COLLOQUIUM ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND

IN CO-OPERATION WITH ACA-EUROPE

HELSINKI 25–27 MAY 2025

DIALOGUE WITH THE EUROPEAN COURT OF HUMAN RIGHTS – ADVISORY OPINIONS UNDER PROTOCOL NO. 16 TO THE CONVENTION AND THE IMPACT OF THE COURT'S JUDGMENTS AT THE NATIONAL LEVEL

Questionnaire

The Finnish presidency of ACA-Europe during 2023-25, in close co-operation with Sweden, has focused on the dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). During the Finnish presidency, seminars have been organised on a variety of issues like the duty of the national courts to make a reference for a preliminary ruling to the CJEU (Stockholm, October 2023), mechanisms of counteracting conflicting rulings from the domestic courts and the CJEU and the ECtHR (Zagreb, February 2024) and the multilevel protection of fundamental and human rights in European administrative courts (Inari, May 2024).

In the upcoming Colloquium, which will be held in Helsinki 25-27 May 2025, the focus will be on the judicial dialogue between the national supreme administrative courts and the ECtHR. In this questionnaire, as well as in the Colloquium, this dialogue is approached from two different perspectives.

The first part of the questionnaire examines the procedure in which a national court can seek an opinion from the ECtHR in a case pending before it, namely the mechanism of advisory opinions under Protocol No. 16 to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The aim is to find answers to such questions as: Is the mechanism of advisory opinions perceived as a useful tool? What are the experiences so far? Can we draw any lessons already at this stage? Having in mind that all the participating countries have not acceded to the advisory opinion system, the questions will be different for those States that have done this and the ones that have not.

The second part of the questionnaire will focus on the impact of the judgments of the ECtHR at the national level. While in certain fields of law the jurisprudence of the ECtHR has been well recognised and embedded in the legal orders of the Contracting States, in some other fields the case law has been more contested and even criticised. This may be the case, for example, when the ECtHR is faced with new topics and uses evolutive interpretation of the Convention and its Protocols, or when the judgments are closely linked to politically sensitive areas such as national security or issues that traditionally have belonged to the field of political deliberation. In this questionnaire, the impact of the ECtHR case law is approached from a point of view of two such distinct but similarly pressing issues, namely climate change litigation and summary return of aliens at the border.

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In section A of the second part of the questionnaire, we will explore the extremely topical issue of climate change litigation. Even though the ECHR does not contain any particular provisions on climate change or environmental matters, the ECtHR has been called upon to develop its case law in those issues as the exercise of certain Convention rights may be undermined by the serious adverse effects of climate change and the existence of harm to the environment.

In section B of the second part of the questionnaire, we will explore another contemporary issue linked to immigration law. As is well known, the ECtHR has a rich jurisprudence in this field where a wide variety of questions have been assessed under different Convention articles. In this questionnaire, the intention is to focus on a very specific and highly debated topic of summary returns of aliens at the border or shortly after entry into the territory (so called push-backs)[1]. The attention is specifically on those situations in which persons trying to enter a particular state have been denied entry at the border or in its close proximity, be it a land or sea border, and which have been assessed by the ECtHR especially against the prohibition of the collective expulsion of aliens.

In brief, the second part of the questionnaire aims at exploring the impact the case law of the ECtHR in the above-mentioned specific fields has had at the national level, both in terms of legislation and its interpretation by national courts. By looking at the national framework we are able to get a better understanding of how the rights protected by the Convention operate in the legal and political reality of the Contracting States, as the Convention is – as often repeated by the ECtHR – a living instrument anchored to the present-day conditions. Moreover, as novel issues of interpretation linked to changing and evolving challenges are first encountered at the level of the national courts, having a closer look at the national jurisprudence can serve to predict the questions to be raised before the ECtHR. This, for its part, underlines the two-way nature of the dialogue between European and national courts.

[1] For the definition and principles drawn from the current case law, see *ECHR-KS Key Theme – Summary returns of migrants and/or asylum-seekers ("push-backs") and related case scenarios (last updated 31/08/2024).*

BACKGROUND INFORMATION

Please state the formal title of your court and the name of your country.

