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.

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.

Greece ratified Protocol No. 16 to the ECHR on 26 February 2019 (Article 1 of Law no. 4596/2019, Official Government Gazette, Issue A΄32). Greece declared that the highest courts designated for the purposes of Article 1, paragraph 1, of the Protocol are the Special Highest Court (Court of Article 100 of the Greek Constitution), the Supreme Court (Areios Pagos), the Supreme Administrative Court (Council of State) and the Court of Audit (Article 2, paragraph 1, of Law no. 4596/2019).

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.

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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.

1. In its judgment no. 490/2020, the Fifth Section of the Court rejected an application for annulment on the grounds that the time-limit has expired. The applicant then complained that the aforementioned rejection is contrary to Article 6, paragraph 1, of the ECHR. The Court responded that the reasons for rejection do not raise any question of violation of a principle or a rule of the ECHR and, hence, that there is no need to satisfy the applicant's request and ask for an advisory opinion from the EctHR. The Court added, however, that it is not bound, in all circumstances, by the applicant's request. This case-law may be considered as well established (see judgment no. 223/2023 of the Fifth Section of the Court· see also judgment no. 1892/2023 of the Third Section of the Court, in a case regarding the question whether the *ex lege* inadmissibility of applications against decisions of judicial councils imposing disciplinary penalties on judges is contrary to article 6, paragraph 1, of the ECHR).
2. In its Judgment no. 1535/2023, the Plenary Session of the Court rejected the applicant's similar request (in a case regarding mandatory religious education in schools), holding that Protocol No. 16 "extends the advisory jurisdiction of the ECtHR, in the context of the effort to ensure the effectiveness of the mechanism for monitoring the Convention and to strengthen the dialogue between the national courts and the ECtHR. This advisory procedure, which is established with a view to further strengthening the interaction between the ECtHR and the national authorities and enhancing the implementation of the Convention, in accordance with the principle of subsidiarity, is optional. The submission of the request is entrusted to the absolute discretion of the requesting supreme court, must be reasoned and must concern matters of principle relating to the interpretation or application of the rights and freedoms of the ECHR which are posed in the context of a case pending before it".

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

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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.

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12. If it is known that ratification is <u>not</u> 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]

[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.

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.

Law 4936/2022, entitled "National Climate Law - Transition to climate neutrality and adaptation to climate change, urgent provisions to address the energy crisis and protect the environment" (Official Government Gazette Issue A΄105), entered into force on 27 May 2022.
This law establishes measures and policies for the country's adjustment to climate change and for ensuring the decarbonisation pathway up to the year 2050. In particular, it establishes: (a) measures and policies to enhance adaptation to climate change at minimum cost, (b) interim man-made emission mitigation targets for the years 2030 and 2040, (c) indicators to monitor progress towards the achievement of the respective targets, (d) procedures for assessing and adjusting the targets and taking additional measures and (e) measures to mitigate emissions from the power generation, buildings, transport and business sectors.
This law also provides for the establishment of a mechanism for carbon budgeting for the key sectors of the economy and the system of governance and participation for climate action.

Nevertheless, the law does not provide for access to justice in cases of climate change litigation.

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

☐ Yes. Please elaborate.
☒ No.

It should be noted that The Fifth Section of the Court has long been elaborating the general procedural provisions on standing before the Council of State in order to bring an application for annulment in environmental disputes, recognizing the legitimate interest of associations, the statutory purpose of which is the protection of the natural environment whether at a national or at a local level, insofar as their application for annulment does not turn into an "actio popularis" (Judgments nos. 194/2024, 160/2024, 1885/2023 689/2023, 2462/2022 etc.).
Hence, it cannot be ruled out that the same requirements will apply for standing of associations in the climate change litigation.

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.

In a case regarding the zoning (positioning) of a landfill site in the island of Naxos, the applicants complained that there had been a violation of articles 6 and 8 of the ECHR, because the authorities had failed to make appropriate arrangements for the operation of the aforementioned infastructure. In its Judgment no. 963/2019, the Fifth Section of the Court held that the relevant administrative act is lawful and adequately reasoned, is based on the documents of the case file and does not infringe European Union and national legislation. Moreover, the construction and operation of the legally authorised landfill site for the safe disposal of solid waste protects public health and the environment. Consequently, the adoption of the contested measure does not infringe Articles 6 and 8 of the ECHR.

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.

In its Judgment no. 674/2018, the Fifth Section of the Court reiterated that article 6, paragraph 1, of the ECHR is not opposed to the national rule, according to which the time-limit for bringing an application for annulment of an individual administrative act published in the Official Govenment Gazette, begins to run, in respect of third parties who are not addressees of the act, from the date of its publication and not from the date of its notification.

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.

