiction.

⁽⁴⁹⁾ ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, paras. 52–54. 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.

⁽⁵⁰⁾ ECtHR, *Z.A. and Others v. Russia*, Nos. 61411/15 and 3 others, 28 March 2017.

⁽⁵¹⁾ ECtHR, *Ilias and Ahmed v. Hungary* [GC], No. 47287/15, 21 November 2019, para. 186.

1.8. Access to asylum

Unable to obtain a valid travel document, in practice, people seeking asylum often reach the border without valid documents or cross the border in an irregular manner. Regardless of where they are detected or apprehended – on the high seas, at the border or within the territory – if they express the wish to seek asylum, they must be referred to appropriate national procedures. Under EU and CoE law, the principle of non-*refoulement* forbids sending away individuals who seek protection from persecution or serious harm without first assessing their claim (see also [Chapter 4](#)).

Under EU law, the [EU Charter](#) provides for the right to asylum in Article 18 and the prohibition of *refoulement* in Article 19. Under Article 4 of the [Schengen Borders Code](#), border control activities must fully comply with the requirements of the [1951 Convention Relating to the Status of Refugees](#) and the obligations related to access to international protection, in particular the principle of non-*refoulement*. These requirements apply to all border controls, including checks at official border-crossing points and border surveillance activities at the land or sea borders, including those exercised on the high seas.

The EU asylum *acquis* only applies from the moment an individual has arrived at the border, including territorial waters and transit zones (Article 3 (1) of the [Asylum Procedures Directive](#) (2013/32/EU)). Article 6 of the directive lays down details of access to the asylum procedure. In particular, Article 6 (1) requires Member States to register an application within 3 working days, or within 6 working days when an application is submitted to authorities other than those responsible for its registration. Such other authorities also include courts ⁽⁵²⁾. Article 6 (2) obliges states to ensure that individuals have an effective opportunity to lodge an application as soon as possible. Under Article 8 of the directive, where there are indications that a persons present at the border may wish to make an application for asylum, Member States must provide them with information on the possibility to do so.

Article 43 of the Asylum Procedures Directive permits the processing of asylum applications at the border or in transit zones. There, decisions can be taken on the admissibility of the application. Decisions can also be taken on its substance in circumstances in which accelerated procedures may be used in accordance with Article 31 (8) of the directive. The basic principles and guarantees applicable to asylum claims submitted inside the territory apply. Article 43 (2) stipulates that, in border

⁽⁵²⁾ CJEU, C-36/20 PPU, *Ministerio Fiscal v. VL*, 25 June 2020, paras. 59–68.

procedures, a decision must be taken at the latest within 4 weeks from the submission of the claim; otherwise the applicant must be granted access to the territory to further process the application. There is a duty under Article 24 (3) to refrain from using border procedures for vulnerable applicants in need of special procedural guarantees if they are survivors of rape or other serious violence, where adequate support cannot be provided at the border. Article 25 (6) (b) sets some limitations to the processing of applications submitted at the border by unaccompanied children. These provisions do not apply to Ireland, which remains bound by Article 35 of the 2005 version of [Directive 2005/85/EC](#).

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, and thereby putting the individual at risk of torture or inhuman or degrading treatment or punishment, is prohibited by Article 3 of the ECHR.

Example: The case of *Kebe and Others v. Ukraine* ⁽⁵³⁾ concerned Eritrean stowaways on board a commercial vessel docked at a Ukrainian port heading towards Saudi Arabia. The ECtHR found that the Ukrainian authorities had violated the ECHR by refusing to allow the applicants to disembark and apply for asylum. Even though there was no conclusive evidence of whether or not the applicants had requested asylum in Ukraine, the ECtHR considered that, in the light of objective information available at that time, in Saudi Arabia there was a serious risk of return to Eritrea, and Ukraine had failed to consider their claim under Article 3 of the ECHR.

Example: In *M.A. and Others v. Lithuania* ⁽⁵⁴⁾, the applicants, who had fled the Chechen Republic, attempted to cross the border between Lithuania and Belarus on three separate occasions. Although they claimed they were seeking international protection each time, they were refused entry on the grounds that they did not have the necessary travel documents. The Lithuanian border guards had not accepted their asylum applications and had not forwarded them to a competent authority for examination and status determination, as required by domestic law. The ECtHR found that no assessment had been carried out of whether or not it was safe to return the applicants to Belarus, a country that

⁽⁵³⁾ ECtHR, *Kebe and Others v. Ukraine*, No. 12552/12, 12 January 2017.

⁽⁵⁴⁾ ECtHR, *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018. See also ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.

was not a State Party to the ECHR. The Court ruled that the failure to allow the applicants to submit their asylum applications and their removal to Belarus amounted to a violation of 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 ⁽⁵⁵⁾.

1.9. Push-backs and pull-backs at sea

Access to EU territory and CoE 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 [International Convention for the Safety of Life at Sea \(SOLAS\)](#) and [International Convention on Maritime Search and Rescue \(SAR\)](#). 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'. In this context, one of the most controversial issues is where to disembark persons rescued or intercepted at sea.

Push-backs and pull-backs raise issues of compatibility with the principle of non-*refoulement* and the right to leave any country. Through push-backs at sea, persons are forced back to the third country from where they had departed. Through the practice of pull-backs, people are prevented from leaving the territory of a third country or, if already on the high seas, prevented from reaching the territorial sea of EU Member States.

Under EU law, Article 13, read in conjunction with Articles 3 and 4, of the [Schengen Borders Code](#) stipulates that border surveillance must prevent unauthorised border crossings and it must prevent and discourage persons from circumventing the checks at border-crossing points, while respecting the principle of non-*refoulement*. The [Sea Borders Regulation](#) (Regulation (EU) No. 656/2014) regulates surveillance of the external sea borders by EU Member States within the context of operational cooperation with Frontex. Article 4 ensures the protection of fundamental rights and the principle of non-*refoulement*. Article 10 of the Sea Borders Regulation provides for modalities of disembarkation of rescued persons.

⁽⁵⁵⁾ ECtHR, *N.A. v. Finland*, No. 25244/18, 14 November 2019.

Under CoE law, the ECHR applies to all those who are within the jurisdiction of a CoE member state. The ECtHR has held on several occasions⁽⁵⁶⁾ 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 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*⁽⁵⁷⁾, 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. The Italian authorities 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. They 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 the United Nations High Commissioner for Refugees (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 them to the risk of *refoulement*.

⁽⁵⁶⁾ ECtHR, *Xhavara and Others v. Italy and Albania* (dec.), No. 39473/98, 11 January 2001; ECtHR, *Medvedyev and Others v. France* [GC], No. 3394/03, 29 March 2010.

⁽⁵⁷⁾ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

Key points

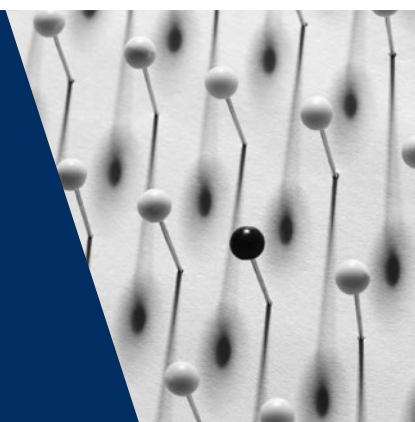
- States have a right to decide whether or not to grant foreigners access to their territory, but must respect EU law, the ECHR and applicable human rights guarantees (see [introduction to this chapter](#)).
- EU law and the ECHR prohibit rejecting persons at borders and returning them to states where they are at risk of persecution or other serious harm (prohibition of *refoulement*) (see [introduction to this chapter](#)).
- EU law establishes common rules for EU Member States regarding the issuance of short-stay 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 1.9](#)).
- EU law, particularly the Schengen *acquis*, enables individuals to travel free from border controls within the Schengen area (see [Section 1.1](#)).
- The local border traffic regime of EU law makes it easier for residents of border areas to cross an external land border of a Member State (see [Section 1.6](#)).
- Under EU law, an entry ban against an individual by a Schengen state denies that person access to the entire Schengen area (see [Section 1.3](#)).
- The EU Charter 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. The ECHR does not provide for the right to asylum as such; however, turning away an individual and thereby putting the individual at risk of torture or other forms of ill-treatment is prohibited (see [Section 1.8](#)).
- 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 1.7](#), [1.8](#) and [1.9](#)), regardless of whether the migrant is in a transit zone or otherwise within that state's jurisdiction.

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

2

Large-scale EU information technology systems and interoperability



EU	Issues covered	CoE
<p>VIS Regulation, Regulation (EC) No. 767/2008</p> <p>Decision on access to VIS by law enforcement authorities, 2008/633/JHA</p> <p>Eurodac Regulation, Regulation (EU) No. 603/2013</p> <p>SIS Regulation, Regulation (EU) 2018/1862; SIS Border Checks Regulation, Regulation (EU) 2018/1861; SIS Returns Regulation, Regulation (EU) 2018/1860</p> <p>EES Regulation, Regulation (EU) 2017/2226</p> <p>ETIAS Regulation, Regulation (EU) 2018/1240</p> <p>ECRIS-TCN Regulation, Regulation (EU) 2019/816</p> <p>Europol Regulation, Regulation (EU) 2016/794</p> <p>eu-LISA Regulation, Regulation (EU) 2018/1726</p>	<p>EU IT systems</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Convention No. 108')</p> <p>Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Modernised Convention No. 108')</p> <p>ECtHR, <i>S. and Marper</i> [GC], Nos. 30562/04 and 30566/04, 2008 (retention of fingerprints)</p>
<p>Interoperability Regulation – borders and visa, Regulation (EU) 2019/817</p> <p>Interoperability Regulation – asylum and migration, Regulation (EU) 2019/818</p>	<p>Interoperability</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>Convention No. 108</p> <p>Modernised Convention No. 108</p>

EU	Issues covered	CoE
<p>EU Charter, Article 8 (2) (right to protection of personal data)</p> <p>General Data Protection Regulation (GDPR), Article 5</p> <p>Data Protection Directive for Police and Criminal Justice Authorities, (EU) 2016/680, Article 4</p> <p>CJEU, Joined Cases C-293/12 and C-594/12, <i>Digital Rights Ireland</i> [GC], 2014 (processing of excessive data)</p>	<p>Purpose limitation</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>Modernised Convention No. 108, Article 5</p>
<p>General Data Protection Regulation (GDPR), Articles 13 and 14</p> <p>Data Protection Directive for Police and Criminal Justice Authorities, (EU) 2016/680, Article 13</p>	<p>Right to information</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>Modernised Convention No. 108, Article 8</p>
<p>General Data Protection Regulation (GDPR), Article 5</p> <p>CJEU, Joined Cases C-293/12 and C-594/12, <i>Digital Rights Ireland</i> [GC], 2014 (protection of personal data against the risk of abuse and unlawful access)</p> <p>Data Protection Directive for Police and Criminal Justice Authorities, (EU) 2016/680, Article 4</p> <p>Legal instruments establishing the EU IT systems (as listed above)</p>	<p>Unauthorised access to data</p>	<p>Modernised Convention No. 108, Article 7</p>
<p>General Data Protection Regulation (GDPR), Chapter 5</p> <p>Data Protection Directive for Police and Criminal Justice Authorities, (EU) 2016/680, Chapter 5</p> <p>Legal instruments establishing the EU IT systems (as listed above)</p>	<p>Data transfer to third countries</p>	<p>Modernised Convention No. 108, Article 14</p>

EU	Issues covered	CoE
<p>EU Charter, Article 8 (2) (right to protection of personal data)</p> <p>General Data Protection Regulation (GDPR), Articles 15–17</p> <p>Data Protection Directive for Police and Criminal Justice Authorities, (EU) 2016/680, Articles 14–17</p> <p>CJEU, Joined Cases C-203/15 and C-698/15, <i>Tele2 Sverige</i> [GC], 2016 (obligation to notify to ensure right to effective remedy)</p>	<p>Data subject rights (access to, and correction and deletion of, data)</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>Modernised Convention No. 108, Article 9</p> <p>ECtHR, <i>Segerstedt-Wiberg and Others v. Sweden</i>, No. 62332/00, 2006 (access to information held by security services)</p>

Introduction

This chapter looks at large-scale IT systems established by the EU in the area of freedom, security and justice. It presents their safeguards relating to selected fundamental rights, especially those connected to data protection, the right for respect to private life, the right to asylum and the right to an effective remedy. It also explains interoperability, which is achieved through interconnecting large-scale EU IT systems. It will enable authorised users to carry out a search of an individual across the systems and to see the data they are authorised to access, rather than searching each system separately.

Under EU law, visa, border, asylum and immigration authorities of EU Member States increasingly rely on technology when taking decisions affecting a person. IT systems are also increasingly serving internal security purposes. For third-country nationals – applicants for international protection, migrants in an irregular situation, visa applicants or everyday travellers – it is difficult to understand how the IT systems function and how they influence decision-making.

The EU has set up six large-scale IT systems, not counting Europol databases. These IT systems provide support to manage migration, asylum and borders, enhance judicial cooperation and contribute to strengthening internal security within the Union.

The EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) was established in 2011 by [Regulation \(EU\) No. 1077/2011](#) and reinforced by [Regulation \(EU\) 2018/1726](#). The Agency is responsible for the development and operational management of large-scale EU

IT systems. It ensures their effective, secure and continuous operation, as well as the continuous and uninterrupted exchange of data between the national authorities using them. The Agency must ensure the highest levels of data security, data quality and data protection.

Under CoE law, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) as modernised by its amending protocol (CETS No. 223) lays down the core principles on the protection of personal data processing, carried out by both the private and public sectors. These principles equally apply to data processing by large-scale EU IT systems. Convention No. 108 and its modernising protocol ('Modernised Convention No. 108') protect individuals against abuses that may accompany the processing of personal data, and seek to regulate the transborder flows of personal data. Under the right for respect to private and family life in Article 8 of the ECHR, the ECtHR has dealt with the automated processing of personal data in large-scale databases established at national level. Together with CoE soft law instruments, such as the [Police Recommendation \(Recommendation No. R \(87\) 15\)](#), such case law provides guidance on the use of personal data by law enforcement authorities, for example when querying any of the below EU IT systems.

2.1. Large-scale EU information systems

The EU IT systems are used in a number of migration-related processes: in the asylum process, in visa processing, during border checks, when issuing residence permits, when apprehending migrants in an irregular situation, in the return procedures and for issuing entry bans, as well as when exchanging information on third-country nationals' criminal convictions. They also have additional purposes. In particular, law enforcement authorities can consult them to fight terrorism and other serious crime under strict conditions. This section presents the six large-scale EU systems, as well as the Europol databases and how these will become interoperable. Only the first three systems presented below – European Asylum Dactyloscopy (Eurodac), Visa Information System (VIS) and the SIS – were operational in July 2020, and the legal framework of Eurodac and VIS was under review.

2.1.1. European Asylum Dactyloscopy (Eurodac)

Eurodac contains the fingerprints of third-country nationals who apply for asylum in one of the EU Member States, as well as the fingerprints of migrants apprehended in connection with an irregular border crossing. Fingerprints of children under the age of 14 years are not processed, although a [pending revision](#) of the Eurodac Regulation intends to lower that age to 6 years. According to eu-LISA, Eurodac stored almost 5.5 million fingerprint datasets in 2018 ⁽⁵⁸⁾. The system has been operational since 2003 and was revised in 2013 by Regulation (EU) No. 603/2013 ([Eurodac Regulation](#)) ⁽⁵⁹⁾.

Eurodac assists EU Member States in determining where applicants for international protection first entered the EU. The storing of fingerprints in Eurodac allows an EU Member State to know if the individual has already applied for asylum elsewhere or if the person has been apprehended in another EU Member State after an irregular entry. It thus supports EU Member States in applying the [Dublin Regulation](#) (Regulation (EU) No. 604/2013) (see [Section 5.2](#)).

An additional purpose for which national law enforcement authorities and the EU Agency for Law Enforcement Cooperation (Europol) are authorised to access data in Eurodac is the prevention, detection or investigation of terrorist offences or of other serious crime, but only for these purposes, under strict conditions. Because of practical obstacles, as of July 2020 Europol had not yet been able to connect to Eurodac.

The Eurodac Regulation applies to all EU Member States as well as to the Schengen Associated Countries ⁽⁶⁰⁾.

2.1.2. Visa Information System (VIS)

VIS aims to facilitate the application procedure for Schengen visas (short-stay visas) and the exchange of data between Schengen Member States – including their diplomatic and consular representations – on such applications. It also serves asylum, immigration control and security-related purposes. It stores data about visa

⁽⁵⁸⁾ eu-LISA (2019), *Eurodac – 2018 annual report*, June 2019, p. 4.

⁽⁵⁹⁾ It is complemented by an implementing regulation laying down more detailed rules for the application of Eurodac; see [Commission Implementing Regulation \(EC\) No. 1560/2003 \(OJ 2003 L 222/3\)](#) as amended by [Commission Implementing Regulation \(EU\) No. 118/2014 \(OJ 2014 L 39/1\)](#).

⁽⁶⁰⁾ Ireland is only bound by [Council Regulation \(EC\) No. 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention](#), OJ 2000 L 316/1.

applicants, including fingerprints, photographs and decisions on applications for short-stay visas. Fingerprints of children under the age of 12 years are not processed, although a [pending revision](#) of the VIS Regulation intends to lower that age limit to 6 years.

The [VIS Regulation](#) (EC) No. 767/2008 describes how VIS works. VIS was rolled out worldwide in November 2015 ⁽⁶¹⁾. By August 2018, over 60 million visa applications and 40 million fingerprint datasets were entered in VIS ⁽⁶²⁾.

As one of the purposes of VIS is reinforcing the internal security of the Schengen area, [Council Decision 2008/633/JHA](#) grants national law enforcement authorities and Europol access to data for the prevention, detection or investigation of terrorist offences or of other serious crime, but only for these purposes and under strict conditions. This access was put into effect as of September 2013 ⁽⁶³⁾. [Table 2](#) shows in which EU Member States VIS applies.

2.1.3. Schengen Information System (SIS)

The SIS stores alerts on certain categories of wanted or missing persons (both EU citizens and third-country nationals) and missing objects. It also contains alerts on third-country nationals who are subject to a refusal of entry or a return decision. The database includes instructions to police officers and border guards on specific action to be taken when a person or object is located (e.g. to arrest a suspect, to protect a vulnerable missing person or to seize an invalid passport). National law enforcement, border control, customs, visa and judicial authorities can access the data stored in the SIS, strictly within their mandates.

⁽⁶¹⁾ Commission Implementing Decision (EU) 2015/912 of 12 June 2015 determining the date from which the Visa Information System (VIS) is to start operations in the 21st, 22nd and 23rd regions, OJ 2015 L 148/28.

⁽⁶²⁾ European Commission (2019), *Factsheet: EU Information systems – Security and Borders*, Brussels, April 2019, p. 1.

⁽⁶³⁾ See Council Decision 2013/392/EU of 22 July 2013 fixing the date of effect of Decision 2008/633/JHA concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ 2013 L 198/45, which was then replaced, as a result of a successful action for annulment before the CJEU, by Council Implementing Decision (EU) 2015/1956 of 26 October 2015 fixing the date of effect of Decision 2008/633/JHA concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ 2015 L 284/146.

The system has been operational since March 1995; its more advanced second generation ⁽⁶⁴⁾ was launched in April 2013. A revision of the SIS legal framework encompassing three different legal acts – namely the *SIS Regulation* (Regulation (EU) 2018/1862), *SIS Border Checks Regulation* (Regulation (EU) 2018/1861) and *SIS Returns Regulation* (Regulation (EU) 2018/1860) – entered into force in December 2018. It brought about important technical and operational improvements including new alert categories (e.g. return decisions) and created more efficient information exchange between EU Member States’ law enforcement authorities and with EU agencies such as Europol, the European Union Agency for Criminal Justice Cooperation (Eurojust) and Frontex. In 2018, the SIS included a total of more than 82 million alerts, of which only some 930,000 were alerts on persons, the rest being on objects. Checked over 6.1 billion times in 2018, it was the most widely used EU IT system in the field of migration and security ⁽⁶⁵⁾. Table 2 shows in which EU Member States the SIS applies.

2.1.4. Entry/Exit System (EES)

EES was created by the *EES Regulation* (Regulation (EU) 2017/2226, last amended by *Regulation (EU) 2019/817*) for registering the movements into and out of the Schengen area of all third-country nationals who are admitted for a short stay (both visa-bound and visa-free travellers), meaning one or multiple visits amounting to a maximum of 90 days in a period of 180 days. The system calculates and monitors the duration of stay of third-country nationals admitted, with a view to facilitating the border crossing of *bona fide* travellers, and to identifying overstayers and identity fraud. It will replace the current obligation to stamp passports manually with electronic registration of when and where the person entered and exited the Schengen area and an automated calculation of how many days the person can still stay on a short-term basis. The EES also records refusals of entry.

The objectives of the EES also include preventing irregular immigration and facilitating the management of migration flows. As an additional purpose, the system should contribute to the prevention, detection and investigation of terrorist offences and of other serious crime. As a result, alongside border, visa and immigration authorities, national law enforcement authorities and Europol will have access to the data stored therein but only for the national security related purposes described above and under strict conditions.

⁽⁶⁴⁾ See *Regulation (EU) No. 1987/2006*, OJ 2006 L 381/4; and *Decision 2007/533/JHA*, OJ 2007 L 205/63.

⁽⁶⁵⁾ eu-LISA (2019), *SIS II – 2018 Annual Statistics: Factsheet*, March 2019.

The system is expected to be operational in 2022. The EES will apply to all states that are part of the Schengen area (see [Table 2](#)).

2.1.5. European Travel Authorisation and Information System (ETIAS)

The [ETIAS Regulation](#) (Regulation (EU) 2018/1240, last amended by [Regulation \(EU\) 2019/817](#)) established a pre-border checks system for visa-free travellers. The automated system screens nationals from visa-free third countries to establish whether or not they should be allowed to enter the EU for visits of up to 90 days in any 180-day period. Using an online application tool, it collects personal data on visa-free travellers prior to their arrival at the EU's external borders. Frontex and the border control authorities of the relevant Member State(s) cross-check those data against all relevant databases. If the checks conclude that the person does not pose a security, irregular migration or public health risk, the individual will receive an automatic authorisation to travel to the EU. Otherwise, the application will be referred to manual checks by competent authorities. The European Travel Authorisation and Information System (ETIAS) thus facilitates travel by providing travellers with an early indication of their likely admissibility into the Schengen area.

Before a person embarks on a trip, carriers, such as airlines, have limited access to ETIAS and the EES data only to verify if the traveller holds an ETIAS authorisation and has not yet exhausted the 90 days in a 180-day period.

The system is expected to go live at the end of 2022. ETIAS will apply to all states that are part of the Schengen area (see [Table 2](#)).

2.1.6. European Criminal Records Information System on Third-Country Nationals (ECRIS-TCN)

ECRIS-TCN is a centralised database that enables EU Member States to exchange information on the criminal records of third-country nationals convicted in the EU. It works on a 'hit/no hit' basis. The system was created by the [ECRIS-TCN Regulation](#) (Regulation (EU) 2019/816) and supplements the decentralised EU criminal records database (the European Criminal Records Information System, ECRIS) established by [Council Decision 2009/316/JHA](#).

ECRIS-TCN helps identify, on a 'hit/no hit' basis, which Member State(s) hold(s) criminal records on a third-country national being checked. Queries may be made using biometric data, such as fingerprints. In the event of a hit, national judicial authorities can contact the corresponding Member State bilaterally for more details using ECRIS.

National authorities will be entitled to query ECRIS-TCN for criminal proceedings but also for non-criminal proceedings (e.g. when processing applications for a residence permit). Europol, Eurojust and the European Public Prosecutor's Office are also afforded direct access to ECRIS-TCN, within their respective mandates.

ECRIS-TCN is expected to be operational at the end of 2022. All EU Member States except for Denmark and Ireland participate in the system (see [Table 2](#)).















2.1.7. Europol Information System (EIS)






The EIS is Europol's central criminal information and intelligence database. It is regulated in Europol's founding regulation, [Regulation \(EU\) 2016/794](#), and became operational in 2005. It covers all of Europol's mandated crime areas and contains information on serious crimes with a transnational character, on suspected and convicted persons, on criminal structures and on the means used to commit crimes. The upgraded version of the EIS, launched in 2013, can store and cross-check biometrics and cybercrime-related data. The EIS is a reference system, which can be used to check if information on an individual or an object of interest is available beyond national jurisdictions.

Europol staff and designated officers in EU Member States' law enforcement authorities have access to the EIS. National authorities can run searches in the system and, in the event of a hit, they can request additional information via Europol's Secure Information Exchange Network Application (SIENA). In addition, [Europol's cooperation partners](#) may have indirect access to store and query data via Europol's Operational Centre.






Table 2 lists the existing large-scale IT systems, indicating the main purpose, the third-country nationals covered, the biometric identifiers processed and their geographical applicability. For more information on these EU databases, particularly from the data protection angle, see the [Handbook on European Data Protection Law](#), Section 8.3.2.

Table 2: Large-scale EU IT systems in the field of migration and security

IT system	Main purpose	Persons covered	Biometric identifiers	Applicability
Eurodac	Determining the state responsible for examining an application for international protection Additional purpose: law enforcement	Applicants and beneficiaries of international protection Migrants who crossed the external borders irregularly		27 EU Member States + SAC
VIS	Facilitating the exchange of data between Schengen Member States on visa applications Additional purpose: law enforcement	Visa applicants and sponsors		24 EU Member States (not CY, HR, IE) + SAC
SIS	Facilitating law enforcement cooperation to safeguard security in the EU and Schengen Member States	Missing, vulnerable and wanted persons	   	25 EU Member States (not CY, IE) + SAC
SIS – border checks	Entering and processing alerts for the purpose of refusing entry into or stay in the Schengen Member States	Third-country nationals convicted or suspected of an offence subject to custodial sentence of at least 1 year Migrants in an irregular situation	  	25 EU Member States (not CY, IE) + SAC
SIS – return	Entering and processing alerts on third-country nationals subject to a return decision	Migrants in an irregular situation subject to a return decision	  	25 EU Member States (not CY, IE) + SAC
EES	Calculating and monitoring the duration of authorised stay of third-country nationals and identifying overstayers	Third-country national travellers coming for a short-term stay	 	24 EU Member States (not CY, HR, IE) + SAC

IT system	Main purpose	Persons covered	Biometric identifiers	Applicability
ETIAS	Pre-travel assessment of whether or not a visa-exempt third-country national poses a security, irregular migration or public health risk	Travellers coming from visa-free third countries	None	26 EU Member States (not IE) + SAC
ECRIS-TCN	Sharing information on previous convictions of third-country nationals	Third-country nationals with a criminal record	 	25 EU Member States (not DK, IE)
EIS	Storing and querying data on serious international crime and terrorism	Persons suspected or convicted of serious organised crime and terrorism	  	27 EU Member States

NB: **Blue colouring** of an IT system means that it will start (fully) functioning later – precise date to be determined by the European Commission. To find up-to-date information on the go-live dates, consult eulisa.europa.eu (for all IT systems except for Europol) and europol.europa.eu (for Europol)

  : fingerprints;  : palm prints;  : facial image;  : DNA profile.

SAC: Schengen Associated Countries, i.e. Iceland, Liechtenstein, Norway and Switzerland.
For further details on applicability, see notes to Annex 1.

Source: FRA, based on legal instruments, 2020

2.2. Interoperability

Interoperability is the ability of different IT systems to communicate and exchange data with each other. In practice, this means that entitled users will be able to carry out a targeted search for an individual across the various IT systems in one go, and see the personal data they are authorised to access, rather than having to undertake multiple searches in separate systems. This needs to be done in line with their access rights and the data protection requirements of the underlying systems. In other words, the EU IT systems, which are currently not interlinked and operate in silos, will be able to ‘speak to each other’ once they are interoperable. Interoperability aims to help authorities to verify the identity of those individuals whose data are stored in at least one of the underlying IT systems and to detect multiple identities.

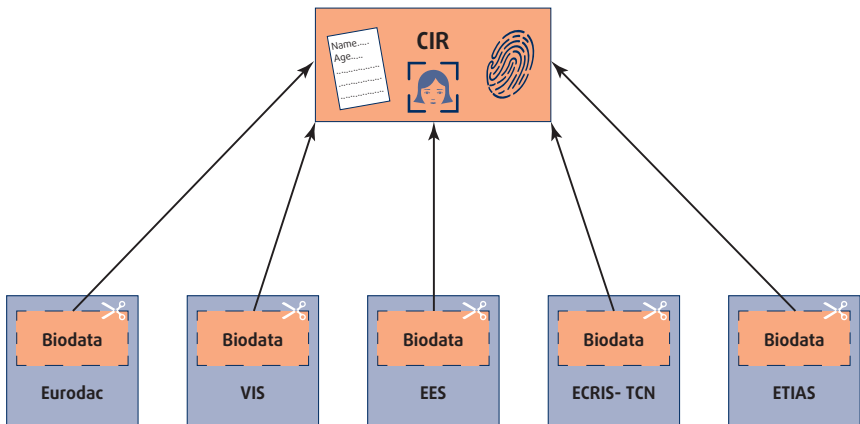
Interoperability may enhance protection – for example by supporting the detection of missing people, including children – but also creates fundamental rights challenges. These result from the weak position of the individuals whose data are stored in IT systems, who often lack knowledge of their rights.

The core components of interoperability of large-scale EU IT systems as established by the Interoperability Regulations ([Regulation \(EU\) 2019/817](#) and [Regulation \(EU\) 2019/818](#)) are explained in Sections 2.2.1 to 2.2.4. They are expected to become operational by the end of 2023.

2.2.1. Common Identity Repository

The Common Identity Repository (CIR) stocks the basic identity data of all people whose data are in large-scale EU IT systems in a common, central data store (Chapter IV of the Interoperability Regulations). This identity data repository will be common to and used by all the IT systems except for the SIS, for which a separate technical solution is applied. Specific biometric and biographical data of persons are moved from the existing systems (e.g. Eurodac, VIS and EES) and stored in a common platform, as illustrated in Figure 2. New IT systems (ETIAS and ECRIS-TCN) will build this component into their architecture. The data stored in the common repository continue to ‘belong’ to the underlying IT systems.

Figure 2: Common Identity Repository



Source: FRA, 2020

2.2.2. European Search Portal

The European Search Portal (ESP) acts as a single window to simultaneously query the various IT systems and the CIR with one search. Through the portal, users will be able to see data on an individual stored in those IT systems they are authorised to view, including the SIS, the EIS and two Interpol databases, using both biographical and biometric data. A single screen will show the combined results.

2.2.3. Multiple-Identity Detector

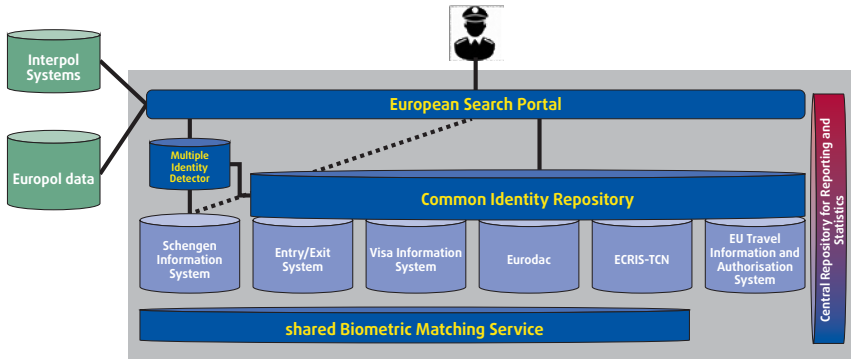
The Multiple-Identity Detector (MID) is a mechanism to detect if data on the same person are stored in several IT systems under different names and identities (Chapter V of the Interoperability Regulations). Different identities used by the same person will be detected and linked, which will help combat identity fraud. When national authorities with access rights search the systems, they can see all identities registered in the systems relating to the individual, regardless of whether or not they have been stored under a different name. The Multiple-Identity Detector is intended to ensure the correct identification of an individual through an automated as well as manual verification process.

2.2.4. Shared Biometric Matching Service

By comparing templates from biometric data stored in the IT systems, the shared Biometric Matching Service (BMS) enables the searching and comparing of biometric data, e.g. fingerprints and facial images, across different IT systems (Chapter III of the Interoperability Regulations). It is a tool to facilitate searches launched across systems using biometric data. Without it, biometric data could not be used for the CIR and the Multiple-Identity Detector.

Figure 3 illustrates the technical components of interoperability of large-scale IT systems and the individual underlying IT systems affected.

Figure 3: Technical components of interoperability



Source: European Commission, 2018

2.3. Oversight

Under EU law, to ensure a high and consistent level of data protection, national and EU bodies are mandated to oversee the IT systems' compliance with EU data protection standards. Supervision is shared between the data protection authorities (DPAs) of EU Member States and the European Data Protection Supervisor (EDPS). Each individual IT system, as well as the Interoperability Regulations, set out their specific roles and powers.

The EDPS is responsible for monitoring and ensuring the protection of fundamental rights of individuals with regard to the processing of personal data by EU agencies and bodies, including data stored in large-scale EU IT systems. To that end, the EDPS acts as an investigating and complaints body. It works in close cooperation with the national supervisory authorities.

While there are slight differences between the legal bases for the EU IT systems, in general they establish that national DPAs and the EDPS must cooperate, each acting within the scope of its own powers. They form supervision coordination groups for each large-scale EU IT system, to ensure coordinated and effective supervision of their functioning. Representatives of the national DPAs and of the EDPS meet regularly – usually twice a year, within the framework of the European Data Protection Board – to discuss common issues regarding supervision. Activities include, inter alia, joint inspections and inquiries and work on a shared methodology. The same obligations also flow from Article 62 of the [EU Institutions Data Protection Regulation](#) (Regulation (EU) 2018/1725).

In addition, every person has the right to lodge a complaint with the national DPA, which must investigate and inform the complainant of the progress or the outcome of the complaint within 3 months⁽⁶⁶⁾. For alleged data protection breaches by eu-LISA when managing the EU IT systems, individuals can turn to the EDPS, which needs to inform the complainant of the progress and the outcome of the complaint within 3 months (Articles 57 (1) (e) and 63 of the EU Institutions Data Protection Regulation). If unsuccessful, both complaint procedures can lead to judicial review: before the competent national courts or the CJEU, respectively⁽⁶⁷⁾ (see also Section 2.8).

Under CoE law, *Modernised Convention No. 108* requires states to appoint one or more fully independent and impartial supervisory authorities for ensuring compliance with the Convention (Article 15). Such authorities must have powers to investigate, to intervene, to issue decisions on violations of the Convention's data protection standards and to impose administrative sanctions, alongside the power to initiate legal proceedings in the event of alleged violations of the safeguards in the Convention. Supervisory authorities also need to be mandated to deal with individual complaints concerning data protection rights.

2.4. Purpose limitation, data minimisation and data accuracy

Under EU law, the principle of purpose limitation requires that personal data be collected only for specified purposes, which must be explicitly defined. The principle flows from Article 8 (2) of the *EU Charter* and is mirrored in the EU data protection legislation, namely in Article 5 (1) (b) of the *GDPR*, as well as Article 4 (1) (b) of the *Data Protection Directive for Police and Criminal Justice Authorities* and Article 4 (1) (b) of the *EU Institutions Data Protection Regulation*. Purpose limitation also implies that personal data must not be further processed in a manner that is incompatible with those purposes. The person concerned needs to be able to foresee the purpose for which data will be processed⁽⁶⁸⁾.

All legal instruments setting up EU IT systems specify the purpose for which they process personal data. EU IT systems may have additional purposes, such as helping apprehend and return migrants in an irregular situation, as well as fighting terrorism

⁽⁶⁶⁾ GDPR, Arts. 13 (2) (d), 14 (2) (e) and 52–53.

⁽⁶⁷⁾ GDPR, Art. 52; EU Institutions Data Protection Regulation, Art. 64.

⁽⁶⁸⁾ CJEU, C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Opinion of Advocate General Kokott delivered on 18 July 2007, para. 53.

and other serious crimes (see Table 3) ⁽⁶⁹⁾. Optimising the use of IT systems and their interoperability to serve additional purposes must not lead to a function creep, resulting in data being used for purposes that were not initially envisaged.

Table 3: Primary and additional purposes in the legal instruments on EU IT systems

IT system	Primary purpose	Additional purposes	
		Apprehension and return	Fighting serious crimes and terrorism
Eurodac	Application of the Dublin Regulation	Yes (partially – apprehension)	Yes
VIS	Supporting the visa application process and border checks	Yes	Yes
SIS	Safeguarding internal security in the Member States	No	–
SIS – borders	Processing alerts on refusals of entry and stay	–	No
SIS – return	Processing of alerts on return decisions	–	No
EES	Registration of entry and exit of all third-country nationals	Yes	Yes
ETIAS	Pre-border checks for visa-free third-country nationals	No	Yes
ECRIS-TCN	Information exchange on previous convictions of third-country nationals in other EU Member States in the context of judicial cooperation	No	–
Interoperability	Ensuring the correct identification of the person	–	–

NB: – = already part of the primary purpose.

Source: FRA, based on existing legal instruments, 2020

The current trend in EU IT systems as well as national systems is to process more biometric and alphanumeric data. Closely linked to the principle of purpose limitation is the principle of data minimisation. It is spelled out in Article 5 (1) (c) of the GDPR, Article 4 (1) (c) of the Data Protection Directive for Police and Criminal Justice Authorities and Article 4 (1) (c) of the EU Institutions Data Protection Regulation. Data minimisation requires that personal data must be adequate, relevant and limited to what

⁽⁶⁹⁾ See also CJEU, C-482/08, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* [GC], 26 October 2010.

is necessary for the purposes for which they are processed. Following the principle of data minimisation, in VIS for instance, previously collected biometric data should be reused if the applicant applies again for a Schengen visa within 59 months (Article 13 (3) of the [Visa Code](#) (Regulation (EC) No. 810/2009)).

Example: In *Digital Rights Ireland* ⁽⁷⁰⁾, the CJEU criticised the generalised way in which the [Data Retention Directive \(2006/24/EC\)](#) covered all individuals and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception.

Under the principle of data accuracy, the controller should not use information without taking steps to ensure with reasonable certainty that the data are accurate and up to date. This principle is reflected in Article 5 (1) (d) of the GDPR, Article 4 (1) (d) of the Data Protection Directive for Police and Criminal Justice Authorities and Article 4 (1) (d) of the EU Institutions Data Protection Regulation. The controller must take every reasonable step to ensure that inaccurate personal data are erased or rectified without delay. The principle of data accuracy is also reflected in all legal instruments regulating EU IT systems ⁽⁷¹⁾. The [eu-LISA Regulation](#) also mandates the agency to work towards establishing automated data quality control mechanisms and common data quality indicators for all IT systems (Article 12).

Under CoE law, the right to respect for family and private life under Article 8 of the ECHR encompasses private and family life, home and correspondence. This right is complemented by [Modernised Convention No. 108](#). Article 5 (4) (b) of the Convention establishes the principle of purpose limitation. The processing of personal data must be done for legitimate purposes, and personal data cannot be processed in a way incompatible with those purposes. This is followed by the principle of data minimisation under Article 5 (4) (c) of the Convention, which establishes that the processing of personal data must be 'adequate, relevant and not excessive in relation to the purposes for which they are processed'. The Convention also requires that the data be kept accurate (Article 5 (4) (d)).

⁽⁷⁰⁾ CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [GC], 8 April 2014, para. 57.

⁽⁷¹⁾ See VIS Regulation, Art. 29 (1) (c); Eurodac Regulation, Art. 23 (1) (c); SIS Regulation, Art. 59 (1); SIS Border Checks Regulation, Art. 44 (1); SIS Returns Regulation, Art. 19 (containing a cross-reference to the SIS Border Checks Regulation); EES Regulation, Art. 39 (1) (c); ETIAS Regulation, Arts. 7 (2) (a) and 8 (2) (a); and ECRIS-TCN Regulation, Art. 13 (1) (d).

Example: The ECtHR held that access of national authorities to personal data stored in centralised systems constitutes an interference with the right to private life (Article 8 of the ECHR). In particular, in *Leander v. Sweden* ⁽⁷²⁾, the ECtHR found such interference in relation to a secret police register. In *S. and Marper v. UK* ⁽⁷³⁾, the ECtHR found that the retention of fingerprints on the authorities' records can be regarded as constituting an interference with the right to respect for private life. In *Weber and Saravia v. Germany* ⁽⁷⁴⁾, the ECtHR further held that the transmission of data to other authorities and the subsequent use by them enlarges the group of individuals with knowledge of the personal data intercepted and can therefore lead to investigations being instituted against the persons concerned. In the Court's view, this danger amounts to an interference with the right to private life separate from that entailed by the initial collection and storage of personal data.

For more on purpose limitation, data minimisation and accuracy, see the *Handbook on European Data Protection Law*, Chapter 3 and Section 8.3.2.

2.5. Right to information

Under EU law, the EU data protection legislation includes provisions guaranteeing the right to information and the principle of transparency ⁽⁷⁵⁾. Under Articles 13 and 14 of the GDPR and Article 14 of the [Data Protection Directive for Police and Criminal Justice Authorities](#), individuals must be informed of the identity and contact details of the controller, the purpose of the processing of data, retention periods, the right to request access to stored data and its erasure or rectification, and the right to lodge a complaint with a supervisory authority. Similar requirements stem from Article 79 of the [EU Institutions Data Protection Regulation](#). However, Article 13 (3) of the Data Protection Directive for Police and Criminal Justice Authorities and Article 79 (3) of the EU Institutions Data Protection Regulation carve out some possible exceptions to this obligation, to avoid obstructing or prejudicing ongoing investigations, or to

⁽⁷²⁾ ECtHR, *Leander v. Sweden*, No. 9248/81, 26 March 1987.

⁽⁷³⁾ ECtHR, *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008, para. 73.

⁽⁷⁴⁾ ECtHR, *Weber and Saravia v. Germany*, No. 54934/00, 29 June 2006.

⁽⁷⁵⁾ GDPR, Art. 5 (2); Data Protection Directive for Police and Criminal Justice Authorities, recital 26; and EU Institutions Data Protection Regulation, Art. 4 (1).

protect public security and national security. The provision of information is not only a transparency requirement under EU data protection law, but it also promotes respect for the dignity of the person as protected in Article 1 of the [EU Charter](#).

The right to information is included in the legal instruments for Eurodac, VIS, SIS, EES and ETIAS as well as in the Interoperability Regulations ⁽⁷⁶⁾. Under the SIS, it fully applies in case of alerts on refusal of entry or stay and on return decisions. In the context of police or judicial cooperation in criminal matters, the right to information can be restricted where national laws allow, in particular to safeguard national security, defence, public security, and the prevention, detection, investigation and prosecution of criminal offences (Article 52 (2) of the [SIS Border Checks Regulation](#)). For ECRIS-TCN, individuals have the right to obtain information in writing concerning their own criminal records in accordance with the law of the Member State where they request such information to be provided (recital 21 of the [ECRIS-TCN Regulation](#)).

Although persons must normally be informed when their data are collected, such information does not necessarily cover all the purposes for which data may be used. Table 4 illustrates the main aspects of the right to information as guaranteed by the different instruments setting up large-scale EU IT systems.

⁽⁷⁶⁾ Eurodac Regulation, Art. 29; VIS Regulation, Art. 37; SIS Border Checks Regulation, Art. 52 and SIS Returns Regulation, Art. 19 (containing a cross-reference to the SIS Border Checks Regulation); EES Regulation, Art. 50; ETIAS Regulation, Art. 64; and Interoperability Regulations, Art. 47.

Table 4: The right to information when data are collected in EU IT systems

	Eurodac	VIS	SIS	SIS – borders SIS – return	EES	ETIAS	ECRIS-TCN	Inter-operability
Instrument has a provision on the right to information	Yes	Yes	No.	Yes, with restrictions	Yes	Yes	No.	Yes
Information must be provided in an understandable manner	Yes	No.	n/a	No.	Yes	No.	n/a	Yes
Determining the Member State responsible for the asylum procedure	Yes	Yes	n/a	n/a	n/a	n/a	n/a	Yes
	Partially: apprehension	Yes	n/a	Yes, with restrictions	Yes	n/a	n/a	Yes
Apprehension and return purposes	Yes	Yes	n/a	Yes, with restrictions	Yes	No.	n/a	Yes
	Partially: apprehension	Yes	n/a	Yes, with restrictions	Yes	No.	n/a	Yes
Prevention, detection and investigations of serious crimes and terrorism	Yes	Yes	n/a	Yes, with restrictions	Yes	No.	n/a	Yes
Information must include that data can be used for:								
Data subject must be informed about possible data sharing with third countries	No.	Yes	n/a	n/a	Yes	n/a	n/a	n/a

NB: n/a = not applicable.

Source: FRA, based on existing legal instruments, 2020

Under CoE law, pursuant to Article 8 of *Modernised Convention No. 108*, States Parties must provide that controllers inform the data subjects about their identity and habitual residence, the legal basis and purpose of the processing, the categories of personal data processed, the recipients of their personal data (if any) and how they can exercise their rights to access, rectification and remedy. Any other information deemed necessary to ensure fair and transparent personal data processing should also be communicated.

For more on the right to information, see the *Handbook on European Data Protection Law*, Sections 6.1 and 8.3.2.

2.6 Access to data

Under EU law, the legal instruments instituting large-scale EU IT systems clearly define the type of authorities that can search the IT systems, including by means of interoperability. EU Member States are obliged to notify the European Commission of the names of the authorities entitled to access the IT system. This information is made publicly available in the *Official Journal of the European Union* and by eu-LISA⁽⁷⁷⁾. Table 5 gives an overview of the types of authority allowed to search the individual EU IT systems. The larger the number with access, the higher the risk of unlawful use.

All EU IT systems, except ECRIS-TCN, allow access by national law enforcement authorities and Europol for fighting terrorism and other serious crime. This is covered by the main purpose of the SIS regulations on police cooperation and border checks⁽⁷⁸⁾, and as an additional purpose in Eurodac, VIS, EES and ETIAS⁽⁷⁹⁾.

⁽⁷⁷⁾ On the SIS, see OJ 2019 C 222/1; on Eurodac, see eu-LISA, *List of designated authorities which have access to data recorded in the Central System of Eurodac pursuant to Article 27(2) of the Regulation (EU) No. 603/2013, for the purpose laid down in Article 1(1) of the same Regulation*, 2019; and on VIS, see OJ2016C187/4.

⁽⁷⁸⁾ SIS Regulation, Art. 1; SIS Border Checks Regulation, Art. 1.

⁽⁷⁹⁾ Eurodac Regulation, Art. 1 (2); Council Decision 2008/633/JHA, Art. 1; EES Regulation, Art. 6 (2); and ETIAS Regulation, Art. 1 (2).

Table 5: Authorities allowed to search IT systems, by purpose

IT system	Visa issuance	Border checks	Fighting serious crime and terrorism	Combating irregular migration	Return procedure	Dublin procedure
Eurodac	n/a	n/a	Police and Europol	Police	Immigration authorities	Asylum authorities
VIS	Visa and border authorities	Border authorities	Police and Europol	Police	Immigration authorities	Asylum authorities
SIS – borders SIS – return	Visa and border authorities	Border authorities	Police and Europol	Police	Immigration authorities	n/a
EES	Visa and border authorities	Border authorities	Police and Europol	Police	Immigration authorities	n/a
ETIAS	n/a	Border authorities	Police and Europol	Immigration authorities	n/a	n/a
ECRIS-TCN	n/a	n/a	Police, Europol, judicial authorities, Eurojust and the European Public Prosecutor’s Office	n/a	n/a	n/a
Interoperability	Visa and border authorities	Border authorities	Police and Europol	Police	Immigration authorities	Asylum authorities

NB: n/a = not applicable.
Source: FRA, based on existing legal instruments, 2020

EU data protection legislation prohibits unauthorised access to personal data in Article 5 (1) (f) of the GDPR and Article 4 (1) (f) of the [Data Protection Directive for Police and Criminal Justice Authorities](#). Both state that personal data must be ‘processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing’. Under Articles 28 and 32 of the GDPR, the processor and controller need to take the necessary measures to avoid data being disclosed to or accessed by unauthorised third parties.

Example: In *Digital Rights Ireland* ⁽⁸⁰⁾, the CJEU clarified that EU legislation providing for the collection and retention of personal data must impose sufficient guarantees to protect personal data effectively against the risk of abuse and against any unlawful access and use of that data. The quantity and sensitive nature of the data must be taken into account. The need for such safeguards is all the greater where personal data are processed automatically and where there is a significant risk of unlawful access to those data. On this matter, the CJEU highlighted the need to have in place rules that would ‘serve to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality’ ⁽⁸¹⁾.

Under CoE law, [Modernised Convention No. 108](#) requires that the controller and, where applicable, the processor take appropriate security measures against risks such as unauthorised access to, or destruction, loss or disclosure of, personal data (Article 7). Under Article 15 of the Convention, states must ensure that supervisory authorities are bound by obligations of confidentiality with regard to confidential information to which they have access, or have had access, in the performance of their duties.

For more on the use of stored data and protection from unauthorised access, see the [Handbook on European Data Protection Law](#), Chapter 4 and Section 8.3.2.

⁽⁸⁰⁾ CJEU, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [GC], 8 April 2014, para. 54 (with further references).

⁽⁸¹⁾ *Ibid.*, para. 66.

2.7. Data transfers to third parties

Under EU law, the EU data protection framework and the individual legal instruments establishing the various EU IT systems strictly regulate the transmission of personal data to third countries and international organisations. Chapter V of the GDPR and of the [Data Protection Directive for Police and Criminal Justice Authorities](#) obliges the data controller and processor to ensure that processing of data after transfer to a third country or an international organisation complies with data protection rules. Under Article 44 of the GDPR, the controller and processor will also be responsible for onward transfers, for example from one third country to another.

Given the different types of data stored in the individual EU IT systems, data sharing with third countries and international organisations is regulated differently in each of the information systems, as illustrated in Table 6. The [Eurodac Regulation](#) establishes a ban on further data sharing (Article 35). The [ETIAS Regulation](#) (Article 65) contains an explicit prohibition on sharing the information contained therein with third countries and international organisations, with the exception of Interpol and some strictly circumscribed cases to facilitate return. Other EU databases allow the sharing of personal data with third countries to identify a third-country national for the purpose of return, albeit with some exceptions⁽⁸²⁾. To facilitate police cooperation, under certain conditions, a Member State may also share SIS data with third countries through mechanisms used by Europol (Article 48) and Eurojust (Article 49) according to the [SIS Regulation](#). The [ECRIS-TCN Regulation](#) does not allow data sharing with third countries, but states' requests for information on previous convictions contained in ECRIS-TCN must be addressed to Eurojust, which will contact the EU Member State that holds information on the conviction (Article 17).

Typically, information is shared to obtain the assistance of the country of origin for the purposes of identifying a third-country national in view of a future removal. This also concerns rejected asylum applicants.

Table 6: Purposes allowing the sharing of data with third countries or international organisations in EU IT systems

IT system	Purposes allowing sharing data with third parties
VIS	For return purposes
SIS	No sharing, except by Europol and Eurojust with the consent of the Member State that issued the alert, under certain conditions

⁽⁸²⁾ See EES Regulation, Art. 41 (2); SIS Returns Regulation, Art. 15; and VIS Regulation, Art. 31.

IT system	Purposes allowing sharing data with third parties
SIS – borders	No sharing, except by Europol with the consent of the Member State that issued the alert
SIS – return	For return purposes
EES	For return purposes
ETIAS	For return purposes For checks against Interpol databases
ECRIS-TCN	No sharing, except by application to Eurojust, which will contact the EU Member State that holds information
Interoperability	No sharing

Source: FRA, based on existing legislative instruments, 2020

Under CoE law, Modernised Convention No. 108 regulates the transborder flows of personal data. States Parties cannot prohibit the transfer of such data to a recipient under the jurisdiction of another State Party unless there is a real and serious risk that it would lead to the circumvention of the provisions of the Convention. Article 14 (2) of the Convention prescribes that transborder data flows to a recipient who is not subject to the jurisdiction of a State Party are only allowed if there is an appropriate level of protection. An appropriate level of protection can be secured by the law of that state or international organisation, or by ad hoc or approved standardised safeguards adopted and implemented by the persons involved in the transfer and further processing of the data.

For more on international data transfers, see the *Handbook on European Data Protection Law*, Chapter 7.

2.8. Data subjects' rights

Under EU law, Article 8 (2) of the *EU Charter* sets out, as part of the right to protection of personal data, that '[e]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.' The possibility of exercising the right of access is part of the right to an effective remedy, as protected under Article 47 of the Charter. The CJEU has stated that the characteristics of a remedy must be determined in a way that is consistent with the principle of effective judicial protection⁽⁸³⁾.