Supreme Administrative Court of Austria (Verwaltungsgerichtshof)

I THE ADVISORY OPINION MECHANISM

In accordance with Protocol No. 16 to the ECHR, the highest national courts or tribunals may request the ECtHR to give an advisory opinion. These requests concern questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its protocols. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. It must give reasons for its request and must provide the ECtHR with the relevant legal and factual background to the pending case. Protocol No. 16 came into force on 1 August 2018.

1. Has your country ratified Protocol No. 16?

☐ Yes. Please elaborate (e.g., the ratification year, which courts can make a request).
☒ No, our country has not ratified Protocol No. 16. Please continue to Question 11.

The following nine questions are addressed to states that have ratified Protocol No. 16:

2. Has your court or any court in your country requested an advisory opinion from the ECtHR? If yes, what was the case about?

☐ Yes. Please elaborate.
☐ No.

3. Has your court considered of its own motion in the context of a pending case whether an advisory opinion from the ECtHR could assist in resolving a particular question?

☐ Yes.
  ☐ A request was made.
  ☐ No request was made. Please elaborate on the reasons for deciding not to request an advisory opinion.
☐ No.

4. Has a party to the proceedings asked your court to request an advisory opinion from the ECtHR?

☐ Yes. Please elaborate whether the party's request was accepted or rejected and if rejected, did you give reasons for the refusal.
☐ No.

5. If your court decided to request an advisory opinion, did you give your view on the question(s) posed? If not, for what reasons?

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☐ Yes. Please elaborate.
☐ No. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

6. If an advisory opinion was requested and delivered, was it useful when resolving the case?

☐ Yes. Please elaborate.
☐ No. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

7. Was the advisory opinion cited in the decision of your court? Did your court enter into a dialogue with the advisory opinion or did you simply state its findings?

☐ Yes, the advisory opinion was cited in the decision of our court. Please elaborate.
☐ No, the advisory opinion was not cited in the decision of our court. Please elaborate.
☐ Not applicable because our court has not requested an advisory opinion.

8. If an advisory opinion was requested and delivered, did the advisory opinion have any wider impact on the national legal order?

☐ Yes. Please elaborate.
☐ No.
☐ Not applicable because our court has not requested an advisory opinion.

9. Have advisory opinions requested by other courts (in your country or abroad) had an impact on the national legal order?

☐ Yes. Please elaborate.
☐ No.

10. The ECtHR is under a duty to give reasons for refusing a request for an advisory opinion. Has such reasoning been useful for your court when deciding whether to request an advisory opinion or when deciding how to formulate it?

☐ Yes. Please elaborate.
☐ No.

The following five questions are addressed to states that have not ratified Protocol No. 16:

11. Is it known whether ratification is forthcoming?

☐ Yes. Please elaborate.
☒ No, we do not know whether ratification is forthcoming.

12. If it is known that ratification is not forthcoming, do you know the reason(s) for this?

☐ Yes. Please elaborate.
☐ No, we do not know the reasons for this.
☒ Not applicable in the light of the answer to Question 11.

13. After the entry into force of Protocol No. 16 in 2018, has your court dealt with a case in which it might have been useful to be able to request an advisory opinion? If so, what was the nature of the question(s)?

☐ Yes. Please elaborate.
☒ No.

14. Does your court make use of advisory opinions requested by courts abroad as sources of case law?

☐ Yes. Please elaborate.
☒ No.

15. Have advisory opinions requested by courts abroad had an impact on your national legal order?

☐ Yes. Please elaborate.
☒ No.

II THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE NATIONAL LEVEL

A. CLIMATE CHANGE LITIGATION[2]

The intersection between climate change and human rights law can be regarded as an important theme for future climate litigation. On 9 April 2024, the Grand Chamber of the ECtHR issued three separate rulings on cases relating to climate change. In the case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC], 2024, the ECtHR found violations of Article 8 and Article 6.1 of the ECHR. Nonetheless, two other cases – Duarte Agosthinho and Others v. Portugal and 32 Others and Carême v. France – were declared inadmissible. These cases illustrate the challenging issues for national courts in relation to climate change, e.g. with regard to holding governments accountable for inadequate national climate policies through the perspective of human rights, admissibility criteria, interpretation of locus standi and national courts' competence to scrutinize political decision-makers' decisions and inaction.