Yet, according to the Council of State's well established case-law, Article 24 of the Greek Constitution, which guarantees the so-called "right to the environment" (providing that "[t]he protection of the natural and cultural environment constitutes a duty of the State and a right of every person") and the sustainability principle, has been established, among others, in order to preserve natural resources for the benefit of future generations. To be more specific, the Court consistently holds that "The fundamental rule of sustainable development applies in particular to sensitive ecosystems, which are characterised by the unity of their landscape and the close interdependence of man-made systems and the natural environment, and whose development, whether residential, tourist or economic, must be linked to the preservation of their character and of the man-made and natural environment and must not infringe their carrying capacity. In order to

protect sensitive ecosystems, special spatial planning is required, which must provide for forms of low-impact development compatible with the principle of preserving their cultural and natural capital. Compliance by the administrative authorities with these constitutional requirements is subject to review by the Council of State in each specific case, taking into account the lessons of common experience". (Judgments nos. 399/2024, 1037/2022, 630/2022, 524/2021 etc.).
In the same context, the Court, construing Article 24, paragraph 2, of the Constitution regarding spatial and urban planning, has held that this provision "recognises that the State is responsible for spatial and urban planning and establishes its obligation to plan space in accordance with the findings and concepts of the science of spatial and urban planning. The aim of spatial planning is to serve the functionality and development of settlements and to ensure the best possible living conditions. This planning is carried out within the framework of the principle of sustainability (sustainable development), in accordance with the explicit reference to the principle of sustainable development in Article 24, paragraph 1, i.e. the preservation of the natural environment and natural resources for the benefit not only of the present generation but also of future generations, through the organisation of human activities (physical, economic, social and cultural) in space (Opinion of the Court 601/2002).

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?

As a rule, the Council of State reviews the constitutionality of every measure of a legislative nature in an ancillary manner and reviews directly every normative, i.e. regulatory, administrative act. The same applies in the environmental litigation. In fact, the Fifth Section of the Court has held that Article 24 of the Constitution directly enables it to declare the failure/omission of the administrative authorities to adopt regulatory acts relating to the protection of the environment, i.e. to adopt or expand a normative regime favourable to the environmental protection, even though that kind of judicial review is not in principal permissible under the constitutional principle of the separation of powers.
More specifically, in its Judgments nos. 1600/2023, 2261/2014, 2924/2011 etc., the Court has ruled that "[a]ccording to Article 24 of the Constitution, it is mandatory for the legislature and the administrative authorities to take the necessary normative, general or individual measures of a preventive or remedial nature, and for the courts to provide effective protection of the environment. Consequently, the authorities' omission to take such measures, which may even include the adoption or amendment of normative administrative acts, constitutes a failure to take a lawful action which is subject to annulment by the Council of State, because otherwise that constitutional requirement would be reduced to a mere theoretical declaration of principle, with the result that the environment would remain without effective protection, despite the clear intention of the constitutional legislature to the contrary".

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. In a set of cases regarding the legality of the master plan of the "Ellinikon Project", i.e. the urban development plan of the former Ellinikon International Airport in Athens, the Court affirmed, taking into account all the relevant recitals of the Project's environmental impact study, that the competent administrative authorities had taken into account the so called "climate change parameter" before issuing the administrative act approving the Project's environmental conditions (Judgments 2776/2020 in Plenum, 893-895/2021 of the Fifth Section).

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, not yet.

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.

The main difference seems to be that legal questions raised by climate change may be considered opaque, since they are not linked with specific legislative or administrative measures. Furthermore, legal questions raised by climate change may be considered that touch upon the delicate matter of the relations between the legislative and the judicial branch, i.e. the constitutional principle of separation of powers, in a more intense manner compared to 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")[3]? Please briefly explain the main points of the national provisions.

No. Law no. 4939/2022 (Official Government Gazette, Issue A΄133) defines *en masse* migratory flows as "the arrival of a significant number of displaced persons, coming from a designated country or geographical area, regardless of whether their arrival was spontaneous or assisted, such as through an evacuation programme".

[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.

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Nevertheless, there are no national provisions allowing authorities to take measures in order to prevent or reverse these flows.
It should be noted though, that on the 2nd of March 2020, the Greek Government, considering that Greece was confronted with the phenomenon of instrumentalised migration, issued an act of legislative content provided for in Article 44 of the Constitution (Official Government Gazette, Issue A'45), in the face of "[an] asymmetric threat to the security of the country that exceeds the justification basis of international and EU law for the asylum procedure, combined with the absolute objective impossibility of examining in a reasonable time the asylum applications that would arise due to the illegal mass entry into the country" (recital 2 of the act's preamble). Article 1 of the act of legislative content provided that the submission of applications for asylum by persons who enter the country illegally is suspended for a month following the entry of this act into force. Such persons shall be returned, without registration, to their country of origin or nationality. Neither this act of legislative content nor any other individual administrative act based on it was challenged before the Council of State.

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 Council of State has jurisdiction in the field of immigration law. Nevertheless, there is no case-law concerning neither summary returns nor collective expulsions, mainly because Greece hasn't ratified Protocol no. 4 to the ECHR.

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.

No.

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.

Although Greece was involved in the case Sharifi and Others v. Italy and Greece - 16643/09, the violation of Article 4 of Protocol No. 4 to the ECHR was found only against Italy.
In pending case K.K. and 17 others v. Greece (1712/21 etc.), concerning the alleged return of the applicants from Greece to Turkey (i.e. deportation from the Greek Islands to Turkey) without any prior procedure, the applicants complain about violation of Articles 2, 3 (alone and in conjunction with Article 13) and 5, paragraph 1, of the ECHR. Nevertheless, the ECtHR has indexed this case as relevant to potential violation of Article 4 of Protocol No. 4 to the ECHR, despite the fact that Greece has not ratified it. The same applies for case F.C. and 4 others v. Greece (10258/21 etc.).

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