⁽⁸³⁾ CJEU, C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v. Justitiekanslern* [GC], 13 March 2007, para. 37; C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v. Izpallnitelen direktor na Darzhaven fond 'Zemedelie'-Razplasztatelna agentsia*, 27 June 2013, para. 59; and CJUE, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida* [GC], 18 December 2014, para. 45.

The rights of access to, and correction and deletion of, one's own stored data are also included in the EU data protection legislation, namely in Articles 15–17 of the GDPR, Articles 14–17 of the [Data Protection Directive for Police and Criminal Justice Authorities](#) and Articles 80–83 of the [EU Institutions Data Protection Regulation](#). The right of access, as guaranteed under Article 15 of the GDPR and Articles 14–15 of the [Data Protection Directive for Police and Criminal Justice Authorities](#), may be restricted, provided the measure is necessary and proportionate for specific reasons. For example, such a reason may entail the need to protect national security or prevent criminal offences.

As a rule, the persons concerned must be informed about the rights of access, correction and deletion at the moment the data are included in the IT systems (see [Section 2.5](#)).

Example: In *Tele2 Sverige* ⁽⁸⁴⁾, the CJEU held that, in the context of security measures affecting the right to private life and the right to the protection of personal data, national law enforcement authorities must notify the persons affected, under the applicable national procedures, as soon as that notification is no longer capable of jeopardising the investigations undertaken by those authorities. The CJEU has found that notification is, in fact, necessary to enable the persons affected by these measures to exercise, inter alia, their right to an effective legal remedy guaranteed in Article 47 of the EU Charter.

The right of access, rectification and erasure of data is reflected in all EU IT systems (including the components of interoperability) ⁽⁸⁵⁾, but it is limited regarding the SIS. Under Article 19 of the [SIS Returns Regulation](#), Article 53 (3) of the [SIS Border Checks Regulation](#) and Article 67 (3) of the [SIS Regulation](#), the authorities can deny access to the SIS if this is indispensable for the performance of a lawful task in connection with an alert or for the protection of rights and freedoms of third parties. In the context of interoperability, Article 49 of Regulations [\(EU\) 2019/817](#) and [\(EU\) 2019/818](#) mandates eu-LISA to run a web portal for the purposes of facilitating the exercise of the rights of access to, or rectification, erasure or restriction of

⁽⁸⁴⁾ CJEU, Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others* [GC], 21 December 2016, para. 12. See also, *mutatis mutandis*, CJUE, C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG* [GC], 19 January 2010, para. 52; and CJEU, C-362/14, *Maximillian Schrems v. Data Protection Commissioner* [GC], 6 October 2015, para. 95.

⁽⁸⁵⁾ See VIS Regulation, Art. 38; Eurodac Regulation, Art. 29 (4); EES Regulation, Art. 52; ETIAS Regulation, Art. 64; ECRIS-TCN Regulation, Art. 25; and Interoperability Regulations, Art. 48.

processing of, personal data. The web portal will include a user interface enabling persons to receive the contact information of the authorities of the Member State that is responsible for the manual verification of different identities.

All EU IT systems, including in the context of interoperability, guarantee the right to appeal before a court or a competent authority ⁽⁸⁶⁾. In addition, Articles 78–79 of the GDPR, Article 53–54 of the Data Protection Directive for Police and Criminal Justice Authorities and Article 64 of the EU Institutions Data Protection Regulation reconfirm that the right to an effective judicial remedy must be provided for any decisions by the controller or the processor, as well as the supervisory authority. The possibility of lodging an administrative complaint before a supervisory authority is not considered an effective remedy under the [EU Charter](#).

Under CoE law, the rights of data subjects are regulated under Article 9 of [Modernised Convention No. 108](#). Every individual has a right to obtain confirmation of the processing of personal data relating to him or her, to object at any time to the processing of his or her personal data, and to obtain rectification or erasure of data if they have been processed contrary to the Convention. Remedies are provided for under the Convention.

Example: In *Segerstedt-Wiberg and Others v. Sweden* ⁽⁸⁷⁾, concerning access to personal information held by security services, the ECtHR held that the interests of national security and the fight against terrorism prevail over the applicant's interest in having access to information about them in the Security Police files. In *Yonchev v. Bulgaria* ⁽⁸⁸⁾, the ECtHR found that the legislation must provide an effective and accessible procedure enabling applicants to have access to any important information concerning them.

For more on the rights of data subjects, see the [Handbook on European Data Protection Law](#), Chapter 6.

⁽⁸⁶⁾ VIS Regulation, Art. 40 (1); Eurodac Regulation, Art. 29 (14); EES Regulation, Art. 54 (1); ETIAS Regulation, Art. 64; SIS Returns Regulation, Art. 19; SIS Border Checks Regulation, Art. 54; SIS Regulation, Art. 68; ECRIS-TCN Regulation, Art. 27; and Interoperability Regulations, Art. 48 (8).

⁽⁸⁷⁾ ECtHR, *Segerstedt-Wiberg and Others v. Sweden*, No. 62332/00, 6 June 2006, para. 91.

⁽⁸⁸⁾ ECtHR, *Yonchev v. Bulgaria*, No. 12504/09, 7 December 2017, paras. 49–53.

Key points

- Visa, border, asylum and immigration authorities of EU Member States rely on technology when taking decisions affecting a person (see [introduction to this chapter](#)).
- [Eurodac](#) assists Member States to determine where applicants for international protection first entered the EU and where their claims should be examined (see [Section 2.1.1](#)).
- [VIS](#) contains fingerprints, photographs and decisions on applications for Schengen visas and facilitates the application procedure for Schengen visas (see [Section 2.1.2](#)).
- The [SIS](#) contains alerts on certain categories of wanted or missing persons, missing objects and third-country nationals subject to a refusal of entry or a return decision. The SIS assists national law enforcement, border control, customs, visa and judicial authorities (see [Section 2.1.3](#)).
- When operational, the [EES](#) will register the travel(s) of all third-country nationals into and out of the Schengen area and monitor their duration. It will facilitate the identification of third-country nationals who overstay in the Schengen area (see [Section 2.1.4](#)).
- When operational, [ETIAS](#) will screen visa-free third-country nationals to establish whether or not they pose a security, irregular migration or public health risk (see [Section 2.1.5](#)).
- When operational, the [ECRIS-TCN](#) will enable information exchange on criminal records of third-country nationals who have been convicted in the EU (see [Section 2.1.6](#)).
- These different large-scale EU IT systems will be made interoperable, allowing authorities to search for an individual across all systems, including using biometric data, in accordance with their access rights (see [Section 2.2](#)).
- National DPAs and the EDPS ensure that data processing respects European data protection law (see [Section 2.3](#)).
- EU and CoE law requires that personal data be only used for the purpose(s) for which they were collected (see [Section 2.4](#)).
- Under EU and CoE law, individuals have a right to know about the processing of their personal data, but that right can be limited in some cases (see [Section 2.5](#)).
- EU law clearly defines what personal data each authority can access and for what purpose (see [Section 2.6](#)).
- EU and CoE law strictly limits personal data sharing with third countries and international organisations (see [Section 2.7](#)).

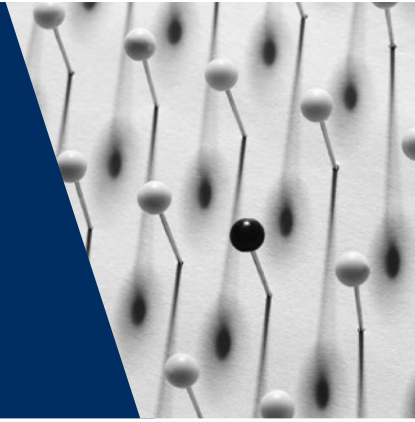
- Under EU and CoE law, individuals have a right to access data stored on them and to request that inaccurate or unlawfully processed data be corrected or deleted (see Section 2.8).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

3

Status and associated documentation



EU	Issues covered	CoE
<p>Asylum Procedures Directive (2013/32/EU), Article 9 (right to remain)</p> <p>Reception Conditions Directive (2013/33/EU), Article 6 (documentation)</p>	Asylum seekers	ECtHR, <i>Saadi v. the United Kingdom</i> [GC], No. 13229/03, 2008, and <i>Suso Musa v. Malta</i> , No. 42337/12, 2013 (entry considered unauthorised until formally authorised)
Qualification Directive (2011/95/EU)	Recognised refugees and persons granted subsidiary protection	ECHR, Article 3 (prohibition of torture)
<p>Trafficking Victims Directive (Residence Permits) (2004/81/EC)</p> <p>Employers Sanctions Directive (2009/52/EC)</p>	Victims of trafficking and particularly exploitative working conditions	<p>Convention on Action against Trafficking in Human Beings, 2005, Article 14 (residence permit also owing to the personal situation of the victim)</p> <p>ECtHR, <i>Chowdury and Others v. Greece</i>, No. 21884/15, 2017 (Bangladeshi victims of trafficking in Greece)</p> <p>ECtHR, <i>Rantsev v. Cyprus and Russia</i>, No. 25965/04, 2010 (Russian victim of trafficking in Cyprus)</p>
	Persons affected by Rule 39 interim measures	ECtHR, <i>Mamatkulov and Askarov v. Turkey</i> [GC], Nos. 46827/99 and 46951/99, 2005, and <i>Savridin Dzhurayev v. Russia</i> , No. 71386/10, 2013 (extradition despite indication of Rule 39 by the ECtHR)

EU	Issues covered	CoE
Return Directive (2008/115/EC) ECJ, C-357/09 PPU, <i>Kadzoev</i> [GC], 2009	Migrants in an irregular situation	ECtHR, <i>Ibrogimov v. Russia</i> , No. 32248/12, 2018 (victim of discrimination and withdrawal of residence permit)
Long-Term Residence Directive (2003/109/EC) CJEU, C-302/18, <i>X v. Belgische Staat</i> , 2019 (the ‘resources’ criterion does not refer to the origin of the resources)	Long-term residents	Convention on Establishment, 13 December 1955 ECtHR, <i>Kurić and Others v. Slovenia</i> [GC], No. 26828/06, 2012 (unlawful deprivation of residence permits)
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	
Free Movement Directive (2004/38/EC)	Third-country national family members of EEA nationals	
CJEU, C-135/08, <i>Rottmann</i> [GC], 2010, and C-221/17, <i>Tjebbes</i> [GC], 2019 (loss of citizenship of the Union)	Stateless persons and loss of citizenship	ECtHR, <i>Hoti v. Croatia</i> , No. 63311/14, 2018 (stateless long-term residents)

Introduction

This chapter will look at the 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 or not the absence of status or documentation interferes with the enjoyment of an ECHR right of the individual concerned and, if so, whether or not 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 3.2 and 3.5). Some EU, ECHR, EU Charter and ESC rights are granted only to those whose presence in a particular country is lawful (see Chapter 9).

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 3.1, 3.2 and 3.8). Where an individual is entitled under EU or national law to a certain status or to certain documentation, 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 specific documentation to him or her. In some circumstances, the right to respect for family and private life (Article 8) may require the state to recognise status, authorise residence or issue documentation to a migrant. Article 8 cannot, however, 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⁽⁸⁹⁾.

3.1. Asylum seekers

Asylum seekers request 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 4).

Under EU law, asylum seekers are defined as 'applicants for international protection'. Their situation 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 9 (1) of the *Asylum Procedures Directive* (2013/32/EU) provides that

⁽⁸⁹⁾ ECtHR, *Hoti v. Croatia*, No. 63311/14, 26 April 2018, paras. 121–122; ECtHR, *Liu v. Russia*, No. 42086/05, 6 December 2007, para. 50.

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 the responsible authority has made a decision, although some exceptions exist, notably for subsequent applications.

The right of asylum seekers to documentation under EU law is set out in the [Reception Conditions Directive](#) (2013/33/EU; see [Annex 1](#) for EU Member States bound by the directive). Article 6 of this directive states that all those who lodge an application for asylum must be given, within 3 days, a document certifying their status as asylum seekers or that they are allowed to stay while the asylum application is being examined. According to Article 6 (2), states can refrain from doing so when the applicant is in detention or at the border.

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 or not domestic law allows asylum seekers 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 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* ⁽⁹⁰⁾ 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) when an asylum seeker had been lawfully detained for 7 days in suitable conditions while his asylum application was being processed.

Example: In *Suso Musa v. Malta* ⁽⁹¹⁾, however, the Court held that, when a state had exceeded its legal obligations and enacted legislation explicitly authorising the entry or stay of migrants pending an asylum application, either independently or pursuant to EU law, any ensuing detention for the purpose of preventing an unauthorised entry might raise an issue as to the lawfulness of that detention under Article 5 (1).

⁽⁹⁰⁾ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 65.

⁽⁹¹⁾ ECtHR, *Suso Musa v. Malta*, No. 42337/12, 23 July 2013.

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

Example: Before the UN Human Rights Committee ⁽⁹²⁾, the German government had acknowledged that asylum seekers were lawfully resident for the duration of their asylum procedure. However, in *Omwenyike v. Germany* ⁽⁹³⁾, the ECtHR 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.

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

Under EU law, the [EU Charter](#) 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 their 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/EU) give an explicit right to be granted the status of refugee or subsidiary protection. Persons granted international protection can lose their status if there is a genuine improvement in the situation in their country of origin (see [Section 4.1.8](#)).

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: 3 years for refugees and 1 year for beneficiaries of subsidiary protection. Article 25 entitles refugees and, in certain cases, beneficiaries of subsidiary protection to travel documents.

⁽⁹²⁾ CCPR/C/DEU/2002/5, 4 December 2002.

⁽⁹³⁾ ECtHR, *Omwenyike v. Germany* (dec.), No. 44294/04, 20 November 2007.

Under the ECHR, there is no right to asylum such as that found in Article 18 of the EU Charter. Moreover, the ECtHR cannot examine whether or not the refusal or withdrawal of refugee status under the 1951 Geneva Convention ⁽⁹⁴⁾ or the refusal of subsidiary protection under the Qualification Directive ⁽⁹⁵⁾ is contrary to the ECHR. The ECtHR can, however, examine whether or not 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 4) ⁽⁹⁶⁾.

3.3. Victims of trafficking and of particularly exploitative labour conditions

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

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 irregular immigration allows a reflection period during which the victim cannot be expelled (Article 6). It also requires EU Member States to issue a residence permit to victims of trafficking who cooperate with the authorities (Article 8). The permit has to be valid for at least 6 months and is renewable. Although not dealing directly with residence permits for victims, the Anti-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 of 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.

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

⁽⁹⁵⁾ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, para. 226 (relating to Art. 15 of the Qualification Directive).

⁽⁹⁶⁾ ECtHR, *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008, paras. 106–107.

Example: The case of *Chowdury and Others v. Greece* ⁽⁹⁷⁾ concerned 42 undocumented Bangladeshi nationals, who had worked as seasonal agricultural workers in Greece. The applicants complained that they had been subjected to trafficking in human beings and that Greece had failed to fulfil its positive obligation under Article 4 of the ECHR. Although Greece had in principle put in place a legislative framework to combat trafficking in human beings, operational measures were ad hoc, despite the national authorities' awareness of the migrant workers' situation and the abuses they had been exposed to. In addition, the ECtHR concluded that, by acquitting the defendants of charges of trafficking in human beings interpreted very narrowly, commuting their sentences and awarding the victims very low compensation, the authorities had failed to fulfil their procedural obligation to guarantee an effective investigation and judicial procedure in respect of the situations of human trafficking and forced labour.

Example: The case of *Rantsev v. Cyprus and Russia* ⁽⁹⁸⁾ 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, second, the police had failed to take suitable operational measures to protect the victim from trafficking. It 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 CoE law, in states that are party to the [Council of Europe Convention against Trafficking in Human Beings](#) (CETS No. 197), the authorities must allow the suspected victim a recovery and reflection period during which the victim 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 or not 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 victims' 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

⁽⁹⁷⁾ ECtHR, *Chowdury and Others v. Greece*, No. 21884/15, 20 March 2017.

⁽⁹⁸⁾ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 284.

of trafficking are not at risk of being returned to their country without being given the appropriate help (see also [Chapter 10](#) on vulnerable groups and, for the list of ratifications, [Annex 2](#)).

3.4. Persons affected by Rule 39 interim measures

When the ECtHR receives an application, it may decide, at the request of a party or of any other person concerned, or of its own motion, that a state should take certain provisional measures while the ECtHR continues its examination of the case ⁽⁹⁹⁾. In the immigration context, interim measures based on Rule 39 of the [Rules of Court](#) ⁽¹⁰⁰⁾ typically 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 ⁽¹⁰¹⁾. In many cases, this concerns asylum seekers whose claims have received a final rejection and who have exhausted all appeal rights with a suspensive effect under domestic law. Whatever the status of an individual in the state concerned is, once the ECtHR has applied a Rule 39 interim measure to prevent the individual's removal while it examines the case, the expelling state is under an obligation to comply with any Rule 39 measure indicated ⁽¹⁰²⁾.

Example: In the *Mamatkulov and Askarov v. Turkey* case ⁽¹⁰³⁾, 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, 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

⁽⁹⁹⁾ ECtHR, *Rules of Court*, as in force on 3 June 2019, Rule 39.

⁽¹⁰⁰⁾ For detailed instructions on how to lodge a request under Rule 39, see ECtHR, 'Interim Measures'.

⁽¹⁰¹⁾ ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016.

⁽¹⁰²⁾ ECtHR, *Azimov v. Russia*, No. 67474/11, 18 April 2013.

⁽¹⁰³⁾ ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, 4 February 2005.

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.

Example: In *Savridin Dzhurayev v. Russia* ⁽¹⁰⁴⁾, the applicant was forcibly transferred to Tajikistan in a special operation involving Russian state agents, even though an ECtHR interim measure remained in force. Because the respondent state disregarded the interim measure, the applicant had been put at risk of ill-treatment in Tajikistan and the Court had been prevented from securing him the practical and effective benefit of his rights under Article 3 of the ECHR. Article 34 of the Convention, as well as Article 3, had therefore been violated. The Court ordered the respondent state to take tangible remedial measures to protect the applicant against the existing risks to his life and health in a foreign jurisdiction. In addition, given repeated incidents of this kind, the Court ordered the respondent state to resolve this recurrent problem without delay by taking decisive general measures in order to ensure the effective protection of potential victims in line with interim measures issued by the Court.

3.5. 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 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 9.5](#) 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 bound by 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

⁽¹⁰⁴⁾ ECtHR, *Savridin Dzhurayev v. Russia*, No. 71386/10, 25 April 2013.

reasons, another reason to regularise the stay can be pressing reasons of family or private life guaranteed under Article 7 of the EU Charter and Article 8 of the ECHR (see Chapter 6 on family life).

Example: In *M. Ghevondyan* ⁽¹⁰⁵⁾, on 4 June 2012, the French Council of State (*Conseil d'État*) held that Article 6 of the Return Directive did not impose on the competent authorities of the Member States the obligation to take a return decision systematically against third-country nationals in an irregular situation. Article 6 (4) mentions a number of exceptions to and derogations from Article 6 (1). Therefore, return decisions must 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 best interests of the child, the situation of the family and the health of the alien, as stated by Article 5 of the directive. Consequently, if this ground is invoked by the alien, the courts should review 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, unlike the case of asylum seekers, mandatory. 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 should provide written confirmation of their situation. This written confirmation is compulsory if voluntary departure has been extended or removal has been postponed (Article 14 (2)). The situation is most acute for those who have to be released from detention because the maximum permitted detention has elapsed (see Chapter 7 on detention) but who still do not have permission to stay ⁽¹⁰⁶⁾.

Example: In *Kadzoev* ⁽¹⁰⁷⁾, 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

⁽¹⁰⁵⁾ France, Council of State (*Conseil d'État*), *M. Ghevondyan*, No. 356505, 4 June 2012.

⁽¹⁰⁶⁾ On the situation of non-removed persons, see FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office of the European Union, Chapter 2.

⁽¹⁰⁷⁾ ECJ, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)* [GC], 30 November 2009.

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.

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: The case of *Novruk and Others v. Russia* ⁽¹⁰⁸⁾ concerned several applicants who applied for a temporary residence permit in Russia and were refused because the applicants tested positive for HIV. The ECtHR stressed the particular vulnerability of persons infected with HIV and noted that the entry, stay and residence restrictions on people living with HIV could not be objectively justified by reference to public health concerns. 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 the particular case and was found not to be objectively justified. The Court ruled that there was a violation of Article 14 of the ECHR in conjunction with Article 8, as the applicants had been a victim of discrimination on account of their health status.

Under the ESC, the personal scope is, in principle, limited to nationals of other States Parties who are lawfully resident or working regularly within the territory. The ECSR has held, however, that, given their fundamental nature and their link to human dignity, certain rights apply to all persons in the territory, including irregular migrants. These rights comprise the right to medical assistance ⁽¹⁰⁹⁾, the right to shelter ⁽¹¹⁰⁾ and the right to education ⁽¹¹¹⁾. The UN Human Rights Committee also affirmed the positive obligation of states to ensure that everyone has access to the essential healthcare necessary to prevent foreseeable risks to life, regardless of migration status ⁽¹¹²⁾.

⁽¹⁰⁸⁾ ECtHR, *Novruk and Others v. Russia*, Nos. 31039/11 and 4 others, 15 March 2016. See also ECtHR, *Kiyutin v. Russia*, No. 2700/10, 10 March 2011.

⁽¹⁰⁹⁾ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, merits, 8 September 2004; ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, merits, 23 October 2012.

⁽¹¹⁰⁾ ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009.

⁽¹¹¹⁾ ECSR, *Conclusions 2011, Statement of interpretation on Art. 17 (2)*.

⁽¹¹²⁾ UN Human Rights Committee, *Toussaint v. Canada*, Communication No. 2348/2014, views of 24 July 2018.

3.6. Long-term residents

Under EU law, the Long-Term Residence Directive (2003/109/EC as amended by Directive 2011/51/EU; see Annex 1) for EU Member 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 5 years⁽¹¹³⁾. This entitlement is subject to conditions relating to stable and regular resources and sickness insurance.

To acquire long-term resident status, under Article 5 (1) (a) of the Long-Term Residence Directive, third-country nationals must show that they have stable, regular and sufficient resources.

Example: In the case of *X. v. Belgium*⁽¹¹⁴⁾, the CJEU clarified that the origin of the resources is not a decisive criterion to establish whether or not they are stable, regular and sufficient. The person need not necessarily have such resources him- or herself; they may also come from a third party. The CJEU used comparable requirements under Article 7 (1) (b) and (c) of the Free Movement Directive (2004/38/EC).

Similar conditions to those under the Long-Term Residence Directive are in the **Family Reunification Directive** (2003/86/EC; see Chapter 6 on families). When the CJEU pronounced on those requirements, it leaned towards a strict interpretation. It maintained that Member States' margin to manoeuvre must not be used in a manner that would undermine the objective of the latter directive⁽¹¹⁵⁾.

Under Article 11 of the Long-Term Residence Directive, the grant of long-term resident status leads to treatment equal to nationals in several important areas (see Chapter 9 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.

⁽¹¹³⁾ See also CJEU, C-502/10, *Staatssecretaris van Justitie v. Mangat Singh*, 18 October 2012.

⁽¹¹⁴⁾ CJEU, C-302/18, *X v. Belgische Staat*, 3 October 2019.

⁽¹¹⁵⁾ CJEU, C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010, para. 52.

Example: In *CGIL and INCA* ⁽¹¹⁶⁾, the CJEU considered the imposition of a fee of EUR 80 to EUR 200 for the issue or renewal of a residence permit, depending on the duration of the residence permit, in addition to a pre-existing fee of EUR 73.50 for such a permit regardless of duration. The Court pointed out that EU Member States do not enjoy unlimited discretion in levying fees on third-country nationals when issuing a residence permit and that EU Member States are not allowed to set charges that might create an obstacle to the exercise of the rights enshrined in the Long-Term Residence Directive. The CJEU concluded that the fees are disproportionate to the objective pursued by the directive and can create an obstacle to the exercise of the rights under the directive.

Example: In *European Commission v. the Netherlands* ⁽¹¹⁷⁾, the CJEU held that the Netherlands had failed to fulfil its obligation under the Long-Term Residence Directive insofar as it imposed excessive and disproportionate fees (varying from EUR 188 to EUR 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 in the Netherlands and (iii) third-country nationals' family members seeking reunification. More specifically, the Court pointed out that EU Member States do not enjoy unlimited discretion in levying fees on third-country nationals when issuing a residence permit and that EU Member States are not allowed to set charges that might create an obstacle to the exercise of the rights enshrined in the Long-Term Residence Directive.

According to the CJEU, EU Member States can impose integration requirements on third-country nationals who have acquired long-term resident status, as long as these requirements do not jeopardise the achievement of the objectives pursued by the directive ⁽¹¹⁸⁾.

⁽¹¹⁶⁾ CJEU, C-309/14, *Confederazione Generale Italiana del Lavoro (CGIL), Istituto Nazionale Confederale Assistenza (INCA) v. Presidenza del Consiglio dei Ministri, Ministero dell'Interno, Ministero dell'Economia e delle Finanze*, 2 September 2015.

⁽¹¹⁷⁾ CJEU, C-508/10, *European Commission v. Kingdom of the Netherlands*, 26 April 2012.

⁽¹¹⁸⁾ CJEU, C-579/13, *P. and S. v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, 3 July 2015.

The CJEU has also clarified the meaning of Article 13 of the Long-Term Residence Directive. It does not enable EU Member States to grant long-term resident status under more favourable conditions than those outlined in the directive, but rather allows the coexistence of national schemes ⁽¹¹⁹⁾.

Under the ECHR, long-term residence has generally been recognised as a factor to be taken into account if expulsion is proposed (see [Section 4.4](#)).

Example: In *Kurić and Others v. Slovenia* ⁽¹²⁰⁾, 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 had not requested Slovenian citizenship within a 6-month time limit. The consequences of such erasure were either statelessness or loss of their residence rights ⁽¹²¹⁾. 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](#) (CETS No. 19) provides for an enhanced status in all Member States for those who are long-term residents, but only if they are nationals of states that are parties to the Convention.

3.7. Turkish nationals

Under EU law, 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 EEC and Turkey in the light of a possible accession by the latter to the EEC. The agreement has been the subject of more than 60

⁽¹¹⁹⁾ CJEU, C-469/13, *Shamim Tahir v. Ministero dell’Interno, Questura di Verona*, 17 July 2014, paras. 39–44.

⁽¹²⁰⁾ ECtHR, *Kurić and Others v. Slovenia* [GC], No. 26828/06, 26 June 2012.

⁽¹²¹⁾ Slovenia is not a party to the [Council of Europe 2006 Convention on the avoidance of statelessness in relation to State succession](#) (CETS No. 200).

judgments by the CJEU. 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 nationals in the territory of EU Member States. Article 6 (1) of [Decision No. 1/80 of the Association Council](#) provides that Turkish nationals legally employed in an EU Member State gain the right to remain in that Member State.

The Ankara Agreement does not give Turkish nationals 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 ⁽¹²²⁾. Such rights do not apply to Turkish nationals who wish to make use of – rather than provide – services ⁽¹²³⁾.

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* ⁽¹²⁴⁾, 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.

In *Essent Energie Productie BV* ⁽¹²⁵⁾, Turkish nationals who were legally resident and working in Germany were posted in the Netherlands to provide services. The CJEU concluded that it is not allowed to ask for a work permit in order for these workers to be made available for work from another company because these Turkish nationals were not seeking access to the labour market in the Netherlands. Requiring a work permit would be tantamount to a new restriction on the freedom to provide services.

⁽¹²²⁾ ECJ, C-37/98, *The Queen v. Secretary of State for the Home Department, ex parte Abdulnasir Savas*, 11 May 2000; ECJ, C-16/05, *The Queen, Veli Tum and Mehmet Dari v. Secretary of State for the Home Department*, 20 September 2007; CJEU, C-186/10, *Oguz v. Secretary of State for the Home Department*, 21 July 2011.

⁽¹²³⁾ CJEU, C-221/11, *Leyla Ecem Demirkan v. Bundesrepublik Deutschland* [GC], 24 September 2013.

⁽¹²⁴⁾ ECJ, Joined Cases C-317/01 and C-369/01, *Eran Abatay and Others and Nadi Sahin v. Bundesanstalt für Arbeit*, 21 October 2003.

⁽¹²⁵⁾ CJEU, C-91/13, *Essent Energie Productie BV v. Minister van Sociale Zaken en Werkgelegenheid*, 11 September 2014.

The case of *Soysal* ⁽¹²⁶⁾ 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 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 Regulation (EC) No. 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* ⁽¹²⁷⁾, 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, 8 years after having been granted leave to enter and remain in the country, was not considered by the CJEU to constitute an abuse.

The case of *A, B, P* ⁽¹²⁸⁾ concerned two Turkish nationals, who requested a residence permit after taking up employment in the Netherlands, and a third applicant married to a Turkish-Dutch national, who applied for a family reunification residence permit. The CJEU concluded that the issuance of a residence permit to third-country nationals, including Turkish nationals, which is conditional upon the collection and retention of their biometric data, does not constitute a 'new restriction' within the meaning of Decisions No. 2/76 and No. 1/80 of the EEC-Turkey Association Council. The Court found that the objective to prevent and combat identity and document fraud was an overriding reason in the public interest justifying it.

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.

⁽¹²⁶⁾ ECJ, C-228/06, *Mehmet Soysal and Ibrahim Savatli v. Bundesrepublik Deutschland*, 19 February 2009.

⁽¹²⁷⁾ CJEU, C-186/10, *Tural Oguz v. Secretary of State for the Home Department*, 21 July 2011, para. 46; ECJ, C-16/05, *The Queen, Veli Turm and Mehmet Dari*, 20 September 2007.

⁽¹²⁸⁾ CJEU, C-70/18, *Staatssecretaris van Justitie en Veiligheid v. A and Others*, 3 October 2019.

The 1970 Additional Protocol to the Ankara Agreement provides for several rights, which are discussed in [Chapter 9](#) on access to economic and social rights. With regard to status, Turkish nationals have the right to remain in the territory while exercising their social and labour market rights ⁽¹²⁹⁾.

Family members, including those who are not Turkish nationals, benefit from privileged treatment under Decision No. 1/80 of the EEC-Turkey Association Council (see [Chapter 6](#) on family life) ⁽¹³⁰⁾. 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 EU Member State.

Example: In *Altun* ⁽¹³¹⁾, 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* ⁽¹³²⁾, the CJEU clarified that family members of a Turkish worker could still claim the rights conferred upon them by such a decision once the worker had acquired the nationality of the host EU Member State while still retaining his Turkish nationality.

3.8. British nationals

Under EU law, with the withdrawal of the United Kingdom from the European Union, since 1 February 2020, British nationals are third-country nationals. The Withdrawal Agreement sets up a transition period until 31 December 2020 (subject to prolongation) during which the United Kingdom remains bound by EU law ⁽¹³³⁾. This means

⁽¹²⁹⁾ ECJ, C-337/07, *Altun v. Stadt Böblingen*, 18 December 2008, para. 21; ECJ, C-171/95, *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 EU Member States] 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.'

⁽¹³⁰⁾ CJEU, C-451/11, *Natthaya Dülger v. Wetteraukreis*, 19 July 2012.

⁽¹³¹⁾ ECJ, C-337/07, *Altun v. Stadt Böblingen*, 18 December 2008, para. 50.

⁽¹³²⁾ CJEU, Joined Cases C-7/10 and C-9/10, *Staatssecretaris van Justitie v. Tayfun Kahveci and Osman Inan*, 29 March 2012.

⁽¹³³⁾ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ 2020 L 29/7, Arts. 126–127.

that British nationals are treated in the same way as EU citizens. Once the transition period expires, their rights and obligations will depend on any agreement that the EU may conclude with the United Kingdom.

3.9. 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⁽¹³⁴⁾. 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 6 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.

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.

Example: In *Aristimuño Mendizabal v. France*⁽¹³⁵⁾, the ECtHR found that the applicant's rights under Article 8 of the ECHR had been violated by 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.

⁽¹³⁴⁾ See the agreements concluded with the EEA and with Switzerland (see footnotes 5 and 6), and the [Free Movement Directive](#) (Directive 2004/38/EC, OJ 2004 L 158/77).

⁽¹³⁵⁾ ECtHR, *Aristimuño Mendizabal v. France*, No. 51431/99, 17 January 2006.

3.10. 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 are competent to determine the rules regarding the acquisition and loss of their citizenship, which also includes EU citizenship, as well as the additional rights which citizenship confers. 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 EU Member States ⁽¹³⁶⁾.

Loss of citizenship, however, may engage EU law if this also entails loss of EU rights. Article 67 (2) of the TFEU establishes that stateless persons are to be treated as third-country nationals.

Example: In the *Rottmann* case ⁽¹³⁷⁾, Dr Rottmann was born a citizen of Austria. After being accused in Austria of serious fraud in the exercise of his profession, he 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. That 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's decision to deprive an individual of citizenship, insofar 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

⁽¹³⁶⁾ Under Art. 20 (1) of the TFEU, 'Citizenship of the Union shall be additional to and not replace national citizenship'; ECJ, C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, 7 July 1992; ECJ, C-192/99, *The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice*, 20 February 2001.

⁽¹³⁷⁾ CJEU, C-135/08, *Janko Rottman v. Freistaat Bayern* [GC], 2 March 2010, paras. 41–45.

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 for him or her to recover the citizenship of his or her Member State of origin.

Example: The *Tjebbes* case⁽¹³⁸⁾ concerned a Dutch law providing for the automatic loss of nationality for Dutch nationals who resided outside the Netherlands for 10 years or more. Children of denaturalised individuals would also lose Netherlands nationality under the 10-year rule. Following the *Rottmann* case, the CJEU determined that the decision to withdraw nationality must comply with the principle of proportionality. The CJEU held that national authorities need to conduct an individual examination to determine whether or not the consequence of losing the nationality of an EU Member State, which entails the loss of EU citizenship, might disproportionately effect the normal development of the family and professional life of the person concerned. In addition, a remedy must be available for reinstating nationality if the measure is deemed to be disproportionate.

Under the ECHR, there is no right to acquire citizenship of a state⁽¹³⁹⁾. The ECtHR, however, has stated that an arbitrary denial of citizenship, as well as the loss of citizenship, might raise an issue under Article 8 of the Convention because of the impact that such a denial or loss may have on the private life of the individual⁽¹⁴⁰⁾.

Example: In the case of *Genovese v. Malta*⁽¹⁴¹⁾, the ECtHR considered the denial of Maltese citizenship to a child born out of wedlock outside 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.

⁽¹³⁸⁾ CJEU, C-221/17, *Tjebbes and Others v. Minister van Buitenlandse Zaken* [GC], 12 March 2019.

⁽¹³⁹⁾ European Commission of Human Rights, *Family K. and W. v. the Netherlands* (dec.), No. 11278/84, 1 July 1985.

⁽¹⁴⁰⁾ 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; ECtHR, *Ramadan v. Malta*, No. 76136/12, 21 June 2016, para. 85; ECtHR, *K2 v. the United Kingdom*, No. 42387/13, 7 February 2017.

⁽¹⁴¹⁾ ECtHR, *Genovese v. Malta*, No. 53124/09, 11 October 2011.

Example: In the case of *Hoti v. Croatia* ⁽¹⁴²⁾, the applicant was a stateless person born in Kosovo, who had lived and worked in Croatia since 1979. In 2014, Croatia refused to extend his temporary residence permit for failing to provide a valid travel document. The ECtHR found that stateless individuals, such as the applicant, were required to fulfil requirements that, owing to their status, they were unable to fulfil, in that they needed to have a valid travel document to apply for permanent residence in Croatia. The Court also observed the Croatian authorities' insistence on the applicant obtaining a travel document from the authorities in Kosovo, while his statelessness was evident from his birth certificates. Consequently, Croatia had failed to comply with its positive obligation to provide an effective and accessible procedure enabling the applicant to have his status in Croatia determined with due regard to his right to private life under Article 8 of the ECHR.

Key points

- Status and documentation often allows non-citizens to access the labour market, and private and public services (see [introduction to this chapter](#)).
- The EU Charter 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 is at risk of death or ill-treatment in the state of destination (see [Section 3.2](#)).
- 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 application, and must be given a document allowing their stay in the Member State during the examination of the asylum application (see [Section 3.1](#)).
- Recognised refugees and beneficiaries of subsidiary protection must be given a residence permit as well as travel documents under EU law (see [Section 3.2](#)).
- 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 3.3](#)).

⁽¹⁴²⁾ ECtHR, *Hoti v. Croatia*, No. 63311/14, 26 April 2018. See also ECtHR, *Sudita Keita v. Hungary*, No. 42321/15, 12 May 2020.

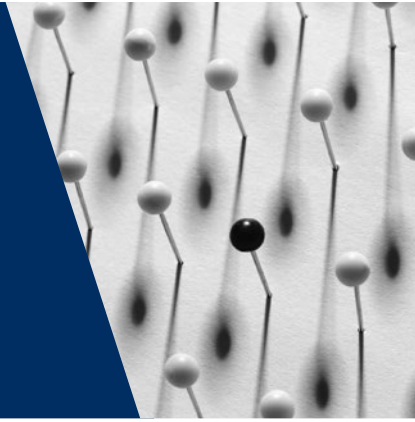
- The Return Directive requires that EU Member States either regularise the position of third-country nationals in an irregular situation or issue a return decision to them (see [Section 3.5](#)).
- Under the ECHR, failure to recognise a migrant's status or to issue him or her with documentation might raise an issue under Article 8 (see [Section 3.5](#)).
- Under EU law, third-country nationals are entitled to enhanced status (long-term residence) after legally residing in an EU Member State continuously for 5 years (see [Section 3.6](#)).
- Turkish nationals and their families cannot be made subject to more stringent conditions as regards self-employment or providing services than those that 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 3.7](#)).
- With the withdrawal of the United Kingdom from the EU (1 February 2020), British nationals are third-country nationals (see [Section 3.8](#)).
- 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 3.9](#)).
- Neither EU law nor the ECHR covers acquisition or loss of citizenship, but loss of citizenship may engage EU law if the citizenship loss also entails loss of EU rights (see [Section 3.10](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

4

Asylum determination and barriers to removal: substantive issues



EU	Issues covered	CoE
<p>TFEU, Article 78, and EU Charter, Article 18 (right to asylum), both referring to UN Convention relating to the Status of Refugees, which enshrines this principle in its Article 33</p> <p>EU Charter, Article 19 (protection in the event of removal, expulsion or extradition)</p>	<p>Principle of non-refoulement</p>	<p>ECHR, Article 3 as interpreted by the ECtHR in <i>Soering v. the United Kingdom</i>, No. 14038/88, 1989 (extradition giving rise to exposure to ill-treatment)</p> <p>ECHR, Article 2 (right to life)</p> <p>ECtHR, <i>Saadi v. Italy</i> [GC], No. 37201/06, 2008 (absolute nature of prohibition of return to torture)</p>
<p>Qualification Directive (2011/95/EU), Article 4</p>	<p>Assessment of the risk</p>	<p>ECtHR, <i>Sufi and Elmi v. the United Kingdom</i>, Nos. 8319/07 and 11449/07, 2011 (how to assess the existence of a real risk in situations of indiscriminate violence and in respect of humanitarian conditions)</p> <p>ECtHR, <i>Salah Sheekh v. the Netherlands</i>, No. 1948/04, 2007 (burden of proof for members of persecuted groups)</p> <p>ECtHR, <i>J.K. and Others v. Sweden</i> [GC], No. 59166/12, and <i>F.G. v. Sweden</i> [GC], No. 43611/11, 2016 (burden of proof)</p>

EU	Issues covered	CoE
<p>Dublin Regulation, Regulation (EU) No. 604/2013</p> <p>CJEU, Joined Cases C-411/10 and C-493/10, 2011 <i>N.S. and M.E.</i> [GC], 2011 (Dublin transfers)</p>	<p>Dublin transfers</p>	<p>ECtHR, <i>M.S.S. v. Belgium and Greece</i> [GC], No. 30696/09, 2011 (return to a state of destitution from one EU Member State to another)</p> <p>ECtHR, <i>Tarakhel v. Switzerland</i> [GC], No. 29217/12, 2014 (individual guarantees)</p>
<p>Return Directive (2008/115/EC), Articles 5 and 9</p>	<p>Expulsion of seriously ill persons</p>	<p>ECtHR, <i>D. v. the United Kingdom</i>, No. 30240/96, 1997 (expulsion of a terminally ill man)</p> <p>ECtHR, <i>Paposhvili v. Belgium</i> [GC], No. 41738/10, 2016 (absence of an imminent risk of dying)</p>
	<p>Diplomatic assurances</p>	<p>ECtHR, <i>Ramzy v. the Netherlands</i>, No. 25424/05, 2010 (insufficient assurances)</p> <p>ECtHR, <i>Othman (Abu Qatada) v. the United Kingdom</i>, No. 8139/09, 2012 (acceptable assurances)</p>
<p>EU Charter, Article 18 (right to asylum)</p> <p>Qualification Directive (2011/95/EU)</p> <p>ECJ, C-465/07, <i>Elgafaji</i> [GC], 2009 (subsidiary protection)</p> <p>CJEU, C-542/13, <i>M'Bodj</i> [GC], 2014 (subsidiary protection and serious illness)</p> <p>Exclusion from protection:</p> <p>CJEU, Joined Cases C-57/09 and C-101/09, <i>B and D</i> [GC], 2010</p> <p>CJEU, C-573/14, <i>Lounani</i> [GC], 2017 (terrorism)</p> <p>CJEU, C-369/17, <i>Ahmed</i>, 2018 (subsidiary protection)</p> <p>Cessation of protection:</p> <p>CJEU, Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, <i>Abdulla</i> [GC], 2010</p> <p>EU Charter, Article 19 (protection in the event of removal, expulsion or extradition)</p>	<p>Asylum determination (refugee status and subsidiary protection)</p>	

EU	Issues covered	CoE
Qualification Directive (2011/95/EU), Article 8	Internal relocation	ECtHR, <i>Sufi and Elmi v. the United Kingdom</i> , Nos. 8319/07 and 11449/07, 2011 (how to assess the risk of ill-treatment in cases of relocation protection)
EU Charter, Article 19 (protection in the event of removal, expulsion or extradition)	Prohibition of collective expulsion	ECHR, Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) ECtHR, <i>Čonka v. Belgium</i> , No. 51564/99, 2002 (expulsion without individual assessment) ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> [GC], No. 27765/09, 2012 (collective expulsion on the high seas) ECtHR, <i>N.D. and N.T. v. Spain</i> [GC], Nos. 8675/15 and 8697/15, 2020 (storming a border fence)
	Barriers to expulsion on other human rights grounds	ECtHR, <i>Mamatkulov and Askarov v. Turkey</i> [GC], Nos. 46827/99 and 46951/99, 2005 (risk of a flagrant denial of justice under Article 6 of the ECHR)
<p>Long-term residents: Long-Term Residence Directive (2003/109/EC), Article 12</p> <p>Third-country national family members of EEA nationals: Free Movement Directive (2004/38/EC), Article 28 CJEU, C-300/11, ZZ [GC], 2013 (notification duties)</p> <p>Turkish nationals: Decision 1/80 of the EEC-Turkey Association Council, Article 14 (1) ECJ, C-349/06, <i>Polat</i>, 2007 (measures authorising limitations on rights of Turkish nationals)</p>	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 owing to requirements of EU law and/or the ECHR.

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 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/EU). In exceptional circumstances, both instruments allow for exceptions to the prohibition on removal of a refugee.

Non-absolute barriers exist to strike 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 4.3](#)).

4.1. 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⁽¹⁴³⁾. It means that, in principle, refugees must not be returned to a country where they have a reason to fear persecution.

⁽¹⁴³⁾ 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, including Art. 7 of the International Covenant on Civil and Political Rights. See UNHCR (2007), *Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*.

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.’

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 member states of the CoE are parties to the 1951 Geneva Convention, but Turkey applies the Convention only in relation to refugees from Europe⁽¹⁴⁴⁾. The UNHCR has issued a *Handbook on procedures and criteria for determining refugee status and guidelines on international protection*, last updated in February 2019, which covers in detail the issues dealt with in Sections 4.1.1 to 4.1.8 and 5.1⁽¹⁴⁵⁾.

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 (CRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ICCPR and the International Covenant on Economic, Social and Cultural Rights. The EU asylum *acquis* measures have been adopted under this policy, including the Dublin Regulation (Regulation (EU) No. 604/2013), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU) and the Reception Conditions Directive (2013/33/EU). Denmark and Ireland are not, or only partly, bound by the EU asylum *acquis* (see Annex 1).

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 1951 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

⁽¹⁴⁴⁾ Turkey maintains a geographical reservation under Art. 1 (B) of the Convention, which restricts its obligations to people uprooted by events in Europe.

⁽¹⁴⁵⁾ UNHCR (2019), *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, UNHCR, Geneva.

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' ⁽¹⁴⁶⁾.

The Qualification Directive, as revised in 2011 ⁽¹⁴⁷⁾, 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 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, 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 (2) incorporates the relevant case law of the ECtHR regarding Article 3 of the ECHR ⁽¹⁴⁸⁾.

The CJEU concluded that refugees enjoy stronger protection from *refoulement* under EU law, since any form of removal under the Qualification Directive must be in conformity with the right to asylum and the principle of non-*refoulement*, as enshrined in Articles 4 and 19 (2) of the EU Charter ⁽¹⁴⁹⁾.

Under the ECHR, Articles 2 and 3 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.

⁽¹⁴⁶⁾ CJEU, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, 2 March 2010, para. 52; CJEU, C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* [GC], 17 June 2010, para. 37; CJEU, C-720/17, *Mohammed Bilali v. Bundesamt für Fremdenwesen und Asyl*, 23 May 2019, para. 54.

⁽¹⁴⁷⁾ Directive 2011/95/EU, OJ 2011 L 337/9.

⁽¹⁴⁸⁾ See explanations relating to the 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.

⁽¹⁴⁹⁾ CJEU, Joined Cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra; X and X v. Commissaire général aux réfugiés et aux apatrides* [GC], 14 May 2019, paras. 94-95.

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 to inhuman or degrading treatment or punishment in the country to which he or she was returned ⁽¹⁵⁰⁾.

Example: In *Saadi v. Italy* ⁽¹⁵¹⁾, 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 ECtHR 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, did not negate this risk either. 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* ⁽¹⁵²⁾, the Maltese Civil Court held that Malta's deportation to Libya of asylum seekers who were subsequently imprisoned and tortured violated Article 3 of the ECHR as well as Article 36 of the Constitution of Malta.

⁽¹⁵⁰⁾ ECtHR, *M.A. v. France*, No. 9373/15, 1 February 2018; 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 and 4 others, 30 October 1991.

⁽¹⁵¹⁾ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008. See also ECtHR, *Mannai v. Italy*, No. 9961/10, 27 March 2012.

⁽¹⁵²⁾ Malta, Constitutional Jurisdiction (*Gurisdizzjoni Kostituzzjonali*), *Abdul Hakim Hassan Abdulle Et v. Ministry tal-Gustizzja u Intern Et, Qorti Civili Prim'Awla (Gurisdizzjoni Kostituzzjonali)*, No. 56/2007, 29 November 2011.

4.1.1. The nature of the risk under EU law

Under EU law, the [Qualification Directive](#) protects against *refoulement*. Individuals are eligible for refugee status (see [Chapter 3](#) on status and associated documentation) if they have a well-founded fear of persecution within the meaning of Article 1 A of the [1951 Geneva Convention](#). Under Article 9 of the Qualification Directive, an act of persecution must:

- 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), and ‘acts of a gender-specific or child-specific nature’. For example, victims of trafficking can be considered to be 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, which in its recast version explicitly requires due consideration of gender identity for the purposes of determining membership of a particular social group.

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 *Y and Z* joined cases ⁽¹⁵³⁾, the CJEU was called on to define which acts may constitute an ‘act of persecution’ in the context of a serious violation of freedom of religion under Article 9 (1) (a) of the Qualification Directive and Article 10 of the EU Charter. Specifically, the Court was asked if 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 or not a violation of the right guaranteed by Article 10 (1) of the EU 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 forgo religious activities that can put his or her life in danger in the country of origin.

Example: In *Fathi* ⁽¹⁵⁴⁾, the CJEU reaffirmed a broad definition of ‘religion’, which encompasses all its constituent components, be they public or private, collective or individual. The Court held that the definition of ‘religion’ in the Qualification Directive provides only a non-exhaustive list of components that may characterise the concept of religion as a reason for persecution. An applicant claiming to be at risk of persecution for reasons based on religion cannot be required to make statements or produce documents concerning each of the components covered by Article 10 (1) (b) of the Qualification Directive to substantiate his or her religious beliefs. The Court also stated that imposing the death penalty or a custodial sentence, is capable, in itself, of constituting an ‘act of persecution’, within the meaning of Article 9 (1) of the directive, provided that such penalties are actually applied in the country of origin that adopted such legislation.

Example: In *X, Y and Z* ⁽¹⁵⁵⁾, the CJEU stated that, when assessing an application for refugee status, the competent authorities cannot reasonably expect the applicant for asylum to conceal his or her homosexuality in the country of origin or to exercise reserve in the expression of his or her sexual orientation in order to avoid the risk of persecution.

⁽¹⁵³⁾ CJEU, Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, 5 September 2012, paras. 72 and 80.

⁽¹⁵⁴⁾ CJEU, C-56/17, *Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite*, 4 October 2018.

⁽¹⁵⁵⁾ CJEU, Joined Cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel*, 7 November 2013.

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, 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 or execution (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: In *Mohamed M'Bodj v. État Belge* ⁽¹⁵⁶⁾, the CJEU ruled that an applicant suffering from a serious illness cannot be granted subsidiary protection for that reason under Article 15 of the Qualification Directive. The fact that removal is precluded by the absence of appropriate medical treatment in the country of origin does not mean that the applicant should be granted subsidiary protection and therefore lawful residence in the EU Member State, unless he is intentionally deprived of healthcare in his country of origin.

Example: *MP v. Secretary of State for the Home Department* ⁽¹⁵⁷⁾ concerned the possible granting of subsidiary protection to a person who was a victim of torture in his country of origin. The CJEU ruled that EU Member States cannot expel the applicant if such expulsion would result in significant and permanent deterioration of that person's mental health disorders, particularly where such deterioration would endanger his life. However, the fact that removal is precluded by the absence of appropriate treatment does not mean that that applicant should be granted subsidiary protection under Article 15 (b) of the Qualification Directive and therefore lawful residence in the EU Member State. When deciding on the granting of subsidiary protection, the authorities should ascertain whether or not the return of the victim to the country of origin is likely to entail intentional deprivation of necessary medical treatment by the authorities, since these are the conditions under which the person is eligible for subsidiary protection.

⁽¹⁵⁶⁾ CJEU, C-542/13, *Mohamed M'Bodj v. État Belge* [GC], 18 December 2014.

⁽¹⁵⁷⁾ CJEU, C-353/16, *MP v. Secretary of State for the Home Department* [GC], 24 April 2018.

Example: In the *Elgafaji* case ⁽¹⁵⁸⁾, 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 to the circumstances of the applicant and/or to the general situation in the country of origin.

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 ⁽¹⁵⁹⁾.

4.1.2. 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 4.1.7](#)).

⁽¹⁵⁸⁾ ECJ, C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie* [GC], 17 February 2009, paras. 35–39. On similar issues, see also CJEU, C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, 30 January 2014.

⁽¹⁵⁹⁾ The CJEU was also asked to define the term ‘internal armed conflict’ in C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, 30 January 2014.

The ECtHR tends to examine cases 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 Court often either finds the issues under both articles inseparable and examines them together ⁽¹⁶⁰⁾ or examines the complaint under Article 2 in the context of the related main complaint under Article 3.

Example: In *Bader and Kanbor v. Sweden* ⁽¹⁶¹⁾, 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.

Example: In *Al-Saadoon and Mufdhi v. the United Kingdom* ⁽¹⁶²⁾, 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 if there is a general situation of violence or armed conflict or if there are human rights abuses. Where an individual is a **member of a group subject to systematic ill-treatment** ⁽¹⁶³⁾, it may not be necessary to cite evidence of personal risk factors.

Example: In *Salah Sheekh v. the Netherlands* ⁽¹⁶⁴⁾, 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 or not 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

⁽¹⁶⁰⁾ ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016, para. 110.

⁽¹⁶¹⁾ ECtHR, *Bader and Kanbor v. Sweden*, No. 13284/04, 8 November 2005.

⁽¹⁶²⁾ ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, 2 March 2010.

⁽¹⁶³⁾ ECtHR, *H. and B. v. the United Kingdom*, Nos. 70073/10 and 44539/11, 9 April 2013, para. 91; ECtHR, *Tadzhibayev v. Russia*, No. 17724/14, 1 December 2015, para. 43.

⁽¹⁶⁴⁾ ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007.

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 or not there is a foreseeable and real risk of ill-treatment contrary to Article 3 of the ECHR.

Example: In *N.A. v. the United Kingdom* ⁽¹⁶⁵⁾, 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 ⁽¹⁶⁶⁾.