16. Are there specific rules concerning standing of individuals in the climate change litigation context before your court?

[2] The phrase "climate change litigation" usually refers to cases that raise material issues of law or fact relating to climate change mitigation, adaptation or the science of climate change. Such cases are brought before a range of administrative, judicial and other adjudicatory bodies. For more details, see https://climate.law.columbia.edu/content/climate-change-litigation and https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

☐ Yes. Please elaborate.
☒ No.

17. Are there specific rules concerning standing of associations in the climate change litigation context before your court?

☒ Yes. Please elaborate.
☐ No.

Following the European Court of Justice's judgement from 20 December 2017, C-664/15, *Protect*, a number of Austrian statutory laws were adapted. Many statutory (federal and provincial) laws now grant environmental organisations party status and rights of challenge.

In accordance with the case law of the European Court of Justice, the Supreme Administrative Court has gradually extended the party status (and thus the possibility of an appeal to the Supreme Administrative Court) of environmental organisations:

For example, in its judgment from 20 December 2019, Ro 2018/10/0010, regarding the felling of trees in a protected forest in the outer zone of a national park, the Supreme Administrative Court has ruled that the party status of recognised environmental organisations can arise directly from the Aarhus Convention.
In its judgment from 28 March 2022, Ra 2020/10/0101, the Supreme Administrative Court ruled that a recognised environmental organisation's right to bring an action for infringement of EU environmental law cannot be restricted due to a lack legal interest. Rather, a recognised environmental organization is entitled to object to infringements of EU environmental law irrespective of the question of violation of subjective rights. In this regard, the legal standing of recognised environmental organisations assessing the compliance with EU environmental legislation differs from that of other so-called "formal" parties whose legitimacy to lodge an appeal also is not dependent on the violation of subjective rights, but whose appeal can be dismissed due to a lack of legal interest.
More recently, in its judgment from 13 June 2023, Ra 2021/10/0162, the Supreme Administrative Court ruled that recognised environmental organisations not only have a right to request the adoption of a regulation to implement EU environmental law, but are also entitled to request the review or annulation of such a regulation before administrative authorities and courts.

18. Have there been any climate related cases before your court during recent years in which Article 8 (right to respect for private and family life) of the ECHR has played a role? Please elaborate and/or provide examples.

☐ Yes.
  ☐ Article 8 has been only a part of the argumentation.
  ☐ Article 8 has formed an essential part of the court's reasoning.
☒ No.

19. Have there been any climate related cases before your court during recent years in which Article 6.1 (right to a fair trial/access to court) of the ECHR has played a role? Please elaborate and/or provide examples.

☒ Yes.
☐ No.

Art. 6.1. of the ECHR only played a role in a climate related case before the Supreme Administrative Court when the Supreme Administrative Court dismissed the complaint of a citizens' initiative against the approval of the extraction of mineral raw materials in open-cast mining and ruled that the requested oral hearing could be refrained from in accordance with art. 6.1. of the ECHR because the Supreme Administrative Court was called upon after proceedings had taken place before the Environmental Senate, a tribunal within the meaning of the ECHR, and the complainant did not request that an oral hearing be held before the Environmental Senate (see the judgment from 24 February 2006, 2005/04/0044).

20. Have there been climate related cases before your court during recent years in which there has been a link to the rights of future generations? Please elaborate and/or provide examples.

☐ Yes.
☒ No.

The Supreme Administrative Court frequently refers to art. 1 Aarhus Convention in its case law. However, the Supreme Administrative Court did not elaborate on the rights of future generations mentioned in this provision.

21. Have there been any climate or other environmentally related cases before your court during recent years in which your court's competence to scrutinize political decision-makers' decision or inaction has been dealt with?

☐ Yes.
☒ No.

22. Have there been cases before your court during recent years in which the court has examined whether the competent national authorities, be it at legislative, executive or judicial level, have met relevant requirements pursuant to the domestic climate framework?

☐ Yes.
☒ No.

23. Has the *Klimaseniorinnen Schweiz v. Switzerland* case had an impact in your country? For instance, have new cases been brought to your court after that case? Please elaborate.

☐ Yes.
☒ No.

