COLLOQUIUM ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND

IN CO-OPERATION WITH ACA-EUROPE

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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.

The Administrative Law Chamber of the Supreme Court of Estonia (in Estonian Riigikohtu halduskolleegium).

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 Protocol no 16 was ratified in 26th of June 2017. According to the ratification act § 2, the court, that can make a request according to the article 1 section 1 of the Protocol is the Supreme Court of Estonia.[2]

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.

The Administrative Law Chamber of the Supreme Court has so far not requested an advisory opinion. The panel of the Criminal Chamber of the Supreme Court, however, requested an advisory opinion in 2023. Although the request (no P16-2023-002) was refused (see decision here), the Panel of a Grand Chamber provided a substantive response to the posed question.
The case concerned the interpretation of article 4 § 1 of Protocol No. 7. Namely, the Estonian prosecuting authorities opened pre-trial proceedings in respect of a mayor in relation to the suspected offences of embezzlement and wilful breach of the public procurement rules. In August 2019 the district prosecutor in charge of the case decided to terminate the proceedings in respect of the suspected offence of wilful breach of the public procurement rules. Six months later a senior prosecutor revoked the decision to terminate the pre-trial proceedings in respect of the suspected offence of wilful breach of the public procurement rules. The County Court and the Court of Appeal both convicted the defendant on both charges. The question arose whether the principle of *ne bis in idem* was breached and whether the described order issued by the prosecutor's office in August 2019 can be interpreted as an acquittal within the meaning of Article 4 § 1 of Protocol No. 7 to the Convention, and if so, is such an acquittal final. In its answer, the Court referred to its

[2] Available in Estonian: https://www.riigiteataja.ee/akt/216062017003

case law and stated that the first question asked by the requesting court is the subject of well-established case law of the Court.

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.

For example, in the case no 3-20-999/37[3] the Administrative Law Chamber of the Supreme Court rejected the party´s request for an advisory opinion. The Chamber stated that its interpretation about the question, whether the complaint was filed due time, was not in conflict with the case law of ECtHR and therefore filing a request was not needed (p 26.1 and 26.2). In the case no 3-18-1758/26[4] the request was also rejected because it linked to procedural issues that were still under dispute, since the Chamber established a violation of procedural law in the matter and sent the case back to the first instance court (p 26).
In case the request is made, but the leave of appeal is not granted, the Administrative Law Chamber is not giving any reasons, why the leave was not granted or the request for advisory opinion refused. These reasons are covered by the confidentiality of deliberations.

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?

☐ 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.

[3] Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-999/37
[4] Available in Estonian: https://rikos.rik.ee/?asjaNr=3-18-1758/26

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☐ 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[5]

[5] 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

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?

☐ Yes. Please elaborate.
☒ No.

In climate change litigations apply the same rules as in other environmental disputes. According to the General Part of Environmental Code Act[6] § 30 section 1 a person whose right, including the right to the environment meeting the health and well-being needs, has been violated may file an intra-authority appeal with the administrative authority in accordance with the procedure provided for in the Administrative Procedure Act or file a claim with the administrative court in accordance with the procedure provided for in the Code of Administrative Court Procedure.

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

☐ Yes. Please elaborate.
☒ No.

In climate change litigations apply the same rules as in other environmental disputes. According to the General Part of Environmental Code Act § 30 section 2 where an environmental organisation contests an administrative decision or a taken administrative step in accordance with the procedure provided for in the Code of Administrative Court Procedure or in the Administrative Procedure Act, it is presumed that its interest is reasoned or that its rights have been violated where the contested administrative decision or step is related to the environmental protection goals or the current environmental protection activities of the organisation.

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.

https://climate.law.columbia.edu/content/climate-change-litigation and https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

[6] Available in English: https://www.riigiteataja.ee/en/eli/529122023002/consolide

☐ 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.

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.

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?

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?