Example: In *Sufi and Elmi v. the United Kingdom* ⁽¹⁶⁷⁾, 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: if the parties to the conflict were either employing methods and tactics of warfare that increased the risk of civilian casualties or directly targeting civilians; if 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

⁽¹⁶⁵⁾ ECtHR, *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008, paras. 114-117 and 147.

⁽¹⁶⁶⁾ See also ECtHR, *X. v. Switzerland*, No. 16744/14, 26 January 2017.

⁽¹⁶⁷⁾ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 241-250 and 293. For a more recent assessment of the situation in Somalia, see ECtHR, *K.A.B. v. Sweden*, No. 886/11, 5 September 2013.

country, unless it could be demonstrated that he or she was sufficiently well connected to powerful persons or groups in the city to enable him or her to obtain protection.

Example: In *L.M. and Others v. Russia* ⁽¹⁶⁸⁾, a stateless Palestinian and two Syrian nationals were detained in Russia pending their expulsion to Syria. The ECtHR found the applicants' allegations that their expulsion to Syria would breach Articles 2 and 3 of the ECHR well founded, given the level of intensity of the conflict in Syria, and in particular in Aleppo and Damascus, the applicants' cities of origin, where there had been particularly heavy fighting and considerable danger of ill-treatment.

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 **emanate not from the receiving state** itself, but rather from non-state actors, illness or humanitarian conditions in that country.

Example: *J.K. and Others v. Sweden* ⁽¹⁶⁹⁾ concerned an Iraqi man, who had worked for American clients and operated out of a US armed forces base in Iraq, and his family, who had fled Iraq because they had been exposed to serious threats and abuse by al-Qaeda. The ECtHR held that in that situation the Iraqi State would not be able to provide the applicants with effective protection against threats by al-Qaeda or other private groups, and the applicants would thus face a real risk of continued persecution by non-state actors if returned to Iraq.

Example: *D. v. the United Kingdom* ⁽¹⁷⁰⁾ 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 his 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* ⁽¹⁷¹⁾,

⁽¹⁶⁸⁾ ECtHR, *L.M. and Others v. Russia*, Nos. 40081/14, 40088/14 and 40127/14, 15 October 2015, paras. 119–127.

⁽¹⁶⁹⁾ ECtHR, *J.K. and Others v. Sweden* [GC], No. 59166/12, 23 August 2016.

⁽¹⁷⁰⁾ ECtHR, *D. v. the United Kingdom*, No. 30240/96, 2 May 1997.

⁽¹⁷¹⁾ ECtHR, *N. v. the United Kingdom* [GC], No. 26565/05, 27 May 2008.

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.

Example: *Paposhvili v. Belgium* ⁽¹⁷²⁾ concerned a Georgian national suffering from leukaemia and recurrent tuberculosis and facing removal due to criminal activity in Belgium. The ECtHR built on the approach taken in *D. v. the United Kingdom*. It clarified that, even in the absence of an imminent risk of dying, a lack of appropriate and accessible treatment in the receiving country that exposes the individual to a 'serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy' would fall under Article 3. The Court ruled that it is for the applicant to adduce evidence of a real risk of being subjected to treatment contrary to Article 3 of the ECHR and for the authorities to assess whether or not appropriate treatment is available and accessible in the receiving country so that the applicant avoids finding him- or herself in a situation amounting to ill-treatment. States must assess the impact of removal on the individual by comparing his or her health prior to removal and how it would develop after the removal. The Court found that the Belgian authorities had not examined the applicant's medical conditions in the context of his removal and thus violated Article 3 of the ECHR.

Example: *Babar Ahmad and Others v. the United Kingdom* ⁽¹⁷³⁾ involved alleged terrorists facing extradition to the United States. The Court found that Article 3 would not be breached by their expected detention conditions at ADX Florence (a 'supermax' prison) or by the length of their possible sentences.

Example: In *Aswat v. the United Kingdom* ⁽¹⁷⁴⁾, the Court found that the proposed extradition of the applicant, a suspected terrorist suffering from a serious mental disorder, to the United States would constitute a violation of Article 3, given the uncertainty over his conditions of detention in the receiving country. His mental disorder was of sufficient severity to have necessitated his transfer from ordinary prison to a high-security psychiatric hospital in the United Kingdom. The medical evidence clearly indicated that it continued to be appropriate

⁽¹⁷²⁾ ECtHR, *Paposhvili v. Belgium* [GC], No. 41738/10, 13 December 2016, paras. 183–191.

⁽¹⁷³⁾ ECtHR, *Babar Ahmad and Others v. the United Kingdom*, Nos. 24027/07 and 3 others, 10 April 2012.

⁽¹⁷⁴⁾ ECtHR, *Aswat v. the United Kingdom*, No. 17299/12, 16 April 2013.

for him to remain there ‘for his own health and safety’. Therefore, in light of the available medical evidence, there was a real risk that the applicant’s extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration of his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.

Example: In *Sufi and Elmi v. the United Kingdom* ⁽¹⁷⁵⁾, 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.* ⁽¹⁷⁶⁾, 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.

The ECtHR has also had to consider whether or not 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 ⁽¹⁷⁷⁾.

Example: In *S.F. and Others v. Sweden* ⁽¹⁷⁸⁾, 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

⁽¹⁷⁵⁾ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 267–292.

⁽¹⁷⁶⁾ France, Council of State (*Conseil d’État*), *M. A.*, No. 334040, 1 July 2011.

⁽¹⁷⁷⁾ See, for example, ECtHR, *A.A. v. Switzerland*, No. 58802/12, 7 January 2014; ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016; ECtHR, *Muminov v. Russia*, No. 42502/06, 11 December 2008.

⁽¹⁷⁸⁾ ECtHR, *S.F. and Others v. Sweden*, No. 52077/10, 15 May 2012.

communications and regime critics, even outside 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 irregularly without valid identity documents.

4.1.3. 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.

On the timing of an assessment, the Qualification Directive provides in Article 4 (3) that it is to be carried out at the time of taking a decision on the application. The revised [Asylum Procedures Directive](#) requires in Article 46 (3) that, in appeals procedures, the examination of facts and points of law be made with respect to the time when the appeal is heard. The timing to assess the cessation of protection status is described in [Section 4.1.8](#).

Under ECHR law, the ECtHR has distinguished two types of asylum claims based on the nature of the risk. On the one hand, if the risk stems from a general and well-known situation, the authorities have to carry out an assessment of the risk of their own motion. On the other hand, in situations of asylum claims based on an individual risk, 'it must be for the person seeking asylum to rely on and to substantiate such a risk' ⁽¹⁷⁹⁾. In the latter case, it is thus for the applicant to cite evidence capable of proving that there are substantial grounds for believing that, if he or she is removed

⁽¹⁷⁹⁾ ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016, paras. 126–127; ECtHR, *J.K. and Others v. Sweden* [GC], No. 59166/12, 23 August 2016, para. 98.

from a member state, he or she will 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⁽¹⁸⁰⁾. 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⁽¹⁸¹⁾. 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⁽¹⁸²⁾.

Example: In *Singh and Others v. Belgium*⁽¹⁸³⁾, the Court noted that the Belgian authorities had rejected documents submitted in support of an asylum application by Afghan nationals. The authorities had not sufficiently investigated the documentation before finding it unconvincing. 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 easy to undertake. Therefore, they had not conducted a close and rigorous scrutiny of the asylum application as required by Article 13 of the ECHR, violating that provision in conjunction with Article 3.

Considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the ECHR and having regard to the position of vulnerability of asylum seekers, the authorities may be required to assess whether or not a risk exists of their own motion. This is the case, when an applicant chooses not to rely on or disclose a specific individual ground for asylum, by deliberately refraining from mentioning it, and if a state is made aware of facts relating to a specific individual that could expose him or her to a risk of ill-treatment upon returning to the country in question⁽¹⁸⁴⁾.

⁽¹⁸⁰⁾ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, para. 129.

⁽¹⁸¹⁾ ECtHR, *J.K. and Others v. Sweden* [GC], No. 59166/12, 23 August 2016, para. 93; ECtHR, *M.A. v. Switzerland*, No. 52589/13, 18 November 2014, para. 55; 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.

⁽¹⁸²⁾ ECtHR, *Matsiukhina and Matsiukhin v. Sweden* (dec.), No. 31260/04, 21 June 2005; ECtHR, *Collins and Akaziebie v. Sweden* (dec.), No. 23944/05, 8 March 2007; ECtHR, *A.A.M. v. Sweden*, No. 68519/10, 3 April 2014.

⁽¹⁸³⁾ ECtHR, *Singh and Others v. Belgium*, No. 33210/11, 2 October 2012.

⁽¹⁸⁴⁾ ECtHR, *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016, para. 127.

Article 36 of the ECHR entitles a member state to intervene in a case lodged with the Court by one of its nationals against another member state. This provision – which was inserted into the ECHR to allow a state to provide diplomatic protection to its nationals – was found not to apply in cases where the applicants' complaint was fear of being returned to the member state of their nationality, which allegedly would subject them to treatment contrary to Articles 2 and 3 of the Convention ⁽¹⁸⁵⁾.

Under ECtHR case law, the risk must be assessed not only on the basis of individual factors, but cumulatively ⁽¹⁸⁶⁾. Any assessment must be individualised, taking into account all the evidence ⁽¹⁸⁷⁾. If a person has suffered past persecution, this may be a strong indication that they will suffer future risk ⁽¹⁸⁸⁾.

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. It 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 ⁽¹⁸⁹⁾. It has found reports to be unreliable when the sources of information are unknown and the conclusions inconsistent with other credible reporting ⁽¹⁹⁰⁾.

When an individual has not been expelled, the date of the ECtHR's assessment is the point in time for considering the risk ⁽¹⁹¹⁾. 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 ⁽¹⁹²⁾. When an applicant has already been expelled, the ECtHR will look at whether or not the individual has been ill-treated, including during the deportation process ⁽¹⁹³⁾, or whether or not the country information demonstrates substantial reasons for believing that the applicant would be ill-treated.

⁽¹⁸⁵⁾ ECtHR, *I. v. Sweden*, No. 61204/09, 5 September 2013.

⁽¹⁸⁶⁾ ECtHR, *S.F. and Others v. Sweden*, No. 52077/10, 15 May 2012, paras. 68–69.

⁽¹⁸⁷⁾ 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*, Nos. 8319/07 and 11449/07, 28 June 2011.

⁽¹⁸⁸⁾ ECtHR, *R.C. v. Sweden*, No. 41827/07, 9 March 2010; ECtHR, *J.K. and Others v. Sweden* [GC], No. 59166/12, 23 August 2016, paras. 99–102.

⁽¹⁸⁹⁾ ECtHR, *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008, paras. 118–122.

⁽¹⁹⁰⁾ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 230–234.

⁽¹⁹¹⁾ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008.

⁽¹⁹²⁾ ECtHR, *A.A. v. the United Kingdom*, No. 8000/08, 20 September 2011.

⁽¹⁹³⁾ ECtHR, *Thuo v. Cyprus*, No. 3869/07, 4 April 2017.

Example: In *Sufi and Elmi v. the United Kingdom* ⁽¹⁹⁴⁾, 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.

Example: In *Muminov v. Russia* ⁽¹⁹⁵⁾, the applicant was an Uzbek national who was, on the basis of available information, apparently serving a 5-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.

4.1.4. 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 willingness and ability in the receiving state, whether on the part of 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 or not 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 [...] that is 'effective and of a non-temporary

⁽¹⁹⁴⁾ ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, 28 June 2011.

⁽¹⁹⁵⁾ ECtHR, *Muminov v. Russia*, No. 42502/06, 11 December 2008.

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* ⁽¹⁹⁶⁾, which concerned the cessation of refugee status, the CJEU held that, 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 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 a specific protection regime exists. The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was 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](#), which incorporates Article 1 D of the 1951 Geneva Convention into EU law).

Example: The *Bolbol* case ⁽¹⁹⁷⁾ 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.

⁽¹⁹⁶⁾ CJEU, Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland* [GC], 2 March 2010.

⁽¹⁹⁷⁾ CJEU, C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal* [GC], 17 June 2010.

Example: In *El Kott* ⁽¹⁹⁸⁾, 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 Article 12 (1) (b) or (2) and (3) of the directive applies.

Under the ECHR, the assessment of whether or not 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 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 if the receiving state is effectively and practically able and willing to protect the individual against that risk.

Example: In *Hida v. Denmark* ⁽¹⁹⁹⁾, 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.

⁽¹⁹⁸⁾ CJEU, C-364/11, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal* [GC], 19 December 2012.

⁽¹⁹⁹⁾ ECtHR, *Hida v. Denmark* (dec.), No. 38025/02, 19 February 2004.

The ECtHR has been called upon to examine whether or not **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 ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether or not the 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 or not 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 is given to assurances. More usually the Court will assess, first, the quality of assurances given and, second, whether or not, in the 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 ⁽²⁰⁰⁾.

4.1.5. 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 internal protection 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 and if certain areas are safe for the individual to pass to reach the destination site. An assessment of individual circumstances is also required ⁽²⁰¹⁾.

⁽²⁰⁰⁾ ECtHR, *T.M. and Others v. Russia*, Nos. 31189/15 and 5 others, 7 November 2017, para. 24; ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, paras. 120–122; ECtHR, *Gayratbek Saliev v. Russia*, No. 39093/13, 17 April 2014, paras. 65–67; 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.

⁽²⁰¹⁾ ECtHR, *A.A.M. v. Sweden*, No. 68519/10, 3 April 2014, para. 73; ECtHR, *J.K. and Others v. Sweden* [GC], No. 59166/12, 23 August 2016, para. 96.

Example: In *Sufi and Elmi v. the United Kingdom* (202), 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 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 probably be exposed to a risk of treatment contrary to Article 3, unless it could be demonstrated that the applicant had recent experience of 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 real risk of being exposed to treatment in breach of Article 3 (203).

4.1.6. 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 that that country is considered safe and that certain safeguards are respected. This section explains when this is possible. The applicable procedural safeguards for adults are described in [Section 5.2](#) and those for unaccompanied children in [Section 10.1](#).

Two situations presume safety in another country. A country can be considered safe if it fulfils a set of requirements listed in the [Asylum Procedures Directive](#) (Article 38). Among these, the asylum seeker has to be admitted by the **safe third country**, have the possibility of seeking 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. To determine that a state is a safe third country, there must be a pre-established list, which has to be notified to the Commission. A safe third country also requires the existence of a connection between the applicant and the third country on the basis of which it would be reasonable for the asylum seeker to go to that country. Transiting through a country (safe transit country) does not qualify as a sufficient connection between the applicant and the safe third

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

(203) See also ECtHR, *M.Y.H. v. Sweden*, No. 50859/10, 27 June 2013.

country⁽²⁰⁴⁾. In cases of lack of respect of these provisions, an EU Member State cannot rely on the rebuttable presumption of safety under the Asylum Procedures Directive⁽²⁰⁵⁾.

The second presumption regards states that apply the [Dublin Regulation](#), namely the EU Member States, Iceland, Liechtenstein, Norway and Switzerland (see [Section 5.2](#)). The Dublin Regulation involves an **allocation of responsibility** to EU Member States for examining applications for international protection; there is a hierarchy of criteria to allocate responsibility for examining applications lodged in one EU Member State by individuals who then travelled to another. There is a rebuttable presumption that all states that apply the Dublin Regulation are safe and comply with the EU Charter and the ECHR.

Among the various criteria listed in the Dublin 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 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](#), (EU) No. 603/2013), which all states applying the Dublin 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 will 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 that have systemic deficiencies in their asylum and reception systems. In certain cases leading to serious violations of the [EU Charter](#), this may lead to states having to examine an application, even if it is not their responsibility to do so under the Dublin Regulation.

⁽²⁰⁴⁾ CJEU, C-564/18, *LH v. Bevándorlási és Menekültügyi Hivatal*, 19 March 2020; CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, 14 May 2020, paras. 157–160.

⁽²⁰⁵⁾ CJEU, C-404/17, *A. v. Swedish Migration Agency*, 25 July 2018.

Example: In the *N.S. and M.E. joined cases* ⁽²⁰⁶⁾, the CJEU gave a preliminary ruling on whether or not under certain circumstances a state may be obliged to examine an application under the sovereignty clause included in Article 3 (2) of the Dublin 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 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* ⁽²⁰⁷⁾, 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 also 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.

⁽²⁰⁶⁾ 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* [GC], 21 December 2011.

⁽²⁰⁷⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

Example: In *Ilias and Ahmed v. Hungary* ⁽²⁰⁸⁾, the ECtHR concluded that Hungary violated Article 3 of the ECHR by expelling two Bangladeshi asylum seekers to Serbia from a transit zone located at the border. The authorities had not properly assessed if the applicants would have effective access to asylum in that country or if they would be at risk of chain *refoulement* to North Macedonia or to Greece, where the reception conditions for asylum seekers were in breach of Convention standards.

4.1.7. Exclusion from international protection

Under EU law, Articles 12 and 17 of the [Qualification Directive](#), which build on Article 1 F of the [1951 Geneva Convention](#), contain provisions that exclude international protection for those persons who do not deserve it. 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 their admission;
- an act contrary to the purposes and principles of the United Nations.

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

The European Asylum Support Office (EASO) publication [Exclusion: Articles 12 and 17 Qualification Directive](#) provides a judicial analysis that serves as a tool for courts dealing with potential cases of exclusion from international protection ⁽²⁰⁹⁾.

⁽²⁰⁸⁾ ECtHR, *Ilias and Ahmed v. Hungary* [GC], No. 47287/15, 21 November 2019.

⁽²⁰⁹⁾ EASO (2016), *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A judicial analysis*, Publications Office, Luxembourg.

Example: In *B and D* ⁽²¹⁰⁾, 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 '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 or not there are serious reasons for considering the person guilty of such acts or crimes. This should be done with a view to determining if the acts committed by the organisation meet the conditions of those provisions, and if 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 EU Member State or on an assessment of proportionality in relation to the particular case ⁽²¹¹⁾.

Example: In *Lounani* ⁽²¹²⁾, the CJEU clarified that exclusion from refugee status under Article 12 (2) (c) of the Qualification Directive is not limited to the actual perpetrators of terrorist acts. It covers also persons who engage in recruitment, organisation, transportation or equipment of individuals who travel to a state other than their own for the purpose of, inter alia, the perpetration, planning or preparation of terrorist acts. To apply this exclusion clause, it is not a prerequisite that the applicant had been convicted of a terrorist offence.

Example: In *Shajin Ahmed* ⁽²¹³⁾, the CJEU affirmed that the grounds for exclusion regarding subsidiary protection under Article 17 (1) should be regarded in the light of the Court's interpretation of Article 12 (2) (b) and (c) of the directive relating to exclusion from refugee status.

⁽²¹⁰⁾ CJEU, Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D* [GC], 9 November 2010.

⁽²¹¹⁾ See also CJEU, C-373/13, *H. T. v. Land Baden-Württemberg*, 24 June 2015.

⁽²¹²⁾ CJEU, C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani* [GC], 31 January 2017.

⁽²¹³⁾ CJEU, C-369/17, *Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal*, 13 September 2018.

Under the ECHR, since the prohibition of torture and inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the 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* ⁽²¹⁴⁾, 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 under Article 3.

4.1.8. Cessation of international protection

Under EU law, when the risk situation in a third country has improved, Articles 11 and 16 of the [Qualification Directive](#) allow international protection 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* ⁽²¹⁵⁾ 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 the refugee status was granted, no longer exists and the person has no other reason to fear being persecuted. In assessing a change of circumstances, states must consider the refugee's individual situation while verifying if the actor or actors of protection have taken reasonable steps to prevent the persecution and if, among other

⁽²¹⁴⁾ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008, para. 138. See also ECtHR, *Ismoilov and Others v. Russia*, No. 2947/06, 24 April 2008, para. 127; ECtHR, *Ryabikin v. Russia*, No. 8320/04, 19 June 2008.

⁽²¹⁵⁾ CJEU, Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* [GC], 2 March 2010.

things, they 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.

Example: the case *M, X and X* ⁽²¹⁶⁾ concerned three applicants, who either had had their refugee status revoked or had been refused that status on the basis of Article 14 of the Qualification Directive because they represented a danger to the security of the host EU Member State or because of a conviction for serious crime. The CJEU specified that third-country nationals with a well-founded fear of persecution must be classified as refugees for the purposes of the directive and the 1951 Geneva Convention, whether or not they have been formally granted refugee status as defined in the directive. Although such persons will not, or will no longer, be entitled to all the rights and benefits that the directive reserves for persons granted refugee status, they continue to be entitled to a certain number of rights laid down in the 1951 Geneva Convention.

The status of refugees and beneficiaries of subsidiary protection who have been subject to very serious harm in the past will not cease in cases of changed circumstances, if they can invoke compelling reasons for refusing to avail themselves of the protection of their country of origin (Qualification Directive, Articles 11 and 16).

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 ⁽²¹⁷⁾. To assess the situation, the ECtHR relies on relevant government reports, and information provided by the UNHCR and various international NGOs, 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

⁽²¹⁶⁾ CJEU, Joined Cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra, X and X v. Commissaire général aux réfugiés et aux apatrides* [GC], 14 May 2019.

⁽²¹⁷⁾ ECtHR, *Tomić v. the United Kingdom* (dec.), No. 17837/03, 14 October 2003; ECtHR, *Hida v. Denmark* (dec.), No. 38025/02, 19 February 2004.

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 ⁽²¹⁸⁾.

4.2. Collective expulsion

Under both EU and ECHR law, collective expulsions are prohibited. A collective expulsion is any measure that compels individuals, regardless of their legal situation ⁽²¹⁹⁾, 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 ⁽²²⁰⁾. The prohibition of collective expulsion does not outlaw removals by group charter flights ⁽²²¹⁾.

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.

Under the ECHR, Article 4 of Protocol No. 4 prohibits collective expulsions. This prohibition also applies on the high seas ⁽²²²⁾, and in the context of non-admission and rejection at the border ⁽²²³⁾. The term 'expulsion' refers to any forcible removal of a foreigner from the territory, irrespective of the lawfulness and length of stay, the location of apprehension, and the person's status or conduct ⁽²²⁴⁾. The decisive criterion for an expulsion to be characterised as 'collective' is the absence of a reasonable and objective examination of the particular case of each individual within the group. The size of the group expelled is not relevant: even two persons may be sufficient to form a group ⁽²²⁵⁾. The persons concerned must have the opportunity to

⁽²¹⁸⁾ ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87 and 4 others, 30 October 1991; ECtHR, *N.A. v. the United Kingdom*, No. 25904/07, 17 July 2008.

⁽²¹⁹⁾ ECtHR, *Georgia v. Russia (I)* [GC], No. 13255/07, 3 July 2014, paras. 168–170.

⁽²²⁰⁾ For more information, see ECtHR, 'Collective expulsions of aliens', factsheet, March 2020, available at echr.coe.int under Press / Press Service / Factsheets / Expulsion.

⁽²²¹⁾ ECtHR, *Sultani v. France*, No. 45223/05, 20 September 2007.

⁽²²²⁾ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

⁽²²³⁾ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, paras. 185 and 187; ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 200 and 204.

⁽²²⁴⁾ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, para. 185. See also ECtHR, *Asady and Others v. Slovakia*, No. 24917/15, 24 March 2020, para. 60.

⁽²²⁵⁾ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, paras. 193–194 and 202–203.

put forward their arguments to the competent authorities on an individual basis, for children via their parents or a primary caregiver ⁽²²⁶⁾. However, the degree of individual examination of the personal circumstances of each member of the expelled group depends on several factors.

Example: In *Čonka v. Belgium* ⁽²²⁷⁾, 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 given to 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 *Khlaifia and Others v. Italy* ⁽²²⁸⁾, the ECtHR examined the case of three Tunisian nationals intercepted at sea by the Italian coastguard, detained in a reception centre and on board ships and then returned to Tunisia after the issuing of individual expulsion orders drafted in identical terms. The Court ruled that the fact that several individuals were subject to similar decisions did not in itself lead to the conclusion that there had been a collective expulsion. Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances. The Court concluded that the applicants had had a genuine and effective opportunity to raise arguments against their expulsion during their identification and at the moment of the establishment of their nationality.

Example: In *N.D. and N.T. v. Spain* ⁽²²⁹⁾, the ECtHR reviewed the removal of two sub-Saharan Africans who entered the Spanish enclave of Melilla as part of a larger group, which stormed and climbed the border fence. The Spanish authorities apprehended the applicants and handed them over to Morocco without carrying out individual procedures or giving them the opportunity to seek asylum. The ECtHR noted that the applicants – who, the Court had already

⁽²²⁶⁾ ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 133–137.

⁽²²⁷⁾ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002. See also ECtHR, *M.A. v. Cyprus*, No. 41872/10, 23 July 2013, where the ECtHR did not find a violation of Article 4 of Protocol No. 4.

⁽²²⁸⁾ ECtHR, *Khlaifia and Others v. Italy* [GC], No. 16483/12, 15 December 2016, paras. 237–254.

⁽²²⁹⁾ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020.

established, had no arguable claim under Article 3 of the ECHR – did not make use of other means to seek legal entry into Spain. In particular, they did not provide convincing evidence that they were prevented from physically reaching the nearby official border-crossing point where the Spanish authorities had set up an office to register asylum claims. The ECtHR concluded that the lack of individual removal decisions was a consequence of the applicants' own conduct and, therefore, did not find any violation of Article 4 of Protocol No. 4 to the ECHR.

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

Example: In its decision in *European Roma and Travellers Forum v. France* ⁽²³⁰⁾, 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.

4.3. 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 that 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 of 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](#)).

⁽²³⁰⁾ ECSR, *European Roma and Travellers Forum v. France*, Complaint No. 64/2011, merits, 24 January 2012.

Example: In *Abdida* ⁽²³¹⁾, the CJEU affirmed that removing a third-country national suffering from a serious illness to a country in which appropriate treatment is not available, which results in a serious risk of inhuman or degrading treatment, violates Article 5 of the Return Directive. In addition, the Court ruled that national legislation that does not grant suspensive effect to an appeal challenging a return decision, and may expose the applicant to a serious risk of grave and irreversible deterioration in his or her state of health, is incompatible with the 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 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 6.2](#) 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 ⁽²³²⁾.

Example: In *Mamatkulov and Askarov v. Turkey* ⁽²³³⁾, the ECtHR considered whether or not 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.

⁽²³¹⁾ CJEU, C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* [GC], 18 December 2014.

⁽²³²⁾ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012, para. 233.

⁽²³³⁾ ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, 4 February 2005. See also ECtHR, *M.E. v. Denmark*, No. 58363/10, 8 July 2014.

Example: In *Othman (Abu Qatada) v. the United Kingdom* ⁽²³⁴⁾, 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 ⁽²³⁵⁾.

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.

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 irregular status in view of the host country's needs, should be covered by the rules that already protect other foreign nationals from deportation ⁽²³⁶⁾.

4.4. 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, among others, long-term resident 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.

⁽²³⁴⁾ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, 17 January 2012.

⁽²³⁵⁾ United Kingdom, *EM (Lebanon) v. Secretary of State for the Home Department* [2008] UKHL 64, 22 October 2008.

⁽²³⁶⁾ ECSR, Conclusions 2011, Statement of interpretation on Art. 19 (8).

4.4.1. Long-term residents

Under EU law, 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 (Article 12 of the [Long-Term Residence Directive](#)) and cannot be ordered automatically following a criminal conviction, but requires a case-by-case assessment ⁽²³⁷⁾.

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

Under EU law, individuals of any nationality who are family members of EEA nationals, including EU citizens but only insofar as they have exercised free movement rights, have a right to residence that 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 than 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 ⁽²³⁸⁾. In the case of permanent residents, the grounds for expulsion must reach the level of ‘serious grounds of public policy or public security’. As stated in Article 27 (2) of the directive, these measures must comply with the principle of proportionality and 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’ ⁽²³⁹⁾. States must notify their decisions to the person concerned, including the grounds on which they are based (Article 30) ⁽²⁴⁰⁾.

⁽²³⁷⁾ CJEU, C-636/16, *Wilber López Pastuzano v. Delegación del Gobierno en Navarra*, 7 December 2017.

⁽²³⁸⁾ See the following cases in which the Court has interpreted the notion of ‘imperative grounds of public security’ under Art. 28 (3): CJEU, Joined Cases C-331/16 and 366/16, *K. v. Staatssecretaris van Veiligheid en Justitie and H. F. v. Belgische Staat* [GC], 2 May 2018, paras. 39–56; CJEU, C-348/09, *Pl. v. Oberbürgermeisterin der Stadt Remscheid* [GC], 22 May 2012, paras. 20–35; CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis* [GC], 23 November 2010, paras. 39–56.

⁽²³⁹⁾ 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 direksia na vateshnite raboti kam Ministerstvo na vateshnite raboti*, 17 November 2011; CJEU, C-430/10, *Hristo Gaydarov v. Director na Glavna direksia ‘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, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, 29 April 2004, paras. 65–71.

⁽²⁴⁰⁾ See also FRA (2018), *Making EU Citizens’ Rights a Reality: National courts enforcing freedom of movement and related rights*, Publications Office, Luxembourg, Section 2.5.

Example: In *ZZ v. Secretary of State for the Home Department* ⁽²⁴¹⁾, the CJEU dealt with the meaning of Article 30 (2) of the Free Movement Directive, which requires the authorities to inform the persons concerned of the grounds on which a decision to refuse the right of residence is based, unless this is contrary to the interests of state security. In determining whether the authorities can refrain from disclosing certain information on grounds of state security, the CJEU noted that there is a need to balance state security with the requirements of the right to effective judicial protection stemming from Article 47 of the EU Charter. It concluded that the national court reviewing the authorities' choice not to disclose, precisely and in full, the grounds on which a refusal is based must have jurisdiction to ensure that the lack of disclosure is limited to what is strictly necessary. In any event, the person concerned must be informed of the essence of the grounds on which the decision was based, in a manner that takes due account of the necessary confidentiality of the evidence.

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 ⁽²⁴²⁾.

There is protection for family members in the event of the 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 6.2) ⁽²⁴³⁾.

⁽²⁴¹⁾ CJEU, C-300/11, *ZZ v. Secretary of State for the Home Department* [GC], 4 June 2013.

⁽²⁴²⁾ 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.

⁽²⁴³⁾ For information on a case with protection granted, see CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [GC], 8 March 2011. For information on a case in which protection was not granted, see CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres* [GC], 15 November 2011, and CJEU, C-87/12, *Kreshnik Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 8 May 2013; see also CJEU, C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012.

4.4.3 Turkish nationals

Under EU law, Article 14 (1) of *EEC-Turkey Association Council Decision No. 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 nationals 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 preventative grounds, such as deterring other foreign nationals, or when it automatically follows 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 ⁽²⁴⁴⁾.

Example: In *Nazli* ⁽²⁴⁵⁾, 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 EU 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 EU Member State.

Example: In *Polat* ⁽²⁴⁶⁾, 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 EU Member State may constitute grounds

⁽²⁴⁴⁾ ECJ, Case 36/75, *Roland Rutili v. Ministre de l'intérieur*, 28 October 1985, para. 27; ECJ, Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg*, 29 April 2004, para. 67.

⁽²⁴⁵⁾ ECJ, C-340/97, *Ömer Nazli, Çağlar Nazli and Melike Nazli v. Stadt Nürnberg*, 10 February 2000.

⁽²⁴⁶⁾ ECJ, C-349/06, *Murat Polat v. Stadt Rüsselsheim*, 4 October 2007.

for taking such measures only insofar 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.

Key points

- There are absolute, near absolute and non-absolute barriers to removal (see [introduction to this chapter](#)).
- 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 4.1](#)).
- Under EU law, any action taken by EU Member States under the EU asylum *acquis* or under the Return Directive, including under the Dublin Regulation, must be in conformity with the right to asylum and the principle of non-*refoulement* (see [Section 4.1](#)).
- 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 or not the individual may be excluded from protection under the Qualification Directive or the 1951 Geneva Convention (see [Sections 4.1.2](#) and [4.1.7](#)).
- In assessing if 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 4.1.3](#) and [4.3](#)).
- Under the ECHR, the asylum seeker needs, in principle, to corroborate his or her claim, and it is frequently necessary to give him or her the benefit of the doubt when assessing the credibility of his or her statements. However, if substantiation is lacking or information is presented that gives strong reason to question the veracity of the asylum seeker's submissions, the individual must provide a satisfactory explanation for this (see [Section 4.1.3](#)).
- 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 arises from non-state actors, an illness or humanitarian conditions in that country (see [Section 4.1.2](#)).

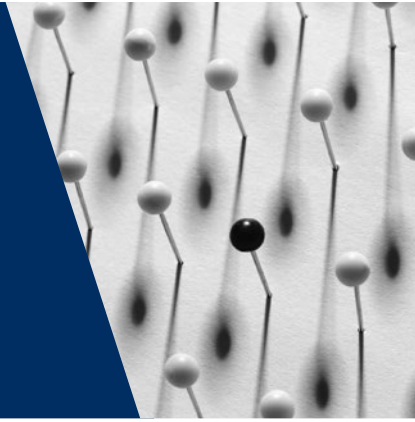
- An individual who would risk treatment prohibited by EU law or the ECHR if returned to his or her home area in the receiving country may be safe in another part of the country (internal protection) (see [Section 4.1.5](#)). Alternatively, the receiving state may be able to protect him or her against such a risk (sufficiency of protection). In these cases, the expelling state may conclude that he or she is not in need of international protection (see [Section 4.1.4](#)).
- Both EU law and the ECHR prohibit collective expulsions (see [Section 4.2](#)).
- 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 4.4.2](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

5

Procedural safeguards and legal support in asylum and return cases



EU	Issues covered	CoE
Asylum Procedures Directive (2013/32/EU)	Asylum procedures	
EU Charter, Article 47 (right to an effective remedy before a tribunal and to a fair trial)	Right to an effective remedy	ECHR, Article 13 (right to an effective remedy) ECtHR, <i>Abdolkhani and Karimnia v. Turkey</i> , No. 30471/08, 2009 (domestic remedy needs to deal with the substance of the claim)
Asylum Procedures Directive (2013/32/EU), Article 46 (5)–(9)	Suspensive effect	ECtHR, <i>Gebremedhin v. France</i> , No. 25389/05, 2007 (suspensive effect of domestic remedy for asylum claims in transit zone) ECtHR, <i>De Souza Ribeiro v. France</i> [GC], No. 22689/07, 2012 (no automatic suspensive effect in certain expulsion cases) ECtHR, <i>Hirsi Jamaa and Others v. Italy</i> [GC], No. 27765/09, 2012 (absence of suspensive effect of domestic remedies against military personnel operating a push-back at sea)
Asylum Procedures Directive (2013/32/EU), Article 31 (8)	Accelerated asylum procedures	ECtHR, <i>I.M. v. France</i> , No. 9152/09, 2012 (procedural safeguards for accelerated asylum procedures)

EU	Issues covered	CoE
Dublin Regulation, Regulation (EU) No. 604/2013 CJEU, Joined Cases C-411/10 and C-493/10, <i>N.S. and M.E.</i> [GC], 2011 CJEU, C-245/11, <i>K.</i> [GC], 2012 CJEU, C-578/16, <i>C.K. and Others v. Slovenia</i> , 2017 CJEU, C-646/16, <i>Jafari</i> [GC], 2017 CJEU, C-490/16, <i>A.S. v. Slovenia</i> [GC], 2017 CJEU, C-163/17, <i>Jawo</i> [GC], 2019	Dublin procedure	ECtHR, <i>M.S.S. v. Belgium and Greece</i> [GC], No. 30696/09, 2011 (transfer under the Dublin procedure raising risk of degrading treatment)
Return Directive (2008/115/EC) CJEU, C-61/11 PPU, <i>El Dridi</i> , 2011 CJEU, C-562/13, <i>Abdida</i> [GC], 2014 CJEU, C-47/15, <i>Affum</i> [GC], 2016	Return procedure	ECHR, Article 13 (right to an effective remedy) ECHR, Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) ECtHR, <i>C.G. and Others v. Bulgaria</i> , No. 1365/07, 2008 (lack of procedural safeguards in deportation proceedings)
EU Charter, 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> [GC], No. 30696/09, 2011 (ineffective legal aid scheme)
Asylum Procedures Directive (2013/32/EU), Articles 20–22	Legal assistance in asylum procedures	Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 2009
Return Directive (2008/115/EC), Article 13 (remedies)	Legal assistance in return decisions	Committee of Ministers, Twenty Guidelines on Forced Return, 2005

Introduction

This chapter looks at the procedure for examining applications for international protection (asylum procedures) and procedures for 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 judicial 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 8 will focus on the way removal is performed.

ECtHR case law requires states to exercise independent and rigorous scrutiny of claims that 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](#).

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](#).

5.1. 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 appeal process.

The EU [Asylum Procedures Directive](#) (2013/32/EU) sets out very detailed rules on common procedures for granting and withdrawing international protection. The directive applies to asylum claims made in the territory of EU Member States bound by the directive, including at borders, in territorial waters and in transit zones (Article 3).

5.1.1. Interview, examination procedure and initial decision-making

Under EU law, asylum seekers and their dependants need to have access to asylum procedures (Article 6 of the [Asylum Procedures Directive](#); see also [Section 1.8](#)). They are allowed to remain in an EU Member State until a decision is made on their application (Article 9) or pending judicial review in the event of appeal (Article 46). Exceptions to the right to remain can be made in the event of certain repeat

applications (Articles 9 (2) and 41) and in extradition cases. Extradition under [Council Framework Decision 2002/584/JHA](#) on the European arrest warrant has its own procedural safeguards ⁽²⁴⁷⁾.

Applicants need to be given a **personal interview** (Articles 14 and 15 of the Asylum Procedures Directive) ⁽²⁴⁸⁾. The interview must take place in a confidential setting, normally without the presence of the applicant's family members. It must be carried out by a person who is competent to take into account the circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. A corresponding written report has to be drafted and made accessible to the applicant (Article 17). EU Member States must give the applicant an opportunity to make comments on the report before the responsible authority takes a decision on the application (Article 17 (3)). According to Article 15 (3) (e) of the recast directive, interviews with children must be conducted in a child-appropriate manner. Unaccompanied children have specific guarantees, including the right to a representative (Article 25). The best interests of the child must be a primary consideration (Article 25 (6)); see also [Chapter 10](#). For more information on legal assistance, see [Section 5.5](#).

The **examination of an application** must comply with the procedural requirements of the Asylum Procedures Directive, as well as the requirements for assessing evidence of an application under the [Qualification Directive](#) (Article 4). It must be carried out individually, objectively and impartially, using up-to-date information (Article 10 of the Asylum Procedures Directive and Article 4 of the Qualification Directive). According to Article 10 of the Asylum Procedures Directive, the quasi-judicial or administrative body responsible for taking first-instance decisions should not automatically reject applications on the grounds of failure to submit an application as soon as possible. Article 12 of the Asylum Procedures Directive provides that asylum applicants must be informed of the procedure to follow and the time frame in a language they understand or may reasonably be supposed to understand; receive the services of an interpreter, whenever necessary; be allowed to communicate with UNHCR or with organisations providing legal advice; be given access to the evidence used to take a decision on their application; be given notice of the decision within

⁽²⁴⁷⁾ ECJ, C-388/08 PPU, *Criminal proceedings against Artur Leymann and Aleksei Pustovarov*, 1 December 2008.

⁽²⁴⁸⁾ See also CJEU, C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform and Others*, 22 November 2012.

a reasonable time; and be informed of the decision in a language they understand or may reasonably be supposed to understand. Under Article 13 of the directive, applicants have a duty to cooperate with the authorities.

Example: The cases *A, B and C* ⁽²⁴⁹⁾ concerned three applicants for international protection in the Netherlands who feared persecution because of their sexual orientation. National authorities rejected their application on the ground that the statements concerning their homosexuality were vague and implausible and lacked credibility. The CJEU stated that, when verifying an asylum claim, EU Member States are bound by the EU Charter, notably its Article 1 (human dignity) and Article 7 (right to respect for private and family life). While the Court acknowledged that ‘stereotyped notions’ could constitute useful elements for the evaluation of an asylum application, the evaluation should include an individualised assessment considering the applicant’s personal circumstances and vulnerability. National authorities should not carry out detailed questioning on the sexual practices of an applicant, as this would be contrary to human dignity. The Court concluded that the non-declaration of homosexuality at the outset to the authorities cannot lead to a conclusion that the individual’s declaration lacks credibility.

Asylum seekers are entitled to **withdraw** their asylum claims. The procedures for withdrawal must also comply with notification requirements, which include written notification (Articles 44 and 45 of the Asylum Procedures Directive). When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, applications may be treated as withdrawn or abandoned; the state, however, needs to take a decision either to discontinue the examination and record the action taken or to reject the application (Articles 27 and 28 of the Asylum Procedures Directive).

Decisions on asylum applications must be taken by the responsible authority as soon as possible and not later than 6 months after the application, save in the circumstances listed in Article 31 (3) and (4) of the Asylum Procedures Directive, in which the review can be extended to a maximum of 21 months. If decisions cannot be taken within 6 months, the applicant has to be informed of the delay or upon his or her request be told when a decision can be expected (Article 31 (6)). Basic

⁽²⁴⁹⁾ CJEU, C-148/13 to C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie* [GC], 2 December 2014.

guarantees laid down in Chapter II of the directive must be respected during the examination of the claim. Decisions must be in writing and must give information on how they can be challenged (Article 11 of the directive).

Under Article 33 of the Asylum Procedures Directive, EU Member States can declare **applications inadmissible**, for example repeat applications in which there are no new elements or if a non-EU Member State is deemed to be a safe third country for the applicant. A personal interview needs to be conducted, except for cases of inadmissible repeat applications (Article 34).

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 ⁽²⁵⁰⁾. 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 ⁽²⁵¹⁾. 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 ⁽²⁵²⁾.

5.1.2. Right to an effective remedy

Individuals must have access to a practical and effective remedy against a refusal of asylum or of 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 this end, detailed procedural requirements have been developed both under EU law and by the ECtHR.

⁽²⁵⁰⁾ ECtHR, *B.A.C. v. Greece*, No. 11981/15, 13 October 2016; 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.

⁽²⁵¹⁾ For more information, see ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 301.

⁽²⁵²⁾ *Ibid.*, para. 293.

Under EU law, Article 47 of the [EU Charter](#) 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 Charter, however, requires that the review be done by a tribunal, whereas Article 13 of the ECHR only requires a review before a national authority ⁽²⁵³⁾.

The second paragraph of Article 47 of the EU Charter is based on Article 6 of the ECHR, which guarantees the right to a fair trial 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 ⁽²⁵⁴⁾. Article 47 of the EU Charter makes no such distinction.

Article 46 of the [Asylum Procedures Directive](#) provides for the right to an effective remedy against a decision rejecting international protection, a refusal to reopen a previously discontinued application and a decision to withdraw international protection. It must include a full and *ex nunc* examination of both facts and points of law. Time limits must not render the submission of an appeal impossible or excessively difficult.

Under the ECHR, Article 13, which guarantees the right to an effective remedy before a national authority, is applicable to immigration cases. 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 5.4](#)). In addition, the prohibition of arbitrariness inherent in all convention rights is often relied on to provide important safeguards in asylum or immigration cases ⁽²⁵⁵⁾. However, Article 6 of the ECHR, which guarantees the right to a fair hearing before a court, is not applicable to asylum and immigration cases (see [Section 5.5](#)). For remedies against unlawful or arbitrary deprivation of liberty, see Chapter 7 ([Section 7.10](#)).

⁽²⁵³⁾ Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 2007 C 303/17.

⁽²⁵⁴⁾ ECtHR, *Maaouia v. France* [GC], No. 39652/98, 5 October 2000, paras. 38–39.

⁽²⁵⁵⁾ ECtHR, *C.G. and Others v. Bulgaria*, No. 1365/07, 24 April 2008, para. 49.

The ECtHR has laid down general principles about 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⁽²⁵⁶⁾. As a remedy must be effective in practice as well as in law, the ECtHR may need to consider, among other elements, whether or not an asylum seeker was afforded sufficient time to file an appeal.

Example: In *Abdolkhani and Karimnia v. Turkey*⁽²⁵⁷⁾, 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 Czechia have found deadlines that were 2 and 7 days too short⁽²⁵⁸⁾. Conversely, in *Diouf*⁽²⁵⁹⁾, the CJEU found that a 15-day time limit to appeal in an accelerated procedure 'does not seem,

⁽²⁵⁶⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 288; ECtHR, *Kudła v. Poland* [GC], No. 30210/96, 26 October 2000, para. 157.

⁽²⁵⁷⁾ ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009, paras. 111–117.

⁽²⁵⁸⁾ Austria, Austrian Constitutional Court (*Österreichische Verfassungsgerichtshof*), Decision G31/98, G79/98, G82/98, G108/98 of 24 June 1998; Czechia, Czech Constitutional Court (*Ústavní soud České republiky*), Decision No. 9/2010, Coll., which came into effect in January 2010.

⁽²⁵⁹⁾ CJEU, C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 67.

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’.

Other state actions that may hinder the effectiveness of guarantees include failing to notify individuals of a decision or of their appeal rights, and 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* ⁽²⁶⁰⁾, 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 and 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 ⁽²⁶¹⁾.

5.1.3. Appeals with automatic suspensive effect

Under EU law, Article 46 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](#). The directive requires EU Member States to allow applicants to remain in their territory until the time limit to lodge an appeal has expired as well as pending the outcome of an appeal. According to Article 46 (6) of the directive, there is no automatic right to stay for certain types of unfounded and inadmissible applications, in which case the appeal body must be given the power to rule on whether or not the applicant may remain in the territory during the time required to review the appeal. A similar exception exists for transfer decisions taken under the [Dublin Regulation](#) (Regulation (EU) No. 604/2013, Article 27 (2)).

⁽²⁶⁰⁾ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002.

⁽²⁶¹⁾ ECtHR, *Kudła v. Poland* [GC], No. 30210/96, 26 October 2000.

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 if 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* ⁽²⁶²⁾, the ECtHR considered that the applicant's allegations of 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 requires that foreign nationals have access to a remedy with suspensive effect, against a decision to remove them to a country where there is real reason to believe that they run 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 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 for that, they had to apply for leave to enter on grounds of asylum. They were then held in a 'waiting area' while the authorities examined if 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. Although 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 where there is real reason to believe that he or she runs a risk of torture or ill-treatment, the person concerned must have access to a remedy with automatic suspensive effect. Such an effect 'in

⁽²⁶²⁾ ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007.

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* ⁽²⁶³⁾, 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* ⁽²⁶⁴⁾, 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.

The ECtHR found that a claim under Article 13 of the ECHR, in conjunction with Article 8 of the ECHR and Article 4 of Protocol No. 4 to the ECHR, does not require the domestic remedy to have an automatic suspensive effect.

Example: In *De Souza Ribeiro v. France* ⁽²⁶⁵⁾, the applicant, a Brazilian national, had resided in French Guiana (a French overseas territory) with his family since the age of 7. 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, when expulsion is challenged because of alleged interference with private and family life, it is not imperative to provide for an automatic suspensive effect for the remedy to be effective. However, the Court concluded that the haste with which the removal order was executed had the effect of rendering the available remedies

⁽²⁶³⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 293.

⁽²⁶⁴⁾ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, paras. 197–207.

⁽²⁶⁵⁾ ECtHR, *De Souza Ribeiro v. France* [GC], No. 22689/07, 13 December 2012, para. 83.

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.

Example: The case of *Khlaifia and Others v. Italy* ⁽²⁶⁶⁾ concerned the return of Tunisian nationals from Italy. The applicants had not requested asylum but challenged the collective nature of their return, claiming that it constituted a collective expulsion as prohibited by Article 4 of Protocol No. 4 to the ECHR. Under Italian law, the applicants could appeal against the return decision but such an appeal would not automatically suspend the removal. Provided there is an effective possibility of challenging the return decision, there is no need for appeals against alleged violations of Article 4 of Protocol No. 4 to suspend the removal automatically, the ECtHR concluded. Only when there is a risk of irreversible harm in the form of a violation of Article 2 or 3 of the ECHR must a remedy have automatic suspensive effect. Therefore, the Court did not find a violation of Article 13 in conjunction with Article 4 of Protocol No. 4.

5.1.4. Accelerated asylum procedures

Under EU law, Article 31 (8) of the [Asylum Procedures Directive](#) lists 10 situations in which accelerated procedures might be applied, such as when an application is considered unfounded because the applicant is from a safe country of origin or when applicants refuse to give their fingerprints. While the basic principles and guarantees set forth in the directive remain applicable, 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 (see also [Section 5.1.3](#)). In practice, accelerated procedures may also have shorter deadlines by which to appeal against a negative decision.

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.

⁽²⁶⁶⁾ ECtHR, *Khlaifia and Others v. Italy* [GC], No. 16483/12, 15 December 2016, paras. 272–281.

Example: In *I.M. v. France* ⁽²⁶⁷⁾, 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 5 days. This very short application period imposed particular constraints, as the applicant was 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. Although 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 2 months under the ordinary procedure. The 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 in conjunction with Article 3 of the ECHR.

5.2. Dublin procedure

The [Dublin Regulation](#) (Regulation (EU) No. 604/2013) requires that EU Member States examine any application for international protection lodged by a third-country national or a stateless person and that the application be examined by one single Member State (Article 3 (1)). The regulation 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 procedure for transfer to that state.

Under EU law, the Dublin Regulation provides time frames for states to comply with requests to take back or take charge of asylum seekers (Articles 21, 22, 25 and 29) and stipulates the need for the state to gather certain evidence before transferring an applicant (Article 22), the need to ensure confidentiality of personal information (Article 39) and the need to inform the individual of the Dublin Regulation in general

⁽²⁶⁷⁾ ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, paras. 136–160.

(Article 4) and of the intended Dublin transfer and legal remedies available (Article 26). There are evidential requirements in terms of administrative cooperation (Article 34) and safeguards in terms of cessation of responsibility (Article 19).

Example: The cases of *Ghezelbash* and *Karim* ⁽²⁶⁸⁾ relate to the scope of effective remedies in the Dublin Regulation. In *Ghezelbash*, the CJEU ruled that the applicant had the right, in an appeal against a transfer decision, to plead the incorrect application of one of the criteria determining responsibility under the Dublin Regulation, specifically the criteria relating to the granting of a visa under Article 12. In *Karim*, the CJEU concluded that an applicant challenging the transfer decision may invoke an infringement of the rule that a Member State is no longer responsible for the application for international protection if the applicant has left its territory for at least 3 months (Article 19 (2) of the Dublin Regulation).

The Dublin Regulation secures the application of the Dublin rules even after the person has withdrawn an asylum application (Articles 20 (5) and 18 (1) (c)) ⁽²⁶⁹⁾.

Article 5 of the Dublin Regulation normally requires a personal interview to be conducted with each applicant. Applicants have the right to an effective remedy: either they must be allowed to stay during the review of the transfer decision by the appeals body or the appeals body must be given the ability to suspend the transfer either on its own initiative or upon request (Article 27 (3)).

The Dublin Regulation also contains procedural safeguards for unaccompanied children (see [Section 10.1](#) for more details) and provisions to uphold family unity. Articles 8–11 and 16 of the regulation contain criteria for determining the Member State responsible for core family members (as defined in Article 2 (g) of the regulation). In addition, a Member State may ask another EU Member State to examine an application in order to bring together other family members (Article 17 (2), ‘humanitarian clause’). Article 7 (3) requires EU Member States to take into consideration any available evidence on the presence of family members and relatives in the territory of an EU Member State, if it is produced before another Member State accepts responsibility for examining the asylum application and the previous application has not yet been decided on the substance.

⁽²⁶⁸⁾ CJEU, C-63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* [GC], 7 June 2016; CJEU, C-155/15, *George Karim v. Migrationsverket* [GC], 7 June 2016.

⁽²⁶⁹⁾ See also CJEU, C-620/10, *Migrationsverket v. Nurije Kastrati and Others*, 3 May 2012, para. 49.

Where serious humanitarian issues are concerned, an EU Member State may, in some circumstances, become responsible for examining an asylum application when one person is dependent on another person, provided that family ties exist between the two.

Example: The *K.* case ⁽²⁷⁰⁾ concerned the proposed transfer from Austria to Poland of a woman whose daughter-in-law had a newborn baby. The daughter-in-law was furthermore suffering from serious illness and a disability, following a traumatic experience in a third country. If what happened to her were to become known, the daughter-in-law would probably 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) (of the 2003 version of the regulation, which have been reworded in Article 16 (1) of the 2013 version) are satisfied, the Member State that, 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.

An EU Member State, even where it is not responsible under the Dublin Regulation criteria, may nevertheless decide to examine an application (the sovereignty clause under Article 17 (1)) ⁽²⁷¹⁾. According to Article 3 (2) of the regulation, 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 that intends to transfer the applicant must examine the other regulation criteria and, within a reasonable length of time, determine whether or not 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 to become responsible for examining the application (Article 3 (2)) in order to eliminate the risk of infringement of the applicant's fundamental rights.

