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).*

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BACKGROUND INFORMATION

Supreme Court of Norway

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?

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☐ 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?

☐ 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.

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In the same way as judgments and decisions by the ECtHR are used as sources of law, advisory opinions are used when relevant.

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?

☐ Yes. Please elaborate.
☒ No.

The general admissibility criteria of "legal interest" in The Dispute Act Section 1-3 applies also in these kinds of cases. This entails that the claimant(s) must demonstrate a genuine need to have the claim decided against the defendant(s). It follows from Section 1-3 of the Dispute Act that this shall be determined based on an overall assessment of the relevance of the claim and the parties' connection to the claim.

17. Are there specific rules concerning standing of associations 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.

The general rules on standing of associations also apply in the context of climate change litigation. Pursuant to Section 1-4 of the Dispute Act that, this entails that an organisation or foundation may bring an action in its own name in relation to matters that fall within its purpose and normal scope, provided that the conditions in Section 1-3 are otherwise satisfied.

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.

HR-2020-2472-P concerned the validity of an administrative decision awarding ten petroleum production licenses for a total of 40 blocks or parts of blocks on the Norwegian continental shelf in the south and southeast parts of the Barents Sea. The Supreme Court, sitting in a plenary formation, unanimously found that the decision was not incompatible with The Constitution (Article 112) or The European Convention on Human Rights.

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.

Please see our answer to question 23.

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.

As previously mentioned, one of the questions in HR-2020-2472-P was whether an administrative decision awarding petroleum production licenses was compatible with Article 112 of The Constitution. Article 112 reads: *"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.*

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles."

As the wording shows, the notion of "future generations" is only explicitly mentioned in relation to the state's duty to manage natural resources on the basis of comprehensive long-term consideration. Nonetheless, the authorities´ duty to take measures for the implementation under section 3 will in practice ensure a certain level of protection of the rights and interests of future generations more generally.

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?

This was amongst the main questions raised in the previously mentioned 2020 plenary judgment from the Supreme Court (HR-2020-2472-P), see paragraphs 5 and 39 of the judgment.

In interpreting Article 112 of The Constitution, the Supreme Court attached considerable weight to the wording of Article 112 and its preparatory works, and concluded – against the view of the Government – that the provision entailed individual rights relevant in combating climate change. But the Supreme Court also highlighted that given how decisions involving basic environmental issues often require a political balancing of interests and broader priorities, democracy considerations suggest that these decisions should be made by popularly elected bodies, and not by the courts, see para 142 of the judgment. For the courts to be able to set aside a legislative decision or an administrative decision to which Stortinget (the parliament) has otherwise consented as contrary to Article 112 of The Constitution, Stortinget must have grossly neglected its duties under Article 112 subsection 3.

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?

There have not been any cases before the Supreme Court in recent years concerning whether the national authorities *more generally* have met relevant requirements pursuant to the domestic climate framework – the aforementioned plenary judgment concerned a specific administrative decision and its compatibility with the Constitution, the ECHR and EEA law.

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.

The *Klimaseniorinnen Schweiz v. Switzerland* case has been invoked in at least one case which is currently pending before the Supreme Court's Appeals Committee. This case (case no. 24-177617SIV-HRET) concerns questions relating to the use of interim measures (temporary injunctions) in the context of and as a measure to prevent or suspend planned petroleum related activities.

The underlying case which the contested interim measure relates to, concerns the validity of decisions of the Ministry of Energy approving the plan for development and operations (PDO) for three petroleum projects in the North Sea. Oslo District Court found that the decisions were incompatible with inter alia the EIA directive. As a result, the decisions were set aside as invalid. The District Court simultaneously granted an interim measure prohibiting the authorities from making further decisions relating to the petroleum

projects on the basis that the PDO decisions were in fact valid, until the validity of the decisions had been determined by a final and enforceable judgment.

On appeal, Borgarting Court of Appeal set aside the interim measure granted by Oslo City Court. The Court of Appeal is yet to render judgment on the validity of the decisions. This is largely due to the fact that the Court of Appeal has decided to request an advisory opinion from the EFTA Court, see case E-18/24.

The ruling from the Court of Appeal setting aside the interim measure has been appealed, and the case is as previously mentioned still pending before the Supreme Court's Appeals Committee. In the appeal, it is inter alia argued that the Court of Appeal's ruling is contrary to ECHR Article 6 and Article 13.

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.

As national case law in the area of climate change is still limited, it is difficult to point to major differences between the legal questions in these cases and cases regarding 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.

[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.

Article 34 of the Immigration Act sets out that in a mass flight situation, the King in Council may decide that collective protection may be granted. It follows from the second paragraph that any foreign national who is caught up in a situation of mass flight as mentioned in the first paragraph, and who arrives in the realm or is here when this section becomes applicable, may upon application be granted a temporary residence permit on the basis of a group assessment (collective protection). A foreign national who meets the criteria for collective protection, is exempt from the general criterium in Article 56 that a first-time residence permit shall be issued prior to entry into the realm, see the Immigration regulation ("utlendingsforskriften") section § 10-1.

Apart from this, the national legislation does not contain any general rules intended to cover situations where entry is attempted by aliens *en masse* and/or instances of "instrumentalised migration".

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 Court of Norway has jurisdiction in the field of immigration law, but has thus far not dealt with any cases involving alleged summary returns of aliens. There also appears to have been very few cases involving alleged summary returns of aliens before the lower courts.

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.

As far as we can tell, the case law of the ECtHR in the field of summary returns of aliens has not had a significant impact on the content of the national legislation and/or on its interpretation by the national courts. But as previously mentioned, there does not exist much national case law in this area.

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.

There have been brought cases against Norway alleging that there has been a violation of Article 4 of Protocol No. 4, see inter alia *B. and others v. Norway*. As far as we are aware, these cases have, however, been declared inadmissible on the ground that the admissibility criteria set out in Articles 34 and 35 of the Convention had not been met, see *B and others v. Norway* § 3 and § 22.