In the case no 3-20-771/113[7] an environmental organisation contested a building permit for constructing a shale oil production plant. The organisation mostly relied on the fact that the construction of the oil plant did not enable to fulfil the objective of climate neutrality, but also blamed that there had been other shortcomings in assessing the environmental impact of the plant. The Administrative Law Chamber stated that the obligation to preserve the environment and natural resources as provided in the Constitution serves as the basis for the obligation of the State to limit greenhouse gas emissions in the conditions of global warming. Upon permitting developments of a significant climate impact, it must be observed that the planned activities were justified by an overriding interest and did not bring along a need to excessively restrict the freedoms of persons or the public interest in the future in order to curb climate changes. The Court found that the climate impact of operating the plant must be assessed preliminary upon issue of the building permit of the plant if the building permit is granted before the integrated environmental permit. If the planned

[7] Available in Estonian: https://rikos.rik.ee/LahendiOtsingEriVaade?asjaNr=3-20-771/103. Summary in English also available in JuriFast: https://www.aca-europe.eu/WWJURIFAST26_WEB/DOCS/BE12/BE12001563.pdf

activities brought along consequences due to which it is not possible to achieve the objectives of reducing greenhouse gas emission, such activities would certainly have a significant environmental impact. The more intensively and likely the planned activities aggravate the achievement of climate objectives, the more substantial the interests justifying the activities must be. The Supreme Court also emphasised that essential issues of the obligation to limit greenhouse gas emission must be decided based on the best available scientific information and international obligations of Estonia by the legislator. The Constitution obligates the Estonian State to make a proportional contribution to the achievement of the objective of the Paris Climate Agreement. To this end, it is in turn necessary to establish, in good times, a realistic and legally binding stage- and sector-based emissions allocation plan for achieving climate neutrality.

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.

No.

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.

No. So far, the legal questions raised by climate change have not differed significantly from other environmental matters.

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")[8]? Please briefly explain the main points of the national provisions.

The regulation concerning the summary returns of aliens at the border is regulated in the State Borders Act.[9] The purpose of the regulation is to prevent and manage mass immigration, including instrumentalized migration. According to § 9[10] section 1 in an emergency caused by mass immigration, in the event of a threat to public order or national security, the Police and Border Guard Board may return an alien who has illegally crossed the external border to the foreign state from where they arrived in Estonia without the issue of a precept to leave or without making a decision on prohibition on entry if it was possible for the alien to enter Estonia through a border crossing point open for crossing of the external border. In an emergency caused by mass immigration the Police and Border Guard Board may refuse the receipt of an application for international protection if the application was not filed at the location determined by the Police and Border Guard Board (§ 9[10] section 6).
However, upon the return of an alien the Police and Border Guard Board is to consider the principle of *non-refoulement* (§ 9[10] section 2). Also, the Police and Border Guard Board may admit an alien to Estonia for humanitarian reasons (§ 9[10] section 5), for example an applicant with special needs. According to § 9[10] section 3 where an alien cannot be returned immediately, the Police and Border Guard Board will organise compliance with the alien's obligation to leave in accordance with the rules provided in the Obligation to Leave and Prohibition on Entry Act. An alien may contest their return in accordance with the rules provided in the Code of Administrative Court Procedure. Contesting the return of an alien does not suspend the return of the alien nor does it provide grounds for admitting the alien to Estonia (§ 9[10] section 4). However, in an emergency caused by mass immigration, the court may suspend the expulsion or compliance with the precept to leave of an alien who has illegally crossed the external border until the administrative court has rejected by a decision the complaint filed by the alien (Obligation to Leave and Prohibition on Entry Act § 6[9] section 1).[10]

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.

Yes, the Administrative Law Chamber of the Supreme Court has jurisdiction in the field of immigration law. Up until now there have been now cases at the Supreme Court, where the Court had to deal with collective expulsion cases.

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.

[8] 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.
[9] Available in English: https://www.riigiteataja.ee/en/eli/518072024001/consolide
[10] Available in English: https://www.riigiteataja.ee/en/eli/505082024005/consolide

In the explanatory memorandum of the State Borders Act § 9[10] references to the case law of ECtHR have been made. Namely, the Court´s reasonings in cases *N.D ja N.T. vs. Spain* and *Hirsi Jamaa and Others v. Italy* have been brought out.

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.

No, there are no cases brought against Estonia in the referred matter.