⁽²⁷⁰⁾ CJEU, C-245/11, *K. v. Bundesasylamt* [GC], 6 November 2012.

⁽²⁷¹⁾ See also CJEU, C-528/11, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, 30 May 2013; CJEU, C-661/17, *M.A and Others*, 23 January 2019.

Example: in the *N.S. and M.E.* joint cases ⁽²⁷²⁾, the CJEU looked at whether or not Article 4 of the EU Charter, which corresponds to Article 3 of the ECHR, would be breached if the individuals were transferred to Greece under the Dublin 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 (see *M.S.S. v. Belgium and Greece* ⁽²⁷³⁾). The CJEU held that EU Member States could not be 'unaware' of the systemic deficiencies in the asylum procedure and reception conditions in Greece that created a real risk of asylum seekers being subjected to inhuman or degrading treatment. It stressed that the Dublin Regulation had to be implemented in conformity with Charter rights, which meant that – in the absence of other responsible EU Member States – 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.

Example: In the *C.K. and Others v. Slovenia* case ⁽²⁷⁴⁾, the CJEU ruled that a Dublin transfer has to be suspended if the medical condition of the applicant is so serious as to provide substantial grounds for believing that the transfer would result in a real risk of inhuman or degrading treatment under Article 4 of the EU Charter. The Court ruled that not only risks stemming from systemic flaws but also circumstances affecting the individual situation of an applicant can, in exceptional circumstances, preclude a Dublin transfer. The CJEU stated that Article 17 (1) of the Dublin Regulation, read in the light of Article 4 of the EU Charter, does not oblige EU Member States to make use of the discretionary clause. However, the discretionary clause can be triggered if the person's state of health 'is not expected to improve in the short term' or a further suspension would 'risk worsening the condition of the person concerned.'

According to the CJEU case law, an applicant for international protection may be transferred to the Member State that is normally responsible for processing the application or that has previously granted the person subsidiary protection, unless

⁽²⁷²⁾ 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* [GC], 21 December 2011. See also CJEU, C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, 14 November 2013.

⁽²⁷³⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

⁽²⁷⁴⁾ CJEU, C-578/16, *C.K. and Others v. Slovenia*, 16 February 2017.

the expected living conditions in that Member State for those granted international protection would expose the person to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment.

Example: The *Jawo* case ⁽²⁷⁵⁾ concerned the question of whether or not the EU Charter prohibits the transfer of an applicant under the Dublin Regulation to the responsible Member State, if there is a serious risk that the applicant will be subject to inhuman or degrading treatment. The applicant, a Gambian national, had initially lodged an asylum application in Italy, continued his journey while the application was pending and submitted another application in Germany. The German authorities rejected the application as inadmissible and ordered the applicant's transfer to Italy. The applicant argued that Germany was the responsible Member State because of the expiry of the 6-month time limit under the Dublin Regulation and that the transfer to Italy would be unlawful because of the systemic deficiencies and living conditions there. The CJEU concluded that the Dublin transfer of an applicant to another Member State is inhuman and degrading if it exposes the person to a situation of extreme material poverty that 'does not allow him to meet his most basic needs.'

Example: The *Ibrahim, Sharqawi and Magamadov* cases ⁽²⁷⁶⁾ concerned beneficiaries of subsidiary protection in a Member State who applied for asylum in another Member State. The CJEU concluded that an asylum seeker may be transferred to the Member State that is responsible for processing the application or that has previously granted the applicant subsidiary protection unless the expected living conditions in that Member State would expose him or her to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment. The Court clarified that inadequacies in the social system of the Member State concerned do not warrant the conclusion that there is a risk of such treatment.

⁽²⁷⁵⁾ CJEU, C-163/17, *Abubacarr Jawo v. Bundesrepublik Deutschland* [GC], 19 March 2019.

⁽²⁷⁶⁾ CJEU, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Bashar Ibrahim (C-297/17), Mahmud Ibrahim and Others (C-318/17), Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji (C-319/17) v. Bundesrepublik Deutschland, Bundesrepublik Deutschland v. Taus Magamadov (C-438/17)* [GC], 19 March 2019.

Example: In the *Jafari* and *A.S. v. Slovenia* cases ⁽²⁷⁷⁾, Austrian and Slovenian courts requested clarification of whether facilitating mass border crossings during an exceptional situation could be considered the issuance of a visa, or constitutes ‘irregular crossing’ under the Dublin Regulation. The CJEU ruled that a Member State is still responsible for an international protection claim when it authorises persons who do not have a visa to enter on humanitarian grounds. A person must be viewed as crossing irregularly into the territory of a Member State even when an unusually large number of persons cross the border. The CJEU confirmed that in such a situation the Dublin Regulation remains applicable.

Under the ECHR, it is not the role of the ECtHR to interpret the Dublin 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 ⁽²⁷⁸⁾.

Example: In *M.S.S. v. Belgium and Greece* ⁽²⁷⁹⁾, 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, owing to Greece’s failure to apply the asylum legislation and the major structural deficiencies in 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.

Example: In *Tarakhel v. Switzerland* ⁽²⁸⁰⁾, the ECtHR ruled that, even in the absence of ‘systematic deficiencies’ in the Italian reception arrangements, there would be a violation of Article 3 of the ECHR if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual

⁽²⁷⁷⁾ CJEU, C-646/16, *Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl* [GC], 26 July 2017; and CJEU, C-490/16, *A.S. v. Republika Slovenija* [GC], 26 July 2017.

⁽²⁷⁸⁾ ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy* (dec.), No. 27725/10, 2 April 2013; ECtHR, *Mohammed v. Austria*, No. 2283/12, 6 June 2013.

⁽²⁷⁹⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

⁽²⁸⁰⁾ ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014.

guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

5.3. 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 (Article 5 of the [Reception Conditions Directive](#) (2013/33/EU)). Information on the legal assistance or help available also needs to be provided. The information should be provided in a language that the individual understands or is reasonably presumed to understand. Asylum applicants have the right to appeal against decisions of the authorities not to grant benefits (Article 26 of the Reception Conditions Directive).

Failure to comply with obligations under the Reception Conditions Directive may be actionable as a breach of EU law giving rise to *Francovich* damages (see the [introduction](#) to this handbook), and/or may result in a breach of Article 3 of the ECHR ⁽²⁸¹⁾.

Example: Both the ECtHR and the CJEU have held in *M.S.S.* and in *N.S. and M.E.*, respectively, that systemic flaws in the asylum procedure and the reception conditions for asylum seekers in the responsible Member State had resulted in inhuman and degrading treatment contrary to Article 3 of the ECHR or Article 4 of the EU Charter ⁽²⁸²⁾.

5.4. 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 prioritises the use of voluntary departures over forced removals (Article 7).

⁽²⁸¹⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; ECtHR, *N.H. and Others v. France*, Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020.

⁽²⁸²⁾ 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 and Minister for Justice, Equality and Law Reform* [GC], 21 December 2011, para. 86.

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 sheets at least in the five most common languages for migrant groups specific to that 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 of obtaining legal advice, representation and, if necessary, linguistic assistance – free of charge – in accordance with rules set down in national law.

Example: *FMS and Others* ⁽²⁸³⁾ concerned Afghan and Iranian rejected asylum seekers detained in a transit zone in Hungary, located at the country's southern border with Serbia. After their asylum applications were dismissed as inadmissible pursuant to Hungarian law, they were issued with return decisions, requiring them to go back to Serbia. However, Serbia refused to readmit them on the ground that the conditions set out in the [EU-Serbia readmission agreement](#) were not met (the applicants had entered Hungary from Serbia via the transit zones, and not irregularly). After that, the Hungarian authorities amended the country of destination in the initial return decisions, replacing it with the individuals' respective countries of origin. The CJEU clarified that amending the country of destination in the initial return decision is so substantial that it must be regarded as a new return decision. Effective judicial review needs to be available against such a decision. More generally, the CJEU also held that, although Member States may make provision for return decisions to be challenged before non-judicial authorities (Article 13 (1) of the Return Directive), a person subject to a return decision must, at a certain stage of the procedure, be able to challenge its lawfulness before at least one judicial body, in accordance with the right to an effective remedy before a tribunal guaranteed by Article 47 of the EU Charter. In the absence of national rules providing for such a judicial review, the national court is entitled to hear an action seeking the challenge the return decision.

⁽²⁸³⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 110–123 and 124–130.

Article 9 of the directive provides that removal decisions have to be postponed if they would breach the non-*refoulement* principle and persons are pursuing a remedy with suspensive effect. Removal may, furthermore, be postponed for reasons specific to the person, such as state of health, and because of 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 establishes 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 nationals enjoy comparable protection ⁽²⁸⁴⁾.

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 certain country 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 was not in accordance with the law.

Example: *C.G. and Others v. Bulgaria* ⁽²⁸⁵⁾ 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 as required under Article 8 of the ECHR. Furthermore, the Bulgarian courts had refused to gather evidence to confirm or dispel the allegations against

⁽²⁸⁴⁾ Decision No. 1/80 of the EEC-Turkey Association Council.

⁽²⁸⁵⁾ ECtHR, *C.G. and Others v. Bulgaria*, No. 1365/07, 24 April 2008.

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* ⁽²⁸⁶⁾, 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 a lack of coordination between the authorities in determining such interests.

Hastily implemented removal, which essentially precludes the judicial examination of the lawfulness of a removal measure owing to the excessively short time frame, renders existing remedies ineffective and unavailable, thus violating Article 13 of the ECHR ⁽²⁸⁷⁾.

5.5. 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 ⁽²⁸⁸⁾. 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 guaranteed under Article 6 ECHR, which holds a prominent position in any democracy ⁽²⁸⁹⁾. As already stated, Article 6 has been held inapplicable to asylum and immigration proceedings because the proceedings do not concern the determination of one's civil right or obligation, or a criminal charge ⁽²⁹⁰⁾. This, however, does not mean that the principles of access to court that the ECtHR has developed under Article 6 of the ECHR are irrelevant to Article 13. In terms of procedural guarantees,

⁽²⁸⁶⁾ ECtHR, *Anayo v. Germany*, No. 20578/07, 21 December 2010; ECtHR, *Saleck Bardi v. Spain*, No. 66167/09, 24 May 2011.

⁽²⁸⁷⁾ ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 156–164.

⁽²⁸⁸⁾ For more information, see FRA (2010), *Access to Effective Remedies: The asylum-seeker perspective*, Publications Office, Luxembourg.

⁽²⁸⁹⁾ ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979.

⁽²⁹⁰⁾ ECtHR, *Maaouia v. France* [GC], No. 39652/98, 5 October 2000, para. 38.

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* ⁽²⁹¹⁾, 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. It noted that, although available in law, the administrative procedure for obtaining a residence permit and the exemption from paying the statutory charges had not been available in practice, because the administrative charge was disproportionate 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 indigence of the applicant. It reiterated that the principles of access to court developed under Article 6 were also relevant to 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 ⁽²⁹²⁾.

Example: In *M.S.S. v. Belgium and Greece* ⁽²⁹³⁾, 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** 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. 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'.

⁽²⁹¹⁾ ECtHR, *G.R. v. the Netherlands*, No. 22251/07, 10 January 2012, paras. 49–50.

⁽²⁹²⁾ Council of Europe, Committee of Ministers, *Recommendation No. R (81) 7 on measures facilitating access to justice*, adopted on 14 May 1981; ECtHR, *Siałkowska v. Poland*, No. 8932/05, 22 March 2007.

⁽²⁹³⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, para. 319.

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 reflects its historical and constitutional significance. The explanation on Article 47 in regard to its legal aid provision mentions Strasbourg case law – specifically the *Airey* case ⁽²⁹⁴⁾. 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.

5.5.1. Legal assistance in asylum procedures

Under EU law, Article 22 (1) of the [Asylum Procedures Directive](#) entitles applicants to consult with a legal adviser on matters relating to their application. Pursuant to Article 20 of the directive, in the case of a negative decision by the administration, EU Member States must ensure that free legal assistance and representation be granted to applicants in order to lodge an appeal as well as for the appeal hearing. Free legal assistance and/or representation may not be granted to those appeals that have no tangible prospects of success (Article 20 (3)). EU Member States may require that certain conditions be fulfilled, such as monetary matters or time limits (Article 21).

Article 23 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 a closed area, such as a detention facility or transit zone. Applicants are allowed to bring to the personal asylum interview a legal adviser or other counsellor admitted as such under national law.

The CoE Guidelines on human rights protection in the context of accelerated asylum procedures ⁽²⁹⁵⁾ also recognise the right to legal aid and assistance.

5.5.2. Legal assistance in return procedures

Under EU law, the provision of legal assistance is not limited to asylum procedures but also includes return procedures. This is notable because 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

⁽²⁹⁴⁾ ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979.

⁽²⁹⁵⁾ Council of Europe, Committee of Ministers, [Guidelines on human rights protection in the context of accelerated asylum procedures](#), adopted on 1 July 2009.

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. Given this, Article 13 (4) 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 [Directive 2005/85/EC](#) (see [Section 5.5.1](#)).

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 CoE *Twenty Guidelines on Forced Return* (Guideline 9) also provides for legal assistance in the context of return ⁽²⁹⁶⁾.

5.5.3. Legal assistance to challenge reception conditions

Under EU law, a decision to refuse asylum support taken under the [Reception Conditions Directive](#) (2013/33/EU) may be challenged by the affected individual (Article 26 of the directive). In case of an appeal or a review, EU Member States must ensure free legal assistance and representation insofar as such aid is requested and if it is necessary to ensure effective access to justice. Under the Reception Conditions Directive, EU Member States may impose similar limitations to legal assistance as provided for by the [Asylum Procedures Directive](#) for the review of asylum decisions.

⁽²⁹⁶⁾ Council of Europe, Committee of Ministers, [Twenty Guidelines on Forced Return](#), adopted on 4 May 2005.

Key points

- EU law requires fair and efficient procedures in the context of both examining an asylum application and examining returns (see Sections 5.1.1 and 5.4).
- 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 the immigration context, it requires independent and rigorous scrutiny of any claim that there are 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 5.1.2).
- Article 13 of the ECHR requires a remedy with automatic suspensive effect where an individual alleges that the implementation of a return measure might expose him or her to a real risk of violation of Article 2 or 3 of the ECHR, on account of the irreversible nature of the harm that might occur. In cases where there is no risk of such harm, the ECHR requires that the individual should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic court (see Section 5.1.3).
- Article 47 of the EU Charter requires a judicial remedy and contains more extensive fairness safeguards than Article 13 of the ECHR (see Section 5.1.2).
- There are procedural safeguards under EU law in respect of the entitlement to and withdrawal of support and benefits for asylum seekers (see Section 5.3).
- Lack of legal assistance may raise an issue under Article 13 of the ECHR as well as Article 47 of the EU Charter (see Section 5.5).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

6

Private and family life and the right to marry

EU	Issues covered	CoE
<p>EU Charter, Article 9 (right to marry and right to found a family)</p> <p>Council Resolution (1997) on measures to be adopted on the combating of marriages of convenience</p>	<p>The right to marry and to found a family</p>	<p>ECHR, Article 12 (right to marry)</p> <p>ECTHR, <i>O'Donoghue and Others v. the United Kingdom</i>, No. 34848/07, 2010 (obstacles to the right to marry)</p> <p>ECTHR, <i>Schembri v. Malta (dec.)</i>, No. 66297/13, 2017 (marriage considered not genuine)</p>
<p>EU Charter, Article 7 (respect for private and family life)</p> <p>Family members of EEA nationals exercising free movement rights:</p> <p>Free Movement Directive (2004/38/EC)</p> <p>CJEU, C-673/16, <i>Coman</i> [GC], 2018 (same-sex marriages)</p> <p>ECJ, C-127/08, <i>Metock</i> [GC], 2008 (previous lawful stay of third-country national family member in EU Member States is not required)</p> <p>ECJ, C-60/00, <i>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)</p> <p>ECJ, C-59/85, <i>State of the Netherlands v. Reed</i>, 1986 (unmarried companions)</p>	<p>Family regularisation</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>ECTHR, <i>Rodrigues da Silva and Hoogkamer v. the Netherlands</i>, No. 50435/99, 2006 (best interests of the child)</p> <p>ECTHR, <i>Darren Omoregie and Others v. Norway</i>, No. 265/07, 2008 (strong ties of Nigerian spouse with his country of origin)</p> <p>ECTHR, <i>Nunez v. Norway</i>, No. 55597/09, 2011 (family life in Norway)</p>

EU	Issues covered	CoE
<p>CJEU, C-34/09, <i>Zambrano</i> [GC], 2011 (children at risk of losing the benefits of EU citizenship)</p> <p>CJEU, C-256/11, <i>Dereci</i> [GC], 2011 (spouse and children)</p> <p>Family members of third-country national sponsors:</p> <p>Family Reunification Directive (2003/86/EC) (the family member has normally to apply from outside the country)</p>		
<p>Family members of EEA nationals exercising free movement rights:</p> <p>Free Movement Directive (2004/38/EC)</p> <p>CJEU, C-338/13, <i>Noorzia</i>, 2014 (minimum age to lodge an application for family reunification)</p> <p>CJEU, C-578/08, <i>Chakroun</i>, 2010 (it does not matter whether the family was created before or after the third-country national arrived)</p> <p>Family members of third-country national sponsors:</p> <p>Family Reunification Directive (2003/86/EC)</p>	<p>Family reunification</p>	<p>ECHR, Article 14 (protection from discrimination) in conjunction with Article 8 (right to respect for private and family life)</p> <p>ECtHR, <i>Biao v. Denmark</i> [GC], No. 38590/10, 2016 (indirect discrimination)</p> <p>ECtHR, <i>Tuquabo-Tekle and Others v. the Netherlands</i>, No. 60665/00, 2006 (children left behind)</p> <p>ESC, Article 19 (6) (family reunion of foreign workers)</p>
<p>EU Charter, Article 7 (respect for private and family life)</p>	<p>Protection from expulsion</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p>
<p>Family members of EEA nationals exercising free movement rights:</p> <p>Free Movement Directive (2004/38/EC), Article 13</p> <p>Family members of third-country national sponsors:</p> <p>Family Reunification Directive (2003/86/EC), Article 15</p>	<p><i>Relationship breakdown cases</i></p>	<p>ECtHR, <i>Berrehab v. the Netherlands</i>, No. 10730/84, 1988 (maintaining contact with children)</p>

EU	Issues covered	CoE
<p>Family members of EEA nationals exercising free movement rights: Free Movement Directive (2004/38/EC), Articles 27–33</p> <p>Family members of third-country national sponsors: Family Reunification Directive (2003/86/EC), Article 6 (2)</p>	<p><i>Criminal conviction cases</i></p>	<p>ECtHR, <i>Boultif v. Switzerland</i>, No. 54273/00, 2001 (criteria to assess proportionality of expulsion)</p> <p>ECtHR, <i>Üner v. the Netherlands</i> [GC], No. 46410/99, 2006 (criteria to assess barriers deriving from the right to family and private life)</p> <p>ECtHR, <i>Assem Hassan Ali v. Denmark</i>, No. 25593/14, 2018 (criteria on the best interests of the child and the prevention of disorder or crime)</p>

Introduction

This chapter will look at the right to respect for private and family life and 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. 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⁽²⁹⁷⁾. 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 or not 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⁽²⁹⁸⁾.

Example: In *Omojudi v. the United Kingdom* (299), the ECtHR 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

⁽²⁹⁷⁾ ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002, para. 61.

⁽²⁹⁸⁾ ECtHR, *A.A. v. the United Kingdom*, No. 8000/08, 20 September 2011; ECtHR, *Maslov v. Austria* [GC], No. 1638/03, 23 June 2008; ECtHR, *Üner v. the Netherlands* [GC], No. 46410/99, 18 October 2006.

⁽²⁹⁹⁾ ECtHR, *Omojudi v. the United Kingdom*, No. 1820/08, 24 November 2009, para. 37.

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](#) enshrines the right to marry and to found a family (Article 9) and the right to respect for private and 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 50 years ago ([Regulation \(EEC\) No. 1612/68](#), repealed and replaced by [Regulation \(EU\) No. 492/2011](#)) 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 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 or not restrictions on family migration may act as a discouragement to EU citizens to exercise their rights to free movement 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 nationals under Article 7 of [Decision No. 1/80](#) adopted under the [Ankara Agreement](#). The adoption at EU level of the [Long-Term Residence 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 action 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 respect, special provisions for refugees are contained in Chapter V of the Family Reunification Directive.

6.1. 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](#). 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 requires an existing family relationship when seeking immigration authorisation.

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 **marriage of convenience** (or sham marriage) is a marriage contracted for the sole purpose of enabling the person concerned to enter or reside in an EU Member State ⁽³⁰⁰⁾ and without any intention to cohabit or share the other social characteristics of marriage. Facilitating a marriage of convenience is a criminal offence in many jurisdictions.

Forced marriages occur when one (or both) of the spouses is an unwilling party to the marriage. Forced marriage is internationally recognised as a human rights violation and a form of gender-based violence ⁽³⁰¹⁾. Coercing someone into a forced marriage is also 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 into their suitability ⁽³⁰²⁾. There is also a close link between forced marriage and **child marriage**.

⁽³⁰⁰⁾ Art. 1 of Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, OJ 1997 C 382/1; Family Reunification Directive, Art. 16 (2) (b).

⁽³⁰¹⁾ Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011, CETS No. 210.

⁽³⁰²⁾ Council of Europe, Parliamentary Assembly, *Resolution 1468 (2005) on forced marriages and child marriages*, adopted on 5 October 2005; Council of Europe, Parliamentary Assembly, *Resolution 2233 (2018) on forced marriages*, adopted on 28 June 2018.

Under EU law, the perceived incidence of marriages of convenience for immigration purposes led to the adoption at EU level of [Council Resolution 97/C382/01](#). This resolution reflected the European states' concern about marriages of convenience, and listed factors that 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 ascertain if the proposed marriage is one of convenience and to prevent it. Consequently, a state is not necessarily in violation of Article 12 of the ECHR if it subjects marriages involving foreign nationals to scrutiny in order to establish whether or not 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. 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* ⁽³⁰³⁾ 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 or not to issue the required certificate, the determinative test considered only the immigration status of the individual applicant and no enquiries were made about 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

⁽³⁰³⁾ ECtHR, *O'Donoghue and Others v. the United Kingdom*, No. 34848/07, 14 December 2010.

from the requirement to obtain a certificate of approval. The Court also found that the fees charged for such certificates were excessively high and there were no waivers or fee reductions for needy persons.

Example: *Schembri v. Malta* ⁽³⁰⁴⁾ concerned a Maltese national who met a Pakistani citizen of Afghan origin after he was released from immigration detention, where he had been kept for irregular entry. He moved unlawfully to Italy. The two kept contact and got married. The husband applied for a visa in the Maltese Embassy in Rome. Malta rejected his application because he had lied about the status of his stay in Italy. It later transpired that the authorities suspected a marriage of convenience. The ECtHR rejected the applicant's argument that there was a breach of Article 8 of the ECHR, as this provision does not protect marriages of convenience. The Court concluded that the marriage was not genuine and that there was not a committed relationship for the purpose of applicability of Article 8.

6.2. Family regularisation

Family regularisation is when the resident sponsor wishes to regularise – as a family member – the situation of a family member who is already in the territory either in 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 family members of EU nationals, and who have exercised their right to free movement. The qualifying family members are spouses, children under the age of 21, children aged over 21 years but dependent, dependent direct relatives in the ascending line and those of the spouse or partner (Article 2 (2)) as well as under specific circumstances 'any other family members' (Article 3 (2)). Pursuant to the EEA Agreement and the EU-Swiss Agreement, the Union right to free movement extends to the whole geographical area covered by the two agreements. However, the category of qualifying family members is somewhat more restrictive, as illustrated in Table 7.

⁽³⁰⁴⁾ ECtHR, *Schembri v. Malta* (dec.), No. 66297/13, 19 September 2017.

Table 7: Third-country national family members of EEA and Swiss nationals

Free Movement Directive (Art. 2)	<p>Spouse (including of the same sex)</p> <p>Registered partner, if the legislation of the host Member State treats registered partnerships as equivalent to marriage</p> <p>Direct descendants of the EU national who are under the age of 21 or are dependants and those of the spouse or registered partner</p> <p>Dependent direct relatives in the ascending line and those of the spouse or registered partner</p>
EEA Agreement, (Annex V) (*)	<p>Spouse or civil partner</p> <p>Direct descendants of the EEA national, or of the spouse or civil partner, who are either under the age of 21 or dependent on the EEA national or the spouse or civil partner</p> <p>Dependent direct relatives in the ascending line of the EEA national or their spouse or civil partner</p>
EU-Swiss Agreement, (Annex I, Art. 3)	<p>The spouse or registered unmarried partner of an EU or EFTA citizen</p> <p>A direct descendant under the age of 21 of an EU or EFTA citizen and his or her spouse or registered unmarried partner</p> <p>A relative in an ascending line of an EU or EFTA citizen and his or her spouse or registered unmarried partner</p>

(*) *Decision No. 158/2007 (7 December 2007) of the EEA Joint Committee incorporated the Free Movement Directive into the framework of the EEA Agreement.*

The CJEU has provided clarification concerning ‘spouse’ and ‘other family members’.

Example: The *Coman* ⁽³⁰⁵⁾ case concerned Mr Coman, a Romanian national, and Mr Hamilton, a US national, who cohabited for 4 years in the United States before marrying in Belgium. Based on the Free Movement Directive, they asked the Romanian authorities to issue them with the necessary documents to enable the couple to work and reside permanently in Romania. However, the Romanian authorities refused to grant Mr Hamilton that right of residence on the ground that in Romania – which does not recognise same-sex marriage – he was not considered the ‘spouse’ of an EU citizen. The CJEU concluded that, while EU Member States have the freedom whether or not to authorise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse (here a third-country national) a derived right of residence in their territory. The Court

⁽³⁰⁵⁾ CJEU, C-673/16, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [GC], 5 June 2018.

recognised that same-sex marriages must be treated in the same way as opposite-sex marriages for a specific legal purpose, i.e. family reunification rights of EU citizens who exercise EU free movement rights.

Example: In *Rahman* ⁽³⁰⁶⁾, 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 who have exercised free movement rights are often in a privileged situation compared with those third-country nationals who are family members of nationals of the country who have not exercised the right of free movement, 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 they entered the host country. It applies also to persons who entered in an irregular manner.

Example: The case of *Metock* ⁽³⁰⁷⁾ 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.

⁽³⁰⁶⁾ CJEU, C-83/11, *Secretary of State for the Home Department v. Rahman and Others* [GC], 5 September 2012.

⁽³⁰⁷⁾ ECJ, C-127/08, *Metock and Others v. Minister for Equality, Justice and Law Reform* [GC], 25 July 2008, paras. 53–54 and 58. *Metock* was followed by the Swiss Federal Supreme Court in its decision BGE 136 II 5, 29 September 2009.

Example: In the case of *MRAX* ⁽³⁰⁸⁾, 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, by granting, under certain conditions, derived rights to their third-country national family members.

Example: The case of *Carpenter* ⁽³⁰⁹⁾ concerned a third-country national wife of a national of the United Kingdom whose business consisted of providing services, for remuneration, in other EU 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.

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 *Zambrano* ⁽³¹⁰⁾, the CJEU held that the third-country national parents of two Belgian children – who were born and raised in Belgium and had never exercised free movement rights (hence Article 3 (1) of the Free Movement Directive was not applicable) – could not be denied residence and work permits, since it would have the effect of depriving the EU citizen children the genuine enjoyment of the substance of the rights conferred upon them by their status as EU citizens (Article 20 of the TFEU).

⁽³⁰⁸⁾ ECJ, C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State*, 25 July 2002, para. 80.

⁽³⁰⁹⁾ ECJ, C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, 11 July 2002, paras. 36–46. See also ECJ, C-370/90, *The Queen v. IAT and Surinder Singh, ex parte Secretary of State for the Home Department*, 7 July 1992, concerning the possibility to claim such rights for EU nationals returning to their home country.

⁽³¹⁰⁾ CJEU, C-34/09, *Ruiz Zambrano v. Office national de l'emploi (ONEm)* [GC], 8 March 2011; ECJ, C-200/02, *Zhu and Chen v. Secretary of State for the Home Department*, 19 October 2004, paras. 42–47.

In subsequent cases, the Court emphasised that cross-border intra-EU movement remained a prerequisite. In *McCarthy* ⁽³¹¹⁾, the CJEU ruled that the refusal to grant a UK residence permit to the third-country national husband of a woman with dual Irish/UK nationality did not deprive her of the substance of her EU citizenship rights. In *Dereci* ⁽³¹²⁾, the CJEU held that EU Member States can refuse a residence permit to a third-country national family member unless such refusal would, for the EU citizen concerned, lead to the denial of the genuine enjoyment of the substance of the rights stemming from his or her EU citizenship, which is a matter for the referring national court to verify. To guide such assessment, the CJEU pointed out that the desirability, for economic or family reasons, of keeping the family together is not sufficient in itself to conclude that the EU citizen will be forced to leave the Union ⁽³¹³⁾.

These rulings, however, related to the specific circumstances of the cases and do not apply in all circumstances. For example, a child who is a Union citizen must be legally, financially or emotionally dependent on the third-country national who is refused a right of residence, as it is that dependency that would lead to the Union citizen being obliged to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole ⁽³¹⁴⁾.

Example: In *Iida v. Ulm* ⁽³¹⁵⁾, 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 as a family member of a Union citizen, which was refused by the German authorities. In these circumstances, the CJEU was asked to ascertain whether or not a third-country national can be allowed to reside in the state of origin of his family members, even though they have moved from the Member State of origin and have been residing predominantly in another EU Member State. The CJEU noted that a third-country national family member of an EU

⁽³¹¹⁾ CJEU, C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011, paras. 49 and 54–56.

⁽³¹²⁾ CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres* [GC], 15 November 2011, para. 68.

⁽³¹³⁾ See also CJEU, C-165/16, *Toufik Lounes v. Secretary of State for the Home Department* [GC], 14 November 2017.

⁽³¹⁴⁾ CJEU, Joined Cases C-356/11 and C-357/11, *O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.*, 6 December 2012, para. 56.

⁽³¹⁵⁾ CJEU, C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012.

citizen who has exercised free movement rights can only benefit from the Free Movement Directive 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 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. The Court ruled out the possibility that refusal would deny Mr Iida's spouse and daughter genuine enjoyment of the substance of the rights associated with their status as 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 Iida was in principle eligible to be 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.

Requests for family reunification must be examined even if there is an entry ban on the third-country national who is a family member of an EU citizen who has never exercised his or her right of freedom of movement.

Example: In *K.A. and Others* ⁽³¹⁶⁾, several third-country nationals in an irregular situation were ordered to return to their countries and banned from entering Belgium, some of them on grounds of a threat to public policy. While still in Belgium, they submitted applications for residence permits, on the basis of family reunification with Belgian nationals. The Belgian authorities refused to examine their applications solely on the ground that the third-country nationals were the subjects of an entry ban. The CJEU noted the existence of a relationship of dependency, which would compel the EU citizen, in practice, to accompany the third-country national family member and, therefore, leave the EU until the authorities decided whether or not to lift the entry ban and issue a residence permit to the third-country national. The CJEU concluded that Article 20 of the TFEU requires that requests for family reunification must be examined even if there is an entry ban on a third-country national who is a family member of an EU citizen who has never exercised his or her right of freedom of movement.

⁽³¹⁶⁾ CJEU, C-82/16, *K.A. and Others v. Belgische Staat* [GC], 8 May 2018.

Whether or not there exists a dependency between the third-country national and the EU citizen and whether or not public policy grounds justify the entry ban must be assessed on a case-by-case basis.

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 Netherlands v. Reed* ⁽³¹⁷⁾, 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. EU Member States can derogate from this provision. Family members of EEA nationals, however, cannot be made subject to such a requirement ⁽³¹⁸⁾.

National rules requiring a third-country sponsor parent to be in possession of sufficient resources (based on preceding income patterns) before granting family reunification are compatible with Article 7 (1) (c) of the Family Reunification Directive ⁽³¹⁹⁾.

⁽³¹⁷⁾ ECJ, C-59/85, *State of Netherlands v. Ann Florence Reed*, 17 April 1986, paras. 28–30.

⁽³¹⁸⁾ ECJ, C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State*, 25 July 2002; ECJ, C-503/03, *Commission of the European Communities v. Kingdom of Spain* [GC], 31 January 2006.

⁽³¹⁹⁾ CJEU, C-558/14, *Mimoun Khachab v. Subdelegación del Gobierno en Álava*, 21 April 2016.

The Family Reunification Directive permits EU Member States to 'require third country nationals to comply with integration measures, in accordance with national law' (Article 7 (2)). Where integration measures exist prior to admission for family reunification, EU Member States often require, for example, family members to demonstrate basic language proficiency.

Example: The case of *K. and A.* ⁽³²⁰⁾ concerned two wives seeking to join their husbands, who were legally resident third-country nationals. In their applications for family reunification, the wives had sought to be exempted from having to pass the civic integration exam on the grounds of the physical and mental difficulties they each faced. Their applications were refused on the ground that these impediments were not sufficiently serious. The CJEU held that Article 7 (2) of the Family Reunification Directive allows the imposition of integration measures on third-country nationals. However, the principle of proportionality requires integration measures to fulfil the objective of integrating them and not limiting the possibility of family reunion. The Court ruled that EU Member States must consider the individual circumstances of the applicant (such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members), which can lead to dispensing with the civic integration exam where family reunification would otherwise be excessively difficult.

Under the ECHR, 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 if the member state's refusal was justified is whether or not 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 ⁽³²¹⁾. The Court's case law in this area is closely tied to the particular features and facts of each case (also see [Section 6.4](#) for further examples).

⁽³²⁰⁾ CJEU, C-153/14, *Minister van Buitenlandse Zaken v. K. and A.*, 9 July 2015.

⁽³²¹⁾ ECtHR, *Darren Omoregie and Others v. Norway*, No. 265/07, 31 July 2008, para. 68; ECtHR, *Bajsultanov 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.

Example: In *Darren Omoregie and Others v. Norway* ⁽³²²⁾, 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, even though 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 *Nunez v. Norway* ⁽³²³⁾, the applicant entered Norway contrary to a re-entry ban 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 6.4.1).

Example: In *Sorabjee v. the United Kingdom* ⁽³²⁴⁾, the 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 3 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 *Zambrano* (see the example earlier 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.

⁽³²²⁾ ECtHR, *Darren Omoregie and Others v. Norway*, No. 265/07, 31 July 2008.

⁽³²³⁾ ECtHR, *Nunez v. Norway*, No. 55597/09, 28 June 2011.

⁽³²⁴⁾ European Commission of Human Rights, *Sorabjee v. the United Kingdom* (dec.), No. 23938/94, 23 October 1995.

Example: In *Rodrigues da Silva and Hoogkamer v. the Netherlands* ⁽³²⁵⁾, 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 where 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* ⁽³²⁶⁾ 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 ⁽³²⁷⁾.

6.3. Family reunification

Family reunification describes situations where the person who is resident in an EU Member State or a CoE 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 that is determinative (see also [Table 7](#)).

In relation to family members who are not part of the core family, the CJEU held that 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. Member States are therefore entitled to lay down in their legislation particular requirements about the nature and duration of dependence. The CJEU has, however, also specified that those requirements

⁽³²⁵⁾ ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006.

⁽³²⁶⁾ ECtHR, *G.R. v. the Netherlands*, No. 22251/07, 10 January 2012.

⁽³²⁷⁾ ECtHR, *Anakomba Yula v. Belgium*, No. 45413/07, 10 March 2009.

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 ⁽³²⁸⁾.

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 or not 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 is a set of requirements that EU Member States need to follow when implementing it ⁽³²⁹⁾.

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 set higher than 21 years of age, before the spouse can join him or her. Some EU Member States have applied this option, arguing that it can help prevent forced marriages.

Example: In *Noorzia* ⁽³³⁰⁾, the CJEU noted that requiring applicants to have reached 21 years of age before being allowed to lodge an application for family reunification does not prevent the exercise of the right to family reunification or render it excessively difficult. Such a rule prevents forced marriage and is consistent with the principles of equal treatment and legal certainty.

EU law does not draw a distinction between family relationships concluded before and after the sponsor took up residence in the territory ⁽³³¹⁾.

⁽³²⁸⁾ CJEU, C-83/11, *Secretary of State for the Home Department v. Rahman and Others*, 5 September 2012, paras. 36–40.

⁽³²⁹⁾ ECJ, C-540/03, *European Parliament v. Council of the European Union* [GC], 27 June 2006, paras. 62–65.

⁽³³⁰⁾ CJEU, C-338/13, *Marjan Noorzia v. Bundesministerin für Inneres*, 7 July 2014.

⁽³³¹⁾ ECJ, C-127/08, *Metock and Others v. Minister for Equality, Justice and Law Reform* [GC], 25 July 2008.

With regard to the family members of third-country nationals living in the EU, the 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 EU Member States does make a clear distinction. This distinction is also not relevant to qualifying third-country national family members of EEA citizens.

Example: In *Chakroun* ⁽³³²⁾, the CJEU addressed Dutch legislation that made a distinction between family ‘formation’ and ‘reunification’, each of which had a different residence regime, including financial requirements. The 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 2 years after the sponsor’s arrival in the Netherlands, their situation was treated as family formation and not family reunification, despite the couple’s 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 the family relationship arose before or after the sponsor’s entry. The Court took into account the lack of such a distinction in EU law (Article 2 (d) and recital 6 of the directive and Article 7 of the EU Charter) and the necessity not to deprive the directive’s provisions of their effectiveness.

The Free Movement Directive and, before its adoption, [Regulation \(EEC\) No. 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 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 ⁽³³³⁾.

Unaccompanied children who have been granted refugee status are entitled, under the Family Reunification Directive, to have their first-degree relatives in direct ascending line reunited with them. The applicable date for determining whether or

⁽³³²⁾ CJEU, C-578/08, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010.

⁽³³³⁾ EFTA Court, *Arnulf Clauder*, No. E-4/11, 26 July 2011, para. 44.

not a refugee is an unaccompanied child for the purposes of the Family Reunification Directive is the date on which he or she entered the EU Member State and made the asylum application, and not the date of the application for family reunification⁽³³⁴⁾.

Under the ECHR, the ECtHR 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.

As a matter of principle, if family life was created at a time when the persons involved were aware that their immigration status was such that the persistence of that family life within the host state would, from the outset, be precarious, the removal of the non-national family member would constitute a violation of Article 8 of the ECHR only in exceptional circumstances⁽³³⁵⁾.

Regarding spouses who have been left behind, many of the same arguments that are raised by CoE member states – and accepted by the ECtHR – in family regularisation cases are also applied to reunification cases. Spouses who are resident in CoE member states, and 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, or to accept the non-national spouses for settlement. If a member state, however, decides to enact legislation conferring on certain categories of immigrants the right to be joined by spouses, it must do so in a manner compatible with the principle of non-discrimination enshrined in Article 14 of the ECHR⁽³³⁶⁾.

Example: The case of *Biao v. Denmark*⁽³³⁷⁾ concerned a naturalised Danish national of Togolese origin (the first applicant), who married a Ghanaian national (the second applicant). The applicants lived in Sweden and had a son who gained Danish citizenship thanks to his father's nationality. When the second applicant applied for family reunification permit in Denmark, her request was

⁽³³⁴⁾ CJEU, C-550/16, *A and S v. Staatssecretaris van Veiligheid en Justitie*, 12 April 2018, paras. 55–60 and 64.

⁽³³⁵⁾ ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006, para. 39; ECtHR, *Darren Omoregie and Others v. Norway*, No. 265/07, 31 July 2008, para. 57.

⁽³³⁶⁾ ECtHR, *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016, para. 138; ECtHR, *Hode and Abdi v. the United Kingdom*, No. 22341/09, 6 November 2012, paras. 43–55.

⁽³³⁷⁾ ECtHR, *Biao v. Denmark* [GC], No. 38590/10, 24 May 2016.

refused on the grounds that the applicants did not comply with the ‘attachment requirement’ under the Aliens Act that a couple applying for family reunification must not have stronger ties with another country – Ghana in the applicants’ case – than with Denmark. The ‘attachment requirement’ was lifted for persons who had held Danish citizenship for at least 28 years, as well as for non-Danish nationals who were born in Denmark and had lawfully resided there for at least 28 years. The applicants claimed to have been subjected to indirect discrimination due to the ‘attachment requirements’. The ECtHR held that the government had ‘failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule’. The Court thus found a violation of Article 14 of the ECHR in conjunction with Article 8.

Example: In *Jeunesse v. the Netherlands* ⁽³³⁸⁾, the Dutch authorities had refused a residence permit to a Surinamese mother of three children born in the Netherlands. The ECtHR established the existence of exceptional circumstances, which led it to find a breach of Article 8 of the ECHR. The Court noted that the applicant had been born as a Dutch national but lost that nationality involuntarily when Suriname became independent, that the authorities had tolerated her presence in the country for 16 years, which allowed her to establish and develop strong family, social and cultural ties in the Netherlands, and that they had failed to take account of or assess evidence of the practicality, feasibility and proportionality of denying her residence in the Netherlands.

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: The case of *Tuquabo-Tekle and Others v. the Netherlands* ⁽³³⁹⁾ involved a family reunification claim of a mother, her husband and three of her children living in the Netherlands, to be joined by a daughter residing in Eritrea. The mother had first obtained the right to reside in Norway and to bring her children on humanitarian grounds. Only her eldest son came to join her in Norway 1

⁽³³⁸⁾ ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 3 October 2014, paras. 121–122.

⁽³³⁹⁾ ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, No. 60665/00, 1 March 2006.

year later, while her other two children remained living in Eritrea, and were to join her at a later stage. Her marriage to a refugee living in the Netherlands led the whole family to settle in the Netherlands, where two further children were born. Subsequently, Ms Tekle and her husband acquired Dutch nationality. They applied for a provisional residence visa for her 14-year-old daughter, who was still residing in Eritrea. The Dutch authorities rejected the request on the basis that the close family ties between the mother and her child had meanwhile ceased to exist. Considering that the applicants had established strong bonds in the Netherlands and maintained only loose ties to their country of origin, the best way to develop family life, according to the ECtHR, was to grant the daughter the right to settle ⁽³⁴⁰⁾.

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 that are so serious as to endanger public health ⁽³⁴¹⁾;
- b) a requirement of suitable housing should not be so restrictive as to prevent any family reunion ⁽³⁴²⁾;
- c) a requirement of a period of residence of more than 1 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, insofar 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

⁽³⁴⁰⁾ ECtHR, *El Ghatet v. Switzerland*, No. 56971/10, 8 November 2016.

⁽³⁴¹⁾ ECSR, Conclusions XVIII-1, Turkey, Art. 19 (6).

⁽³⁴²⁾ ECSR, Conclusions 2011, Belgium, Art. 19 (6).

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⁽³⁴³⁾.

According to the ECSR, refugees are to enjoy to the full extent the right to family reunification under the ESC. While facilitating family reunification, states have to respond to the specific needs of refugees and asylum seekers⁽³⁴⁴⁾.

6.4. 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 two scenarios, namely relationship breakdown and criminal convictions, which themselves can be interrelated.

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

6.4.1. Relationship breakdown

If 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, because he or she has only a derived right through the family member who has been accompanied or joined.

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**)⁽³⁴⁵⁾. Relationship breakdown is not sufficient to justify loss of residence. Article 13 of the Free Movement Directive provides for the

⁽³⁴³⁾ For a statement on these principles, see ECSR, *Conclusions 2011, Statement of interpretation on Art. 19 (6)*.

⁽³⁴⁴⁾ ECSR, *Conclusions 2015, Statement of interpretation on the rights of refugees under the ESC*.

⁽³⁴⁵⁾ ECJ, C-267/83, *Aissatou Diatta v. Land Berlin*, 13 February 1985.

retention of a right of residence for third-country national family members, in the event of divorce or annulment where the marriage has lasted 3 years, 1 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 partners are EEA nationals (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 as a result of death, divorce or separation. A duty to grant an autonomous permit only exists after 5 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 EU Member States have discretion as to what provisions are introduced.

Under the ECHR, the ECtHR considers whether or not 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 ⁽³⁴⁶⁾, but it will consider that some situations may require the third-country national to be permitted to remain.

Example: In *Berrehab v. the Netherlands* ⁽³⁴⁷⁾, 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.

6.4.2. Criminal convictions

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

⁽³⁴⁶⁾ ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006.

⁽³⁴⁷⁾ ECtHR, *Berrehab v. the Netherlands*, No. 10730/84, 21 June 1988.

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. Family members of Turkish nationals, regardless of their nationality, who have achieved stable residence are similarly protected ⁽³⁴⁸⁾.

Article 6 (2) of the [Family Reunification Directive](#) allows EU 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 that person.

Under the ECHR, the ECtHR will first decide whether or not it is reasonable to expect the family to accompany the offender overseas, and, if not, whether or not 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;

⁽³⁴⁸⁾ CJEU, C-451/11, *Natthaya Dülger v. Wetteraukreis*, 19 July 2012.

- the nationalities of the applicant and any family members concerned;
- the family situation, such as the length of marriage, and other factors expressing the effectiveness of a couple's family life;
- whether or not the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether or not there are children of the marriage and, if so, their age;
- the seriousness of the difficulties that the spouse is likely to encounter in the country to which the applicant is to be expelled;
- 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 ⁽³⁴⁹⁾.

Example: The *A.A. v. the United Kingdom* case ⁽³⁵⁰⁾ 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.

⁽³⁴⁹⁾ ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001; ECtHR, *Üner v. the Netherlands* [GC], No. 46410/99, 18 October 2006, paras. 57–58; ECtHR, *Balogun v. the United Kingdom*, No. 60286/09, 10 April 2012, para. 43; ECtHR, *Udeh v. Switzerland*, No. 12020/09, 16 April 2013, para. 52; ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 3 October 2014, paras. 117–118; ECtHR, *Salem v. Denmark*, No. 77036/11, 1 December 2016, paras. 75 and 78; ECtHR, *Assem Hassan Ali v. Denmark*, No. 25593/14, 23 October 2018, paras. 54–55 and 61.

⁽³⁵⁰⁾ ECtHR, *A.A. v. the United Kingdom*, No. 8000/08, 20 September 2011.

Example: In *Antwi and Others v. Norway* ⁽³⁵¹⁾, 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 5 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 their settling together in Ghana or, at the least, maintaining regular contact.

Example: In *Amrollahi v. Denmark* ⁽³⁵²⁾, 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 result in the break up of his family life. 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 ⁽³⁵³⁾.

Example: In *Hasanbasic v. Switzerland* ⁽³⁵⁴⁾, the applicant had been convicted of minor offences several times. However, the decision to expel him seemed to stem principally from his substantial debts and the very considerable social welfare contributions he and his family had been receiving, rather than from those convictions. In applying the above criteria, the ECtHR considered that the economic well-being of the country was expressly provided for in the Convention as a legitimate aim justifying interference with the right to respect for private and family life. The Swiss authorities were therefore justified in taking into account the applicant's debts and his family's dependence on the welfare system insofar as that dependence affected the country's economic well-being. This was, however, only one of the factors the ECtHR took into consideration,

⁽³⁵¹⁾ ECtHR, *Antwi and Others v. Norway*, No. 26940/10, 14 February 2012.

⁽³⁵²⁾ ECtHR, *Amrollahi v. Denmark*, No. 56811/00, 11 July 2002.

⁽³⁵³⁾ 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; ECtHR, *Udeh v. Switzerland*, No. 12020/09, 16 April 2013.

⁽³⁵⁴⁾ ECtHR, *Hasanbasic v. Switzerland*, No. 52166/09, 11 June 2013.

finding in this case that the expulsion would violate Article 8 ECHR, given the considerable amount of time the applicants had been living in Switzerland and their integration into Swiss society.

Example: The *Assem Hassan Ali v. Denmark* ⁽³⁵⁵⁾ case concerned the expulsion from Denmark of a Jordanian national with six children of Danish nationality. He was deported following several convictions for drug offences. The ECtHR was not convinced that the best interests of the applicant's six children had been so adversely affected by his deportation that they should outweigh the other criteria, namely the prevention of disorder or crime.

Key points

- Family reunification of EU nationals who have not exercised free movement rights is in principle 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 and Swiss citizens, irrespective of their own nationality, insofar as those citizens have exercised their free movement rights. It confers on qualifying family members the same – derived – enhanced protection from expulsion as the EU citizens themselves enjoy (see [Section 6.2](#)).
- 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 EU Member State, although Member States can derogate from that requirement (see [Section 6.3](#)).
- For family reunification purposes, EU law does not draw a distinction between family relationships concluded before and after the sponsor took up residence in the territory of the host state (see [Section 6.3](#)).
- The ECtHR 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 [Sections 6.2](#) and [6.4.1](#)).

⁽³⁵⁵⁾ ECtHR, *Assem Hassan Ali v. Denmark*, No. 25593/14, 23 October 2018.

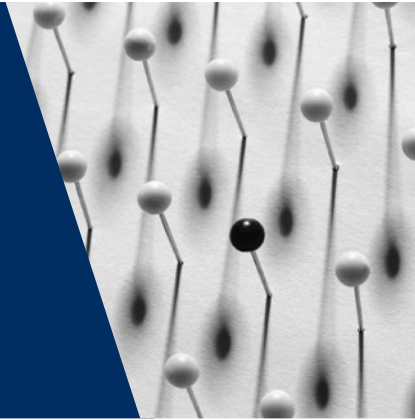
- The ESC provides for a right to family reunion, and the case law of the ECSR circumscribes the conditions and restrictions that may be applied to such reunion (see [Section 6.3](#)).
- Under the ECHR, a blanket prohibition to marry based on the person's immigration status may not be acceptable (see [Section 6.1](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

7

Detention and restrictions to freedom of movement



EU	Issues covered	CoE
Reception Conditions Directive (2013/33/EU), Article 2 (h)	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) Reception Conditions Directive (2013/33/EU), Article 8 (2)	Alternatives to detention	ECtHR, <i>Mikolenko v. Estonia</i> , No. 10664/05, 2010 (necessary examination of alternatives to detention)
Return Directive (2008/115/EC), Article 15 (1) Reception Conditions Directive (2013/33/EU), Article 8	Exhaustive list of exceptions to the right to liberty	ECHR, Article 5 (1) (a)–(f) (right to liberty and security)
Reception Conditions Directive (2013/33/EU), Article 8 (3) (c)	<i>Detention to prevent an unauthorised entry into the country</i>	ECHR, Article 5 (1) (f), first limb (right to liberty and security) ECtHR, <i>Saadi v. the United Kingdom</i> [GC], No. 13229/03, 2008, and <i>Suso Musa v. Malta</i> , No. 42337/12, 2013 (persons not yet authorised by the state to enter)
Return Directive (2008/115/EC), Article 15 CJEU, C-61/11 PPU, <i>El Dridi</i> , 2011; C-329/11, <i>Achughbabian</i> [GC], 2011; and C-47/15, <i>Affum</i> [GC], 2016 (relationship between pre-removal and criminal detention)	<i>Detention pending deportation or extradition</i>	ECHR, Article 5 (1) (f), second limb (right to liberty and security)

EU	Issues covered	CoE
<p>Return Directive (2008/115/EC), Article 20</p> <p>Reception Conditions Directive (2013/33/EU), Article 8 (3)</p>	<p>Prescribed by law</p>	<p>ECtHR, Article 5 (1) (right to liberty and security)</p>
<p>Return Directive (2008/115/EC), Articles 15 and 3 (7)</p> <p>Reception Conditions Directive (2013/33/EU), Article 8 (2)</p> <p>CJEU, C-601/15 PPU, <i>J.N.</i> [GC], 2016 (proportionality of asylum detention; validity of the detention grounds related to public security and national security)</p>	<p>Necessity and proportionality</p>	
	<p>Arbitrariness</p>	<p>ECtHR, <i>Rusu v. Austria</i>, No. 34082/02, 2008 (inadequate reasoning and arbitrariness of detention)</p>
	<p><i>Good faith</i></p>	<p>ECtHR, <i>Longa Yonkeu v. Latvia</i>, No. 57229/09, 2011 (coastguards hiding their knowledge of an asylum application)</p> <p>ECtHR, <i>Ozdil and Others v. the Republic of Moldova</i>, No. 42305/18, 2019 (arrests in bad faith)</p>
<p>Return Directive (2008/115/EC), Article 15 (1)</p> <p>Reception Conditions Directive (2013/33/EU), Article 9 (1)</p>	<p><i>Due diligence</i></p>	<p>ECtHR, <i>Singh v. the Czech Republic</i>, No. 60538/00, 2005 (2.5 years in detention pending deportation procedure)</p> <p>ECtHR, <i>H.A. v. Greece</i>, No. 58424/11, 2016 (lack of due diligence – no action to remove for 5 months)</p>
<p>Return Directive (2008/115/EC), Article 15</p> <p>ECJ, C-357/09 PPU, <i>Kadzoev</i> [GC], 2009 (reasonable prospect of removal)</p>	<p><i>Realistic prospect of removal</i></p>	<p>ECtHR, <i>Al Husin v. Bosnia and Herzegovina</i> (No. 2), No. 10112/16, 2019 (detention despite the lack of reasonable prospect of removal)</p>
<p>Return Directive (2008/115/EC), Article 15 (5)–(6)</p> <p>ECJ, C-357/09 PPU, <i>Kadzoev</i> [GC], 2009 (no further detention beyond the maximum period of detention)</p>	<p><i>Maximum length of detention</i></p>	<p>ECtHR, <i>Auad v. Bulgaria</i>, No. 46390/10, 2011 (assessment of reasonable length of detention according to particular circumstances of each case)</p>

EU	Issues covered	CoE
<p>Return Directive (2008/115/EC), Articles 3 (9), 16 (3) and 17</p> <p>Reception Conditions Directive (2013/33/EU), Article 11</p> <p>Anti-Trafficking Directive (2011/36/EU), Article 11</p>	<p>Detention of individuals with specific needs</p>	<p>ECtHR, <i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i>, No. 13178/03, 2006 (unaccompanied child)</p> <p>ECtHR, <i>Muskhadzhiyeva and Others v. Belgium</i>, No. 41442/07, 2010, and <i>S.F. and Others v. Bulgaria</i>, No. 8138/16, 2017 (children detained in unsuitable facilities)</p> <p>ECtHR, <i>Bistieva and Others v. Poland</i>, No. 75157/14, 2018 (child's best interests limit the detention of families with children)</p> <p>ECtHR, <i>Rantsev v. Cyprus and Russia</i>, No. 25965/04, 2010 (victim of trafficking in human beings)</p>
	<p>Procedural safeguards</p>	
<p>Return Directive (2008/115/EC), Article 15 (2)</p> <p>Reception Conditions Directive (2013/33/EU), Article 9 (2)</p>	<p><i>Right to be given reasons</i></p>	<p>ECHR, Article 5 (2) (right to liberty and security)</p> <p>ECtHR, <i>Saadi v. the United Kingdom</i> [GC], No. 13229/03, 2008 (2 days' delay considered too long)</p>
<p>EU Charter, Article 47 (right to an effective remedy and to a fair trial)</p> <p>Return Directive (2008/115/EC), Articles 13 (4) and 15 (3)</p> <p>Reception Conditions Directive (2013/33/EU), Article 9 (3)</p>	<p><i>Right to review of detention</i></p>	<p>ECHR, Article 5 (4) (right to liberty and security)</p> <p>ECtHR, <i>Abdolkhani and Karimnia v. Turkey</i>, No. 30471/08, 2009, and <i>S.D. v. Greece</i>, No. 53541/07, 2009 (no procedure for review)</p>
<p>Return Directive (2008/115/EC), Articles 16 and 17</p> <p>Reception Conditions Directive (2013/33/EU), Article 10</p>	<p>Detention conditions or regimes</p>	<p>ECtHR, <i>M.S.S. v. Belgium and Greece</i> [GC], No. 30696/09, 2011 (detention conditions)</p>
	<p>Compensation for unlawful detention</p>	<p>ECHR, Article 5 (5) (right to liberty and security)</p>

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 ⁽³⁵⁶⁾. Detention of asylum seekers during asylum procedures and migrants in return procedures 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 irregular 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' ⁽³⁵⁷⁾.