In Austria, only the Constitutional Court is competent to rule on the question whether a fundamental or constitutionally guaranteed right has been infringed. The Supreme Administrative Court only has final jurisdiction in matters of statutory administrative law. Therefore, the Supreme Administrative Court is not competent to rule on cases where parties to the proceedings claim that their rights under the ECHR have

been violated. Therefore, new cases concerning the infringement of rights under the ECHR in relation with climate change are brought before the Constitutional Court, not the Supreme Administrative Court.
Since the Supreme Administrative Court is a court of third instance and rules on cases that have already been brought before an administrative authority and then a first instance administrative court, a possible impact of the *Klimaseniorinnen Schweiz v. Switzerland* case at the Supreme Administrative Court will only show itself in time.

24. Can you identify any major differences between the legal questions raised by climate change, on one hand, and environmental matters, on the other hand, addressed so far in your court? Please elaborate and/or provide examples.

In the Austrian legal system, there is no differentiation between legal questions raised by climate change and environmental matters.

The principle of the primacy of the law - as stipulated in art. 18 of the Austrian Constitution (Bundes-Verfassungsgesetz - B-VG) - entails that the actions of the legislature, executive and judiciary must never violate applicable laws. If the law allows for a margin of appreciation or requires the authority to weigh specific interests against each other, authorities and subsequently first instance administrative courts may need to balance environmental interests with other (conflicting) interests. The Supreme Administrative Court then only examines the possible violation of simple statutory provisions in a contested decision by a first instance administrative court. Legal questions raised by climate change and environmental matters are therefore only addressed if this is provided for by simple law.

B. SUMMARY RETURNS OF ALIENS AT THE BORDER OR SHORTLY AFTER ENTRY INTO THE TERRITORY ("PUSH-BACKS")

In this questionnaire, the focus is particularly on the cases that have been assessed by the ECtHR primarily under Article 4 of Protocol No. 4 to the ECHR. Consequently, the focal question has been whether there has been a violation of the prohibition of the collective expulsion of aliens. The ECtHR cases in point are, in particular, N.D. and N.T. v. Spain [GC], 2020, and Shahzad v. Hungary, 2021. In addition, the existence of a sufficient remedy, in particular whether individuals were afforded an effective possibility of submitting arguments against their removal, has been assessed under Article 13 in conjunction with Article 4 of Protocol No. 4 for example in Khlaifia and Others v. Italy [GC], 2016. In Hirsi Jamaa and Others v. Italy [GC], 2012, the extraterritorial scope of Article 4 of Protocol No. 4 was confirmed with respect to State's action on the high seas aiming at preventing migrants from reaching the borders of the State or even to push them back to another State. Furthermore, there are several cases pending at the ECtHR, and three cases concerning alleged summary returns of individuals to Belarus from neighbouring states have been grouped to be heard together on 12 February 2025 by the Grand Chamber.

25. Is there specific national legislation applicable to returns of aliens at the border within the meaning of the ECtHR case law above? In particular, are there any specific national provisions intended to cover situations where entry is attempted by aliens *en masse* and/or where migratory flows are deemed to result

from actions of a third country with the aim of destabilising the receiving state ("instrumentalised migration")[3]? Please briefly explain the main points of the national provisions.

In 2016, special provisions for the preservation of public order and the protection of domestic security during the operation of border controls of the Federal Act Concerning the Granting of Asylum (Asylum Act 2005 – AsylG 2005) entered into force in Austria (sec. 36 to 41 AsylG 2005). However, these special provisions have never been applied to date.

The provisions stipulate that if the Federal Government, in agreement with the Main Committee of the National Council (one of two chambers in the Austrian Parliament), finds, by means of an order, that there is a threat to the preservation of public order and the protection of domestic security, the special provisions of the AsylG 2005 shall be applied during the period of validity of such order and the operation of border controls at internal borders.

The Federal Government shall provide reasons in writing to the Main Committee of the National Council for the finding that there is a threat to the preservation of public order and the protection of domestic security. In that respect, attention shall, in particular, be given to the number of aliens filing applications for international protection and to those state systems whose functioning is affected by current migration movements. The order may be issued for a period of validity of up to six months and be extended a maximum of three times for up to six months in each case.