Article 12 of the [ICCPR](#) provides for the right to liberty of movement without discrimination between citizens and aliens. Restrictions to this right are permitted when they are provided by law and are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.

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 seeking international protection and of persons in return procedures must be necessary. 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.

⁽³⁵⁶⁾ For more information on EU Member State practices regarding deprivation of liberty of persons in return procedures, see FRA (2010), *Detention of Third-Country Nationals in Return Procedures*, Publications Office, Luxembourg.

⁽³⁵⁷⁾ See UNHCR (2012), *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, UNHCR, Geneva; Council of Europe, CPT (2009), *20 Years of Combating Torture: 19th general report, 1 August 2008 to 31 July 2009*, Council of Europe, Strasbourg.

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

Under EU law, the *Reception Conditions Directive* (2013/33/EU) defines ‘detention’ as ‘confinement of an applicant by [an EU] Member State within a particular place, where the applicant is deprived of his or her freedom of movement’ (Article 2 (h)). The CJEU has confirmed that the meaning of term ‘detention’ under the *Return Directive* (2008/115/EC) is the same ⁽³⁵⁸⁾.

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 or not 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 ⁽³⁵⁹⁾. The difference between deprivation of liberty and restriction on freedom of movement is one of degree or intensity and not of nature or substance ⁽³⁶⁰⁾. 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; it requires 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 ⁽³⁶¹⁾. This is particularly the case if other factors are present, such as

⁽³⁵⁸⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 224–225.

⁽³⁵⁹⁾ ECtHR, *De Tommaso v. Italy* [GC], No. 43395/09, 23 February 2017, para. 80.

⁽³⁶⁰⁾ *Ibid.*

⁽³⁶¹⁾ See ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009 (Article 5 was applicable, as the applicant was detained for a few hours), and ECtHR, *Mahdid and Haddar v. Austria* (dec.), No. 74762/01, 8 December 2005 (Article 5 was not applicable, as the applicant’s stay in a transit zone was not equivalent to detention).

if the facility is closed⁽³⁶²⁾, if there is an element of coercion⁽³⁶³⁾ or if the situation has particular effects on the individual, including any physical discomfort or mental anguish⁽³⁶⁴⁾.

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 of whether or not that person has been deprived of his or her liberty. Such intentions might be relevant when considering the justification for detention under Article 5 (1) (a)–(f) of the ECHR⁽³⁶⁵⁾. 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⁽³⁶⁶⁾.

Example: In *Amuur v. France* and *Riad and Idiab v. Belgium*, both concerning asylum seekers⁽³⁶⁷⁾, and in *Nolan and K. v. Russia*⁽³⁶⁸⁾, 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 did not accept 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. In contrast, in *Ilias and Ahmed v. Hungary*⁽³⁶⁹⁾, the ECtHR found that the stay of two Bangladeshi asylum seekers for 23 days in the transit zone in Hungary at the border with Serbia did not constitute a deprivation of liberty within the meaning of Article 5 of the ECHR (right to liberty). The ECtHR held that the applicants did not cross into the transit zone because of an immediate danger to their life in Serbia, but entered of their own initiative to apply for asylum. The ECtHR further held that Hungary had a right to take all measures necessary

⁽³⁶²⁾ ECtHR, *J.R. and Others v. Greece*, No. 22696/16, 25 January 2018, para. 86.

⁽³⁶³⁾ ECtHR, *Foka v. Turkey*, No. 28940/95, 24 June 2008; ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009.

⁽³⁶⁴⁾ ECtHR, *Guzzardi v. Italy*, No. 7367/76, 6 November 1980; ECtHR, *H.L. v. the United Kingdom*, No. 45508/99, 5 October 2004.

⁽³⁶⁵⁾ ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, paras. 163–164.

⁽³⁶⁶⁾ ECtHR, *Austin and Others v. the United Kingdom* [GC], Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, para. 60.

⁽³⁶⁷⁾ 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.

⁽³⁶⁸⁾ ECtHR, *Nolan and K. v. Russia*, No. 2512/04, 12 February 2009, paras. 93–96.

⁽³⁶⁹⁾ ECtHR, *Ilias and Ahmed v. Hungary* [GC], No. 47287/15, 21 November 2019.

to examine the applicants' claims before admitting them. While waiting for the procedural steps made necessary by their asylum application, the applicants had been living in conditions that had not limited their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims, nor did their stay in the transit zone exceed significantly the time needed for the examination of their asylum request.

Example: In *Rantsev v. Cyprus and Russia* ⁽³⁷⁰⁾, the applicant's daughter was a Russian national residing in Cyprus and working as an artist in a cabaret on a work permit issued at the 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 2 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.

7.2. Alternatives to detention

Under EU law, detention must be a last resort and all alternatives must first be exhausted, unless such alternatives cannot be applied effectively 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 effectively'; see also Article 8 (2) of the revised [Reception Conditions Directive](#) (2013/33/EU), Article 18 (2) of the [Dublin Regulation](#) (Regulation (EU) No. 604/2013)). Detention should therefore only take place after full consideration of all possible alternatives, or when monitoring

⁽³⁷⁰⁾ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 314-325.

mechanisms have not achieved the lawful and legitimate purpose. In Article 8 (4), the revised Reception Conditions Directive obliges states to lay down rules for alternatives to detention in national law.

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; and electronic monitoring, such as tagging ⁽³⁷¹⁾.

The [EU Charter](#) requires Member States to examine alternatives to detention in order to avoid arbitrary deprivation of liberty (Article 6 read in conjunction with Articles 52 and 53) ⁽³⁷²⁾.

Under the ECHR, the ECtHR looks at whether or not a less intrusive measure could have been imposed prior to detention.

Example: In *Mikolenko v. Estonia* ⁽³⁷³⁾, 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.

⁽³⁷¹⁾ For more information, see FRA (2015), *Alternatives to detention for asylum seekers and people in return procedures*, Publications Office, Luxembourg.

⁽³⁷²⁾ EU Charter, Art. 6 read in conjunction with Arts. 52 and 53. See also CJEU, C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, 28 April 2011, paras. 39–41; CJEU, C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, 5 June 2014, para. 64.

⁽³⁷³⁾ ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009.

Example: In *Omwenyeke v. Germany* ⁽³⁷⁴⁾, 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.

7.3. Exhaustive list of exceptions to the right to liberty

Under EU law, asylum-related detention and return-related detention are covered by two different legal regimes ⁽³⁷⁵⁾. Deprivation of liberty is regulated in Article 8 of the revised [Reception Conditions Directive](#) and Article 28 of the [Dublin Regulation](#) for asylum seekers, and in Article 15 of the [Return Directive](#) for persons in return procedures.

According to Article 8 of the [Reception Conditions Directive](#) and to Article 26 of the [Asylum Procedures Directive](#) (2013/32/EU), it is not acceptable to detain a person solely for the reason that he or she has lodged an asylum application ⁽³⁷⁶⁾. It is also not permissible to detain a person for the sole reason that he or she is subject to the [Dublin Regulation](#) (Article 28 (1) of the regulation). Exhaustive grounds for the detention of asylum seekers are listed in Article 8 (3) of the [Reception Conditions Directive](#). Asylum seekers may be detained in six different situations:

- to determine or verify the applicant's identity or nationality ⁽³⁷⁷⁾;
- to determine elements of the asylum application that could not be determined in the absence of detention, in particular where there is a risk of absconding ⁽³⁷⁸⁾;
- to decide on the applicant's right to enter the territory;

⁽³⁷⁴⁾ ECtHR, *Omwenyeke v. Germany* (dec.), No. 44294/04, 20 November 2007.

⁽³⁷⁵⁾ ECJ, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)* [GC], 30 November 2009, para. 45; and CJEU, C-534/11, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, 30 May 2013, para. 52.

⁽³⁷⁶⁾ For more information, see European Commission, Directorate-General of Home Affairs (2012), 'Reception conditions'.

⁽³⁷⁷⁾ See also CJEU, C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, 14 September 2017.

⁽³⁷⁸⁾ *Ibid.*

- if they are detained under the Return Directive and submit an asylum application to delay or frustrate the removal ⁽³⁷⁹⁾;
- when the protection of national security or public order so requires ⁽³⁸⁰⁾; and
- in accordance with Article 28 of the Dublin Regulation, which under certain conditions allows detention to secure transfer procedures under the regulation.

Example: In the *Al Chodor* case ⁽³⁸¹⁾, the applicant and his two minor children were detained by the Czech police pending their transfer to Hungary pursuant to the Dublin Regulation. The CJEU found that an applicant for international protection can be detained under the Dublin Regulation only if national law provides for objective criteria to determine if there is a risk of absconding. It noted that any measure on deprivation of liberty must be accessible, precise and foreseeable, as required by Article 6 of the EU Charter. The CJEU concluded that, in the absence of these objective criteria in a binding provision of general application under national law, detention is unlawful.

Example: The CJEU clarified in *FMS and Others* ⁽³⁸²⁾ that, under the Reception Conditions Directive (Article 8) and the Return Directive (Article 15) respectively, neither an applicant for international protection nor a person subject to a return decision may be detained solely on the ground that they cannot meet their own needs. Likewise, the CJEU ruled in *VL* ⁽³⁸³⁾ that the lack of places in a reception facility cannot justify holding an applicant for international protection in detention.

Article 15 (1) of the Return Directive only allows the detention of third-country nationals who are the 'subject of return procedures'. Deprivation of liberty is permitted in particular when there is a risk of absconding or the individual avoids or hampers the preparation of return or the removal process:

⁽³⁷⁹⁾ See also CJEU, C-534/11, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, 30 May 2013.

⁽³⁸⁰⁾ See also CJEU, C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016.

⁽³⁸¹⁾ CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017.

⁽³⁸²⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 256, 266, 272 and 281.

⁽³⁸³⁾ CJEU, C-36/20 PPU, *Ministerio Fiscal v. VL*, 25 June 2020, paras. 104–113.

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

Example: The *J.N.* (³⁸⁴) case concerned an individual with an enforceable return decision who submitted a fourth asylum application. He was detained on grounds of public order and national security under Article 8 (3) of the Reception Conditions Directive in the light of prior criminal offences. The CJEU found that the return decision did not lapse during the examination of the asylum application. At the same time, the Court ruled that the applicant must be allowed to stay in the territory while the asylum application was being considered.

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 children;
- 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 (³⁸⁵). If the detention cannot be based on any of these grounds, it is automatically unlawful (³⁸⁶). The grounds are restrictively interpreted (³⁸⁷). There is no catch-all provision,

⁽³⁸⁴⁾ CJEU, C-601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016.

⁽³⁸⁵⁾ 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.

⁽³⁸⁶⁾ ECtHR, *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, 7 July 2011, para. 99.

⁽³⁸⁷⁾ ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009.

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, any deprivation of liberty under Article 5 (1) (f) of the ECHR must be based on one of these specific grounds, which are restrictively interpreted.

7.3.1. Detention to prevent an unauthorised entry into the country

Under EU law, the [Schengen Borders Code](#) (Regulation (EU) 2016/399) requires that third-country nationals who do not fulfil the entry conditions be refused entry into the EU. Border guards have a duty to prevent irregular entry (Article 14). 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. The [Reception Conditions Directive](#) allows, under Article 8 (3) (c), the detention of asylum seekers who arrive at the border when this is necessary to decide on their right to enter the territory.

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* ⁽³⁸⁸⁾, 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

⁽³⁸⁸⁾ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 65.

Article 5 (1) (f) of the ECHR. The Court did not accept the argument that, as soon as an asylum seeker surrenders himself/herself to the immigration authorities, he or she is seeking to effect an 'authorised' entry, with the result that detention could not be justified under Article 5 (1) (f). An interpretation of this provision as only permitting the 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 7-day detention under an accelerated asylum procedure, in the context of a mass influx situation, had not been in violation of Article 5 (1).

Example: In *Suso Musa v. Malta* ⁽³⁸⁹⁾, however, the Court held that, where a state had exceeded its legal obligations and enacted legislation explicitly authorising the entry or stay of immigrants pending an asylum application, either independently or pursuant to EU law, any ensuing detention for the purpose of preventing an unauthorised entry might raise a question about the lawfulness of detention under Article 5 (1) (f). Indeed, in such circumstances, it would be difficult to consider the measure to be closely connected to the purpose of the detention or to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 (1) (f), which stipulates the clear and precise interpretation of domestic law provisions. In *Saadi*, national law (albeit allowing temporary admission) had not granted the applicant formal authorisation to stay or to enter the territory, and therefore no such issue had arisen. Therefore, the question of when the first limb of Article 5 ceased to apply, because the individual had been granted formal authorisation to enter or stay, was largely dependent on national law.

⁽³⁸⁹⁾ ECtHR, *Suso Musa v. Malta*, No. 42337/12, 23 July 2013.

7.3.2. Detention pending removal or extradition

Under EU law, some of the grounds provided for in Article 8 (3) of the [Reception Conditions Directive](#) are aimed at mitigating the 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 7.2](#)). 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) and (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 ⁽³⁹⁰⁾.

Example: In *El Dridi* ⁽³⁹¹⁾, the CJEU was asked to verify whether or not 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 objective of the directive – namely to return a person to his/her country of origin 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.

⁽³⁹⁰⁾ CJEU, C-61/11 PPU, *El Dridi, alias Soufi Karim*, 28 April 2011, and CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne* [GC], 6 December 2011 (public order related detention is not compatible with the objective of the Return Directive); CJEU, C-430/11, *Criminal proceedings v. Md Sagor*, 6 December 2012, and CJEU, C-522/11, Order of the Court, *Criminal Proceedings v. Abdoul Khadre Mbaye*, 21 March 2013 (concerning the imposition of a fine); CJEU, C-297/12, *Criminal proceedings v. Gjoko Filev and Adnan Osmani*, 19 September 2013; CJEU, C-290/14, *Criminal proceedings v. Skerdjan Celaj*, 1 October 2015 (concerning detention based on violating a pre-existing entry ban).

⁽³⁹¹⁾ CJEU, C-61/11, *El Dridi, alias Soufi Karim*, 28 April 2011, para. 59.

Example: In *Achughbabian* ⁽³⁹²⁾, the Court examined if the principles established in *El Dridi* also applied to a third-country national's imprisonment sentence for an offence of unlawful entry or stay in the territory of an EU Member State. The Court clarified that the Return Directive does not preclude a Member State from classifying unlawful stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national residence rules, or from imposing detention while determining whether or not the stay is legal. When detention is imposed before or during the return procedure, that situation is covered by the directive and, therefore, the detention 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 of Member States' imposing 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.

Example: In *Affum* ⁽³⁹³⁾, the CJEU considered the case of a national of Ghana intercepted by French police at the entrance of the Channel Tunnel while transiting through France from Belgium to the United Kingdom. She was detained for unlawful entry, and an order to transfer her to Belgium was issued pursuant to a readmission agreement between France and Belgium. The CJEU decided that the Return Directive was applicable to third-country nationals who were only briefly present in the territory of the Member State. It found that the directive precludes national legislation envisaging imprisonment for unlawful stay, as it would thwart the application of the return procedure and delay the return. However, the CJEU clarified that the directive does not preclude national legislation permitting the imprisonment of a third-country national subject to a return procedure who stays in the territory without a justified ground for non-return.

Under the ECHR, the second limb of Article 5 (1) (f) entitles CoE member states 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.

⁽³⁹²⁾ CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne* [GC], 6 December 2011, paras. 37–39 and 45.

⁽³⁹³⁾ CJEU, C-47/15, *Sélina Affum v. Préfet du Pas-de-Calais* [GC], 7 June 2016.

Example: In *Mikolenko v. Estonia* (³⁹⁴), 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* (³⁹⁵), 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, 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 that effort. The detention was unlawful for lack of diligence and was a breach of Article 5 of the ECHR.

Example: In *A. and Others v. the United Kingdom* (³⁹⁶), 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). The detention was clearly not aimed at preventing an unauthorised entry and was therefore unlawful.

Example: In *Popov v. France* (³⁹⁷), the applicants were nationals of Kazakhstan who had arrived in France in 2000. Their applications for refugee status and for residence permits 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 5 months and 3 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

⁽³⁹⁴⁾ ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009. See also ECtHR, *Al Husin v. Bosnia and Herzegovina* (No. 2), No. 10112/16, 25 June 2019.

⁽³⁹⁵⁾ ECtHR, *M. and Others v. Bulgaria*, No. 41416/08, 26 July 2011, paras. 75–76.

⁽³⁹⁶⁾ ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 167.

⁽³⁹⁷⁾ ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012.

sought to establish if any alternative solution, other than administrative detention, could have been envisaged. The French system had therefore not properly protected the children's right to liberty under Article 5 of the ECHR.

7.4. 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 revised [Reception Conditions Directive](#) requires in Article 8 (3) 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.

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, to protect the individual from arbitrariness ⁽³⁹⁸⁾.

Example: In *S.P. v. Belgium* ⁽³⁹⁹⁾, the applicant was placed in a detention centre pending his imminent expulsion to Sri Lanka. The ECtHR then issued an interim measure suspending 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.

⁽³⁹⁸⁾ ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, para. 50; ECtHR, *Dougoz v. Greece*, No. 40907/98, 6 March 2001, para. 55.

⁽³⁹⁹⁾ ECtHR, *S.P. v. Belgium* (dec.), No. 12572/08, 14 June 2011.

Example: In *Azimov v. Russia* ⁽⁴⁰⁰⁾, the applicant was kept in detention for more than 18 months without any maximum time limit set, after the ECtHR had issued an interim measure suspending his expulsion. The ECtHR held that the suspension of the domestic proceedings, due to an interim measure, should not result in a situation in which the applicant languishes in prison for an unreasonably long period.

7.5. 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 that 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 irregular stay (recital 6).

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](#)) ⁽⁴⁰¹⁾.

The revised [Reception Conditions Directive](#) allows the detention of asylum seekers ‘when it proves necessary and on the basis of an individual assessment of each case’ if less coercive alternative measures cannot be effectively applied (Article 8 (2); see also Article 28 (2) and recital 20 of the [Dublin Regulation](#)) ⁽⁴⁰²⁾.

In addition to questions of legality and procedural safeguards, detention must also substantively comply with the fundamental rights contained in the ECHR and the [EU Charter](#) ⁽⁴⁰³⁾.

⁽⁴⁰⁰⁾ ECtHR, *Azimov v. Russia*, No. 67474/11, 18 April 2013.

⁽⁴⁰¹⁾ CJEU, C-61/11 PPU, *El Dridi, alias Soufi Karim*, 28 April 2011, paras. 29–62.

⁽⁴⁰²⁾ See also CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 257–261.

⁽⁴⁰³⁾ CJEU, C-329/11, *Achughbabian v. Préfet du Val-de-Marne* [GC], 6 December 2011, para. 49.

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 ⁽⁴⁰⁴⁾. This is in contrast to other forms of detention covered by Article 5 (1), in particular preventing an individual from committing an offence or fleeing (Article 5 (1) (c)) ⁽⁴⁰⁵⁾.

Article 9 of the ICCPR requires that any deprivation of liberty imposed in an immigration context must be lawful, necessary and proportionate ⁽⁴⁰⁶⁾. 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 ⁽⁴⁰⁷⁾.

7.6. 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 ⁽⁴⁰⁸⁾. 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 ⁽⁴⁰⁹⁾.

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 appropriate; and the length of the detention should not exceed a duration that is reasonably required for the purpose pursued ⁽⁴¹⁰⁾. The speed with which national courts replace a detention order that has either expired or been found to be

⁽⁴⁰⁴⁾ A test of necessity of detention may still be required under national law. See ECtHR, *Patrick Muzamba Oyaw v. Belgium* (dec.), No. 23707/15, 28 March 2017, para. 36; and ECtHR, *J.R. and Others v. Greece*, No. 22696/16, 25 January 2018, para. 111.

⁽⁴⁰⁵⁾ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 72.

⁽⁴⁰⁶⁾ For more, see UN Human Rights Committee, *General Comment No. 35 – Article 9 (Liberty and security of person)*, 16 December 2014.

⁽⁴⁰⁷⁾ UN Human Rights Committee, *A v. Australia*, Communication No. 560/1993, views of 30 April 1997.

⁽⁴⁰⁸⁾ ECtHR, *S., V. and A. v. Denmark*, Nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, para. 74.

⁽⁴⁰⁹⁾ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 67; ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164.

⁽⁴¹⁰⁾ ECtHR, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, paras. 117–119.

defective is another element in assessing if detention is considered arbitrary ⁽⁴¹¹⁾. 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* ⁽⁴¹²⁾, the applicant was arrested when trying to leave Austria because she had entered the country unlawfully without a valid passport and visa, and because she lacked the necessary means of subsistence 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.

Example: In *H.A. and Others v. Greece* ⁽⁴¹³⁾, the applicants – nine unaccompanied children – were apprehended in Greece for lack of papers and were placed under protective custody in police stations. The ECtHR found a violation of Article 5 (1) of the ECHR, as the Greek legislation on protective custody did not lay down any maximum time limits, which could lead to arbitrary situations in which the deprivation of liberty of children could last for long periods.

7.6.1. Good faith

Under the ECHR, detention may be considered arbitrary if the detaining authorities do not act in good faith. When the national authorities make a conscious decision to mislead third-country nationals to facilitate their removal, it violates Article 5 of the ECHR ⁽⁴¹⁴⁾.

⁽⁴¹¹⁾ ECtHR, *Minjat v. Switzerland*, No. 38223/97, 28 October 2003, paras. 46–48; ECtHR, *Khudoyorov v. Russia*, No. 6847/02, 8 November 2005, paras. 136–137.

⁽⁴¹²⁾ ECtHR, *Rusu v. Austria*, No. 34082/02, 2 October 2008, para. 58.

⁽⁴¹³⁾ ECtHR, *H.A. and Others v. Greece*, No. 19951/16, 28 February 2019.

⁽⁴¹⁴⁾ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002; ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008; ECtHR, *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009.

Example: In *Longa Yonkeu v. Latvia* ⁽⁴¹⁵⁾, the ECtHR rejected the government's argument that the State Border Guard Service only learned of the suspension of the applicant's deportation 2 days after he had been deported. For 4 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. Furthermore, 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.

7.6.2. 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 can be found in Article 9 (1) and recital 16 of the revised [Reception Conditions Directive](#) and Article 28 (3) of the [Dublin Regulation](#) 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 ⁽⁴¹⁶⁾. States must therefore make an active effort to organise a removal, whether to the country of origin or to a third country. In practice, 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.

⁽⁴¹⁵⁾ ECtHR, *Longa Yonkeu v. Latvia*, No. 57229/09, 15 November 2011, para. 143.

⁽⁴¹⁶⁾ ECtHR, *Chahal v. the United Kingdom*, 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; ECtHR, *Amie and Others v. Bulgaria*, No. 58149/08, 12 February 2013, para. 72.

Example: In *Singh v. the Czech Republic* ⁽⁴¹⁷⁾, the ECtHR noted that the applicants were detained for 2.5 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.

Example: In *H.A. v. Greece* ⁽⁴¹⁸⁾, the applicant was an Iranian national who arrived in Greece. After being arrested by the police, he was ordered to return to Turkey, but Turkey refused his admission. Pending his expulsion, the applicant was detained for a long time. The ECtHR found that the Greek authorities had failed to act with due diligence, as they did not take any steps to carry out the expulsion for 5 months following Turkey's refusal to admit the applicant. This led to a violation of Article 5 (1) of the ECHR.

7.6.3. 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.

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.

⁽⁴¹⁷⁾ ECtHR, *Singh v. the Czech Republic*, No. 60538/00, 25 January 2005.

⁽⁴¹⁸⁾ ECtHR, *H.A. v. Greece*, No. 58424/11, 21 January 2016.

Example: In *Kadzoev*⁽⁴¹⁹⁾, the ECJ 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⁽⁴²⁰⁾.

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 cooperating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release’⁽⁴²¹⁾.

Under the ECHR, realistic prospects for expulsion are required.

Example: *Al Husin v. Bosnia and Herzegovina (No. 2)*⁽⁴²²⁾ concerned a Syrian national who was detained on the grounds of national security. The applicant was issued with a deportation order stating that, if he failed to leave voluntarily, an additional deportation order would be issued indicating the destination country for his removal. The applicant remained detained on national security grounds for 4 years. Over 40 countries were requested to take the applicant, but to no avail. The applicant was released after 8 years of continuous detention. The ECtHR found that Article 5 (1) had been violated because the grounds of detention had not remained valid for the whole detention period owing to the lack of a realistic prospect of enforcing expulsion.

⁽⁴¹⁹⁾ ECJ, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)* [GC], 30 November 2009, paras. 65–66.

⁽⁴²⁰⁾ See also CJEU, C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, 5 June 2014, paras. 59–60.

⁽⁴²¹⁾ United Kingdom Border Agency (2012), *Enforcement Instructions and Guidance: Chapter 55 detention and temporary release*.

⁽⁴²²⁾ ECtHR, *Al Husin v. Bosnia and Herzegovina (No. 2)*, No. 10112/16, 25 June 2019. See also ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009.

7.6.4. Maximum length of detention

Under EU law, Article 9 (1) of the revised [Reception Conditions Directive](#) and Article 28 (3) of the [Dublin Regulation](#) stipulate that detention of asylum seekers must be for the shortest period possible. Reduced time limits for submitting and responding to transfer requests apply when asylum seekers are detained under the Dublin Regulation.

Pursuant to Article 15 (1) of the [Return Directive](#), detention of persons in return procedures must also be as short as possible. The Return Directive, however, also provides for a time limit of up to 6 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 (Article 15 (5) and (6)). Exceptional extensions require the authorities to have first taken all reasonable efforts to remove the individual. Further detention is not possible once the 6-month period and, in exceptional cases, the additional 12-month period have expired.

Example: In *Kadzoev* ⁽⁴²³⁾, 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 or not 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.

Example: In *FMS and Others* ⁽⁴²⁴⁾, the CJEU provided clarification concerning the duration of detention under both the EU asylum and return *acquis*. Although Article 9 of the Reception Conditions Directive does not require Member States to lay down a maximum period when detaining applicants for international protection, their national law must ensure that detention lasts only for as long as the ground for detention remains valid. By contrast, in cases of pre-removal detention under Article 15 of the Return Directive, prolonged detention can never exceed 18 months and may be maintained only as long as removal arrangements are ongoing and are executed with due diligence.

⁽⁴²³⁾ ECJ, C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)* [GC], 30 November 2009, para. 60.

⁽⁴²⁴⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 262–265 and 278–280.

Under the ECHR, Article 5 (1) (f) does not contain maximum time limits for immigration-related detention. The permissible duration of detention for the purposes of Article 5 (1) (f) of the ECHR depends on an examination of national law together with an assessment of the particular facts of the case ⁽⁴²⁵⁾. Time limits are an essential component of precise and foreseeable law governing the deprivation of liberty.

Example: In *Mathloom v. Greece* ⁽⁴²⁶⁾, an Iraqi national was kept in detention for over 2 years and 3 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* ⁽⁴²⁷⁾, 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 were not prepared to issue him with travel documents. In finding a violation of Article 5 (1), the ECtHR expressed grave doubts about whether or not 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* ⁽⁴²⁸⁾, 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 or not the length of deportation proceedings could affect the lawfulness of detention under this provision thus depended solely on the particular circumstances of each case.

⁽⁴²⁵⁾ ECtHR, *Auad v. Bulgaria*, No. 46390/10, 11 October 2011, para. 128.

⁽⁴²⁶⁾ ECtHR, *Mathloom v. Greece*, No. 48883/07, 24 April 2012.

⁽⁴²⁷⁾ ECtHR, *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010.

⁽⁴²⁸⁾ ECtHR, *Auad v. Bulgaria*, No. 46390/10, 11 October 2011.

7.7. Detention of individuals with specific needs

Under EU law, Article 21 of the revised [Reception Conditions Directive](#) and Article 3 (9) of the [Return Directive](#) list persons considered to be vulnerable (see [Chapter 10](#)). Neither of the two instruments bars the detention of vulnerable persons, but, when they are detained, Article 11 of the Reception Conditions Directive and Articles 16 (3) and 17 of the Return Directive require that detailed attention be paid to their particular situation.

Both directives emphasise that children are only to be detained as a measure of last resort and only if less coercive measures cannot be applied effectively. Detention has to be for the shortest possible period of time. All efforts must be made to release those detained and to place them in accommodation that is suitable for children. Under the Reception Conditions Directive, asylum-seeking unaccompanied children can only be detained in exceptional circumstances and never placed in prison accommodation. Unaccompanied children detained pending removal should be placed in institutions with staff and facilities that correspond to the needs of persons of their age (Article 17 of the Return Directive) ⁽⁴²⁹⁾.

The [Anti-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 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, raising issues under Article 3 of the ECHR ⁽⁴³⁰⁾. The Court also considered that asylum seekers are particularly vulnerable, in the context of detention and as regards conditions in which they were held ⁽⁴³¹⁾.

⁽⁴²⁹⁾ For more, see FRA (2017), *European legal and policy framework on immigration detention of children*, Publications Office, Luxembourg, June 2017.

⁽⁴³⁰⁾ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006; ECtHR, *Muskhadzhiyeva 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.

⁽⁴³¹⁾ 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.

Example: *Yoh-Ekale Mwanje v. Belgium* ⁽⁴³²⁾ concerned the detention of a Cameroonian national at an advanced stage of HIV infection. 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 with a temporary residence permit to safeguard the public interest. They kept her instead in detention for almost 4 months. The ECtHR saw no link between the applicant's detention and the government's aim of deporting her, and therefore found that Article 5 (1) of the ECHR had been violated.

Example: In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* ⁽⁴³³⁾, the ECtHR held that the detention of an unaccompanied asylum-seeking child in an adult detention centre breached Article 3 of the ECHR.

Example: In *Muskhadzhiyeva v. Belgium* ⁽⁴³⁴⁾, the ECtHR 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 was in breach of Article 3 of the ECHR.

Example: In *A.M. and Others v. France* ⁽⁴³⁵⁾, the ECtHR found that, although the material conditions in pre-removal detention centres were appropriate, the conditions in these centres were a source of anxiety for young children. Therefore, the placement of children in detention centres amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR.

Example: In *S.F. and Others v. Bulgaria* ⁽⁴³⁶⁾, the ECtHR considered the detention of a family with three children in a border police detention facility and the length of their stay. The Court noted that the immigration detention of children, whether accompanied or not, raises particular issues, since children are extremely vulnerable and have specific needs. Irrespective of the time spent in detention, the conditions in the police detention facility were not suitable for children. The ECtHR thus found a breach of Article 3 of the ECHR.

⁽⁴³²⁾ ECtHR, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011.

⁽⁴³³⁾ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006.

⁽⁴³⁴⁾ ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010.

⁽⁴³⁵⁾ ECtHR, *A.M. and Others v. France*, No. 24587/12, 12 July 2016.

⁽⁴³⁶⁾ ECtHR, *S.F. and Others v. Bulgaria*, No. 8138/16, 7 December 2017.

Example: In *Bilalova and Others v. Poland* ⁽⁴³⁷⁾, the applicants, Russian nationals of Chechen origin (a woman with her five children), complained that the placement of children in a pre-removal detention centre was unlawful. The ECtHR noted that, as a matter of principle, the confinement of young children in such structures should be avoided and that only short-term placement under suitable conditions could be compatible with the ECHR, provided, however, that the authorities established that they resorted to this measure as a last resort only after having specifically examined less coercive measures and found that none was available. The Court concluded that there was insufficient evidence to show that the domestic authorities had carried out such an assessment, and that steps had not been taken to limit the duration of detention. Therefore, the detention of children violated Article 5 (1) of the ECHR.

Example: In *Bistieva and Others v. Poland* ⁽⁴³⁸⁾, the applicant together with her husband and their children arrived in Poland and applied for asylum. The asylum application was rejected and the family fled to Germany but the German authorities sent them back to Poland, where they were detained. The applicant complained that her detention violated the right to respect for private and family life under Article 8 of the ECHR. The ECtHR found that the applicant's detention interfered with the effective exercise of family life, as the Polish authorities had failed to assess the impact of detention on the family and the children and had not considered the family's detention a measure of last resort. The Court held that observing the child's best interests could not be confined to keeping the family together and included taking all necessary steps to limit the detention of families with children. Therefore, detaining the applicant and her family for nearly 6 months violated Article 8 of the ECHR.

Example: In *Rantsev v. Cyprus and Russia* ⁽⁴³⁹⁾, the ECtHR found that the Cypriot authorities had not provided an explanation of 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 releasing 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.

⁽⁴³⁷⁾ ECtHR, *Bilalova and Others v. Poland*, No. 23685/14, 26 March 2020.

⁽⁴³⁸⁾ ECtHR, *Bistieva and Others v. Poland*, No. 75157/14, 10 April 2018.

⁽⁴³⁹⁾ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010.

7.8. Procedural safeguards

Under both EU law and the ECHR, there are procedural safeguards with respect to the detention of asylum seekers and migrants.

Under EU law, the [Return Directive](#) provides specific guarantees when migrants in an irregular situation face return. The [Reception Conditions Directive](#) (Article 9) and Article 26 (2) of the [Asylum Procedures Directive](#) (2013/32/EU) include safeguards for asylum seekers.

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⁽⁴⁴⁰⁾.

Detention must always be ordered in writing and detention orders have to be issued individually. Simply mentioning the names of children in the detention order issued against the parents or any associated adult violates Article 5 (1) of the ECHR⁽⁴⁴¹⁾.

7.8.1. Right to be given reasons

Under EU law, Article 15 (2) of the [Return Directive](#) requires authorities to order detention in writing and provide reasons in fact and in law. For asylum seekers, the same requirement is included in Article 9 (2) of the revised [Reception Conditions Directive](#). The CJEU has also reasserted these requirements⁽⁴⁴²⁾.

⁽⁴⁴⁰⁾ ECtHR, *O.S.A. and Others v. Greece*, No. 39065/16, 21 March 2019.

⁽⁴⁴¹⁾ ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 102–104.

⁽⁴⁴²⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 257 and 259.

Under the ECHR, every detainee must be informed of the reasons for his or her detention ‘promptly’ and ‘in a language which he [or she] understands’ (Article 5 (2)). This means that a detainee must be told the legal and factual grounds for his or her arrest or detention in simple, non-technical language that the detainee can understand so as to be able, if he or she sees fit, to challenge its lawfulness in court in accordance with Article 5 (4) ⁽⁴⁴³⁾.

Example: In *Nowak v. Ukraine* ⁽⁴⁴⁴⁾, 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 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* ⁽⁴⁴⁵⁾, 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* ⁽⁴⁴⁶⁾, 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.

⁽⁴⁴³⁾ See also ECtHR, *Khlaifia and Others v. Italy* [GC], No. 16483/12, 15 December 2016, para. 115; ECtHR, *Conka v. Belgium*, No. 51564/99, 5 May 2002.

⁽⁴⁴⁴⁾ ECtHR, *Nowak v. Ukraine*, No. 60846/10, 31 March 2011, para. 64.

⁽⁴⁴⁵⁾ ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008.

⁽⁴⁴⁶⁾ ECtHR, *Dbouba v. Turkey*, No. 15916/09, 13 July 2010, paras. 52–54.

Example: In *J.R. and Others v. Greece* ⁽⁴⁴⁷⁾, three Afghan nationals were detained in a Greek ‘hotspot’ on the island of Chios. The ECtHR found a violation of Article 5 (2) of the ECHR. Even though the applicants had received a brochure with information on the reasons for their detention, the content of the brochure was not clear and precise enough to inform the applicants of the reasons of their detention.

7.8.2. Right to review of detention

Under EU law and the ECHR, the right to judicial review is key for ensuring against arbitrary detention.

Under EU law, Article 47 of the [EU Charter](#) demands that any individual in a situation governed by EU law has the right to an effective remedy and to a fair and public hearing within a reasonable time. Article 15 (2) of the [Return Directive](#) and Article 9 (3) of the [Reception Conditions Directive](#) require a speedy judicial review when detention is ordered by administrative authorities. In addition, Article 15 (3) of the Return Directive and Article 9 (5) of the Reception Conditions Directive establish that detention has to be reviewed at reasonable intervals of time either by application from the third-country national or *ex officio*. The review must be carried out by a judicial authority in case of asylum seekers, whereas for persons in return procedures, this is only required in cases of prolonged detention.

Example: In *FMS and Others* ⁽⁴⁴⁸⁾, the CJEU reaffirmed that the lawfulness of detention both under the Reception Conditions Directive and under the Return Directive must be subject to judicial review with no exception. This requires that, in the absence of national rules providing for a judicial review, the national court be entitled to rule on the matter and, if detention is found unlawful, to order the release of the person.

Where the extension of a detention measure has breached the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers that the

⁽⁴⁴⁷⁾ ECtHR, *J.R. and Others v. Greece*, No. 22696/16, 25 January 2018.

⁽⁴⁴⁸⁾ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 273–277.

infringement at issue actually deprived the party relying thereon of the possibility of arguing his or her defence better, to such an extent that the outcome of that administrative procedure could have been different ⁽⁴⁴⁹⁾.

Provision of legal aid is regulated. Article 47 of the EU Charter and Article 13 (4) of the Return Directive 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. For asylum seekers, specific provisions on free legal assistance and representation are included in Article 9 of the Reception Conditions Directive (see [Chapter 5](#) for more details).

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 the detention ‘decided speedily by a court and his [or her] 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 her or she is subjected. Given this, 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 if detention is found to be unlawful ⁽⁴⁵⁰⁾. The remedy must be sufficiently certain, in theory and in practice, in order to be accessible and effective. The existence of automatic judicial review of immigration detention is not an essential requirement under Article 5 (1) of the ECHR ⁽⁴⁵¹⁾.

It is particularly important that asylum seekers have access to effective remedies because they are in a precarious position and could face *refoulement*.

⁽⁴⁴⁹⁾ CJEU, C-383/13, *M. G. and N. R. v. Staatssecretaris van Veiligheid en Justitie*, 10 September 2013.

⁽⁴⁵⁰⁾ ECtHR, *Khlaifia and Others v. Italy* [GC], No. 16483/12, 15 December 2016, para. 131; *Ilmseher v. Germany* [GC], Nos. 10211/12 and 27505/14, 4 December 2018, para. 251.

⁽⁴⁵¹⁾ ECtHR, *J.N. v. the United Kingdom*, No. 37289/12, 19 August 2016, para. 96.

Example: In *Abdolkhani and Karimnia v. Turkey* ⁽⁴⁵²⁾, 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 ⁽⁴⁵³⁾.

Example: In *S.D. v. Greece* ⁽⁴⁵⁴⁾, 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.

Example: In *Oravec v. Croatia* ⁽⁴⁵⁵⁾, the applicant, who was suspected of drug trafficking, was detained and subsequently released. Following the prosecutor's appeal against his release, the applicant was again placed in custody. The ECtHR considered that the appeal represented a continuation of the proceedings relating to the lawfulness of the applicant's detention and that the outcome of the appeal was a crucial factor in deciding on its lawfulness, irrespective of whether at that moment in time the applicant was held in custody or not. Article 5 (4) of the ECHR therefore applied to the circumstances of the case.

7.9. 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 separated, and children and vulnerable individuals should normally not be detained (see [Section 7.7](#) concerning detention of individuals with specific needs and children) ⁽⁴⁵⁶⁾.

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. Pre-removal detention must take place in specialised facilities, as a rule, and detainees

⁽⁴⁵²⁾ ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, 22 September 2009.

⁽⁴⁵³⁾ See also ECtHR, *Z.N.S. v. Turkey*, No. 21896/08, 19 January 2010, and ECtHR, *Dbouba v. Turkey*, No. 15916/09, 13 July 2010.

⁽⁴⁵⁴⁾ ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009.

⁽⁴⁵⁵⁾ ECtHR, *Oravec v. Croatia*, No. 51249/11, 11 July 2017, para. 65.

⁽⁴⁵⁶⁾ For more information, see ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006 (unaccompanied child); ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010 (victim of trafficking).

are to be kept separate from ordinary prisoners⁽⁴⁵⁷⁾. The detention conditions of asylum seekers are regulated in Article 10 of the revised [Reception Conditions Directive](#), with specific provisions for vulnerable persons included in Article 11.

Under the ECHR, the place, regime and conditions of detention must be appropriate, otherwise they may raise an issue under Article 3, 5 or 8 of the ECHR. The Court will look at the individual features of the conditions and their cumulative effect. These include, among other elements, where the individual is detained (airport, police cell, prison)⁽⁴⁵⁸⁾; whether or not other facilities could be used; the size of the containment area; whether or not it is shared and with how many other people; availability of and access to washing and hygiene facilities; ventilation and access to open air; access to the outside world; and whether or not the detainees suffer from illnesses and have access to medical facilities. An individual's specific circumstances are of particular relevance, such as if the detainee is 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 or 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⁽⁴⁵⁹⁾.

Example: In the cases *Dougoz, Peers and S.D. v. Greece*⁽⁴⁶⁰⁾, the Court set out important principles about conditions of detention and also made it 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*⁽⁴⁶¹⁾, the Court found a violation of Article 3 of the ECHR not only in relation to the applicant's detention conditions, 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

⁽⁴⁵⁷⁾ See also CJEU, C-473/13 and C-514/13, *Adalo Bero v. Regierungspräsidium Kassel and Ettayebi Bouzalmate v. Kriesverwaltung Kleve* [GC], 17 July 2014, para. 32, and CJEU, C-474/13, *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik* [GC], 17 July 2014, paras. 16–17.

⁽⁴⁵⁸⁾ ECtHR, *Khanh v. Cyprus*, No. 43639/12, 4 December 2018, para. 46.

⁽⁴⁵⁹⁾ See, for example, Council of Europe, CPT (2019), *Report to the Greek Government on the visit to Greece from 10 to 19 April 2018*.

⁽⁴⁶⁰⁾ 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.

⁽⁴⁶¹⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011.

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 probably endured. The Court concluded that there had been a violation of Article 3 of the ECHR.

Article 3 of the ECHR requires that states take specific measures in cases of detainees on hunger strike. The ECtHR has found that the placement in solitary confinement of a detainee who is at an advanced stage of a hunger strike and may present an increased risk of losing consciousness is problematic, unless appropriate arrangements are made to supervise the person's state of health⁽⁴⁶²⁾.

Example: The case of *Ceesay v. Austria*⁽⁴⁶³⁾ concerns a Gambian national who died of dehydration in pre-removal detention. On the morning of his death he was brought to the hospital. He appeared a physically fit man who was aggressive because he did not want to be examined. He was found fit for detention and was subsequently placed in solitary confinement, owing to his aggressive behaviour. His state of health declined precipitously and he died. The autopsy revealed that he suffered from undiagnosed sickle cell disease. The ECtHR found that the Austrian Ministry of the Interior had issued clear procedures for hunger strike events. Doctors regularly visited the detainee, including on his last day, and during the solitary confinement the police checked upon him every 15–30 minutes. While his aggressive behaviour may have been a sign of already advanced dehydration and a consequent disintegration of his blood cells owing

⁽⁴⁶²⁾ ECtHR, *Palushi v. Austria*, No. 27900/04, 22 December 2009, para. 72.

⁽⁴⁶³⁾ ECtHR, *Ceesay v. Austria*, No. 72126/14, 16 November 2017.

to sickle cell disease, that was not foreseeable at the time of the events. The ECtHR concluded that the authorities could not be blamed for not having tested the detainee for sickle cell disease and did not find a violation of Article 3 of the ECHR.

Relevant soft law sources on this issue include the Council of Europe's Twenty Guidelines on Forced Return⁽⁴⁶⁴⁾ and the European Prison Rules⁽⁴⁶⁵⁾.

7.10. 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 EU law, the ECJ established in *Francovich*⁽⁴⁶⁶⁾ 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.

Under the ECHR, Article 5 (5) 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⁽⁴⁶⁷⁾.

⁽⁴⁶⁴⁾ Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, adopted on 4 May 2005.

⁽⁴⁶⁵⁾ Council of Europe, Committee of Ministers, *Recommendation Rec(2006)2-rev on the European Prison Rules*, adopted on 11 January 2006 and revised and amended on 1 July 2020.

⁽⁴⁶⁶⁾ ECJ, Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci and Others v. Italian Republic*, 19 November 1991.

⁽⁴⁶⁷⁾ ECtHR, *Lobanov v. Russia*, No. 16159/03, 16 October 2008, para. 54.

Key points

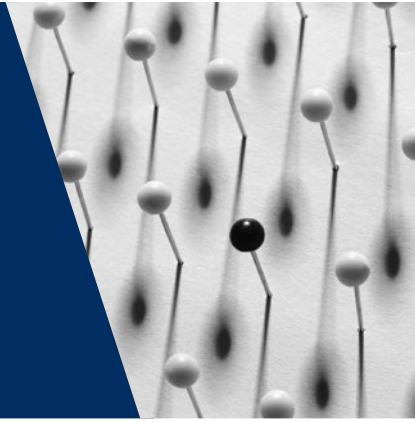
- Under both EU law and the ECHR, deprivation of liberty must be a measure of last resort, after exhausting the possibility of alternative measures that are less intrusive (see [Section 7.2](#)).
- Under the ECHR, the concrete situation of an individual may amount to a deprivation of liberty under Article 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 7.1](#)).
- 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 7.3](#)).
- Under EU law, a deprivation of liberty must be in accordance with the law (see [Section 7.3](#)), necessary and proportionate (see [Section 7.5](#)).
- Under EU law, a maximum length of pre-removal detention has been set at 6 months, which can exceptionally be extended for up to a maximum of 18 months. The ECHR does not contain maximum time limits for immigration detention but, in line with ECtHR case law, national legislation should lay down a maximum period, and the lawfulness of the length of detention depends on the particular circumstances of the case (see [Section 7.6.4](#)).
- Under both EU law and the ECHR, there must be a realistic prospect of removing someone who is being detained for the purpose of removal (see [Section 7.6.3](#)), and removal procedures have to be carried out with due diligence (see [Section 7.6.2](#)).
- A deprivation of liberty must comply with the procedural safeguards in Article 5 (2) of the ECHR on the right to be informed of the reasons for the arrest. Under EU law, the Return Directive and the Reception Conditions Directive make it obligatory to order detention in writing and to provide reasons in fact and in law.
- Under both EU law and the ECHR, the person deprived of his or her liberty has the right to an effective remedy and to have the detention decision reviewed speedily (see [Section 7.8](#)).
- 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 7.7](#) and [7.9](#)).
- An individual who has been detained arbitrarily or unlawfully may have a claim for damages under both EU law and the ECHR (see [Section 7.10](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

8

Forced returns and manner of removal



EU	Issues covered	CoE
<p>Return Directive (2008/115/EC)</p> <p>European Border and Coast Guard Regulation, Regulation (EU) 2019/1896</p> <p>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)</p>	<p>Carrying out removal: safe, dignified and humane</p>	<p>Committee of Ministers, Twenty Guidelines on Forced Return, 2005, No. 19</p>
<p>Asylum Procedures Directive (2013/32/EU), Article 48</p>	<p>Confidentiality</p>	<p>Committee of Ministers, Twenty Guidelines on Forced Return, 2005, No. 12</p>
<p>EU Charter, Article 2 (right to life)</p> <p>Return Directive (2008/115/EC), Article 8 (4)</p>	<p>Serious harm caused by restraint measures</p>	<p>ECHR, Article 2 (right to life)</p> <p>ECHR, Article 3 (prohibition of torture and other forms of ill-treatment)</p> <p>Committee of Ministers, Twenty Guidelines on Forced Return, 2005, No. 19</p>
	<p>Investigations</p>	<p>ECtHR, <i>Tariyeva v. Russia</i>, No. 4353/03, 2006 (medical care in prisons)</p> <p>ECtHR, <i>Tais v. France</i>, No. 39922/03, 2006 (check of medical conditions while in custody)</p> <p>ECtHR, <i>Ramsahai v. the Netherlands</i> [GC], No. 52391/99, 2007 (effective system)</p> <p>ECtHR, <i>Armani Da Silva v. the United Kingdom</i> [GC], No. 5878/08, 2016 (effective investigation)</p>

Introduction

This chapter examines the manner in which a non-national is removed from a state. Legal barriers to removal, such as barriers to removing asylum seekers, are examined in Chapters 1, 4 and 5.

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). Activities carried out by Frontex in the area of return are regulated by the [European Border and Coast Guard Regulation](#) (Regulation (EU) 2019/1896). Coordinated joint removals by air are regulated by [Council Decision 2004/573/EC](#).

Under EU law, large-scale EU information systems contain information on migrants in an irregular situation, which is used in migration-related processes, including the facilitation of returns (see [Section 2.1](#)).

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, which relates to the authorities' use of force in general, the need to protect individuals from harm and 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 CoE Twenty Guidelines on Forced Return provides useful guidance and is, therefore, referred to in several parts of this chapter ⁽⁴⁶⁸⁾. The CPT standards also include a specific section on returns by air ⁽⁴⁶⁹⁾.

⁽⁴⁶⁸⁾ Council of Europe, Committee of Ministers, [Twenty Guidelines on Forced Return](#), adopted on 4 May 2005.

⁽⁴⁶⁹⁾ Council of Europe, CPT (2003), [The CPT Standards: Deportation of foreign nationals by air](#).

Returns are often made possible through readmission agreements concluded at the political or operational level. In the EU, readmission agreements can be concluded by the Union or by individual EU Member States. In 2004–2020, 18 EU readmission agreements were concluded ⁽⁴⁷⁰⁾. Negotiations are ongoing with five countries ⁽⁴⁷¹⁾.

8.1. 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 for forced returns has to be established (Article 8 (6)) ⁽⁴⁷²⁾. In an annex to the [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 ⁽⁴⁷³⁾.

The Return Directive requires that the individual's state of health be 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 5). Domestic legislation and policy may also address specific health issues, such as those of women in a late stage of pregnancy.

⁽⁴⁷⁰⁾ With, in chronological order, Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, North Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde and Belarus. See also the European Commission webpage under [Return & readmission](#). The EU signed non-legally binding readmission arrangements with Afghanistan, Ethiopia, Ghana, Niger and Nigeria.

⁽⁴⁷¹⁾ Algeria, China, Jordan, Nigeria and Tunisia. See also European Commission (2018), 'State of the Union 2018: A stronger and more effective European return policy'.

⁽⁴⁷²⁾ For more information on EU Member State practices, see FRA (2020), 'Forced return monitoring systems – 2020 update'.

⁽⁴⁷³⁾ Council Decision 2004/573/EC 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, OJ 2004 L 261/28. See also European Border and Coast Guard Agency (2018), *Code of Conduct: For return operations and return interventions coordinated or organised by Frontex*, Frontex, Warsaw.

The Return Directive requires that unaccompanied children only be returned to family members, a nominated guardian or adequate reception facilities (Article 10) ⁽⁴⁷⁴⁾.

Under the ECHR, states have a positive obligation to refrain from ill-treating anyone within their jurisdiction or under their control, irrespective of their migration status. An assessment will be made of whether or not 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, pregnancy or mental health concerns, have to be taken into account ⁽⁴⁷⁵⁾. Migrants in an irregular situation subject to removal need to be attested as 'fit to travel' ⁽⁴⁷⁶⁾.

According to the CoE [Twenty Guidelines on Forced Return](#), authorities should cooperate with returnees 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).

8.2. 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 the 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 48 of the [Asylum Procedures Directive](#) (2013/32/EU) and requires EU Member States to respect the confidentiality of any information obtained. Article 30 of the directive provides guarantees of non-disclosure of information to alleged persecutors when collecting information on individual asylum applicants.

⁽⁴⁷⁴⁾ See also FRA (2019), *Returning Unaccompanied Children: Fundamental rights considerations*, Publications Office, Luxembourg, September 2019.

⁽⁴⁷⁵⁾ ECtHR, *Shioshvili and Others v. Russia*, No. 19356/07, 20 December 2016, paras. 85–86; 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; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 January 2007; ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 68–70.

⁽⁴⁷⁶⁾ ECtHR, *Al-Zawatia v. Sweden* (dec.), No. 50068/08, 22 June 2010, para. 58.

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. The ECtHR found a breach of confidentiality in the removal process to be against Article 3 of the ECHR, as the disclosure of information that the returnee was a terrorist suspect might lead to a risk of ill-treatment ⁽⁴⁷⁷⁾.

The CoE [Twenty Guidelines on Forced Return](#) also address the respect for and restrictions imposed on the processing of personal data and the prohibition of sharing information related to asylum applications (Guideline 12).

8.3. 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 cases of death in custody. The right to life is guaranteed under Article 2 of both the [EU Charter](#) and the ECHR. Article 2 is one of the most important rights, 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’ ⁽⁴⁷⁸⁾.

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, the primary duty on states under Article 2 of the ECHR within the context of using force by state agents entails putting in place an appropriate legal framework defining the limited circumstances in which law enforcement may use

⁽⁴⁷⁷⁾ ECtHR, *X. v. Sweden*, No. 36417/16, 9 January 2018, paras. 55–61.

⁽⁴⁷⁸⁾ ECtHR, *McCann and Others v. the United Kingdom*, No. 18984/91, 27 September 1995, paras. 148–149; ECtHR, *Yüksel Erdoğan and Others v. Turkey*, No. 57049/00, 15 May 2007, para. 86; ECtHR, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, 15 May 2007, para. 286; ECtHR, *Giuliani and Gaggio v. Italy* [GC], No. 23458/02, 24 March 2011, paras. 175–176.

force. The 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⁽⁴⁷⁹⁾. 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⁽⁴⁸⁰⁾, and stringent scrutiny must be applied by the relevant authorities to the investigation⁽⁴⁸¹⁾.

The ECtHR has held that member states have not only 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 themselves, 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⁽⁴⁸²⁾. The question is whether or not the authorities have done all that could reasonably be expected of them in order to avoid a real and immediate risk to life of which they knew or ought to have known⁽⁴⁸³⁾.

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 or not there was adequate planning and control of the operation.

⁽⁴⁷⁹⁾ 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; ECtHR, *Giuliani and Gaggio v. Italy* [GC], No. 23458/02, 24 March 2011, para. 209.

⁽⁴⁸⁰⁾ 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.

⁽⁴⁸¹⁾ ECtHR, *Enukidze and Girgvliani v. Georgia*, No. 25091/07, 26 July 2011, para. 277; ECtHR, *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, 30 March 2016, para. 229.

⁽⁴⁸²⁾ ECtHR, *Osman v. the United Kingdom*, 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.

⁽⁴⁸³⁾ ECtHR, *Branko Tomašić and Others v. Croatia*, No. 46598/06, 15 January 2009, para. 51.

Example: In *Kaya v. Turkey* ⁽⁴⁸⁴⁾, the ECtHR reiterated that the 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 raise issues not only 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 of the ECHR in situations where the individual is harmed or injured through the use of restraint that falls short of unlawful killing.

The Court held that there is a breach of Article 3 of the ECHR when an individual suffers brain damage as a result of the use of excessive force upon arrest ⁽⁴⁸⁵⁾, when detainees are slapped in the face by state agents during their detention at a police station ⁽⁴⁸⁶⁾ or when there is a failure by the authorities to effectively investigate the applicants' complaints about alleged ill-treatment during deportation ⁽⁴⁸⁷⁾.

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. Individuals must be protected from the risk of undue police intrusions into their homes ⁽⁴⁸⁸⁾. Safeguards should be in place to avoid any possible abuse and protect human dignity. These might include requiring the state to conduct an effective investigation if that is the only legal means of looking into allegations of unlawful searches of property ⁽⁴⁸⁹⁾.

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 ⁽⁴⁹⁰⁾. In this regard, the CoE [Twenty Guidelines on Forced Return](#) bans restraint measures likely to obstruct the airways, partially or wholly, or forcing the returnee into positions in which he or she risks asphyxia (Guideline 19).

⁽⁴⁸⁴⁾ ECtHR, *Kaya v. Turkey*, No. 22729/93, 19 February 1998.

⁽⁴⁸⁵⁾ ECtHR, *İlhan v. Turkey* [GC], No. 22277/93, 27 June 2000, paras. 77–87.

⁽⁴⁸⁶⁾ ECtHR, *Bouyid v. Belgium* [GC], No. 23380/09, 28 September 2015.

⁽⁴⁸⁷⁾ ECtHR, *Thuo v. Cyprus*, No. 3869/07, 4 April 2017.

⁽⁴⁸⁸⁾ ECtHR, *Kučera v. Slovakia*, No. 48666/99, 17 July 2007, paras. 119 and 122–124; ECtHR, *Rachwalski and Ferenc v. Poland*, No. 47709/99, 28 July 2009, paras. 58–63.

⁽⁴⁸⁹⁾ ECtHR, *Vasylychuk v. Ukraine*, No. 24402/07, 13 June 2013, para. 84.

⁽⁴⁹⁰⁾ See, for example, the United Kingdom case of *FGP v. Serco Plc & Anor* [2012] EWHC 1804 (Admin), 5 July 2012.

8.4. 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. Particularly stringent scrutiny must be applied by the relevant authorities to the ensuing investigation ⁽⁴⁹¹⁾. 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 ⁽⁴⁹²⁾. There must be effective accountability and transparency to ensure respect for the rule of law and to maintain public confidence ⁽⁴⁹³⁾.

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 when the government asserted death from natural causes without any other satisfactory explanation for death or with a defective post mortem examination ⁽⁴⁹⁴⁾. Similarly, there were also examples of breaches of Article 2 found in cases of defective medical care in a prison hospital ⁽⁴⁹⁵⁾ and shortcomings in the examination of the applicant's condition while in custody ⁽⁴⁹⁶⁾.

For an Article 2 compliant investigation, the essential criteria are that it should be independent; adequate and effective; carried out promptly and with reasonable expedition; involving the victim's family; and open to public scrutiny ⁽⁴⁹⁷⁾. The results of the investigation should also be open to the public. The onus is on the authorities to launch the investigation of their own initiative and without waiting for a complaint

⁽⁴⁹¹⁾ ECtHR, *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, 30 March 2016.

⁽⁴⁹²⁾ 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.

⁽⁴⁹³⁾ ECtHR, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, 15 May 2007, para. 325.

⁽⁴⁹⁴⁾ ECtHR, *Tanli v. Turkey*, No. 26129/95, 10 April 2001, paras. 143–147.

⁽⁴⁹⁵⁾ ECtHR, *Tarariyeva v. Russia*, No. 4353/03, 14 December 2006, para. 88.

⁽⁴⁹⁶⁾ ECtHR, *Tais v. France*, No. 39922/03, 1 June 2006.

⁽⁴⁹⁷⁾ ECtHR, *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, 30 March 2016, paras. 232–237.

to be made. The investigation should be conducted by an officer or body that is independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence ⁽⁴⁹⁸⁾.

Key points

- Removals have to be carried out safely and humanely and must protect the dignity of the individual (see [Section 8.1](#)).
- Individuals should be fit to travel, having regard to their physical and mental health (see [Section 8.1](#)).
- 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 8.1](#)).
- Under EU law, EU Member States have to establish effective forced return monitoring systems (see [Section 8.1](#)).
- The Return Directive requires that unaccompanied children only be returned to family members, a nominated guardian or adequate reception facilities (see [Section 8.1](#)).
- The confidentiality of information obtained in the asylum process should be ensured (see [Section 8.2](#)).
- Under both EU law and the ECHR, any use of coercive measures must be reasonable, necessary and proportionate (see [Section 8.3](#)).
- Under the ECHR, the authorities are required to investigate credible allegations of excessive use of force during removal (see [Section 8.4](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

⁽⁴⁹⁸⁾ ECtHR, *Finucane v. the United Kingdom*, No. 29178/95, 1 July 2003, para. 68.

9

Economic and social rights

EU	Issues covered	CoE
<p>EU Charter, 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)</p> <p>Access to the labour market is regulated by secondary EU law for each specific category</p>	<p>Economic rights</p>	<p>ECHR, Article 4 (prohibition of slavery and forced labour)</p> <p>ECHR, Article 11 (freedom of association)</p> <p>ESC, Article 1 (2) (non-discrimination and forced or compulsory labour)</p> <p>ESC, Article 5 (freedom of association)</p> <p>ESC, Article 6 (collective bargaining and collective action)</p> <p>ECtHR, <i>Bigaeva v. Greece</i>, No. 26713/05, 2009 (foreigner allowed to complete professional training but not allowed to sit related examination)</p> <p>ECSR, <i>LO/TCO v. Sweden</i>, Complaint No. 85/2012, 2013 (restrictions on equal treatment of posted workers in respect of employment and trade union rights)</p>

EU	Issues covered	CoE
<p>EU Charter, Article 14 (right to education for everyone)</p> <p>Return Directive (2008/115/EC), Article 14 (1) (migrants in an irregular situation)</p> <p>Reception Conditions Directive (2013/33/EU), Article 14 (asylum seekers)</p>	<p>Education</p>	<p>ECHR, Article 2 of Protocol No. 1 (right to education)</p> <p>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)</p> <p>ECtHR, <i>Ponomaryovi v. Bulgaria</i>, No. 5335/05, 2011 (migrants in an irregular situation charged higher fees for secondary education)</p> <p>European Commission of Human Rights, <i>Karus v. Italy</i> (dec.), No. 29043/95, 1998 (foreigners charged higher fees for tertiary education)</p>
<p>EU Charter, Article 34 (3) (social security and social assistance)</p> <p>For third-country national family members of EEA nationals, long-term residents, asylum applicants, refugees, subsidiary protection status holders and victims of trafficking, rules on housing are contained in secondary EU law</p>	<p>Housing</p>	<p>ECtHR, <i>Gillow v. the United Kingdom</i>, No. 9063/80, 1986 (right to respect for home)</p> <p>ECtHR, <i>M.S.S. v. Belgium</i> [GC], No. 30696/09, 2011 (failure to provide housing can amount to a violation of Article 3 of the ECHR)</p> <p>ESC, Article 31 (right to housing)</p> <p>ECSR, <i>FEANTSA v. the Netherlands</i>, Complaint No. 86/2012, 2014 (right to emergency shelter)</p> <p>ECSR, <i>DCI v. the Netherlands</i>, Complaint No. 47/2008, 2009 (housing for children in an irregular situation)</p>
<p>EU Charter, Article 35 (healthcare)</p> <p>Healthcare is regulated by secondary EU law for each specific category</p>	<p>Healthcare</p>	<p>ESC, Article 11 (the right to health)</p> <p>ESC, Article 13 (the right to social and medical assistance)</p> <p>ECSR, <i>FIDH v. France</i>, Complaint No. 14/2003, 2004</p> <p>ECSR, <i>EUROCEF v. France</i>, Complaint No. 114/2015, 2018 (accommodation and care of unaccompanied children)</p>

EU	Issues covered	CoE
<p>For third-country national family members of EEA nationals:</p> <p>Free Movement Directive (2004/38/EC), Articles 24 and 14</p> <p>Coordination of Social Security Regulation (EC) No. 883/2004, amended by Regulation (EU) No. 465/2012</p> <p>For third-country national moving within the EU:</p> <p>Regulations (EC) No. 859/2003 and (EU) No. 1231/2010</p> <p>Other categories:</p> <p>Secondary EU law has specific entitlements for asylum applicants, refugees, persons granted subsidiary protection, victims of trafficking and long-term residents</p> <p>CJEU, Joined Cases C-443/14 and C-444/14, <i>Alo and Osso</i> [GC], 2016 (residence conditions imposed on a beneficiary of subsidiary protection)</p> <p>CJEU, C-713/17, <i>Ayubi</i>, 2018 (refugee with temporary residence permit)</p>	<p>Social security and assistance</p>	<p>ECtHR, <i>Gaygusuz v. Austria</i>, No. 17371/90, 1996 (discrimination against foreigners as regards unemployment benefits)</p> <p>ECtHR, <i>Koua Poirrez v. France</i>, No. 40892/98, 2003 (discrimination against foreigners as regards disability benefits)</p> <p>ECtHR, <i>Dhahbi v. Italy</i>, No. 17120/09, 2014 (discrimination against foreigners as regards family benefits)</p> <p>ECtHR, <i>Andrejeva v. Latvia</i> [GC], No. 55707/00, 2009 (discrimination against foreigners as regards pensions)</p> <p>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 (right of elderly persons to social protection) and 30 (protection against poverty and social exclusion)</p> <p>ECSR, <i>EUROCEF v. France</i>, Complaint No. 114/2015, 2018 (accommodation and care of unaccompanied children)</p>

Introduction

For most migrants, accessing employment, education, housing, healthcare, social security, social assistance and other social benefits can be a challenging exercise. An acknowledged right to remain is normally necessary to access 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 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⁽⁴⁹⁹⁾.

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⁽⁵⁰⁰⁾. Differentiated treatment becomes less acceptable the more similar a foreigner's immigration situation is to the situation of a state's own citizens⁽⁵⁰¹⁾. Where core fundamental rights are concerned, such as the right to life or the prohibition on degrading treatment, differentiated treatment amounts to prohibited discrimination⁽⁵⁰²⁾. These principles are of particular importance when looking at access to social rights.

This chapter provides a brief overview of both EU and CoE standards relating to access to economic and social rights, namely the rights to work, education, housing, healthcare and social protection.

9.1. 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 (see also [Section 6.2](#)). The directive also applies to third-country national family members of citizens from Iceland, Liechtenstein and Norway⁽⁵⁰³⁾. Family

⁽⁴⁹⁹⁾ EU Charter, Art. 21; ECHR, Art. 14 and Protocol No. 12, Art. 1; ESC, Part V, Art. E.

⁽⁵⁰⁰⁾ ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

⁽⁵⁰¹⁾ ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996.

⁽⁵⁰²⁾ ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009.

⁽⁵⁰³⁾ [Agreement on the European Economic Area](#), 2 May 1992, Part III, Free Movement of Persons, Services and Capital, OJ 1994 L 1/3.

members of Swiss citizens enjoy a similar status ⁽⁵⁰⁴⁾. The family members covered by these different provisions are not only entitled to access the labour market, but also have access to social benefits.

Under EU law, Turkish nationals, 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.

The degree of access to the labour market of other categories of third-country nationals, such as asylum applicants, refugees or long-term residents, is regulated by specific directives. In December 2011, the EU adopted the [Single Permit Directive](#) (2011/98/EU), which introduces 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.

Example: The case of *Martinez Silva* ⁽⁵⁰⁵⁾ concerned the denial to a third-country national of a family benefit on the basis that Italian law does not allow that benefit to be granted to non-EU nationals holding a single work permit. The CJEU held that a single-permit holder may not be excluded from receiving a family benefit by national legislation, because of the equal treatment clause included in the Single Permit Directive.

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 in the welfare and social security system ⁽⁵⁰⁶⁾. It also applies to third-country nationals; according to Article 3 (2) of the directive, however, it 'does not cover difference 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'.

⁽⁵⁰⁴⁾ 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, OJ 2002 L 114/6, Art. 7.

⁽⁵⁰⁵⁾ CJEU, C-449/16, *Kerly del Rosario Martinez Silva v. Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*, 21 June 2017.

⁽⁵⁰⁶⁾ Directive 2000/43/EC, OJ 2000 L 180/22.

The [Community Charter of the Fundamental Social Rights of Workers](#) was adopted on 9 December 1989 by a declaration by all Member States. 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 that fall within the scope of EU law, and its provisions cannot expand the scope of EU law. Under the EU Charter, very few social rights are guaranteed to all individuals, such as the right to education in Article 14 (1) (2), as most rights are restricted to citizens and/or those who are lawfully resident.

Under CoE law, 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 States Parties. The ESC enshrines a body of rights that encompass housing, health, education, employment, social protection, 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 in principle only to nationals of states that have ratified the ESC who are migrants in other states that have also ratified the ESC. According to the ESC Appendix, although it does not specifically refer to them, Articles 1–17 and 20–31 of the ESC apply to foreigners provided they are nationals of a State Party to the ESC lawfully resident or working regularly within the territory of another State Party to the ESC. These articles are to be interpreted in the 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 States Parties, 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, the ECSR has extended the ESC's personal scope to cover everyone in the territory, including migrants in an irregular situation⁽⁵⁰⁷⁾.

The ESC has an important complementary relationship to the ECHR that gives ECSR case law considerable value. Even though not all EU Member States and CoE 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⁽⁵⁰⁸⁾.

9.2. 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.

⁽⁵⁰⁷⁾ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, merits, 8 September 2004; ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, merits, 1 July 2014; and ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, merits, 2 July 2014. Furthermore, the ESCR issued a Statement of interpretation on the rights of refugees under the ESC in 2015.

⁽⁵⁰⁸⁾ 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, the UN Convention on Migrant Workers and International Labour Organization Convention No. 143.

Example: In *Bigaeva v. Greece* (⁵⁰⁹), 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 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 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 1 guarantees the right to work and prohibits discrimination in employment as well as forced labour. This implies that the only jobs from which foreigners may be banned are those that are inherently connected with protection of the public interest or national security and involve the exercise of (high-level) public authority (⁵¹⁰).

Article 18 of the ESC provides for the right to engage in a gainful occupation in the territory of other States Parties 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 (⁵¹¹); that work and residence permits be obtainable by means of a single application procedure and without excessive fees and charges (⁵¹²); that any work permits granted be not too restrictive geographically and/or occupationally (⁵¹³); and loss of employment need not automatically and immediately lead to loss of residence permit, but should give the person time to look for another job (⁵¹⁴).

Article 19 of the ESC includes an extensive catalogue of provisions protecting and supporting migrant workers in the territory of other States Parties, but with the stipulation that they must be there lawfully (see, however, [Chapter 4](#) for details on Article 19 (8)).

⁽⁵⁰⁹⁾ ECtHR, *Bigaeva v. Greece*, No. 26713/05, 28 May 2009.

⁽⁵¹⁰⁾ ECSR, Conclusions 2012, Albania, Art. 1 (2).

⁽⁵¹¹⁾ ECSR, Conclusions XVII-2, Spain, Art. 18 (1).

⁽⁵¹²⁾ ECSR, Conclusions XVII-2, Germany, Art. 18 (2).

⁽⁵¹³⁾ ECSR, Conclusions V, Germany, Art. 18 (3).

⁽⁵¹⁴⁾ ECSR, Conclusions XVII-2, Finland, Art. 18 (3).

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, as well as collective rights ⁽⁵¹⁵⁾.

Under EU law, one of the freedoms enshrined in the [EU Charter](#) 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 of 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 dismissal (Article 30), the right to fair and just working conditions, and 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 9.2.1–9.2.9 briefly outline the situations of the main categories of third-country nationals.

9.2.1. Family members of EEA and Swiss nationals

Under EU law, designated family members – of whatever nationality – of EU citizens who exercise free movement rights and 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 an EU 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 ⁽⁵¹⁶⁾.

In the context of the free movement of EU citizens and their family members of whatever nationality, Article 45 (4) of the [TFEU](#) makes provision for EU Member States to reserve employment in the public service for their own nationals. The CJEU

⁽⁵¹⁵⁾ ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, merits, 6 December 2006, which refers to mine workers.

⁽⁵¹⁶⁾ CJEU, C-70/09, *Alexander Hengartner and Rudolf Gasser v. Landesregierung Vorarlberg*, 15 July 2010, paras. 39–43.

has interpreted this strictly and has not allowed EU Member States to reserve access to certain positions for nationals only, for example to work as a trainee teacher ⁽⁵¹⁷⁾ or a foreign language university assistant ⁽⁵¹⁸⁾.

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 for each 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 April 2020 (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 CJEU has handed down a considerable number of judgments in this field ⁽⁵¹⁹⁾.

9.2.2. Posted workers

Under EU law, those third-country nationals who do not enjoy free movement rights but are lawfully working for an employer in one EU 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 \(96/71/EC\)](#) as amended by [Directive \(EU\) 2018/957](#). 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 ⁽⁵²⁰⁾. 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 EU Member States can be regarded as equivalent ⁽⁵²¹⁾.

⁽⁵¹⁷⁾ ECJ, C-66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, 3 July 1986, paras. 26–27.

⁽⁵¹⁸⁾ ECJ, Joined Cases C-259/91, C-331/91 and C-332/91, *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.

⁽⁵¹⁹⁾ For an overview of the case law related to Directive 2005/36/EC, consult the [directive's EUR-Lex entry](#) under 'document information'.

⁽⁵²⁰⁾ ECJ, C-346/06, *Dirk Ruffert v. Land Niedersachsen*, 3 April 2008.

⁽⁵²¹⁾ ECJ, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1 Byggettan and Svenska Elektrikerförbundet* [GC], 18 December 2007.

To that extent, the directive sets out minimum standards that must apply to employees from one EU 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 maximum work periods and minimum rest periods, breaks, annual holidays and rates of pay.

Under the ESC, the ECSR held that Swedish law entailed restrictions on collective bargaining and action in respect of posted workers, which violated Article 6 (2) and (4) ⁽⁵²²⁾.

9.2.3. Blue Card holders, researchers and students

Under EU law, after 2 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 EU Member State. After 18 months of legal residence in one EU Member State, the EU Blue Card holder may move to another EU Member State to take up highly qualified employment, subject to the EU Member State's limits on the number of non-nationals accepted, provided he or she fulfils the same conditions for the first admission in an EU Member State.

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.

The [Students and Researchers Directive](#) (Directive (EU) 2016/801) regulates third-country nationals' admission to the EU for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. After the completion of their research or studies, researchers and students must have the possibility of staying in the territory of the EU Member State for a period of at least 9 months to seek employment or set up a business.

⁽⁵²²⁾ ECSR, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012, merits, 3 July 2013. See also ECSR, *Conclusions 2018*, Sweden, Art. 6 (4).

Example: In *Ali Ben Alaya* ⁽⁵²³⁾, the CJEU ruled that EU Member States are obliged to admit to their territory a third-country national who meets the conditions for admission, provided that the EU Member State does not invoke against that applicant one of the grounds listed in the directive as a justification for refusing a residence permit. Conditions for admission are exhaustively listed in Articles 6 and 7 of the Students and Researchers Directive.

9.2.4. Turkish nationals

Under EU law, Turkish nationals 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. Nevertheless, Turkish nationals do not have the direct right to enter any EU Member State in order to take up employment. If, however, a EU Member State's national law permits them to take up employment, they then have the right to continue in that same employment after 1 year ⁽⁵²⁴⁾. After 3 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.

Example: In the *Tetik* case ⁽⁵²⁵⁾, the German authorities did not want to grant Mr Tetik a residence permit when he had completed his 3 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* ⁽⁵²⁶⁾ 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.

⁽⁵²³⁾ CJEU, C-491/13, *Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland*, 10 September 2014.

⁽⁵²⁴⁾ ECJ, C-386/95, *Süleyman Eker v. Land Baden-Württemberg*, 29 May 1997, paras. 20–22.

⁽⁵²⁵⁾ ECJ, C-171/95, *Recep Tetik v. Land Berlin*, 23 January 1997, para. 30.

⁽⁵²⁶⁾ CJEU, C-14/09, *Hava Genc v. Land Berlin*, 4 February 2010, paras. 27–28.

Under Article 7 of Decision No. 1/80, family members of a Turkish worker, even if they are not Turkish nationals themselves, can access the labour market after they have been legally residing for 3 years in the EU Member State concerned. Objective reasons may justify the family member concerned living apart from the Turkish migrant worker. National law that makes family reunification difficult or impossible would lead to a restriction on the establishment of a self-employed person which is prohibited under the 1970 Additional Protocol ⁽⁵²⁷⁾.

A Turkish national's child 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 3 years.

Example: In the *Derin* case ⁽⁵²⁸⁾, 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 EU 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 nationals 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 nationals at the time Article 41 of the protocol came into force in a particular EU Member State, then that EU Member State is prohibited from now imposing a visa or work permit requirement (see also [Section 4.4.3](#)).

9.2.5. Long-term residents and beneficiaries of the Family Reunification Directive

Under EU law, persons who have acquired long-term resident status under Article 11 (1) of the [Long-Term Residence 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.

⁽⁵²⁷⁾ CJEU, C-138/13, *Naima Dogan v. Bundesrepublik Deutschland*, 10 July 2014.

⁽⁵²⁸⁾ ECJ, C-325/05, *Ismail Derin v. Landkreis Darmstadt-Dieburg*, 18 July 2007, paras. 74–75.

For beneficiaries of the [Family Reunification Directive](#) (see also [Chapter 6](#)), 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 or not its labour market can accept him or her.

9.2.6. Nationals of other countries with association or cooperation agreements

Under EU law, 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 which the EU has concluded association, stabilisation, cooperation, partnership and/or other types of agreements ⁽⁵²⁹⁾ enjoy equal treatment in many respects, but they are not entitled to the full equal treatment that is enjoyed by EU citizens. As at July 2020, the EU had concluded agreements with over 100 states ⁽⁵³⁰⁾.

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 to and the same working conditions as the nationals of that EU Member State. This is, for 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

⁽⁵²⁹⁾ Stabilisation and association agreements are in place with Albania, Bosnia and Herzegovina, Kosovo (this designation is without prejudice to positions on status, and is in line with UNSCR 1244(1999) and the ICJ Opinion on the Kosovo declaration of independence), Montenegro, North Macedonia and Serbia. Partnership and cooperation agreements exist with 13 eastern European and central Asian countries; the original agreements with Algeria, Morocco and Tunisia have now been replaced by the Euro-Mediterranean agreements (covering seven states). Agreements have been signed with the 79 African, Caribbean and Pacific (ACP) states (the Cotonou Agreement) and with Chile. The Cotonou Agreement expired in February 2020 and currently the second round of negotiations on the future EU-ACP relationship has been concluded. For further information see Council of the European Union (2020), ‘Cotonou Agreement’.

⁽⁵³⁰⁾ European External Action Service, [EU Treaties Office Database](#).

conditions, remuneration and dismissal, relative to its own nationals' ⁽⁵³¹⁾. 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 ⁽⁵³²⁾.

The CJEU has dealt with a number of cases relating to these agreements ⁽⁵³³⁾. Some of these have concerned the possibility of renewing, for work purposes, a third-country national's residence permit, after having lost his or her rights of residence as a dependant as a result of a breakdown in a relationship.

Example: The *El Yassini* ⁽⁵³⁴⁾ 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 ECJ had to ascertain if the approach taken in its case law concerning Turkish nationals ⁽⁵³⁵⁾ was also applicable by analogy to Moroccan nationals, and therefore if 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 and sufficiently practical principles in the field of working conditions and remuneration. The Court nevertheless determined that case law concerning the Ankara Agreement with Turkey could not be 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

⁽⁵³¹⁾ 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 L 70/2, 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 L 97/2.

⁽⁵³²⁾ ECJ, C-18/90, *Office National de l'emploi v. Bahia Kziber*, 31 January 1991.

⁽⁵³³⁾ Some cases related to the agreements are ECJ, C-18/90, *Office National de l'emploi v. Bahia 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 264/2, superseded by the EU–Morocco Euro-Mediterranean Association Agreement); ECJ, C-416/96, *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); and ECJ, C-438/00, *Deutscher Handballbund v. Kolpak*, 8 May 2003 (Slovak Republic).

⁽⁵³⁴⁾ ECJ, C-416/96, *El Yassini v. Secretary of State for the Home Department*, 2 March 1999, paras. 64, 65 and 67.

⁽⁵³⁵⁾ ECJ, C-237/91, *Kazim Kus v. Landeshauptstadt Wiesbaden*, 16 December 1992, paras. 21–23 and 29.

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 imply the termination of his employment before the expiry of the employment agreement. The Court went further and pointed out that the situation would have been different if the EU 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* ⁽⁵³⁶⁾, the ECJ 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 EU 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 EU 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.

In a less extensive manner, Article 23 of the Partnership and Cooperation Agreement with Russia ⁽⁵³⁷⁾ 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'.

⁽⁵³⁶⁾ ECJ, C-97/05, *Mohamed Gattoussi v. Stadt Rüsselsheim*, 14 December 2006, para. 39.

⁽⁵³⁷⁾ 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; latest consolidated version of 1 April 2016), OJ 1997 L 327/3.

Example: The *Simutenkov* case ⁽⁵³⁸⁾ 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 of the Partnership and Cooperation Agreement when assessing a rule drawn up by an EU Member State's sports federation that 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) of the Partnership and Cooperation Agreement.

9.2.7. Asylum seekers and refugees

Under EU law, Article 15 of the [Reception Conditions Directive](#) (2013/33/EU) requires EU Member States to grant **asylum seekers** access to the labour market, if a decision at first instance has not been taken within 9 months of the asylum application (or 1 year for Ireland, in which Article 11 of the 2003 version of the directive (2003/9/EC) still applies) if this delay cannot be attributed to the applicant. Conditions for granting access to the labour market may be decided upon in accordance with national law, but such conditions must ensure that asylum seekers have effective access to the labour market. 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/EU) recognises the right of **refugees** and **those granted subsidiary protection** to take up employment and to be self-employed. They are to be granted the same access as nationals 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 Relating to the Status of Refugees](#). The directive also obliges the EU Member State to guarantee access to vocational training under the same conditions as nationals.

⁽⁵³⁸⁾ ECJ, C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [GC], 12 April 2005, para. 41.

9.2.8. Migrants in an irregular situation

Under EU law, 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 [Employers 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 and Ireland, 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 (Article 4). 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 (Article 5). 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 (Article 13). The directive puts a particular emphasis on the enforcement of the rules (for example Articles 9, 10 and 14) (see [Section 3.3](#) on the issuance of residence permits to victims of particularly exploitative working conditions who collaborate with the justice system).

9.3. 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 Economic, Social and Cultural 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 migrants in both regular and irregular situations.

Under the ECHR, Article 2 of Protocol No. 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 guarantees in principle 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* ⁽⁵³⁹⁾ 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.

Example: In *Ponomaryovi v. Bulgaria* ⁽⁵⁴⁰⁾, 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 lacking permanent residence permits, the authorities had no substantive objection to their remaining in Bulgaria, and apparently never had serious intentions of removing them. Considerations relating to the need to stem or reverse the flow of irregular immigration clearly did not apply to the applicants.

Example: In the case of *Karus v. Italy* ⁽⁵⁴¹⁾, the 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 stay within the Italian economy.

⁽⁵³⁹⁾ ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 64.

⁽⁵⁴⁰⁾ ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011, paras. 59–63.

⁽⁵⁴¹⁾ European Commission of Human Rights, *Karus v. Italy* (dec.), No. 29043/95, 20 May 1998.

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.⁽⁵⁴²⁾

Under EU law, the [EU Charter](#) 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⁽⁵⁴³⁾. 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 has 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))⁽⁵⁴⁴⁾. In addition, children of EEA workers who are or were employed in a EU Member State other than their own benefit from the provision

⁽⁵⁴²⁾ ECSR, Conclusions 2011, Statement of interpretation on Art. 17 (2).

⁽⁵⁴³⁾ Directive 2008/115/EC, OJ 2008 L 348/98, Art. 14 (1).

⁽⁵⁴⁴⁾ Art. 12 (3) of the [Free Movement Directive](#) builds upon ECJ case law on Art. 12 of Regulation (EEC) No. 1612/68, OJ 1968 L 257/2 (today Art. 10 of Regulation (EU) No. 492/2011, OJ 2011 L 141/1) and especially on ECJ, Joined Cases C-389/87 and C-390/87, *G. B. C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen*, 15 March 1989, and on ECJ, C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002.

contained in Article 10 of [Regulation \(EU\) No. 492/2011](#) (former Regulation (EEC) No. 1612/68), which continues to apply independently of the provisions of the Free Movement Directive ⁽⁵⁴⁵⁾.

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 ⁽⁵⁴⁶⁾.

Under Article 26 of the [Qualification Directive](#), EU Member States must ensure that employment-related education opportunities for adults, such as vocational training, are offered to beneficiaries of international protection, under equivalent conditions to those for nationals. Access to the general education system or training must also be allowed to adults granted international protection, under the same conditions as legally residing third-country nationals (Article 27).

Third-country nationals recognised as long-term residents under the [Long-Term Residence Directive](#) (see [Section 3.7](#)) 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).

9.4. 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 ⁽⁵⁴⁷⁾. 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.

⁽⁵⁴⁵⁾ ECJ, C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department* [GC], 23 February 2010.

⁽⁵⁴⁶⁾ For information on asylum applicants, see [Reception Conditions Directive](#), OJ 2013 L 180/96, Art. 14; for information on refugees and subsidiary protection status holders, see [Qualification Directive](#), OJ 2011 L 337/9, Arts. 26–27.

⁽⁵⁴⁷⁾ ECtHR, *Chapman v. the United Kingdom* [GC], No. 27238/95, 18 January 2001.

Example: In the case of *Gillow v. the United Kingdom* ⁽⁵⁴⁸⁾, the ECtHR found a violation of Article 8 of the ECHR 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. 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. On the other hand, the ECtHR did not find a violation of Article 3 of the ECHR where the applicants were not in a situation of material deprivation likely to reach the gravity necessary to fall within the scope of the Article 3 and the authorities had not exhibited indifference towards the applicants, having offered them a way of improving their situation ⁽⁵⁴⁹⁾.

Example: In *M.S.S. v. Belgium and Greece* ⁽⁵⁵⁰⁾, the ECtHR found that Greece's failure to make adequate provision for asylum seekers in view of its 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 when newly arrived migrants are excluded from public housing assistance.

Example: The case of *Bah v. the United Kingdom* ⁽⁵⁵¹⁾ concerned the refusal to consider a mother and her 14-year-old son to be '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

⁽⁵⁴⁸⁾ ECtHR, *Gillow v. the United Kingdom*, No. 9063/80, 24 November 1986, paras. 55–58.

⁽⁵⁴⁹⁾ ECtHR, *N.T.P. and Others v. France*, No. 68862/13, 24 August 2018, paras. 46–49.

⁽⁵⁵⁰⁾ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011. See also ECtHR, *N.H. and Others v. France*, Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020.

⁽⁵⁵¹⁾ ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

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 of the [Rules of Court](#) to ensure that asylum-seeking families are provided with shelter while their claims before the ECtHR are pending (see also [Section 3.4](#)) ⁽⁵⁵²⁾.

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.

Example: In the case of *FEANTSA v. the Netherlands* ⁽⁵⁵³⁾, the ECSR held that the right to emergency shelter and to emergency social assistance is not limited to those belonging to certain vulnerable groups, but extends to all individuals in a precarious situation, pursuant to the principle of upholding their human dignity and the protection of their fundamental rights. The ECSR considered that certain social rights directly related to the rights to life and human dignity are

⁽⁵⁵²⁾ ECtHR, *Afif v. the Netherlands* (dec.), No. 60915/09, 24 May 2011; ECtHR, *Abdilahi Abdulwahidi v. the Netherlands* (dec.), No. 21741/07, 12 November 2013.

⁽⁵⁵³⁾ ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, merits, 2 July 2014.

part of a 'non-derogable core' of rights that protect the dignity of all people. Those rights, therefore, must be guaranteed to refugees and should be assured for all displaced persons.

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) of the ESC⁽⁵⁵⁴⁾. 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⁽⁵⁵⁵⁾.

Although the appendix to the ESC limits its application to lawfully resident nationals of States 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*⁽⁵⁵⁶⁾, it was alleged that Dutch legislation deprived children unlawfully 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), States Parties must take measures to prevent homelessness. This requires a State Party 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.

⁽⁵⁵⁴⁾ ECSR, *Centre on Housing Rights and Evictions (COHRE) v. France*, Complaint No. 63/2010, merits, 28 June 2011.

⁽⁵⁵⁵⁾ ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, merits, 25 June 2010.

⁽⁵⁵⁶⁾ ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009.

Under EU law, Article 1 of the [EU Charter](#) 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 EU Member States' social assistance systems. Therefore, before researchers, students, trainees, volunteers, pupils and au pairs ([Students and Researchers Directive](#), Article 7 (1) (e)) are allowed to enter the EU, they need to provide proof that they have sufficient resources not to become an unreasonable burden on the host EU Member State. EU 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* ⁽⁵⁵⁷⁾, 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 Residence Directive. Specifically, the Court maintained that, under Article 11 (4), EU 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, 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 ⁽⁵⁵⁸⁾. 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; to them, rules established by domestic law apply. Economically inactive

⁽⁵⁵⁷⁾ CJEU, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [GC], 24 April 2012.

⁽⁵⁵⁸⁾ *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.

EEA nationals and their family members, who must show that they are economically 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 with nationals with regard to procedures for obtaining housing (Article 11 (1) (f) of the [Long-Term Residence 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 [Anti-Trafficking Directive](#)).

Under the [Reception Conditions Directive](#), asylum applicants have a right to be supported as soon as they apply for international protection. Under Article 17 of the directive, EU Member States are required to provide persons seeking international protection with material reception conditions that provide an adequate standard of living for applicants, which guarantees their subsistence and safeguards their physical and mental health. According to Article 18, states must take measures to prevent assault and gender-based violence in the accommodation offered. The duty to provide support also applies to persons processed under the [Dublin Regulation](#) (Regulation (EU) No. 604/2013).

Example: In *CIMADE* ⁽⁵⁵⁹⁾, the CJEU clarified how to apply the Reception Conditions Directive in the case of transfer requests under the Dublin Regulation. The CJEU held that a EU Member State seeking to transfer an asylum seeker under the Dublin 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. Therefore, minimum reception conditions must also be granted to asylum seekers awaiting a Dublin Regulation decision.

⁽⁵⁵⁹⁾ CJEU, C-179/11, *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. See also 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* [GC], 21 December 2011.

Under Article 32 of the [Qualification Directive](#) (for Ireland see Article 31 of the [2004/83/EC](#) version of the same directive), EU 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 EU Member State's territory.

9.5. 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 ⁽⁵⁶⁰⁾. Under certain circumstances, however, a member state's responsibility under the ECHR may be engaged where it is shown that the member state's authorities have put an individual's life at risk through acts or omissions that denied the individual healthcare that has otherwise been made available to the general population ⁽⁵⁶¹⁾. However, in cases of 'mere' medical negligence, states' obligations are limited to the setting up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives ⁽⁵⁶²⁾. 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 4](#)).

Under the ESC, Article 11 sets out the right to health and Article 13 provides for the right to medical assistance ⁽⁵⁶³⁾. The ECSR considers that these rights are applicable to migrants in an irregular situation.

⁽⁵⁶⁰⁾ ECtHR, *Bensaid v. the United Kingdom*, No. 44599/98, 6 February 2001.

⁽⁵⁶¹⁾ ECtHR, *Powell v. the United Kingdom* (dec.), No. 45305/99, 4 May 2000.

⁽⁵⁶²⁾ ECtHR, *Lopes de Sousa Fernandes v. Portugal* [GC], No. 56080/13, 19 December 2017, para. 186.

⁽⁵⁶³⁾ See also the [European Convention on Social and Medical Assistance](#) (CETS No. 14), which similarly provides for mutual provision of social and medical assistance to nationals of States that are Parties to it in the territory of another State Party. This Council of Europe Convention has only 18 parties, all of which except Turkey and the United Kingdom are also part of the EU. It was opened for signature on 11 December 1953 and entered into force 1 July 1954.

Example: In *International Federation of Human Rights Leagues (FIDH) v. France* ⁽⁵⁶⁴⁾, 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. Furthermore, 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 States Parties 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 nationals entitlement to medical assistance while they are within the territory of a State Party, even if they are there unlawfully, 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 3 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 to that of adults, the ECSR found a violation of Article 17 on the right of children to protection, as this provision 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 for Children International* case (see [Section 9.4](#)).

Under EU law, the [EU Charter](#) 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.

⁽⁵⁶⁴⁾ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, merits, 8 September 2004. See also ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, merits, 24 January 2018.

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 have exercised free movement rights are entitled to equal treatment with nationals (Article 24 of the [Free Movement Directive](#) for EU nationals) ⁽⁵⁶⁵⁾. Those who wish to reside in another Member State on the basis that they are 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 his or her EEA state of residence is entitled to the necessary treatment ⁽⁵⁶⁶⁾ when visiting other EEA Member States and Switzerland ⁽⁵⁶⁷⁾. Travelling to another Member State for the purpose of receiving publicly provided medical treatment is subject to complex rules ⁽⁵⁶⁸⁾.

Under the [Family Reunification Directive](#), the sponsor may be required to prove that he or she has, in particular, ‘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)).

⁽⁵⁶⁵⁾ [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.

⁽⁵⁶⁶⁾ [Regulation \(EC\) No. 883/2004](#), 29 April 2004, OJ 2004 L 166/1, Art. 19 (1); CJEU, C-211/08, *European Commission v. Kingdom of Spain*, 15 June 2010, paras. 58 and 61.

⁽⁵⁶⁷⁾ 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, OJ 2012 L 103/51.

⁽⁵⁶⁸⁾ See Art. 22 (1) (c) of [Regulation \(EEC\) No. 1408/71](#), at issue in both ECJ, C-368/98, *Abdon Vanbraekel and Others v. Alliance nationale des mutualités chrétiennes (ANMC)*, 12 July 2001, and ECJ, C-372/04, *The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health* [GC], 16 May 2006.

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 EU Member State for its own nationals (Article 5 (1) (b) of the [Long-Term Residence Directive](#)). They also need to show that they have stable and regular resources that are sufficient to maintain themselves and the members of their families without recourse to the EU Member State's social assistance system (Article 5 (1) (a)). Persons who have obtained long-term resident status are entitled to equal treatment with nationals of the host EU 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, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law'.

Under Article 19 of the [Reception Conditions Directive](#), asylum seekers are entitled to necessary healthcare, which must include at least 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 '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 (Article 14). The same applies during detention pending removal (Article 16).

Recognised refugees and those with subsidiary protection are entitled to equal access to healthcare with the EU Member State's own nationals under Article 30 of the [Qualification Directive](#). 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 [Anti-Trafficking Directive \(2011/36/EU\)](#)).

9.6. Social security and social assistance

Social security and social assistance are respectively benefits that are based on past contributions into a national social security system, such as retirement pensions, and benefits 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. In certain circumstances, an issue of discrimination may arise in the area of social security and social assistance, regardless of whether or not 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 ⁽⁵⁶⁹⁾.

Example: The case of *Koua Poirrez v. France* ⁽⁵⁷⁰⁾ 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. The ECtHR found that very weighty reasons would have to be put forward before the ECtHR could regard a difference of treatment based exclusively on the ground of nationality as compatible with the ECHR. The ECtHR ruled that the applicant 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 (see [Section 10.3](#)).

Example: *Dhahbi v. Italy* ⁽⁵⁷¹⁾ concerned the denial of family allowance to a Tunisian national who was legally resident and working in Italy, for not being a national of an EU Member State. The ECtHR found that the applicant had been discriminated against in violation of Article 14 in conjunction with Article 8 of the ECHR ⁽⁵⁷²⁾.

Example: The case of *Andrejeva v. Latvia* ⁽⁵⁷³⁾ 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 is only meaningful if, in each particular case, the

⁽⁵⁶⁹⁾ ECtHR, *Luczak v. Poland*, No. 77782/01, 27 November 2007; ECtHR, *Fawsie v. Greece*, No. 40080/07, 28 October 2010.

⁽⁵⁷⁰⁾ ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, para. 41.

⁽⁵⁷¹⁾ ECtHR, *Dhahbi v. Italy*, No. 17120/09, 8 April 2014.

⁽⁵⁷²⁾ See also ECtHR, *Gaygusuz v. Austria*, No. 17371/90, 16 September 1996, paras. 46–50; ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003, para. 41.

⁽⁵⁷³⁾ ECtHR, *Andrejeva v. Latvia* [GC], No. 55707/00, 18 February 2009, para. 91.

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.

In these examples, the applicants were, in all other respects, similar to a state's own national; none of the applicants was in a precarious immigration situation or subject to restrictions on having recourse to public funds.

Example: The case of *Weller v. Hungary* ⁽⁵⁷⁴⁾ 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 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 young persons (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, as reaffirmed in ECSR decisions ⁽⁵⁷⁵⁾.

Under EU law, two situations regarding third-country nationals have to be distinguished. First, there is a system of coordination of benefits among EU 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 or not they have moved within the EU.

⁽⁵⁷⁴⁾ ECtHR, *Weller v. Hungary*, No. 44399/05, 31 March 2009, paras. 36–39.

⁽⁵⁷⁵⁾ ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, merits, 10 November 2014.

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 EU Member State’s social assistance system. A complex body of law has been built up over the years to coordinate social security and social assistance for persons exercising free movement rights. This has been codified in [Regulation 883/2004/EC](#) (as amended) ⁽⁵⁷⁶⁾ with the basic principle that the EU-wide system is a system of coordination, not harmonisation ⁽⁵⁷⁷⁾. It is intended to minimise the negative effects of migrating between EU Member States by simplifying administrative procedures and ensuring equal treatment between those who move between EU Member States and nationals of a EU Member State. Some entitlements are exportable, while others are not. [Regulation \(EC\) No. 987/2009](#) (as amended) ⁽⁵⁷⁸⁾ sets out the procedures needed to implement [Regulation \(EC\) No. 883/2004](#).

Employed third-country nationals who move between EU Member States, and their family members and their survivors, are entitled to the benefit of the cross-border legislation on accumulation and coordination of social security benefits ([Regulations No.\(EC\) No. 859/2003](#) and [No.\(EU\) No. 1231/2010](#)). This is subject to the condition that the employed third-country nationals are legally resident in a EU Member State’s territory and have links beyond those to the third country and a single EU Member State. These regulations do not cover employed third-country nationals who only have links to a third country and a single EU Member State.

⁽⁵⁷⁶⁾ The regulation has been amended by [Regulation \(EC\) No. 988/2009](#), OJ 2009 L 284/43, [Regulation \(EU\) No. 1231/2010](#), OJ 2010 L 344/1, [Regulation \(EU\) No. 1244/2010](#), OJ 2010 L 338/35, [Regulation \(EU\) No. 465/2012](#), OJ 2012 L 149/4, [Regulation \(EU\) No. 1224/2012](#), OJ 2012 L 349/45, [Regulation \(EU\) No. 517/2013](#), OJ 2013 L 158/1, [Regulation \(EU\) No. 1372/2013](#), OJ 2013 L 346/27, [Regulation \(EU\) 492/2017](#), OJ 2017 L 76/13, and most recently [Regulation \(EU\) 1149/2019](#), OJ 2019 L 186/21.

⁽⁵⁷⁷⁾ ECJ, C-21/87, *Borowitz v. Bundesversicherungsanstalt für Angestellte*, 5 July 1988, para. 23; ECJ, C-331/06, *Chuck v. Raad van Bestuur van de Sociale Verzekeringsbank*, 3 April 2008, para. 27.

⁽⁵⁷⁸⁾ The regulation has been amended by [Regulation \(EU\) No. 465/2012](#), OJ 2012 L 149/4, [Regulation \(EU\) No. 1224/2012](#), OJ 2012 L 349/45, and [Regulation \(EU\) No. 1372/2013](#), OJ 2013 L 346/27.

b) Entitlements for certain categories of third-country nationals

Asylum applicants have no specific right to access social assistance under the [Reception Conditions Directive](#). Article 17, however, sets out general rules on the availability of material reception conditions, and Article 17 (5) – which is not applicable to Ireland – indicates how the amount of financial allowance or vouchers is to be determined.

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 did not cover the minimum required to ensure a dignified existence under Article 1 of the German Constitution⁽⁵⁷⁹⁾.

Under Article 29 of the revised [Qualification Directive](#), an EU 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 EU 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.

Example: In *Ayubi v. Bezirkshauptmannschaft Linz-Land*⁽⁵⁸⁰⁾, the CJEU found that national legislation is contrary to EU law if it provides to refugees with a temporary right of residence in a EU Member State less social security benefits than those received by nationals of that EU Member State and by refugees who have a permanent right of residence there.

Example: In *Alo and Osso*⁽⁵⁸¹⁾, the CJEU ruled that a residence condition imposed on a beneficiary of subsidiary protection amounts to a restriction to his or her access to social welfare protected under Article 29 of the Qualification Directive when such a measure is not imposed on refugees, third country-nationals legally residing in that EU Member State or own nationals. The CJEU, however, accepted that residence restrictions imposed with the objective of facilitating

⁽⁵⁷⁹⁾ Germany, *Bundesverfassungsgericht*, 1 BvL 10/10 and 1 BvL 2/11, 18 July 2012.

⁽⁵⁸⁰⁾ CJEU, C-713/17, *Ahmad Shah Ayubi v. Bezirkshauptmannschaft Linz-Land*, 21 November 2018.

⁽⁵⁸¹⁾ CJEU, Joined Cases C-443/14 and C-444/14, *Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover* [GC], 1 March 2016.

the integration of beneficiaries of subsidiary protection might be permitted under Article 33 of the Qualification Directive (freedom of movement). It is for the national court to decide whether or not subsidiary protection status holders and other legally residing third-country nationals, not being subject to such residence condition, are in an objectively comparable situation.

According to Article 11 (7) of the [Anti-Trafficking Directive](#), EU Member States are required to attend to victims of trafficking with special needs, and specific requirements are set for child victims of trafficking (Article 13).

Under the [Long-Term Residence 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 family members of third-country national sponsors with access to social assistance. The sponsors have to show that they have stable and regular resources that are sufficient to maintain themselves as well as the family members without recourse to the EU Member State's social assistance system (Article 7 (1) (c) of the directive).

Under Article 12 (1) (e) of the [Single Permit Directive](#) and Article 14 (1) (e) of the [Blue Card Directive](#), workers from third countries holding a single permit or an EU Blue Card must enjoy equal treatment with nationals as regards social security.

Key points

General points under EU law and the ESC

- A right to enter or remain is normally necessary in order to access economic and social rights (see [introduction to this chapter](#)).
- 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 9.2–9.6](#)).
- The closer the migrant's situation is to that of a state's own citizens, the greater is the justification that will be required if discriminating on the ground of nationality (see [introduction to this chapter](#)).

- Many rights under the EU Charter are restricted solely to citizens and those lawfully resident in an EU Member State (see [Section 9.1](#)).
- 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 concerning housing for children (see [Section 9.4](#)) and healthcare (see [Section 9.5](#)).
- Very weighty reasons would have to be put forward before the ECtHR could regard a difference of treatment based exclusively on the ground of nationality as compatible with the ECHR (see [Section 9.6](#)).