If such an order is valid and border controls are reintroduced, the special provisions of the AsylG 2005 amend the possibilities of applying for international protection as well as the granting of de facto protection against deportation. Under the special provisions, applications for international protection by aliens who are not entitled to enter and reside in the federal territory shall generally be filed in person, at the time of the border crossing, with an agent of the public security service at the internal border.

Following the filing of an application for international protection, firstly, the admissibility of refusal of entry, rejection at the border or removal shall be determined prior to an interrogation concerning the admissibility of an application for international protection, and, if applicable, the refusal of entry, rejection at the border or removal measure shall be executed. Aliens are not granted de facto protection against deportation in this case.

Only if the refusal of entry, rejection at the border or removal proves impossible or inadmissible on the grounds of art. 2, 3 or 8 of the ECHR, the application for international protection shall be considered. In respect to art. 8 of the ECHR, the best interests of children shall, in particular, be taken into account.

It is possible to lodge a complaint against the refusal of entry, rejection at the border or removal. Such a complaint has no suspensive effect. If the refusal of entry, rejection at the border or removal is held to be illegal, the complainant's entry shall be permitted and the application for international protection shall be considered.

[3] The term "instrumentalised migration" is used, *inter alia*, in Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147.

26. Does your court have jurisdiction in the field of immigration law? If so, has your court dealt with cases involving alleged summary returns of aliens? In particular, have there been cases where the notion of collective expulsion as defined in Article 4 of Protocol No. 4 has been invoked and/or applied? If yes, please briefly explain the main points of the national jurisprudence.

The Supreme Administrative Court has jurisdiction in the field of immigration law (according to the annual activity report of the Supreme Administrative Court the highest number of cases in 2023 was in the area of asylum and aliens law) but has not yet ruled on cases where the notion of collective expulsion as defined in art. 4 of Protocol No. 4 to the ECHR was explicitly invoked or applied.

However, in two judgements the Supreme Administrative Court briefly referred to the notion of collective expulsion as defined in art. 4 of Protocol No. 4 to the ECHR: One case concerned the denial of a residence permit which did not violate art. 4 of Protocol No. 4 to the ECHR (see judgement from 5 March 2000, 2000/19/0013). The other case concerned disciplinary proceedings against a public servant and the assessment of his statement as constitutionally questionable in the light of the prohibition of collective expulsion as defined in art. 4 of Protocol No. 4 to the ECHR (see judgement from 3 October 2013, 2013/09/0077).

In this context, it might also be of relevance that in a recent decision in 2022, the Regional Administrative Court of Styria declared the rejection of an alien under the current regime of asylum and aliens law unlawful because he had used the word "asylum" and therefore should have been granted de facto protection against deportation. The Supreme Administrative Court dismissed an appeal by the Regional Police Directorate of Styria against this decision. Among others, the Supreme Administrative Court relied on its case law that a border control officer must ensure whether an application for international protection has been made prior to carrying out a rejection (see judgement from 5 May 2022, Ra 2021/21/0274).

27. Has the case law of the ECtHR in the field of summary returns of aliens and specifically the Court's interpretation of the scope of Article 4 of Protocol No. 4 had an impact on the content of the national legislation and/or on its interpretation by the national courts? If yes, please briefly explain the main developments.

The case law of the ECtHR in the field of summary returns of aliens has been referenced in the materials on the legislative proposal of the special provisions of the AsylG 2005 (sec. 36 to 41 AsylG 2005) in 2016. The report of the Committee of Internal Affairs of the National Council states that the proposed provisions are in conformity with the rights guaranteed by the ECHR and the respective case law of the ECtHR (it explicitly refers to the judgements of the ECtHR *Hirsi-Jamaa and others v. Italy*, No. 27765/09; *Hirsi-Jamaa and others v. Italy*, No. 27765/09; *Sharifi and Others v. Italy and France*, No. 16643/09).

28. Have any cases been brought against your state in the ECtHR alleging that there has been a violation of Article 4 of Protocol No. 4 (alone or in conjunction with Article 13 of the ECHR) in the field of immigration law? If yes, please briefly explain the main features of these cases.

To our knowledge, no cases have been brought against Austria before the ECtHR alleging a violation of art. 4 of Protocol No. 4 to the ECHR.

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