Economic rights under EU law

- Access to the labour market can be restricted: the degree to which third-country nationals have access to the labour market differs depending on which category they belong to (see [Section 9.1](#)).
- From the moment a person is working, whether lawfully or not, core labour rights have to be respected (see [Section 9.2](#)).
- Qualifying family members of EEA nationals have the same right to access the labour market as citizens of an EU Member State (see [Section 9.2.1](#)).
- Turkish nationals 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 9.2.4](#)).
- Asylum seekers whose claims have not yet been decided at first instance must be granted access to the labour market at the latest 9 months (1 year in Ireland) after their application for international protection (see [Section 9.2.7](#)).
- The Employers Sanctions Directive penalises those who employ migrants in an irregular situation and also provides migrants in abusive situations with the right to claim withheld pay and some other protections (see [Section 9.2.8](#)).

Education (see [Section 9.3](#))

- 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 9.4)

- The EU Charter recognises and respects the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources. Secondary EU law 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.
- EU Member States are required to provide asylum applicants 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 9.5)

- 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 with nationals, whereas asylum seekers and migrants in an irregular situation whose removal has been postponed are entitled to emergency healthcare and essential treatment of illness.
- The ECHR contains no specific provision concerning healthcare, but the ECtHR may examine complaints of this sort under Article 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 9.6)

- Under EU law, for those third-country nationals moving between EU 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 or not he or she has 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](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).

10

Persons with specific needs

EU	Issues covered	CoE
EU Charter, Article 24 (the rights of the child)	Unaccompanied children	ESC, Article 17 (right of children to social, legal and economic protection) ECTHR, <i>Rahimi v. Greece</i> , No. 8687/08, 2011 (unaccompanied child asylum seeker detained in adult detention centre)
Dublin Regulation, Regulation (EU) No. 604/2013, Article 8 CJEU, C-648/11, <i>MA, BT and DA</i> , 2013 (Dublin transfers) Reception Conditions Directive (2013/33/EU), Article 24 Asylum Procedures Directive (2013/32/EU), Article 25 Qualification Directive (2011/95/EU), Article 31 Return Directive (2008/115/EC), Article 10	<i>Reception and treatment</i>	
Asylum Procedures Directive (2013/32/EU), Article 25	<i>Age assessment</i>	Convention on Action against Trafficking in Human Beings, 2005, Article 10 (3) ECSR, <i>EUROCEF v. France</i> , Complaint No. 114/2015, 2018

EU	Issues covered	CoE
Anti-Trafficking Directive (2011/36/EU) Trafficking Victims Directive (Residence Permits) (2004/81/EC) Victims' Rights Directive (2012/29/EU)	Victims of trafficking	ECHR, Article 4 (prohibition of slavery and forced labour) ECtHR, <i>Rantsev v. Cyprus and Russia</i> , No. 25965/04, 2010 (authorities obliged to carry out investigation of their own motion) Convention on Action against Trafficking in Human Beings, 2005
Convention on the Rights of Persons with Disabilities (ratified by the EU) Reception Conditions Directive (2013/33/EU), Articles 19, 21 and 22 Asylum Procedures Directive (2013/32/EU), Article 14	Persons with disabilities	ESC, Article 15 (rights of persons with disabilities to independence, social integration and participation in the life of the community)
Reception Conditions Directive (2013/33/EU), Article 25 Asylum Procedures Directive (2013/32/EU), Article 24	Victims of torture	
Free Movement Directive (2004/38/EC), Article 13 (2) (c) Family Reunification Directive (2003/86/EC), Article 15 (3)	Victims of gender-based violence	ECtHR, <i>Opuz v. Turkey</i> , No. 33401/02, 2009 (domestic violence) ECtHR, <i>R.D. v. France</i> , No. 34648/14, 2016 (risk of ill-treatment in the event of expulsion) Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 2011

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, the specific situation of vulnerable persons needs to be taken into account, for example in reception arrangements or when depriving persons of their liberty. Vulnerable persons are listed in Article 21 of the [Reception Conditions](#)

Directive (2013/33/EU) and Article 3 (9) of the Return Directive (2008/115/EC). Both provisions 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’, but the list in the Reception Conditions Directive is longer and non-exhaustive. Pursuant to Article 22 of the Reception Conditions Directive, EU Member States must assess whether or not vulnerable persons have special reception needs. The Asylum Procedures Directive (2013/32/EU) requires EU Member States to assess if an asylum seeker is in need of special procedural guarantees and, if so, provide him or her with adequate support during the asylum procedure (Article 24).

10.1. Unaccompanied children

The term ‘unaccompanied minors’ is used to describe individuals under the age of 18 who enter the European territory without an adult responsible for them in the receiving state (see Qualification Directive (2011/95/EU), Article 2 (l)). 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 children, 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 children and not to abandon them when releasing them from detention ⁽⁵⁸²⁾.

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 the United States of America. The CRC lays out children’s human rights that are to be applied regardless of immigration status ⁽⁵⁸³⁾. 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

⁽⁵⁸²⁾ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011; ECtHR, *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No. 14165/16, 13 June 2019.

⁽⁵⁸³⁾ 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).

children. Unlike the [EU Charter](#) (Article 24 (2)), this principle is not explicitly stated in the ECHR, but it is regularly expressed in the ECtHR's case law. The principle also underpins specific provisions of EU legislation in relation to unaccompanied children.

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 children, 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 ⁽⁵⁸⁴⁾.

Example: In *EUROCEF v. France* ⁽⁵⁸⁵⁾, the ECSR found violations of Article 31 (2) of the ESC on account of shortcomings in the French shelter and assessment system for unaccompanied children. The ECSR also held that delay in appointing an ad hoc guardian for unaccompanied children, detaining such children in waiting areas and in hotels, using bone testing to determine their age and obstacles to accessing an effective remedy amounted to violating Article 17 (1) of the ESC.

10.1.1. Reception and treatment

Under EU law, specific provisions for unaccompanied children are contained in the asylum instruments as well as in the [Return Directive](#).

Before considering the treatment of unaccompanied children during the application process, it is important to be aware of which state is responsible for processing their asylum application. According to the [Dublin Regulation](#) (Regulation (EU) No. 604/2013), applications by unaccompanied children are to be examined by the EU Member State in which family members, siblings or relatives are legally present (Article 8). They must be provided with a representative (Article 6). Article 6 (3) gives guidance on how to assess the best interests of the child. Article 11 contains rules to avoid separation through the application of the Dublin Regulation if family members submit separate applications in one EU Member State. Finally, Article 16 deals with dependent persons (see [Section 5.2](#)).

⁽⁵⁸⁴⁾ ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, merits, 20 October 2009. The Committee held, inter alia, that unaccompanied children enjoy a right to shelter under Art. 31 (2) of the ESC.

⁽⁵⁸⁵⁾ ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, merits, 24 January 2018.

In the absence of a family member, a sibling or a relative, the Member State responsible is the state where the child has lodged his or her application for asylum provided that it is in the best interests of the child (Article 8).

Example: In *MA, BT and DA v. Secretary of State for the Home Department* ⁽⁵⁸⁶⁾, the CJEU had to determine which state was responsible in the case of an unaccompanied child who had submitted asylum applications in different EU Member States. The CJEU clarified that, in the absence of a family member legally present in a Member State, the state in which the child is physically present is responsible for examining such claim. In doing so, it relied on Article 24 (2) of the EU Charter, whereby, in all actions relating to children, the child's best interests are to be a primary consideration.

Unaccompanied children seeking asylum have to be provided with a representative as soon as they have applied for asylum (Article 24 of the [Reception Conditions Directive](#) and Article 25 of the [Asylum Procedures Directive](#)). The legislation does not, however, provide for the appointment of a representative from the moment an unaccompanied child is detected by the authorities. States can decide to appoint only a guardian or both a guardian and a legal representative to assist the asylum seeker in the asylum procedure as well as to ensure the child's well-being while the asylum application is processed. Under the Asylum Procedures Directive, a representative must be given an opportunity to discuss matters with the child before the asylum interview and accompany him or her to it.

Any interview with an unaccompanied child must be conducted by someone with knowledge of the special needs of this group (Asylum Procedures Directive, Article 25). There are restrictions on the processing of applications by unaccompanied children at the border, in transit zones or through accelerated procedures, which is allowed only in the cases listed in Article 25 (6). In such cases, the directive allows states not to grant an automatic right to stay to unaccompanied children during the review of a negative decision, but only when the conditions listed in Article 46 (7) of the directive are met. These include, for example, the necessary language and legal assistance and at least 1 week to ask a court or tribunal for the right to remain in the territory pending the outcome of the appeal.

⁽⁵⁸⁶⁾ CJEU, C-648/11, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*, 6 June 2013.

The Reception Conditions Directive (Article 24) provides guidance on the type of accommodation to be provided to unaccompanied children, which must be with adult relatives, with a foster family, in reception centres with special provisions for children or in other suitable accommodation. Detention of unaccompanied children is not completely prohibited but is only allowed in exceptional circumstances and never in prison accommodation (Article 11 (3) of the recast directive). The directive also notes that applicants aged 16 and over, but under the age of 18 and therefore still children, may be placed in accommodation centres for adult asylum seekers, but only if it is in the best interests of the child (this condition is not applicable to Ireland, as it was introduced with the 2013 recast directive).

Article 24 of the Reception Conditions Directive further specifies that as far as possible siblings must be kept together, taking into account the best interests of the child concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied children must be kept to a minimum. Furthermore, the directive stipulates that EU Member States must try to trace the family members of unaccompanied children as soon as possible with due regard for their safety. Finally, it requires that individuals working with unaccompanied children must receive appropriate training.

The revised [Qualification Directive](#) includes specific provisions for unaccompanied children who are granted refugee or subsidiary protection status. EU Member States are required to ensure representation of the unaccompanied child 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 children, or any other appropriate representative (Article 31).

Article 31 of the Qualification Directive also requires EU Member States to ensure that unaccompanied children granted asylum are placed with adult relatives, with a foster family, in reception centres with special provisions for children or in other suitable accommodation. The child's views on the type of accommodation must be taken into account in accordance with the child'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 children.

Under Article 10 of the Return Directive, when removing an unaccompanied child from a EU Member State's territory, the authorities of that EU 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 children, 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 departure granted, children's special needs must be taken into account (Article 14) ⁽⁵⁸⁷⁾.

Under the ECHR, the ECtHR has held that in cases concerning foreign children, whether accompanied or unaccompanied, the child's situation of extreme vulnerability is the decisive factor. This factor takes precedence over considerations relating to his or her status as an irregular migrant. The particularly serious conditions in which the child may find him- or herself and any failure of the national authorities to comply with an order to protect the applicant, who is particularly vulnerable because of his or her age, may constitute degrading treatment and breach Article 3 of the Convention ⁽⁵⁸⁸⁾.

Example: In *Rahimi v. Greece* ⁽⁵⁸⁹⁾, the applicant was an unaccompanied Afghan child 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. The Court held that respecting the best interests of the child requires that other placement options than detention be explored for unaccompanied children.

10.1.2. Age assessment

Under EU law, the [Asylum Procedures Directive](#) allows EU Member States to use medical examinations to determine the age of unaccompanied children within the context of their asylum application when they have doubts about an applicant's age (Article 25). In cases where medical examinations are used, EU Member States should ensure that unaccompanied children are informed beforehand of such an assessment and that their consent is sought. The age assessment issue has become

⁽⁵⁸⁷⁾ For more information, see FRA (2019), *Returning Unaccompanied Children: Fundamental rights considerations*, Publications Office, Luxembourg, September 2019.

⁽⁵⁸⁸⁾ ECtHR, *Khan v. France*, No. 12267/16, 28 February 2019; ECtHR, *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No. 14165/16, 13 June 2019.

⁽⁵⁸⁹⁾ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011. See also ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13, 22 November 2016, and ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 65–67.

increasingly contentious throughout Europe. Since children 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 if 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. The least invasive medical examination must be used. Examinations must be carried out by qualified medical staff and respect the applicant's dignity. The directive does not define further what types of medical examinations are appropriate or adequate, and a wide variety of techniques are applied throughout Europe ⁽⁵⁹⁰⁾.

Under the ECHR, the ECtHR has held that an unreasonably long age assessment examination of persons close to adulthood cannot be justified and raises serious doubts about the authorities' good faith, in particular when the member state declares a low number of alleged children in migration per year ⁽⁵⁹¹⁾.

Under other CoE instruments, Article 10 (3) of the [Convention on Action against Trafficking in Human Beings](#) (Anti-Trafficking Convention) ⁽⁵⁹²⁾ also envisages an age assessment when the age of the victim is uncertain. As stressed by the Council of Europe Group of Experts on Action against Human Trafficking (GRETA), monitoring the implementation of the Anti-Trafficking Convention, age assessment must be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual. Such assessments should be conducted in a safe, child- and gender-sensitive manner, with due respect for human dignity. The benefit of the doubt should be applied in such a manner that, in case of uncertainty, the individual will be considered a child ⁽⁵⁹³⁾.

The ESC, under Article 17, establishes the right of children and young persons to social, legal and economic protection.

⁽⁵⁹⁰⁾ See also Council of Europe (2017), *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, Council of Europe, Strasbourg; and EASO (2018), *Practical Guide on Age Assessment*, Publications Office, Luxembourg.

⁽⁵⁹¹⁾ ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13, 22 November 2016.

⁽⁵⁹²⁾ Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197.

⁽⁵⁹³⁾ Council of Europe (2016), *5th General Report on GRETA's Activities: Covering the period from 1 October 2014 to 31 December 2015*, Council of Europe, Strasbourg; UNHCR (1997), 'Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum'.

Example: In *EUROCEF v. France* ⁽⁵⁹⁴⁾, the ECSR analysed the use of bone testing to determinate the age of unaccompanied children in France and found a violation of Article 17 (1) of the ESC. In particular, the ECSR considered the use of bone testing inappropriate and unreliable given the overreliance on bone tests by the French authorities, as documented in national and international sources.

10.2. Victims of trafficking in human beings

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 irregular entry of a person into a state where the person is not a national or a permanent resident ⁽⁵⁹⁵⁾.

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 or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’ ⁽⁵⁹⁶⁾. There is an element of compulsion and intimidation involved in trafficking that is not involved in smuggling.

Under the ECHR, the ECtHR has held that trafficking falls within the scope of Article 4 of the ECHR, which prohibits slavery and forced labour ⁽⁵⁹⁷⁾. 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 ⁽⁵⁹⁸⁾. For more information see also [Section 3.3](#).

⁽⁵⁹⁴⁾ ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, merits, 24 January 2018.

⁽⁵⁹⁵⁾ UN Protocol against the Smuggling of Migrants by Land, Air and Sea supplementing the UN Convention against Transnational Crime, 2000, Art. 3.

⁽⁵⁹⁶⁾ Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), Art. 4; Directive 2011/36/EU, OJ 2011 L 101/1, Art. 2 (1).

⁽⁵⁹⁷⁾ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 282–286.

⁽⁵⁹⁸⁾ ECtHR, *L.E. v. Greece*, No. 71545/12, 21 January 2016; ECtHR, *Chowdury and Others v. Greece*, No. 21884/15, 30 March 2017; *L.O. v. France* (dec.), No. 4455/14, 26 May 2015; ECtHR, *V.F. v. France* (dec.), No. 7196/10, 29 November 2011.

Example: In *Rantsev v. Cyprus and Russia* (⁵⁹⁹), the ECtHR held that it was important that a victim of trafficking should not need to request that they be identified as victims of trafficking or that their trafficking be investigated. The authorities are obliged to take the initiative themselves when such criminal activity is suspected.

The [Anti-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 States 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 in 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 [Anti-Trafficking Directive \(2011/36/EU\)](#) defines trafficking in the same terms as the Council of Europe Anti-Trafficking Convention. Under the directive, EU 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 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 Anti-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 irregularly 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

⁽⁵⁹⁹⁾ ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 288.

sufficient financial resources. Victims need to be treated in a particular way during the procedure to prevent trauma and re-traumatisation (Articles 12 and 15). Specific guarantees apply to child victims of trafficking (Articles 13–16). If victims of human trafficking apply for asylum, their specific reception needs must be assessed and appropriate support provided ([Reception Conditions Directive](#), Articles 21 and 22).

Article 9 of the [Victims' Rights Directive \(2012/29/EU\)](#) requires EU Member States to provide support services to victims of crime, including victims of trafficking in human beings. These include relevant information and advice as well as emotional and, where available, psychological support ⁽⁶⁰⁰⁾.

Both EU and CoE law are concerned with the vulnerability and legal status of trafficking victims once trafficking has been detected. The [Trafficking Victims Directive \(Residence Permits\) \(2004/81/EC\)](#) requires EU Member States to issue a temporary residence permit to victims of trafficking who cooperate with the authorities. Under Article 14 of the Anti-Trafficking Convention, trafficking victims may be issued with a renewable residence permit if their personal situation so requires or if they need to stay in the country in order to cooperate with the authorities in the investigation of the trafficking offence. This issue has been dealt with in [Section 3.3](#).

10.3. 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 [UN Convention on the Rights of Persons with Disabilities \(CRPD\)](#) ⁽⁶⁰¹⁾ 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'.

⁽⁶⁰⁰⁾ See also FRA (2016), *Handbook on European Law relating to access to justice*, Publications Office, Luxembourg.

⁽⁶⁰¹⁾ United Nations (2006), Treaty Series vol. 2515, pp. 3–192.

Under the ECHR, there is no definition of disability, but the ECtHR has held that Article 14 protects against discrimination based on disability ⁽⁶⁰²⁾. The ESCR follows the same approach when interpreting Article 15 of the ESC (right of persons with disabilities), adding that equality of treatment between persons with disabilities, irrespective of their nationality, should exist not only in law but also in practice ⁽⁶⁰³⁾.

Under EU law, the European Union has ratified the CRPD and is therefore bound by the Convention, which is part of the EU legal order. Article 21 of the [Reception Conditions Directive](#) states that EU Member States must take into account the specific situation of vulnerable persons, including persons with disabilities, when implementing the provisions related to reception conditions. Their specific reception needs must be assessed and appropriate support provided (Articles 21 and 22) including mental healthcare, where needed (Article 19). The [Return Directive](#) also includes persons with disabilities when defining vulnerable persons (Article 3 (9)), but there are no particular provisions in relation to them. There is no absolute bar to detaining disabled asylum applicants or persons in return procedures, but, if they are detained, particular attention must be paid to them (Article 16 (3)). In cases of asylum seekers, the Reception Conditions Directive (Article 11) requires that their health, including their mental health, shall be of primary concern to national authorities.

Under Article 14 (2) (b) of the [Asylum Procedures Directive](#), the personal interview may be omitted if applicants are unfit or unable to be interviewed owing to circumstances that are long-lasting and beyond their control. This is especially relevant to those with mental health issues, who may not be able to participate effectively in the interview.

10.4. Victims of torture

As stated in the introduction to this chapter, victims of torture are a group of vulnerable people who have specific safeguards set out in relation to their treatment.

⁽⁶⁰²⁾ ECtHR, *Glor v. Switzerland*, No. 13444/04, 30 April 2009; ECtHR, *Pretty v. the United Kingdom*, No. 2346/02, 29 April 2002; ECtHR, *Koua Poirrez v. France*, No. 40892/98, 30 September 2003.

⁽⁶⁰³⁾ ECSR, *Conclusions XIV-2 1998, Statement of interpretation on Art. 15.*

Under EU law, Article 25 of the [Reception Conditions Directive](#) contains a duty for EU Member States to 'ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damages caused by such acts, in particular access to appropriate medical and psychological treatment or care'. Staff working with them must receive appropriate training.

Difficulties in recounting the trauma suffered may cause problems with the personal asylum interview. Therefore, persons conducting the interview must be knowledgeable about problems that may adversely affect the applicant's ability to be interviewed, in particular indications of torture in the past (Articles 4 (3) and 14 of the [Asylum Procedures Directive](#)). The directive also requires EU Member States to provide applicants who have experienced torture, rape and other serious forms of violence with adequate support during the asylum procedure, if this is required for a fair and efficient asylum procedure. Such applicants are also to be exempted from accelerated and border procedures, where adequate support cannot be provided (Article 24). Additional guarantees apply in cases where appeals against a negative first-instance decision do not have automatic suspensive effect. These include, for example, that necessary language and legal assistance be provided. In addition, the applicant with a negative first-instance decision must have at least 1 week to request a court or tribunal to decide on the right to remain in the territory pending the outcome of the appeal (Article 24 read in conjunction with Article 46 (7)). The provisions on applicants in need of special procedural safeguards were introduced with the 2013 recast of the directive and are therefore not applicable to Ireland.

For those persons in return procedures, if removal is postponed or a period of voluntary departure granted, the special needs of victims of torture and other serious forms of violence must be taken into account ([Return Directive](#), Article 14 (1) (d)).

The [Victims' Rights Directive \(2012/29/EU\)](#) contains a broad definition of the term. Under Article 2 (1) (a), a victim is 'a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence'. The directive thus also covers victims of torture. Victims also include family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death. The status of victim is not conditional on the victim's residence status, citizenship or nationality (recital 10).

Under international law, the UN Committee against Torture published updated standards on support and protection for torture victims in the context of migration in 2018 ⁽⁶⁰⁴⁾. They established key elements in ensuring that torture victims receive the necessary protection and support.

10.5. Victims of gender-based violence

A particular category of victims of serious crimes is individuals who have been subjected to domestic violence. This may also occur in the domestic work environment ⁽⁶⁰⁵⁾.

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 ⁽⁶⁰⁶⁾. The Court has also examined a number of cases where allegations had been made of various forms of gender-related persecution as a shield against expulsion ⁽⁶⁰⁷⁾.

In 2011, the CoE adopted the [Convention on Preventing and Combating Violence Against Women and Domestic Violence \(Istanbul Convention\)](#) ⁽⁶⁰⁸⁾. It is the first legally binding instrument in force in the world creating a comprehensive legal framework to prevent violence, to protect victims and to end the impunity of perpetrators. The Istanbul Convention introduces the possibility of granting migrant women an autonomous residence permit if their residence status depends on their abusive spouse or partner (Article 59), and requires states to ensure that gender-based violence against women may be recognised as a form of persecution within

⁽⁶⁰⁴⁾ UN Committee against Torture, *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*.

⁽⁶⁰⁵⁾ FRA has documented the risks that migrants in an irregular situation typically encounter when they are employed in the domestic work sector; see FRA (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Publications Office, Luxembourg, and FRA (2018), *Out of Sight: Migrant women exploited in domestic work*, Publications Office, Luxembourg.

⁽⁶⁰⁶⁾ ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, para. 160.

⁽⁶⁰⁷⁾ ECtHR, *M.M.R. v. the Netherlands* (dec.), No. 64047/10, 24 May 2016; ECtHR, *R.D. v. France*, No. 34648/14, 16 June 2016; ECtHR, *A.A. and Others v. Sweden*, No. 14499/09, 28 June 2012; ECtHR, *Sow v. Belgium*, No. 27081/13, 19 January 2016.

⁽⁶⁰⁸⁾ Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011, CETS No. 210.

the meaning of the 1951 Geneva Convention (Article 60). It also reiterates the obligation to respect the principle of non-*refoulement* including for victims of violence against women (Article 61) ⁽⁶⁰⁹⁾.

Example: In its decision *U-III-557/2019* ⁽⁶¹⁰⁾, the Croatian Constitutional Court accepted a complaint by a rejected asylum-seeking woman from Iraq. In support of her request, the applicant had initially alleged only warfare in her home country, but at a later stage she explained that she was a victim of domestic violence and that, if returned to Iraq, she risked further ill-treatment or death at the hands of her former husband or her brother, one of whom would necessarily be considered her guardian. Taking into consideration the circumstances of the case as a whole, including her high degree of traumatisation and vulnerability, the Constitutional Court accepted that the applicant had been too ashamed and too afraid to immediately rely on the issue of domestic violence in her initial asylum interview, because it had been conducted by two men. In the new proceedings, the Constitutional Court instructed the authorities to allow the applicant to prove her personal situation and individualised risk in line with up-to-date facts on the situation of women victims of domestic violence in Iraq and their ability to relocate elsewhere within the country.

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 the event 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.

⁽⁶⁰⁹⁾ Council of Europe (2019), *Gender-Based Asylum Claims and Non-refoulement: Articles 60 and 61 of the Istanbul Convention*, Council of Europe, Strasbourg.

⁽⁶¹⁰⁾ Croatia, Constitutional Court (*Ustavni sud Republike Hrvatske*), *Decision No. U-III-557/2019*, 11 September 2019.

Key points

- The best interests of the child must be a primary consideration in all actions concerning children (see [Section 10.1](#)).
- Under EU law, unaccompanied children seeking asylum have the right to be assisted by a representative (see [Section 10.1.1](#)).
- Under EU law, the Asylum Procedures Directive allows EU Member States to use medical examinations to determine the age of unaccompanied children seeking asylum, if there are doubts about whether they are children or not, but the EU Member States must respect certain safeguards (see [Section 10.1.2](#)).
- Under both 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 10.2](#)).
- Both the ECHR and EU law protect against discrimination based on disability. Persons with disabilities are also considered vulnerable persons under EU migration law, and their specific needs, including those concerning their mental health, must be taken into account in asylum and return procedures (see [Section 10.3](#)).
- Under EU law, victims of torture, rape and other serious crimes are entitled to special procedural safeguards, if these are needed for a fair and efficient asylum procedure (see [Sections 10.4](#) and [10.5](#)).
- 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 10.1.1](#) and [10.5](#)).

Further case law and reading:

To access further case law, please consult the [guidelines](#) of this handbook. Additional materials relating to the issues covered in this chapter can be found in the [Further reading section](#).



Further reading

The following selection of references includes publications by international organisations, academics and NGOs as well as by the ECtHR and FRA. The list of further reading has been grouped in nine broad categories (general literature, asylum and refugee law, migrants in an irregular situation and return, detention, free movement in the EU, children, persons with disabilities, border management and large-scale EU IT systems, 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 various journals, such as the *European Journal of Migration and Law*, the *International Journal of Refugee Law* and the *Refugee Survey Quarterly*.

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Case law of the Court of Justice of the European Union

<i>A. v. Swedish Migration Agency</i> , C-404/17, 25 July 2018	125
<i>A, B and C v. Staatssecretaris van Veiligheid en Justitie</i> [GC], C-148/13 to C-150/13, 2 December 2014.....	145
<i>A and S v. Staatssecretaris van Veiligheid en Justitie</i> , C-550/16, 12 April 2018.....	185
<i>A.S. v. Slovenia</i> [GC], C-490/16, 26 July 2017.....	142, 158
<i>Abdon Vanbraekel and Others v. Alliance nationale des mutualités chrétiennes</i> (ANMC), C-368/98, 12 July 2001.....	271
<i>Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides</i> , C-285/12, 30 January 2014.....	111
<i>Abubacarr Jawo v. Bundesrepublik Deutschland</i> [GC], C-163/17, 19 March 2019.....	142, 157
<i>Achughbajian v. Préfet du Val-de-Marne</i> [GC], C-329/11, 6 December 2011.....	195, 208, 209, 212
<i>Adalo Bero v. Regierungspräsidium Kassel and Ettayebi Bouzalmate v.</i> <i>Kriesverwaltung Kleve</i> [GC], Joined Cases C-473/13 and C-514/13, 17 July 2014..	228
<i>Ahmad Shah Ayubi v. Bezirkshauptmannschaft Linz-Land</i> , C-713/17, 21 November 2018	245, 276
<i>Aissatou Diatta v. Land Berlin</i> , C-267/83, 13 February 1985	188
<i>Alexander Hengartner and Rudolf Gasser v. Landesregierung Vorarlberg</i> , C-70/09, 15 July 2010.....	251
<i>Altun v. Stadt Böblingen</i> , C-337/07, 18 December 2008	95
<i>Andrea Francovich v. Italian Republic</i> , C-479/93, 9 November 1995.....	24

<i>Atiqullah Adil v. Minister voor Immigratie, Integratie en Asiel</i> , C-278/12 PPU, 19 July 2012	40
<i>Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland</i> [GC], Joined Cases C-175/08, C-176/08, C-178/08, C-179/08, 2 March 2010.....	102, 106, 121, 129
<i>Aziz Melki and Selim Abdeli</i> [GC], Joined Cases C-188/10 and C-189/10, 22 June 2010	40
<i>Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite</i> , C-56/17, 4 October 2018	109
<i>Bashar Ibrahim (C-297/17), Mahmud Ibrahim and Others (C-318/17), Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji (C-319/17) v. Bundesrepublik Deutschland, Bundesrepublik Deutschland v. Taus Magamadov (C-438/17)</i> [GC], Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, 19 March 2019.....	157
<i>Bashir Mohamed Ali Mahdi</i> , C-146/14 PPU, 5 June 2014.....	202, 217
<i>Baumbast and R v. Secretary of State for the Home Department</i> , C-413/99, 17 September 2002.....	262
<i>Borowitz v. Bundesversicherungsanstalt für Angestellte</i> , C-21/87, 5 July 1988.....	275
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<i>Bundesrepublik Deutschland v. Touring tours and Travel GmbH and Sociedad de Transportes SA</i> , Joined Cases C-412/17 and C-474/17, 13 December 2018	41
<i>Bundesrepublik Deutschland v. B and D</i> [GC], Joined Cases C-57/09 and C-101/09, 9 November 2010	102, 128
<i>Bundesrepublik Deutschland v. Kaveh Puid</i> [GC], C-4/11, 14 November 2013.....	156
<i>Bundesrepublik Deutschland v. Y and Z</i> [GC], Joined Cases C-71/11 and C-99/11, 5 September 2012	109
<i>C.K. and Others v. Slovenia</i> , C-578/16, 16 February 2017	142, 156
<i>Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida</i> [GC], C-562/13, 18 December 2014.....	73, 134, 142
<i>Chuck v. Raad van Bestuur van de Sociale Verzekeringsbank</i> , C-331/06, 3 April 2008.....	275
<i>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</i> , C-179/11, 27 September 2012.....	268
<i>Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani</i> [GC], C-573/14, 31 January 2017	102, 128
<i>Commission of the European Communities v. Kingdom of Spain</i> [GC], C-503/03, 31 January 2006	179

<i>Confederazione Generale Italiana del Lavoro (CGIL), Istituto Nazionale Confederale Assistenza (INCA) v. Presidenza del Consiglio dei Ministri, Ministero dell'Interno, Ministero dell'Economia e delle Finanze, C-309/14, 2 September 2015</i>	91
<i>Criminal Proceedings v. Abdoul Khadre Mbaye, C-522/11, 21 March 2013</i>	208
<i>Criminal proceedings against Artur Leymann and Aleksei Pustovarov, C-388/08 PPU, 1 December 2008</i>	144
<i>Criminal proceedings against Gjoko Filev and Adnan Osmani, C-297/12, 19 September 2013</i>	37, 208
<i>Criminal proceedings v. Md Sagor, C-430/11, 6 December 2012</i>	208
<i>Criminal proceedings against Mossa Ouhrami, C-225/16, 26 July 2017</i>	37
<i>Criminal proceedings v. Skerdjan Celaj, C-290/14, 1 October 2015</i>	208
<i>Deborah Lawrie-Blum v. Land Baden-Württemberg, C-66/85, 3 July 1986</i>	252
<i>Deutscher Handballbund v. Kolpak, C-438/00, 8 May 2003</i>	257
<i>Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others [GC], Joined Cases C-293/12 and C-594/12, 8 April 2014</i>	50, 65, 71
<i>Dirk Ruffert v. Land Niedersachsen, C-346/06, 3 April 2008</i>	252
<i>El Yassini v. Secretary of State for the Home Department, C-416/96, 2 March 1999</i> ...	257
<i>Eran Abatay and Others and Nadi Sahin v. Bundesanstalt für Arbeit, Joined Cases C-317/01 and C-369/01, 21 October 2003</i>	93
<i>Essent Energie Productie BV v. Minister van Sociale Zaken en Werkgelegenheid, C-91/13, 11 September 2014</i>	93
<i>ET Agroconsulting-04-Velko Stoyanov v. Izpalnitelen direktor na Darzhaven fond 'Zemedelie'-Razplashtatelna agentsia, C-93/12, 27 June 2013</i>	73
<i>European Commission v. Kingdom of the Netherlands, C-508/10, 26 April 2012</i>	91
<i>European Commission v. Kingdom of Spain, C-211/08, 15 June 2010</i>	271
<i>European Parliament v. Council of the European Union [GC], C-540/03, 27 June 2006</i>	183
<i>FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2020</i>	125, 160, 199, 204, 212, 218, 223, 225
<i>Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, 22 October 1987</i>	24
<i>Francovich and Bonifaci and Others v. Italian Republic, Joined Cases C-6/90 and C-9/90, 19 November 1991</i>	24, 230

<i>G. B. C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen</i> , Joined Cases C-389/87 and 390/87, 15 March 1989	262
<i>George Karim v. Migrationsverket</i> [GC], C-155/15, June 2016.....	154
<i>Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden- Württemberg</i> , Joined Cases C-482/01 and C-493/01, 29 April 2004.....	136, 138
<i>Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)</i> [GC], C-34/09, 8 March 2011	137, 168, 176
<i>H. T. v. Land Baden-Württemberg</i> , C-373/13, 24 June 2015.....	128
<i>Hassen El Dridi, alias Soufi Karim</i> , C-61/11 PPU, 28 April 2011	142, 195, 202, 208, 212
<i>Hava Genc v. Land Berlin</i> , C-14/09, 4 February 2010.....	254
<i>Hristo Gaydarov v. Director na Glavna direksia 'Ohranitelna politisia' pri Ministerstvo na vateshnite raboti</i> , C-430/10, 17 November 2011	136
<i>Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol</i> [GC], C-265/03, 12 April 2005	259
<i>Ismail Derin v. Landkreis Darmstadt-Dieburg</i> , C-325/05, 18 July 2007	255
<i>Janko Rottman v. Freistaat Bayern</i> [GC], C-135/08, 2 March 2010.....	80, 97
<i>J.N. v. Staatssecretaris voor Veiligheid en Justitie</i> [GC], C-601/15 PPU, 15 February 2016.....	196, 204, 205
<i>K. v. Bundesasylamt</i> [GC], C-245/11, 6 November 2012	142, 155
<i>K. v. Staatssecretaris van Veiligheid en Justitie and H. F. v. Belgische Staat</i> [GC], Joined cases C-331/16 and 366/16, 2 May 2018.....	136
<i>K. v. Staatssecretaris van Veiligheid en Justitie</i> , C-18/16, 14 September 2017.....	203
<i>K.A. and Others v. Belgische Staat</i> [GC], C-82/16, 8 May 2018	178
<i>Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities</i> [GC], Joined Cases C-402/05 P and C-415/05 P, 3 September 2008.....	24
<i>Kazim Kus v. Landeshauptstadt Wiesbaden</i> , C-237/91, 16 December 1992.....	257
<i>Kerly del Rosario Martinez Silva v. Istituto nazionale della previdenza sociale (INPS) and Comune di Genoa</i> , C-449/16, 21 June 2017	247
<i>Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl</i> [GC], C-646/16, 26 July 2017	142, 158
<i>Kreis Warendorf v. Ibrahim Alo & Amira Osso v. Region Hannover</i> [GC], Joined Cases C-443/14 and C-444/14, 1 March 2016	245, 276
<i>Kreshnik Ymeraga and Others v. Ministre du Travail, de l'Emploi et de l'Immigration</i> , C-87/12, 8 May 2013	137

<i>Land Baden-Württemberg v. Panagiotis Tsakouridis</i> [GC], C-145/09, 23 November 2010	136
<i>Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1 Byggettan and Svenska Elektrikerförbundet</i> [GC], C-341/05, 18 December 2007	252
<i>Leyla Ecem Demirkan v. Bundesrepublik Deutschland</i> [GC], C-221/11, 24 September 2013.....	93
<i>LH v. Bevándorlási és Menekültügyi Hivatal</i> , C-564/18, 19 March 2020.....	125
<i>Liselotte Hauer v. Land Rheinland-Pfalz</i> , Case 44/79, 13 December 1979.....	25
<i>M v. Ministerstvo vnitra; X and X v. Commissaire général aux réfugiés et aux apatrides</i> [GC], Joined Cases C-391/16, C-77/17 and C-78/17, 14 May 2019.....	106, 130
<i>M. G. and N. R. v. Staatssecretaris van Veiligheid en Justitie</i> , C-383/13, 10 September 2013.....	226
<i>M. M. v. Minister for Justice, Equality and Law Reform and Others</i> , C- 277/11, 22 November 2012.....	144
<i>M.A. and Others</i> , C-661/17, 23 January 2019.....	155
<i>Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department</i> [GC], C-480/08, 23 February 2010	263
<i>Marjan Noorzia v. Bundesministerin für Inneres</i> , C-338/13, 17 July 2014.....	168, 183
<i>Mary Carpenter v. Secretary of State for the Home Department</i> , C-60/00, 11 July 2002.....	167, 176
<i>Maximilian Schrems v. Data Protection Commissioner</i> [GC], C-362/14, 6 October 2015.....	74
<i>Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie</i> , C-534/11, 30 May 2013.....	203, 204
<i>Mehmet Soysal and Ibrahim Savatli v. Bundesrepublik Deutschland</i> , C-228/06, 19 February 2009.....	94
<i>Mehrdad Ghezlbash v. Staatssecretaris van Veiligheid en Justitie</i> [GC], C-63/15, 7 June 2016.....	154
<i>Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie</i> [GC], C-465/07, 17 February 2009.....	102, 111
<i>Metock and Others v. Minister for Equality, Justice and Law Reform</i> [GC], C-127/08, 25 July 2008	167, 175, 183
<i>Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria</i> , C-369/90, 7 July 1992.....	97
<i>Migrationsverket v. Nurije Kastrati and Others</i> , C-620/10, 3 May 2012	154
<i>Mimoun Khachab v. Subdelegación del Gobierno en Álava</i> , C-558/14, 21 April 2016...	179

<i>Minister van Buitenlandse Zaken v. K. and A.</i> , C-153/14, 9 July 2015	180
<i>Minister voor Immigratie en Asiel v. X, Y and Z v. Minister voor Immigratie en Asiel</i> , Joined Cases C-199/12, C-200/12 and C-201/12, 7 November 2013	109
<i>Ministerio Fiscal v. VL</i> , C-36/20 PPU, 25 June 2020	44, 204
<i>Mohamad Zakaria</i> , C-23/12, 17 January 2013.....	39
<i>Mohamed Ali Ben Alaya v. Bundesrepublik Deutschland</i> , C-491/13, 10 September 2014	254
<i>Mohamed Gattoussi v. Stadt Rüsselsheim</i> , C-97/05, 14 December 2006.....	258
<i>Mohamed M'Bodj v. État Belge</i> [GC], C-542/13, 18 December 2014	102, 110
<i>Mohammed Bilali v. Bundesamt für Fremdenwesen und Asyl</i> , C-720/17, 23 May 2019.....	106
<i>Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal</i> [GC], C-364/11, 19 December 2012	122
<i>Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State</i> , C-459/99, 25 July 2002.....	176, 179
<i>MP v. Secretary of State for the Home Department</i> [GC], C-353/16, 24 April 2018.....	110
<i>Murat Dereci and Others v. Bundesministerium für Inneres</i> [GC], C-256/11, 15 November 2011.....	137, 168, 177
<i>Murat Polat v. Stadt Rüsselsheim</i> , C-349/06, 4 October 2007.....	103, 138
<i>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</i> [GC], Joined Cases C-411/10 and C-493/10, 21 December 2011	25, 102, 126, 142, 156, 159, 268
<i>Naima Dogan v. Bundesrepublik Deutschland</i> , C-138/13, 10 July 2014.....	255
<i>Natthaya Dülger v. Wetteraukreis</i> , C-451/11, 19 July 2012	95, 190
<i>Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal</i> [GC], C-31/09, 17 June 2010	106, 121
<i>O. and S. v. Maahanmuuttovirasto and Maahanmuuttovirasto v. L.</i> , Joined Cases C-356/11 and C-357/11, 6 December 2012.....	177
<i>Office National de l'emploi v. Bahia Kziber</i> , C-18/90, 31 January 1991	257
<i>Oguz v. Secretary of State for the Home Department</i> , C-186/10, 21 July 2011.....	93, 94
<i>Ömer Nazli, Caglar Nazli and Melike Nazli v. Stadt Nürnberg</i> , C-340/97, 10 February 2000.....	138
<i>P. and S. v. Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen</i> , C-579/13, 3 July 2015	91
<i>P.I. v. Oberbürgermeisterin der Stadt Remscheid</i> [GC], C-348/09, 22 May 2012	136

<i>Petar Aladzhev v. Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti</i> , C-434/10, 17 November 2011	136
<i>Pilar Allué and Carmel Mary Coonan and Others v. Università degli studi di Venezia and Università degli studi di Parma</i> , Joined Cases C-259/91, C-331/91 and C-332/91, 2 August 1993	252
<i>Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others</i> , C-528/15, 15 March 2017	204
<i>Prefet des Pyrenees-Orientales v. Abdelaziz Arib</i> [GC], C-444/17, 19 March 2019	41
<i>Productores de Música de España (Promusicae) v. Telefónica de España SAU</i> , Case C-275/06, 29 January 2008	63
<i>Rahmanian Koushaki v. Bundesrepublik Deutschland</i> [GC], C-84/12, 19 December 2013	34
<i>Recep Tetik v. Land Berlin</i> , C-171/95, 23 January 1997	95, 254
<i>Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne</i> [GC], C-673/16, 5 June 2018	167, 174
<i>Rhimou Chakroun v. Minister van Buitenlandse Zaken</i> , C-578/08, 4 March 2010	90, 168, 184
<i>Roland Rutli v. Ministre de l'intérieur</i> , C-36/75, 28 October 1985	138
<i>Said Shamilovich Kadzoev (Huchbarov)</i> [GC], C-357/09 PPU, 30 November 2009	80, 88, 196, 203, 217, 218
<i>Secretary of State for the Home Department v. Rahman and Others</i> [GC], C-83/11, 5 September 2012	175, 183
<i>Seda Küçükdeveci v. Swedex GmbH & Co. KG</i> [GC], C-555/07, 19 January 2010	74
<i>Sélina Affum v. Préfet du Pas-de-Calais</i> [GC], C-47/15, 7 June 2016	142, 195, 209
<i>Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others</i> [GC], C-571/10, 24 April 2012	267
<i>Shajin Ahmed v. Bevándorlási és Menekültügyi Hivatal</i> , C-369/17, 13 September 2018	102, 128
<i>Shamim Tahir v. Ministero dell'Interno, Questura di Verona</i> , C-469/13, 17 July 2014	92
<i>Shirley McCarthy v. Secretary of State for the Home Department</i> , C-434/09, 5 May 2011	177
<i>Soufiane El Hassani v. Minister Spraw Zagranicznych</i> , C-403/16, 13 December 2017	35
<i>Staatssecretaris van Justitie en Veiligheid v. A and Others</i> , C-70/18, 3 October 2019	94
<i>Staatssecretaris van Justitie v. Mangat Singh</i> , C-502/10, 18 October 2012	90

<i>Staatssecretaris van Justitie v. Tayfun Kahveci and Osman Inan</i> , Joined Cases C-7/10 and C-9/10, 29 March 2012.....	95
<i>State of Netherlands v. Ann Florence Reed</i> , C-59/85, 17 April 1986.....	167, 179
<i>Süleyman Eker v. Land Baden-Württemberg</i> , C-386/95, 29 May 1997	254
<i>Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v. Oskar Shomodi</i> , C-254/11, 21 March 2013.....	42
<i>Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others</i> [GC], Joined Cases C-203/15 and C-698/15, 21 December 2016.....	51, 74
<i>Telefonica SA v. European Commission</i> [GC], C-274/12 P, 19 December 2013.....	24
<i>The Queen v. Secretary of State for the Home Department, ex parte Abdulnasir Savas</i> , C-37/98, 11 May 2000.....	93
<i>The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur, interveners: Justice</i> , C-192/99, 20 February 2001	97
<i>The Queen v. IAT and Surinder Singh, ex parte Secretary of State for the Home Department</i> , C-370/90, 7 July 1992.....	176
<i>The Queen, on the application of MA and Others v. Secretary of State for the Home Department</i> , C-648/11, 6 June 2013	281, 285
<i>The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health</i> [GC], C-372/04, 16 May 2006.....	271
<i>The Queen, Veli Tum and Mehmet Dari v. Secretary of State for the Home Department</i> , C-16/05, 20 September 2007.....	93, 94
<i>Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik</i> [GC], C-474/13, 17 July 2014.....	228
<i>Tjebbes and Others v. Minister van Buitenlandse Zaken</i> [GC], C-221/17, 12 March 2019	80, 98
<i>Toufik Lounes v. Secretary of State for the Home Department</i> [GC], C-165/16, 14 November 2017.....	177
<i>Unibet (London) Ltd, Unibet (International) Ltd v. Justitiekanslern</i> [GC], C-432/05, 13 March 2007	73
<i>United Kingdom of Great Britain and Northern Ireland v. Council of the European Union</i> [GC], C-482/08, 26 October 2010	64
<i>Wilber López Pastuzano v. Delegación del Gobierno en Navarra</i> , C-636/16, 7 December 2017.....	136
<i>X. and X. v. État belge</i> [GC], C-638/16 PPU, 7 March 2017.....	34
<i>X v. Belgische Staat</i> , C-302/18, 3 October 2019.....	80, 90

<i>Yoshikazu Iida v. Stadt Ulm</i> , C-40/11, 8 November 2012	137, 177
<i>Zhu and Chen v. Secretary of State for the Home Department</i> , C-200/02, 19 October 2004	176
<i>Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet</i> , C-528/11, 30 May 2013.....	155
<i>ZZ v. Secretary of State for the Home Department</i> [GC], C-300/11, 4 June 2013 ...	103, 137

Case law of EFTA Court

<i>Arnulf Clauder</i> , Case E-4/11, 26 July 2011	184
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Case law of the European Court of Human Rights

<i>A. and Others v. the United Kingdom</i> [GC], No. 3455/05, 19 February 2009.....	200, 205, 210, 213, 214, 215
<i>A.A. v. Switzerland</i> , No. 58802/12, 7 January 2014.....	116
<i>A.A. v. the United Kingdom</i> , No. 8000/08, 20 September 2011.....	119, 169, 191
<i>A.A. and Others v. Sweden</i> , No. 14499/09, 28 June 2012.....	294
<i>A.A.M. v. Sweden</i> , No. 68519/10, 3 April 2014.....	118, 123
<i>A.M. and Others v. France</i> , No. 24587/12, 12 July 2016.....	221
<i>Abdilahi Abdulwahidi v. the Netherlands</i> (dec.), No. 21741/07, 12 November 2013.....	265
<i>Abdolkhani and Karimnia v. Turkey</i> , No. 30471/08, 22 September 2009.....	141, 146, 148, 197, 227
<i>Abdulaziz, Cabales and Balkandali v. the United Kingdom</i> , Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985	32
<i>Abdullahi Elmi and Aweys Abubakar v. Malta</i> , Nos. 25794/13 and 28151/13, 22 November 2016.....	287, 288
<i>Afif v. the Netherlands</i> (dec.), No. 60915/09, 24 May 2011	265
<i>Ahmed v. Austria</i> , No. 25964/94, 17 December 1996	84, 106
<i>Airey v. Ireland</i> , No. 6289/73, 9 October 1979	162, 164
<i>Al Husin v. Bosnia and Herzegovina (No. 2)</i> , No. 10112/16, 25 June 2019.....	196, 210, 217
<i>Al-Jedda v. the United Kingdom</i> [GC], No. 27021/08, 7 July 2011.....	205
<i>Al-Saadoon and Mufdhi v. the United Kingdom</i> , No. 61498/08, 2 March 2010.....	112
<i>Al-Zawatia v. Sweden</i> (dec.), No. 50068/08, 22 June 2010.....	236
<i>Amie and Others v. Bulgaria</i> , No. 58149/08, 12 February 2013	215
<i>Amrollahi v. Denmark</i> , No. 56811/00, 11 July 2002.....	192
<i>Amuur v. France</i> , No. 19776/92, 25 June 1996	30, 43, 200, 211

<i>Anakomba Yula v. Belgium</i> , No. 45413/07, 10 March 2009	182
<i>Anayo v. Germany</i> , No. 20578/07, 21 December 2010.....	162
<i>Andrejeva v. Latvia</i> [GC], No. 55707/00, 18 February 2009.....	245, 273
<i>Antwi and Others v. Norway</i> , No. 26940/10, 14 February 2012	192
<i>Aristimuño Mendizabal v. France</i> , No. 51431/99, 17 January 2006.....	96
<i>Armani Da Silva v. the United Kingdom</i> [GC], No. 5878/08, 30 March 2016	233, 238, 240
<i>Asady and Others v. Slovakia</i> , No. 24917/15, 24 March 2020	131
<i>Assem Hassan Ali v. Denmark</i> , No. 25593/14, 23 October 2018.....	169, 191, 193
<i>Aswat v. the United Kingdom</i> , No. 17299/12, 16 April 2013	115
<i>Auad v. Bulgaria</i> , No. 46390/10, 11 October 2011.....	196, 219
<i>Austin and Others v. the United Kingdom</i> [GC], Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012	200
<i>Avotiņš v. Latvia</i> [GC], No. 17502/07, 23 May 2016.....	26
<i>Azimov v. Russia</i> , No. 67474/11, 18 April 2013	86, 212
<i>B.A.C. v. Greece</i> , No. 11981/15, 13 October 2016	146
<i>Babar Ahmad and Others v. the United Kingdom</i> , Nos. 24027/07 and 3 others, 10 April 2012.....	115
<i>Bader and Kanbor v. Sweden</i> , No. 13284/04, 8 November 2005.....	112
<i>Bah v. the United Kingdom</i> , No. 56328/07, 27 September 2011.....	246, 264
<i>Bajsultanov v. Austria</i> , No. 54131/10, 12 June 2012.....	180
<i>Balogun v. the United Kingdom</i> , No. 60286/09, 10 April 2012.....	191
<i>Beldjoudi v. France</i> , No. 12083/86, 26 March 1992.....	192
<i>Bensaid v. the United Kingdom</i> , No. 44599/98, 6 February 2001.....	269
<i>Berrehab v. the Netherlands</i> , No. 10730/84, 21 June 1988.....	168, 189
<i>Biao v. Denmark</i> [GC], No. 38590/10, 24 May 2016	168, 185
<i>Bigaeva v. Greece</i> , No. 26713/05, 28 May 2009.....	243, 250
<i>Bilalova and Others v. Poland</i> , No. 23685/14, 26 March 2020.....	222
<i>Bistieva and Others v. Poland</i> , No. 75157/14, 10 April 2018.....	197, 222
<i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland</i> [GC], No. 45036/98, 30 June 2005.....	20, 26
<i>Boultif v. Switzerland</i> , No. 54273/00, 2 August 2001.....	169, 191, 192
<i>Bouyid v. Belgium</i> [GC], No. 23380/09, 28 September 2015.....	239
<i>Branko Tomašić and Others v. Croatia</i> , No. 46598/06, 15 January 2009.....	238
<i>C.G. and Others v. Bulgaria</i> , No. 1365/07, 24 April 2008	142, 147, 161

<i>Ceesay v. Austria</i> , No. 72126/14, 16 November 2017.....	229
<i>Chahal v. the United Kingdom</i> [GC], No. 22414/93, 15 November 1996.....	215
<i>Chapman v. the United Kingdom</i> [GC], No. 27238/95, 18 January 2001.....	263
<i>Chowdury and Others v. Greece</i> , No. 21884/15, 20 March 2017	79, 85, 289
<i>Collins and Akaziebie v. Sweden</i> (dec.), No. 23944/05, 8 March 2007.....	118
<i>Čonka v. Belgium</i> , No. 51564/99, 5 February 2002.....	103, 132, 149, 214, 224
<i>D. v. the United Kingdom</i> , No. 30240/96, 2 May 1997	102, 114
<i>Dalea v. France</i> (dec.), No. 964/07, 2 February 2010.....	38
<i>Darraj v. France</i> , No. 34588/07, 4 November 2010.....	236
<i>Darren Omoregie and Others v. Norway</i> , No. 265/07, 31 July 2008.....	167, 180, 181, 185
<i>Dbouba v. Turkey</i> , No. 15916/09, 13 July 2010.....	224, 227
<i>De Souza Ribeiro v. France</i> [GC], No. 22689/07, 13 December 2012	141, 151
<i>De Tommaso v. Italy</i> [GC], No. 43395/09, 23 February 2017	199
<i>Demir and Baykara v. Turkey</i> [GC], No. 34503/97, 12 November 2008	249
<i>Dhahbi v. Italy</i> , No. 17120/09, 8 April 2014.....	245, 273
<i>Dougoz v. Greece</i> , No. 40907/98, 6 March 2001.....	211, 228
<i>El Ghatet v. Switzerland</i> , No. 56971/10, 8 November 2016.....	187
<i>El Morsli v. France</i> (dec.), No. 15585/06, 4 March 2008.....	40
<i>Enukidze and Girgvliani v. Georgia</i> , No. 25091/07, 26 July 2011	238
<i>F.G. v. Sweden</i> [GC], No. 43611/11, 23 March 2016.....	86, 101, 112, 116, 117, 118
<i>Faruk Rooma Alam v. Denmark</i> (dec.), No. 33809/15, 6 June 2017	20
<i>Fawsie v. Greece</i> , No. 40080/07, 28 October 2010	273
<i>Finogenov and Others v. Russia</i> , Nos. 18299/03 and 27311/03, 20 December 2011..	238
<i>Finucane v. the United Kingdom</i> , No. 29178/95, 1 July 2003.....	241
<i>Foka v. Turkey</i> , No. 28940/95, 24 June 2008.....	200
<i>G.R. v. the Netherlands</i> , No. 22251/07, 10 January 2012	163, 182
<i>Gaygusuz v. Austria</i> , No. 17371/90, 16 September 1996.....	245, 246, 273
<i>Gayratbek Saliev v. Russia</i> , No. 39093/13, 17 April 2014.....	123
<i>Gebremedhin [Gaberamadhien] v. France</i> , No. 25389/05, 26 April 2007	141, 150
<i>Genovese v. Malta</i> , No. 53124/09, 11 October 2011	98
<i>Georgia v. Russia (I)</i> [GC], No. 13255/07, 3 July 2014	131
<i>Gillow v. the United Kingdom</i> , No. 9063/80, 24 November 1986.....	244, 264
<i>Glor v. Switzerland</i> , No. 13444/04, 30 April 2009.....	292
<i>Giuliani and Gaggio v. Italy</i> [GC], No. 23458/02, 24 March 2011	237, 238

<i>Guzzardi v. Italy</i> , No. 7367/76, 6 November 1980.....	200
<i>H. and B. v. the United Kingdom</i> , Nos. 70073/10 and 44539/11, 9 April 2013.....	112
<i>H.A. and Others v. Greece</i> , No. 19951/16, 28 February 2019	214
<i>H.A. v. Greece</i> , No. 58424/11, 21 January 2016.....	196, 216
<i>H.L. v. the United Kingdom</i> , No. 45508/99, 5 October 2004	200
<i>Hasanbasic v. Switzerland</i> , No. 52166/09, 11 June 2013	192
<i>Hida v. Denmark</i> (dec.), No. 38025/02, 19 February 2004.....	122, 130
<i>Hirsi Jamaa and Others v. Italy</i> [GC], No. 27765/09, 23 February 2012.....	30, 47, 103, 131, 141, 151
<i>Hode and Abdi v. the United Kingdom</i> , No. 22341/09, 6 November 2012	185
<i>Hoti v. Croatia</i> , No. 63311/14, 26 April 2018.....	80, 81, 99
<i>I. v. Sweden</i> , No. 61204/09, 5 September 2012.....	119
<i>I.M. v. France</i> , No. 9152/09, 2 February 2012	141, 153
<i>Ibrogimov v. Russia</i> [Committee], No. 32248/12, 15 May 2018.....	80
<i>İlhan v. Turkey</i> [GC], No. 22277/93, 27 June 2000	239
<i>Ilias and Ahmed v. Hungary</i> [GC], No. 47287/15, 21 November 2019	30, 43, 127, 200
<i>İnseher v. Germany</i> [GC], Nos. 10211/12 and 27505/14, 4 December 2018.....	226
<i>Ismoilov and Others v. Russia</i> , No. 2947/06, 24 April 2008	123, 129
<i>J.K. and Others v. Sweden</i> [GC], No. 59166/12, 23 August 2016.....	101, 114, 117, 118, 119, 123
<i>J.N. v. the United Kingdom</i> , No. 37289/12, 19 August 2016.....	226
<i>J.R. and Others v. Greece</i> , No. 22696/16, 25 January 2018.....	200, 213, 225
<i>Jeunesse v. the Netherlands</i> [GC], No. 12738/10, 3 October 2014	186, 191
<i>K.A.B. v. Sweden</i> , No. 886/11, 5 September 2013.....	113
<i>K2 v. the United Kingdom</i> , No. 42387/13, 7 February 2017.....	98
<i>Kanagaratnam and Others v. Belgium</i> , No. 15297/09, 13 December 2011	220
<i>Karassev v. Finland</i> (dec.), No. 31414/96, 12 January 1999.....	98
<i>Kaya v. Turkey</i> , No. 22729/93, 19 February 1998.....	239
<i>Kebe and Others v. Ukraine</i> , No. 12552/12, 12 January 2017	45
<i>Khan v. France</i> , No. 12267/16, 28 February 2019	287
<i>Khanh v. Cyprus</i> , No. 43639/12, 4 December 2018.....	228
<i>Khlaifia and Others v. Italy</i> [GC], No.16483/12, 15 December 2016	132, 152, 224, 226
<i>Khudoyorov v. Russia</i> , No. 6847/02, 8 November 2005.....	214
<i>Kiyutin v. Russia</i> , No. 2700/10, 10 March 2011	89

<i>Koua Poirrez v. France</i> , No. 40892/98, 30 September 2003	245, 273, 292
<i>Kučera v. Slovakia</i> , No. 48666/99, 17 July 2007	239
<i>Kudła v. Poland</i> [GC], No. 30210/96, 26 October 2000	148, 149
<i>Kuduzović v. Slovenia</i> (dec.), No. 60723/00, 17 March 2005	98
<i>Kurić and Others v. Slovenia</i> [GC], No. 26828/06, 26 June 2012	80, 92
<i>L.E. v. Greece</i> , No. 71545/12, 21 January 2016	289
<i>L.M. and Others v. Russia</i> , Nos. 40081/14, 40088/14 and 40127/14, 15 October 2015	114
<i>L.O. v. France</i> (dec.), No. 4455/14, 26 May 2015	289
<i>Leander v. Sweden</i> , No. 9248/81, 26 March 1987	66
<i>Liu v. Russia</i> , No. 42086/05, 6 December 2007	81
<i>Lobanov v. Russia</i> , No. 16159/03, 16 October 2008	230
<i>Longa Yonkeu v. Latvia</i> , No. 57229/09, 15 November 2011	196, 215
<i>Lopes de Sousa Fernandes v. Portugal</i> [GC], No. 56080/13, 19 December 2017	269
<i>Louled Massoud v. Malta</i> , No. 24340/08, 27 July 2010	219
<i>Luczak v. Poland</i> , No. 77782/01, 27 November 2007	273
<i>M. and Others v. Bulgaria</i> , No. 41416/08, 26 July 2011	210
<i>M.A. and Others v. Lithuania</i> , No. 59793/17, 11 December 2018	45
<i>M.A. v. Cyprus</i> , No. 41872/10, 23 July 2013	132
<i>M.A. v. France</i> , No. 9373/15, 1 February 2018	107
<i>M.A. v. Switzerland</i> , No. 52589/13, 18 November 2014	118
<i>M.E. v. Denmark</i> , No. 58363/10, 8 July 2014	134
<i>M.K. and Others v. Poland</i> , Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020	131
<i>M.M.R. v. the Netherlands</i> (dec.), No. 64047/10, 24 May 2016	294
<i>M.N. and Others v. Belgium</i> [GC], No. 3599/18, 5 May 2020	34
<i>M.S. v. the United Kingdom</i> , No. 24527/08, 3 May 2012	220
<i>M.S.S. v. Belgium and Greece</i> [GC], No. 30696/09, 21 January 2011	102, 126, 142, 146, 148, 151, 156, 158, 159, 163, 197, 220, 228, 236, 244, 264
<i>M.Y.H. v. Sweden</i> , No. 50859/10, 27 June 2013	124
<i>Maaouia v. France</i> [GC], No. 39652/98, 5 October 2000	147, 162
<i>Mahdid and Haddar v. Austria</i> (dec.), No. 74762/01, 8 December 2005	199
<i>Makaratzis v. Greece</i> [GC], No. 50385/99, 20 December 2004	238
<i>Mamatkulov and Askarov v. Turkey</i> [GC], Nos. 46827/99 and 46951/99, 4 February 2005	79, 86, 103, 134

<i>Mannai v. Italy</i> , No. 9961/10, 27 March 2012	107
<i>Maslov v. Austria</i> [GC], No. 1638/03, 23 June 2008.....	169
<i>Mastromatteo v. Italy</i> [GC], No. 37703/97, 24 October 2002.....	238
<i>Mathloom v. Greece</i> , No. 48883/07, 24 April 2012	219
<i>Matsiukhina and Matsiukhin v. Sweden</i> (dec.), No. 31260/04, 21 June 2005	118
<i>Matthews v. the United Kingdom</i> [GC], No. 24833/94, 18 February 1999.....	20
<i>McCann and Others v. the United Kingdom</i> , No. 18984/91, 27 September 1995.....	237, 238, 240
<i>Medvedyev and Others v. France</i> [GC], No. 3394/03, 29 March 2010.....	47
<i>Mikolenko v. Estonia</i> , No. 10664/05, 8 October 2009.....	195, 202, 210, 217
<i>Minjat v. Switzerland</i> , No. 38223/97, 28 October 2003	214
<i>Mohammed v. Austria</i> , No. 2283/12, 6 June 2013.....	158
<i>Mohammed Hussein and Others v. the Netherlands and Italy</i> (dec.), No. 27725/10, 2 April 2013.....	158
<i>Moustahi v. France</i> , No. 9347/14, 25 June 2020	132, 162, 223, 236, 287
<i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i> , No. 13178/03, 12 October 2006.....	197, 220, 221, 227, 236
<i>Muminov v. Russia</i> , No. 42502/06, 11 December 2008.....	116, 120
<i>Muskhadzhiyeva and Others v. Belgium</i> , No. 41442/07, 19 January 2010...	197, 220, 221
<i>N. v. Sweden</i> , No. 23505/09, 20 July 2010.....	119
<i>N. v. the United Kingdom</i> [GC], No. 26565/05, 27 May 2008.....	114
<i>N.A. v. Finland</i> , No. 25244/18, 14 November 2019.....	46
<i>N.A. v. the United Kingdom</i> , No. 25904/07, 17 July 2008.....	84, 113, 119, 131
<i>N.D. and N.T. v. Spain</i> [GC], Nos. 8675/15 and 8697/15, 13 February 2020.....	103, 131, 132
<i>N.H. and Others v. France</i> , Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020	159, 264
<i>N.T.P. and Others v. France</i> , No. 68862/13, 24 August 2018	264
<i>Nachova and Others v. Bulgaria</i> [GC], Nos. 43577/98 and 43579/98, 6 July 2005.....	238
<i>Nada v. Switzerland</i> [GC], No. 10593/08, 12 September 2012.....	38
<i>Nolan and K. v. Russia</i> , No. 2512/04, 12 February 2009	43, 199, 200
<i>Novruk and Others v. Russia</i> , Nos. 31039/11 and 4 others, 15 March 2016.....	89
<i>Nowak v. Ukraine</i> , No. 60846/10, 31 March 2011.....	224
<i>Nunez v. Norway</i> , No. 55597/09, 28 June 2011	167, 181
<i>O.S.A. and Others v. Greece</i> , No. 39065/16, 21 March 2019.....	223

<i>O'Donoghue and Others v. the United Kingdom</i> , No. 34848/07, 14 December 2010	167, 172
<i>Omojudi v. the United Kingdom</i> , No. 1820/08, 24 November 2009	169
<i>Omwenyeye v. Germany</i> (dec.), No. 44294/04, 20 November 2007	83, 203
<i>Onur v. the United Kingdom</i> , No. 27319/07, 17 February 2009	180
<i>Opuz v. Turkey</i> , No. 33401/02, 9 June 2009	282, 294
<i>Oravec v. Croatia</i> , No. 51249/11, 11 July 2017	227
<i>Osman v. the United Kingdom</i> , No. 23452/94, 28 October 1998	238
<i>Othman (Abu Qatada) v. the United Kingdom</i> , No. 8139/09, 17 January 2012	102, 123, 134, 135
<i>Ozdil and Others v. the Republic of Moldova</i> , No. 42305/18, 11 June 2019	196
<i>Palushi v. Austria</i> , No. 27900/04, 22 December 2009	229
<i>Paposhvili v. Belgium</i> [GC], No. 41738/10, 13 December 2016	102, 115
<i>Patrick Muzamba Oyaw v. Belgium</i> (dec.), No. 23707/15, 4 April 2017	213
<i>Peers v. Greece</i> , No. 28524/95, 19 April 2001	228
<i>Phull v. France</i> (dec.), No. 35753/03, 11 January 2005	40
<i>Ponomaryovi v. Bulgaria</i> , No. 5335/05, 21 June 2011	244, 261
<i>Popov v. France</i> , Nos. 39472/07 and 39474/07, 19 January 2012	210, 220
<i>Powell v. the United Kingdom</i> (dec.), No. 45305/99, 4 May 2000	269
<i>Pretty v. the United Kingdom</i> , No. 2346/02, 29 April 2002	169, 292
<i>Price v. the United Kingdom</i> , No. 33394/96, 10 July 2001	220
<i>R.C. v. Sweden</i> , No. 41827/07, 9 March 2010	118, 119
<i>R.D. v. France</i> , No. 34648/14, 16 June 2016	282, 294
<i>Rachwalski and Ferenc v. Poland</i> , No. 47709/99, 28 July 2009	239
<i>Rahimi v. Greece</i> , No. 8687/08, 5 April 2011	281, 283, 287
<i>Ramadan v. Malta</i> , No. 76136/12, 21 June 2016	98
<i>Ramsahai and Others v. the Netherlands</i> [GC], No. 52391/99, 15 May 2007	233, 237, 240
<i>Ramzy v. the Netherlands</i> , No. 25424/05, 20 July 2010	102
<i>Rantsev v. Cyprus and Russia</i> , No. 25965/04, 7 January 2010	79, 85, 197, 201, 222, 227, 282, 289, 290
<i>Riad and Idiab v. Belgium</i> , Nos. 29787/03 and 29810/03, 24 January 2008	43, 200
<i>Rodrigues da Silva and Hoogkamer v. the Netherlands</i> , No. 50435/99, 31 January 2006	167, 182, 185, 189
<i>Rusu v. Austria</i> , No. 34082/02, 2 October 2008	196, 214

<i>Ryabikin v. Russia</i> , No. 8320/04, 19 June 2008.....	129
<i>S. and Marper v. the United Kingdom</i> [GC], Nos. 30562/04 and 30566/04, 4 December 2008	49, 66
<i>S., V. and A. v. Denmark</i> [GC], Nos. 35553/12, 36678/12 and 36711/12, 22 October 2018.....	213
<i>S.D. v. Greece</i> , No. 53541/07, 11 June 2009.....	197, 220, 227, 228
<i>S.F. and Others v. Bulgaria</i> , No. 8138/16, 7 December 2017	197, 221
<i>S.F. and Others v. Sweden</i> , No. 52077/10, 15 May 2012.....	116, 119
<i>S.P. v. Belgium</i> (dec.), No. 12572/08, 14 June 2011.....	211
<i>Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia</i> , No. 14165/16, 13 June 2019.....	283, 287
<i>Saadi v. Italy</i> [GC], No. 37201/06, 28 February 2008.....	101, 107, 118, 119, 123, 129
<i>Saadi v. the United Kingdom</i> [GC], No. 13229/03, 29 January 2008	79, 82, 195, 197, 206, 213, 214, 224
<i>Salah Sheekh v. the Netherlands</i> , No. 1948/04, 11 January 2007	101, 107, 112, 118
<i>Saleck Bardi v. Spain</i> , No. 66167/09, 24 May 2011	162
<i>Salem v. Denmark</i> , No. 77036/11, 1 December 2016	191
<i>Savridin Dzhurayev v. Russia</i> , No. 71386/10, 25 April 2013	79, 87
<i>Schembri v. Malta</i> (dec.), No. 66297/13, 19 September 2017	167, 173
<i>Segerstedt-Wiberg and Others v. Sweden</i> , No. 62332/00, 6 June 2006.....	51, 75
<i>Shioshvili and Others v. Russia</i> , No. 19356/07, 20 December 2016.....	236
<i>Siałkowska v. Poland</i> , No. 8932/05, 22 March 2007.....	163
<i>Singh and Others v. Belgium</i> , No. 33210/11, 2 October 2012.....	118
<i>Singh v. the Czech Republic</i> , No. 60538/00, 25 January 2005.....	196, 216
<i>Slivenko v. Latvia</i> [GC], No. 48321/99, 9 October 2003	98
<i>Soering v. the United Kingdom</i> , No. 14038/88, 7 July 1989	101, 106, 107
<i>Sow v. Belgium</i> , No. 27081/13, 19 January 2016.....	294
<i>Stamose v. Bulgaria</i> , No. 29713/05, 27 November 2012	39
<i>Sudita Keita v. Hungary</i> , No. 42321/15, 12 May 2020	99
<i>Sufi and Elmi v. the United Kingdom</i> , Nos. 8319/07 and 11449/07, 28 June 2011	84, 101, 103, 113, 116, 119, 120, 124
<i>Sultani v. France</i> , No. 45223/05, 20 September 2007	131
<i>Suso Musa v. Malta</i> , No. 42337/12, 23 July 2013	79, 82, 195, 207
<i>T.M. and Others v. Russia</i> , Nos. 31189/15 and 5 others, 7 November 2017.....	123
<i>Tadzhibayev v. Russia</i> , No. 17724/14, 1 December 2015	112

<i>Tai's v. France</i> , No. 39922/03, 1 June 2006.....	233, 240
<i>Tanlı v. Turkey</i> , No. 26129/95, 10 April 2001	240
<i>Tarakhel v. Switzerland</i> [GC], No. 29217/12, 4 November 2014	102, 123, 158
<i>Tarariyeva v. Russia</i> , No. 4353/03, 14 December 2006	233, 240
<i>Thuo v. Cyprus</i> , No. 3869/07, 4 April 2017.....	119, 239
<i>Timishev v. Russia</i> , Nos. 55762/00 and 55974/00, 13 December 2005.....	261
<i>Tomic v. the United Kingdom</i> (dec.), No. 17837/03, 14 October 2003.....	130
<i>Tuquabo-Tekle and Others v. the Netherlands</i> , No. 60665/00, 1 March 2006.....	168, 186
<i>Udeh v. Switzerland</i> , No. 12020/09, 16 April 2013	191, 192
<i>Üner v. the Netherlands</i> [GC], No. 46410/99, 18 October 2006.....	169, 191
<i>V.F. v. France</i> (dec.), No. 7196/10, 29 November 2011.....	289
<i>Vasylchuk v. Ukraine</i> , No. 24402/07, 13 June 2013	239
<i>Velikova v. Bulgaria</i> , No. 41488/98, 18 May 2000.....	238, 240
<i>Vilvarajah and Others v. the United Kingdom</i> , Nos. 13163/87 and 4 others, 30 October 1991.....	107, 131
<i>Weber and Saravia v. Germany</i> , No. 54934/00, 29 June 2006.....	66
<i>Weller v. Hungary</i> , No. 44399/05, 31 March 2009	274
<i>X. v. Switzerland</i> , No. 16744/14, 26 January 2017	113
<i>X. v. Sweden</i> , No. 36417/16, 9 January 2018.....	237
<i>Xhavera and Others v. Italy and Albania</i> (dec.), No. 39473/98, 11 January 2001.....	47
<i>Yoh-Ekale Mwanje v. Belgium</i> , No. 10486/10, 20 December 2011	213, 221
<i>Yonchev v. Bulgaria</i> , No. 12504/09, 7 December 2017.....	75
<i>Yüksel Erdoğan and Others v. Turkey</i> , No. 57049/00, 15 May 2007	237
<i>Z.A. and Others v. Russia</i> , Nos. 61411/15 and 3 others, 28 March 2017.....	30, 43
<i>Z.N.S. v. Turkey</i> , No. 21896/08, 19 January 2010.....	227

Case law of the European Commission of Human Rights

<i>Family K. and W. v. the Netherlands</i> (dec.), No. 11278/84, 1 July 1985.....	98
<i>Karus v. Italy</i> (dec.), No. 29043/95, 20 May 1998.....	244, 261
<i>Sorabjee v. the United Kingdom</i> (dec.), No. 23938/94, 23 October 1995	181

Case law of European Committee of Social Rights

Centre on Housing Rights and Evictions (COHRE) v. France, Complaint No. 63/2010, merits, 28 June 2011.....266

Centre on Housing Rights and Evictions (COHRE) v. Italy, Complaint No. 58/2009, merits, 25 June 2010.....266

Conference of European Churches (CEC) v. The the Netherlands, Complaint No. 90/2013, merits, 1 July 2014249, 274

Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, merits, 23 October 2012..... 89

Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, merits, 20 October 200989, 244, 246, 266, 284

European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France, Complaint No. 114/2015, merits, 24 January 2018.....244, 245, 270, 281, 284, 289

European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012, merits, 2 July 2014244, 249, 265

European Roma and Travellers Forum v. France, Complaint No. 64/2011, merits, 24 January 2012..... 133

International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, merits, 8 September 2004 89, 244, 249, 270

Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, merits, 6 December 2006.....251

Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, merits, 3 July 2013243, 253

Case law of the UN Human Rights Committee

A v. Australia, Communication No. 560/1993, views of 30 April 1997.....213

Mann Singh v. France, Communication No. 1928/2010, views of 19 July 2013 40

Ranjit Singh v. France, Communication 1876/2009, views of 22 July 2011 40

Toussaint v. Canada, Communication No. 2348/2014, views of 24 July 2018..... 89

Case law of national courts

Austria, Austrian Constitutional Court (<i>Österreichische Verfassungsgerichtshof</i>), Decision G31/98, G79/98, G82/98, G108/98 of 24 June 1998.....	148
Croatia, Constitutional Court (<i>Ustavni sud Republike Hrvatske</i>), Decision No. U-III-557/2019, 11 September 2019.....	295
Czech Republic, Czech Constitutional Court (<i>Ústavní soud České republiky</i>), Decision No. 9/2010, Coll., January 2010.....	148
France, Council of State (<i>Conseil d'État</i>), <i>M. et Mme Forabosco</i> , No. 190384, 9 June 1999.....	36
France, Council of State (<i>Conseil d'État</i>), <i>M. Hicham B</i> , No. 344411, 24 November 2010.....	37
France, Council of State (<i>Conseil d'État</i>), <i>M. A.</i> , No. 334040, 1 July 2011.....	116
France, Council of State (<i>Conseil d'État</i>), <i>M. Ghevondyan</i> , No. 356505, 4 June 2012.....	88
Germany, <i>Bundesverfassungsgericht</i> , 1 BvL 10/10 and 1 BvL 2/11, 18 July 2012.....	276
Malta, Constitutional Jurisdiction (<i>Gurisdizzjoni Kostituzzjonali</i>), <i>Abdul Hakim Hassan Abdulle Et v. Ministry tal-Gustizzja u Intern Et, Qorti Civili Prim'Awla (Gurisdizzjoni Kostituzzjonali)</i> , No. 56/2007, 29 November 2011.....	107
Switzerland, Federal Supreme Court, decision BGE 136 II 5, 29 September 2009.....	175
United Kingdom, <i>EM (Lebanon) v. Secretary of State for the Home Department</i> [2008] UKHL 64, 22 October 2008.....	135
United Kingdom, <i>FGP v. Serco Plc & Anor</i> [2012] EWHC 1804 (Admin), 5 July 2012.....	239
United Kingdom, Supreme Court, <i>WL (Congo) 1 & 2 v. Secretary of State for the Home Department; KM (Jamaica) v. Secretary of State for the Home Department</i> [2011] UKSC 12, 23 March 2011.....	205




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 details and examples of how to use filters and search fields, the user can place the mouse pointer on the  at the right of every search tool in the HUDOC interface.

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 in the top right part of the screen. In the search field, the user can search in the text using a:

- single word (e.g. asylum, refugees)
- phrase (e.g. 'asylum seekers')
- case title
- state
- Boolean phrase (e.g. aliens NEAR residence).

To help the user perform a text search, the **simple Boolean search** is available by clicking on the arrow appearing inside the **search field**. The simple Boolean search offers six search possibilities: 'This exact word or phrase', 'All of these words', 'Any of these words', 'None of these words', 'Near these words', 'Boolean search'.

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 a violation of Article 3.

3) The user can then select the relevant keywords under the **Keywords filter** to narrow the results to those relevant to Article 3, such as the keyword '(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 **Legal Summaries** 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 **Language versions** 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' in 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 languages⁽⁶¹¹⁾. The **language** can be selected at the upper right side of the screen. The search engine 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** document available (<http://curia.europa.eu/common/juris/en/aide-Globale.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.

⁽⁶¹¹⁾ The following languages: since before 30 April 2004, Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish; since 1 May 2004, Czech, Estonian, Hungarian, Latvian, Lithuanian, 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 Regulation (EC) No. 920/2005 and Regulation (EU) No. 1257/2010. Secondary legislation in force at the date of accession is being translated into Croatian and will gradually be published in the *Special edition of the Official Journal of the European Union*.

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 '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 the Civil Service Tribunal.

Alternatively, one can also use the **Name of the 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 multifunctional 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 and the Civil Service Tribunal and in the Opinions of the Advocates General.

The CURIA website also has additional case law tools.

Numerical access (http://curia.europa.eu/jcms/jcms/Jo2_7045/): 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.

Digest of the case-law (http://curia.europa.eu/jcms/jcms/Jo2_7046/): 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.

Annotation of judgments (http://curia.europa.eu/jcms/jcms/Jo2_7083/): 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.

National case-law database (http://curia.europa.eu/jcms/jcms/Jo2_7062/): 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.

EU instruments and selected agreements

EU instruments

Shorthand name	Title
Asylum	
Dublin Regulation (EU) No. 604/2013	Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013, p. 31–59, corrected by Corrigendum, OJ L 49, 25.2.2017.
Dublin Regulation (EC) No. 343/2003	Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25.2.2003, p. 1–10.
Implementing Dublin Regulation (EC) No. 1560/2003	Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222, 5.9.2003, p. 3–23.

Eurodac Regulation (EU) No. 603/2013	Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, p. 1–30.
Eurodac Regulation (EC) No. 2725/2000	Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15.12.2000, p. 1–10.
Reception Conditions Directive 2013/33/EU	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.
Reception Conditions Directive 2003/9/EC	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18–25.
Asylum Procedures Directive 2013/32/EU	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60–95.
Asylum Procedures Directive 2005/85/EC	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13–34.
Qualification Directive 2011/95/EU	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9–26.
Qualification Directive 2004/83/EC	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12–23.
Temporary Protection Directive 2001/55/EC	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12–23.

Trafficking	
Anti-Trafficking Directive 2011/36/EU	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.
Trafficking Victims Directive (Residence Permits) 2004/81/EC	Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, p. 19–23.
Borders and Schengen	
European Border and Coast Guard Regulation (EU) 2019/1896	Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019, p. 1–131.
Schengen Borders Code (Regulation (EU) No. 2016/399)	Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52.
Regulation (EU) No. 610/2013	Regulation (EU) No. 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No. 1683/95 and (EC) No. 539/2001 and Regulations (EC) No. 767/2008 and (EC) No. 810/2009 of the European Parliament and of the Council, OJ L 182, 29.6.2013, p. 1–18.
Sea Borders Regulation (EU) No. 656/2014	Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, p. 93–107.
Schengen Evaluation Mechanism Regulation (EU) No. 1053/2013	Council Regulation (EU) No. 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27–37.

Decision (EU) No. 1105/2011	Decision (EU) No. 1105/2011 of the European Parliament and of the Council of 25 October 2011 on the list of travel documents which entitle the holder to cross the external borders and which may be endorsed with a visa and on setting up a mechanism for establishing this list, OJ L 287, 4.11.2011, p. 9–12.
Local Border Traffic Regulation (EC) No. 1931/2006	Regulation (EC) No. 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, OJ L 405, 30.12.2006, p. 1–22.
Advance Passengers Information Directive 2004/82/EC	Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6.8.2004, p. 24–27.
Carriers Sanctions Directive 2001/51/EC	Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10.7.2001, p. 45–46.
Large-scale EU IT systems	
Interoperability – Police and judicial cooperation, asylum and migration Regulation (EU) 2019/818	Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816, OJ L 135, 22.5.2019, p. 85–135.
Interoperability – Borders and Visa Regulation (EU) 2019/817	Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EU) No. 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ L 135, 22.5.2019, p. 27–84.
ECRIS-TCN Regulation (EU) 2019/816	Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, OJ L 135, 22.5.2019, p. 1–26.
SIS Regulation (EU) 2018/1862	Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No. 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56–106.

SIS – Border Checks Regulation (EU) 2018/1861	Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No. 1987/2006, OJ L 312, 7.12.2018, p. 14–55.
SIS Returns Regulation (EU) 2018/1860	Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, p. 1–3.
SIS Regulation (EC) No. 1987/2006	Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381, 28.12.2006, p. 4–23.
SIS Decision 2007/533/JHA	Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 205, 7.8.2007, p. 63–84.
Council Decision 2013/158/EU	Council Decision 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 L 87, 27.3.2013, p. 10–11.
Council Decision 2013/157/EU	Council Decision of 7 March 2013 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 L 87/8, 27.03.2013, p. 8–9.
eu-LISA Regulation (EU) 2018/1726	Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No. 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No. 1077/2011, OJ L 295, 21.11.2018, p. 99–137.
ETIAS Regulation (EU) 2018/1240	Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 1077/2011, (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236, 19.9.2018, p. 1–71.
Entry/Exit System Regulation (EU) 2017/2226	Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) No. 1077/11, OJ L 327, 9.12.2017, p. 20–82.

Europol Regulation (EU) 2016/794	Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53-114.
General Data Protection Regulation (EU) 2016/679	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1-88.
Data Protection Directive for Police and Criminal Justice Authorities (EU) 2016/680	Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89-131.
VIS Regulation (EC) No. 767/2008	Regulation (EC) No. 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60-81.
VIS Decision 2008/633/JHA	Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member State and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13.8.2008, p. 129-136.
Visa	
Visa List Regulation (EU) 2018/1806	Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 303, 28.11.2018, p. 39-58.
Long-Stay Visa Regulation (EU) No. 265/2010	Regulation (EU) No. 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No. 562/2006 as regards movement of persons with a long-stay visa, OJ L 85, 31.3.2010, p. 1-4.
Visa Code (Regulation (EC) No. 810/2009)	Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15.9.2009, p. 1-58.
Regulation (EU) 2019/1155 amending the Visa Code	Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code), OJ L 188, 12.7.2019, p. 25-54.
Visa Format Regulation (EC) No. 1683/95	Council Regulation (EC) No. 1683/95 of 29 May 1995 laying down a uniform format for visas, OJ L 164, 14.7.1995, p. 1-4.

Irregular migration and return

Immigration Liaison Officers Regulation (recast) (EU) 2019/1240	Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers, OJ L 198, 25.7.2019, p. 88–104.
EU Travel Document Regulation (EU) 2016/1953	Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, OJ L 311, 17.11.2016, p. 13–19.
Employers Sanctions Directive 2009/52/EC	Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, p. 24–32.
Return Directive 2008/115/EC	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107.
Council Decision 2004/573/EC	Council Decision 2004/573/EC 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, OJ L 261/28, 6.8.2004, p. 28–35.
Council Directive 2003/110/EC	Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6.12.2003, p. 26–31.
Facilitation Directive 2002/90/EC	Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17–18.
Mutual Recognition of Expulsion Orders Directive 2001/40/EC	Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2.6.2001, p. 34–36.
Council Decision 2004/191/EC	Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, OJ L 60, 27.2.2004, p. 55–57.
Marriages of Convenience Council Resolution, 1997	Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, OJ C 382, 16.12.1997, p. 1–3.

Legal migration

Students and Researchers Directive (EU) 2016/801	Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132, 21.5.2016, p. 21–57.
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Intra-Corporate Transferees Directive 2014/66/EU	Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, p. 1–22.
Seasonal Workers Directive 2014/36/EU	Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375–390.
Single Permit Directive 2011/98/EU	Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1–9.
Blue Card Directive 2009/50/EC	Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17–29.
Long-Term Residence Directive 2003/109/EC	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.
Directive 2011/51/EU	Directive 2011/51/EU of the European Council and the Parliament of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.5.2011, p. 1–4.
Family Reunification Directive 2003/86/EC	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12–18.
Resident Permits Format Regulation (EC) No. 1030/2002	Council Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ L 157, 15.6.2002, p. 1–7.
Regulation (EC) No. 380/2008	Council Regulation (EC) No. 380/2008 of 18 April 2008 amending Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 115, 29.4.2008, p. 1–7.
Regulation (EU) 2017/1954	Regulation (EU) 2017/1954 of the European Parliament and of the Council of 25 October 2017 amending Council Regulation (EC) No. 1030/2002 laying down a uniform format for residence permits for third-country nationals, OJ L 286, 1.11.2017, p. 9–14.
Free movement, social security and equality	
Security of Identity Cards and Residence Documents Regulation (EU) 2019/1157	Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, OJ L 188, 12.7.2019, p. 67–78.
Regulation (EU) No. 492/2011/EU	Regulation (EU) No. 492/2011 of the European Council and the Parliament of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.05.2011, p. 1–12.

Professional Qualifications Directive 2005/36/EC	Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22–142.
Commission Regulation (EU) No. 623/2012	Commission Regulation (EU) No. 623/2012 of 11 July 2012 amending Annex II to Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, OJ L 180, 12.7.2012, p. 9–11.
Coordination of Social Security Regulation (EC) No. 883/2004	Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123.
Regulation (EU) No. 1231/2010	Regulation (EU) No. 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344, 29.12.2010, p. 1–3.
Regulation (EU) No. 465/2012	Regulation (EU) No. 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No. 883/2004 on the coordination of social security systems and Regulation (EC) No. 987/2009 laying down the procedure for implementing Regulation (EC) No. 883/2004, OJ L 149, 8.6.2012, p. 4–10.
Free Movement Directive 2004/38/EC	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.
Racial Equality Directive 2000/43/EC	Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.
Posting of Workers Directive 96/71/EC	Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 018, 21.1.1997, p. 1–6.

Selected agreements

Shorthand name	Title
UK Withdrawal Agreement	Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 24 January 2020, OJ L 29, 31.1.2020, p. 7-187.
European Community-Switzerland Agreement	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, OJ 2002 L 114 30.4.2002, p. 6-72.
European Economic Area Agreement	Agreement on the European Economic Area, 2 May 1992, OJ L 1, 3.1.1994, p. 3-522.
Convention implementing the 1985 Schengen Agreement	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, 19 June 1990, OJ L 239, 22.9.2000, p. 19-62.
Ankara Protocol	Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations, OJ L 293, 29.12.1972, p. 3-56.

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 18.5.1995 and entered into force on 26.6.2000 (O) 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 (O) 1999 L 176, p. 31-33).

For **Switzerland** see 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 26.10.2004 and entered into force on 01.03.2008 (O) 2008 L 53, pp. 52-79) and Council Decision 2008/146/EC of 28.12.2008 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 (O) 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 (O) 2011 L 160, pp. 21-36).

Application of specific instruments under the Schengen acquis

Dublin and Eurodac Regulations

For **Denmark** see the 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 10.3.2005 and entered into force on 1.4.2006 (O) 2006 L 66, pp. 38-43) and Council Decision 2006/188/EC of 21.2.2006 (O) 2006 L 66, p. 37); based on Article 3 (2) of the above-mentioned agreement, Denmark has notified the European Commission on 4 July 2013 that it will apply both regulations, except for the law enforcement part within Eurodac which requires separate negotiations. On the law enforcement access, see the Protocol to the 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 effective application of the Dublin Convention regarding access to Eurodac for law enforcement purposes, signed on 27.3.2019 and entered into force on 25.5.2019 (O) 2019 L 138, pp. 5-8), and Council Decision (EU) 2019/836 of 13 May 2019 on the conclusion of the Protocol to the 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 regarding access to Eurodac for law enforcement purposes (O) 2019 L 138, pp. 3-4).

For **Iceland and Norway** see the 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 19.12.2001 and entered into force into 1.4.2001 (O) 2001 L 93, pp. 40-47) and Council Decision 2006/167/EC of 21.2.2006 (O) 2006 L 57, pp. 15-18), as well as the the Protocol between the European Union, Iceland and the Kingdom of Norway to the 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 regarding access to Eurodac for law enforcement purpose, signed on 24 October 2019 and entered into force on 4 March 2020 (O) 2020 L 64, pp. 3-7); and Council Decision (EU) 2020/276 of 17.2.2020 on the conclusion of the Protocol between the European Union, Iceland and the Kingdom of Norway to the 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 Switzerland regarding access to Eurodac for law enforcement purposes (O) 2020 L 64, pp. 1-2).

For **Switzerland** see 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 26.10.2004 and entered into force 1.3.2008 (O) 2008 L 53, p. 5-17); and Council Decision 2008/147/EC of 28.12.2008 (O) 2008 L 53, pp. 3-4); as well as the Protocol between the European Union, 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 regarding access to Eurodac for law enforcement purposes, signed on 27.6.2019 and entered into force on 5.2.2020 (O) 2020 L 32, pp. 3-7) and Council Decision (EU) 2020/142 of 21.1.2020 on the conclusion of the Protocol between the European Union, 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 regarding access to Eurodac for law enforcement purposes (O) 2020 L 32, pp. 1-2).

For **Liechtenstein** see the 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 28.2.2008 and entered into force on 19.12.2011 (OJ 2011 L 60, pp. 39–49), as well as the Protocol between the European Union, 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 regarding access to Eurodac for law enforcement purposes, signed on 27.6.2019 and entered into force on 5.2.2020 (OJ 2020 L 32, pp. 3–7) and Council Decision (EU) 2020/142 of 21.1.2020 on the conclusion of the Protocol between the European Union, 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 regarding access to Eurodac for law enforcement purposes (OJ 2020 L 32, pp. 1–2).

Schengen Borders Code

The Schengen Borders Code applies to **Bulgaria, Croatia, Cyprus and Romania** except for Title III on internal borders.

SIS Regulations

Regulation (EC) No. 1987/2006 became applicable on 9 April 2013, as established by Council Decision 2013/158/EU of 7.3.2013 (OJ 2013 L 87, pp. 10–11).

Denmark is not bound by Regulation (EC) No. 1987/2006 nor Council Decision 2013/158/EU, but has opted in for the SIS, and decided to opt in again in relation to the SIS - Returns Regulation (EU) 2018/1860, SIS - Border Checks Regulation (EU) 2018/1861 and SIS Regulation (EU) 2018/1862 as notified to the European Commission on 26 April 2019.

Ireland and the **United Kingdom** do not take part and are not bound by or subject to Council Decision 2013/158/EU of 7.3.2013, therefore only the SIS Decision (2007/533/JHA of 12.6.2007) is applicable to them. As of July 2020, **Ireland** is not yet connected to SIS, however, it is carrying out preparatory activities to connect to SIS but it will not be able to issue or access Schengen-wide alerts for refusing entry or stay. As per the Withdrawal Agreement, the **United Kingdom** continues to participate in SIS during the transition period but cannot use or access alerts for refusing entry into or stay in the Schengen area.

As of July 2020, **Cyprus** is not yet connected to SIS and they have a temporary derogation from joining the Schengen area.

Bulgaria and **Romania** have access to SIS for police and judicial cooperation purposes under the SIS Decision (2007/533/JHA) and Council Decision 2010/365/EU of 29.6.2010 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Bulgaria and Romania. Since August 2018, **Bulgaria** and **Romania** started using SIS for the purpose of refusing entry into or stay in the Schengen area as per Council Decision (EU) 2018/934 of 25.6.2018 (OJ 2018 L 165, pp. 37–39).

Croatia still has some restrictions regarding the use of SIS for the purpose of refusing entry into or stay in the Schengen area. These restrictions will be lifted as soon as Croatia becomes full member of the Schengen area. **Bulgaria, Croatia and Romania** cannot issue Schengen-wide alerts for refusing entry into or stay in the Schengen area as they are not yet part of the Schengen area.

VIS Regulation

Denmark is not bound by the Visa Information System Regulation but has opted in for VIS.

Ireland and the **United Kingdom** do not participate in the Visa Information System Regulation.

VIS does not apply to **Croatia** and **Cyprus**, and only partially applies to **Bulgaria** and **Romania** as per Council Decision (EU) 2017/1908 of 12.10.2017 on the putting into effect of certain provisions of the Schengen acquis relating to the Visa Information System in the Republic of Bulgaria and Romania (OJ 2017 L 269, pp. 39–43).

Entry/Exit System Regulation

Denmark is not bound by the EES Regulation but has opted in for EES as of 24 October 2019.

Ireland and the **United Kingdom** do not participate in the EES Regulation.

EES does not apply to **Croatia** and **Cyprus**, and only partially applies to **Bulgaria** and **Romania**.

ETIAS Regulation

Denmark is not bound by the ETIAS Regulation but has opted in for ETIAS as of 24 October 2019. Ireland and the **United Kingdom** do not participate in the ETIAS Regulation.

ECRIS-TCN Regulation

The ECRIS-TCN Regulation does not apply to **Denmark**, whereas **Ireland** and the **United Kingdom** may decide to opt in.

The ECRIS-TCN Regulation does not apply to **Iceland**, **Liechtenstein**, **Norway** and **Switzerland**.

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 17.2011 (OJ 2011 L 262, pp. 33-43) and No. 18/2012 of 10.2.2012 (OJ 2012 L 161, 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 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 relating to free movement and social security

Regulation (EU) No. 1231/2010 is not applicable to the **United Kingdom**, which remains however bound by Council Regulation (EC) No. 859/2003 of 14.5.2003 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/EC) 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 30.9.2011 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 21.6.1999 and entered into force on 1.6.2002 (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

	Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	Total out of 27 MS	
	Total number of ratifications/ accessions/	10	11	10	10	9	11	12	10	10	11	11	10	11	9	11	11	9	13	8	11	12	10	12	11	12	10	9		
ECHR		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
ECHR Protocol No. 1 (property, education, etc)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
ECHR Protocol No. 4 (freedom of movement, prohibition of collective expulsion of aliens etc)		✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26	
ECHR Protocol No. 6 (abolition of death penalty)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27	
ECHR Protocol No. 7 (procedural safeguards relating to expulsion of aliens etc)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	25	
ECHR Protocol No. 12 (discrimination)		✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	10	
ECHR Protocol No. 13 (abolition of death penalty)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27	
European Convention on Social and Medical Assistance (1953)		✗	✓	✗	✗	✗	✓	✓	✓	✓	✓	✗	✗	✗	✗	✓	✗	✗	✓	✗	✓	✗	✗	✗	✗	✗	✗	✗	14	
European Convention on Establishment (1955)		✗	✓	✗	✗	✗	✓	✓	✗	✓	✗	✗	✗	✗	✗	✓	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	9	
European Convention on Nationality (1997)		✓	✗	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	13	
Convention for the protection of individuals with regard to automatic processing of personal data (1981)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27	
Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (2018)		✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	4	

✓ = State party / applicable ✗ = not signed

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	Total out of 27 MS	
Total number of ratifications/ accessions	10	11	10	10	9	11	12	10	10	11	11	10	11	9	11	11	9	13	8	11	12	10	12	11	12	10	9	27	
Convention on Action against Trafficking in Human Beings (2005)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
Convention on preventing and combating violence against women and domestic violence (2011)	✓	✓	s	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	s	✓	✓	s	✓	s	✓	✓	✓	✓	✓	✓	✓	s	21	

✓ = State party / applicable s = signed x = not signed

Applicability of selected Council of Europe instruments by other Council of Europe States

Country	AD	AL	AM	AZ	BA	CH	GE	IS	LI	MC	MD	ME	MK	NO	RS	RU	SM	TR	UA	UK	Total out of 20 MS	
Total number of ratifications/accessions	10	11	8	7	11	7	10	11	8	8	9	11	11	12	11	5	10	10	10	8	20	
ECHR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
ECHR Protocol No. 1 (property, education, etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	18
ECHR Protocol No. 4 (freedom of movement, prohibition of collective expulsion of aliens etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17
ECHR Protocol No. 6 (abolition of death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
ECHR Protocol No. 7 (procedural safeguards relating to expulsion of aliens etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
ECHR Protocol No. 12 (discrimination)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	10
ECHR Protocol No. 13 (abolition of death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	17
European Convention on Social and Medical Assistance (1953)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	4
European Convention on Establishment (1955)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	3
European Convention on Nationality (1997)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	8
Convention for the protection of individuals with regard to automatic processing of personal data (1981)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (2018)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	1
Convention on Action against Trafficking in Human Beings (2005)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
Convention on preventing and combating violence against women and domestic violence (2011)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	13

✓ = State party / applicable s = signed x = not signed

Annex 3: Acceptance of ESC provisions

Acceptance of ESC provisions by EU Member States

EU Country	ESC (1996)													ESC (1961) and Additional Protocol 1988														
	AT	BE	BG	CY	EE	FI	FR	HU	IE	IT	LT	LV	MT	NL	PT	RO	SE	SI	SK	CZ	DE	DK	EL	ES	HR	LU	PL	
Total accepted	14	24	17	15	20	26	31	17	27	30	24	26	20	30	31	17	23	29	25	15	15	18	21	22	15	16	10	
Art 1 - right to work	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓
Art 2 - just conditions of work	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	0	
Art 5 - right to organise	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 6 - right to bargain collectively	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	0	
Art 7 - protection of children and young persons	0	✓	✓	0	0	0	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	
Art 8 - protection of maternity or employed women	0	✓	✓	0	✓	0	✓	✓	0	✓	✓	✓	0	✓	✓	✓	0	✓	✓	0	0	0	✓	0	✓	0	0	
Art 9 - vocational guidance	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 10 - vocational training	✓	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	0	0	✓	✓	✓	✓	0	
Art 11 - protection of health	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 12 - social security	✓	✓	0	✓	✓	✓	0	0	✓	✓	0	0	0	✓	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 13 - social and medical assistance	✓	✓	0	0	0	✓	✓	✓	✓	✓	0	✓	✓	✓	✓	0	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	0	
Art 14 - benefit from social welfare services	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	
Art 15 - persons with disabilities	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	✓	0	✓	0	✓	✓	✓	✓	✓	✓	✓	
Art 16 - protection of the family	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Art 17 - protection of children and young persons	✓	✓	0	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

✓ = accepted

0 = partly accepted

x = not accepted

ESC (1996)										ESC (1961) and Additional Protocol 1988																	
EU Country	AT	BE	BG	CY	EE	FI	FR	HU	IE	IT	LT	LV	MT	NL	PT	RO	SE	SI	SK	CZ	DE	DK	EL	ES	HR	LU	PL
Total accepted	14	24	17	15	20	26	31	17	27	30	24	26	20	30	31	17	23	29	25	15	15	18	21	22	15	16	10
Art 18 - work in the territory of other Parties	o	✓	o	o	x	✓	✓	x	✓	✓	o	✓	o	✓	✓	o	✓	o	o	o	✓	✓	✓	✓	x	✓	o
Art 19 - protection and assistance of migrant workers	o	o	x	✓	✓	o	✓	x	✓	✓	o	o	x	o	✓	o	✓	✓	o	o	✓	✓	✓	✓	x	✓	✓
Art 20 - non-discrimination on the grounds of sex	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	x	x
Art 21 - information and consultation	x	✓	✓	x	✓	✓	✓	✓	x	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	x	x
Art 22 - participation in improvement of working conditions	x	✓	✓	o	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Art 23 - social protection of elderly persons	x	x	x	x	x	✓	✓	x	✓	✓	x	x	✓	✓	✓	x	✓	✓	✓	✓	x	✓	✓	✓	x	x	x
Art 24 - protection in cases of termination of employment	x	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Art 25 - protection in case of employer's insolvency	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Art 26 - dignity at work	o	o	✓	x	✓	✓	✓	x	✓	✓	✓	✓	o	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Art 27 - workers with family responsibilities	o	x	o	o	✓	✓	✓	x	o	✓	✓	✓	o	✓	✓	o	✓	✓	o	o	✓	✓	✓	✓	✓	x	x
Art 28 - protection of workers' representatives	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	x
Art 29 - consultation in collective redundancy procedures	x	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 30 - protection against poverty and social exclusion	x	✓	x	x	x	✓	✓	x	✓	✓	x	✓	x	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Art 31 - housing	x	x	x	x	x	✓	✓	x	x	✓	o	o	x	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	x

✓ = accepted o = partly accepted x = not accepted

Notes: Yellow-shaded boxes indicate MS who have ratified only the 1996 ESC

Acceptance of ESC provisions by other Council of Europe States who ratified the ESC

NON - EU Country	ESC (1996)																	ESC (1961) and Additional Protocol 1988			
	AD	AL	AM	AZ	BA	GE	MD	ME	MK	NO	RS	RU	TR	UA	IS	UK					
Total accepted	19	18	13	18	16	12	16	18	16	22	25	19	27	24	13	14					
Art 1 - right to work	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓					
Art 2 - just conditions of work	✓	✓	0	✗	✓	0	✓	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	✓	✓	✓	✓	✗	0					
Art 8 - protection of maternity or employed women	✓	✓	✓	✓	✓	0	✓	✓	✓	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	✓	✗	✓	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	✓	✓	✓	✓	0	✓	✓	✓	✓	✓					
Art 18 - work in the territory of other Parties	0	✗	✓	✗	✗	0	0	✗	✗	✗	✓	0	✓	✓	✓	✓					

✓ = accepted 0 = partly accepted ✗ = not accepted

NON - EU Country	ESC (1996)											ESC (1961) and Additional Protocol 1988				
	AD	AL	AM	AZ	BA	GE	MD	ME	MK	NO	RS	RU	TR	UA	IS	UK
Total accepted	19	18	13	18	16	12	16	18	16	22	25	19	27	24	13	14
Art 19 - protection and assistance of migrant workers	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	✓	✗	✓	✗	✓	✓		
Art 27 - workers with family responsibilities	✗	✗	✓	✓	✗	✓	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	✗	✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✓	0		

✓ = accepted 0 = partly accepted ✗ = not accepted

✓ = accepted

0 = partly accepted

✗ = not accepted

Notes: Yellow-shaded boxes indicate states who have ratified only the 1996 ESC

Annex 4: Acceptance of selected UN Conventions

Acceptance of selected UN Conventions by EU Member State

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	Total out of 27	
Total number of ratifications/ accessions	16	15	15	13	16	16	15	13	15	16	15	15	15	15	13	16	16	15	14	15	16	13	16	15	15	14	15		
Refugee Convention	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
Stateless Persons Convention	✓	✓	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	24
Reduction of Statelessness Convention	✓	✓	✓	✗	✓	✓	✗	✗	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✗	✓	✓	21
ICED	✓	✓	s	s	✓	✓	s	✗	✓	✓	s	✓	s	✗	✓	✓	✓	s	✗	✓	✓	s	✓	s	s	s	✓	✓	13
ICERD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
ICCPR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
ICESCR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CAT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CAT - OP	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	s	✓	23
CRC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CRC - OP1 (armed conflict)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
UNITOC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
UNITOC - OP1 (smuggling of migrants)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26
UNITOC - OP2 (trafficking in human beings)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
CRPD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27

✓ = State party / applicable s = signed ✗ = not signed

Acceptance of selected UN Conventions by other Council of Europe States

	Country	AD	AL	AM	AZ	BA	CH	GE	IS	LI	MC	MD	ME	MK	NO	RS	RU	SM	TR	UA	UK	Total out of 20
	Total number of ratifications/accessions	8	16	16	15	16	15	15	12	14	12	15	16	14	16	16	12	11	14	16	15	18
Refugee Convention		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓
Stateless Persons Convention		x	✓	✓	✓	✓	✓	✓	x	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	15
Reduction of Statelessness Convention		✓	✓	✓	✓	x	✓	x	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	12
ICED		x	✓	✓	s	✓	✓	x	x	s	s	s	s	s	✓	✓	✓	x	✓	✓	x	8
ICERD		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
ICCPR		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
ICESCR		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
CEDAW		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
CAT		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
CAT - OP		x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	16
CRC		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
CRC - OP1 (armed conflict)		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
UNTOC		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20
UNTOC - OP1 (smuggling of migrants)		x	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	18
UNTOC - OP2 (trafficking in human beings)		x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19
CRPD		✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	19

✓ = 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)
- ICED - International Convention for the Protection of All Persons from Enforced Disappearance (2006)
- 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)
- UNTOC - UN 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)
- CRPD - Convention on the Rights of Persons with Disabilities (2006)

Annex 5: Country codes used in the annexes

Code	Country	Code	Country
AD	Andorra	LI	Liechtenstein
AL	Albania	LT	Lithuania
AM	Armenia	LU	Luxembourg
AT	Austria	LV	Latvia
AZ	Azerbaijan	MC	Monaco
BA	Bosnia and Herzegovina	MD	Moldova
BE	Belgium	ME	Montenegro
BG	Bulgaria	MT	Malta
CH	Switzerland	NL	Netherlands
CY	Cyprus	MK	North Macedonia
CZ	Czechia	NO	Norway
DE	Germany	PL	Poland
DK	Denmark	PT	Portugal
EE	Estonia	RO	Romania
EL	Greece	RS	Serbia
ES	Spain	RU	Russia
FI	Finland	SE	Sweden
FR	France	SI	Slovenia
GE	Georgia	SK	Slovakia
HR	Croatia	SM	San Marino
HU	Hungary	TR	Turkey
IE	Ireland	UA	Ukraine
IS	Iceland	UK	United Kingdom
IT	Italy		

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