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.

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.

As of this date, the UK Supreme Court is not aware of a decision to which it would have been useful to request an advisory opinion.

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 relation to EU law, the UK Supreme Court has previously made use of preliminary rulings issued by the Court of Justice of the European Union regarding requests made by courts abroad as sources of case law. A recent example of this was the recent use of *Parfums Christian Dior SA v Evora BV* Case (Case C-337/95) EU:C:1997:222; which was cited in the case of *SkyKick UK Ltd and another (Appellants) v Sky Ltd and others (Respondents)* [2024] UKSC 36 for the proposition that the functions of a trade mark are, in part, to guarantee the quality of the item, and that a single undertaking (i.e. company or individual) is accountable for that quality.

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

☒ Yes. Please elaborate.
☐ No.

In relation to EU law, preliminary rulings requested by courts abroad have had an impact on the UK's national legal order. An example of this is *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (Case C-415/93) EU:C:1995:463. This case, originating in Belgium, impacted the football transfer system in the UK, as well as more generally UK employment in relation to professional athletes.

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.

[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.

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

☐ 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.

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 *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52, the Appellant argued that a failure for the UK's Airports National Policy Statement to take into account the Paris Agreement under the United Nations Framework Convention on Climate Change would allow major national projects to be developed without consideration of climate change, and that those projects would create an intolerable risk to life and to people's homes contrary to Article 8 of the ECHR. This argument was dismissed however, partly on the grounds that an individual's Article 8 rights would not be directly affected by the National Policy Statement itself, but only by an individual decision to grant a consent order to an airport's development.

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.

In *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20, the court ruled that a planning commission must consider downstream greenhouse gas emissions when assessing environmental impacts of fossil fuel extraction projects. Emphasis was placed on the future impact on the planet of the burning of fossil fuels. However, the rights of future generations were not explicitly recognised.

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.

In *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52, discussed above, the Appellant questioned the Secretary of State for Transport's decision to designate the Airports National Policy Statement, the national policy framework which governs the construction of a third runway at Heathrow Airport, as national policy. The Appellant challenged that decision on the grounds that the Secretary of State must take into account the Paris Agreement under the United Nations Framework Convention on Climate Change, and if they had done so, would not have designated the Airports National Policy Statement as a national policy. The court recognised that, although the Secretary of State must take into account environmental objectives, weight to be given to a particular consideration is a matter which falls within the discretion of the decision-maker, and is lawful unless the decision made is so unreasonable that no reasonable decision-maker would have made it [121]. That could not be said to be the case [128].

In *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20, the court found that, when considering planning permission to expand oil production from a well site, an environmental impact assessment must have regard to the emissions that will occur when the oil is produced. The local council was therefore wrong in not including these emissions in its assessment [174].

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.

Please see the case of *Finch* described above, in which the failure by Surrey County Council to take into consideration the impact of the burning of oil extracted from a wellsite when conducting an environmental impact assessment in relation to the grant of planning permission for an oil well site, in accordance with the

Town and Country Planning (Environmental Impact Assessment) Regulations 2017 which implemented European Union Directive 92/11/EU, was found to be unlawful.

In *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* [2020] UKSC 52, it was found that, although the United Kingdom had ratified the Paris Agreement, this had not been incorporated into UK law, and therefore did not form part of the domestic climate framework [106].

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.

There have been no cases before the UK Supreme Court in which *Klimaseniorinnen Schweiz v. Switzerland* has been cited or relied on. More broadly, there has been one first instance decision in which the case has been considered: *R. (on the application of Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 (Admin). There, it was held that the Secretary of State's proposal and timescales in relation to adaptation to climate change was not unlawful and fell within the wide margin of appreciation offered by the case.

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.

To the extent to which the Supreme Court has dealt with legal questions around climate change, these have been linked to environmental matters.

In relation to climate change, the recent case of *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others* [2024] UKSC 20 involved the question of whether a planning authority must consider the greenhouse gas emissions resulting from the combustion of oil produced by a new oil well when making an environmental impact assessment. In relation to climate change, a majority of the court found that the emissions that will occur on combustion of the oil produced are "effects of the project" because it is known with certainty that, if the project goes ahead, all the oil extracted from the ground will inevitably be burnt, thereby releasing greenhouse gases into the earth's atmosphere in a quantity which can readily be estimated.

Whilst, unlike with more usual environmental matters, it was recognised that it would be impossible to place a geographical limit on the scope of the harm, it was nevertheless found that the harms could be considered in the same way as other environmental harms.

An example from the environment context is *R (on the application of Mott) (Respondent) v Environment Agency (Appellant)* [2018] UKSC 10. There, the court was asked to consider whether a restriction on a fisherman to fish in the river Severn due to environmental concerns struck a fair balance between the Environmental Agency's responsibility to protect the environment, and compensation for Mr Mott's loss of a right to fish. It was held that, although there is a special importance of environmental protection, this does not detract from the need to draw a fair balance, including by providing compensation to the affected individual.

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.

Although there is no specific national legislative provision intended to cover situations where entry is attempted by aliens *en masse*, there have been recent developments in irregular migration law.

The Illegal Migration Act 2023 is the most recent and comprehensive law addressing irregular migration and returns at the UK border. This act introduces several key provisions:

- Mandatory removal: This requires that those who enter the UK illegally be detained and promptly removed, either to their home country or a safe third country (section 1, not yet in force). This could be applied in mass entry scenarios.

- Inadmissibility of claims: The Home Office is required to declare asylum claims inadmissible for those who have entered the UK irregularly (section 59).

The Nationality and Borders Act 2022 also introduces provisions for the expedited removal of such individuals (section 20, not yet in force), as well as tougher penalties for people smugglers (section 40).

[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.

Finally, section 15 of the Immigration Act 1971 grants the Home Secretary of the United Kingdom broad powers to deport any foreign national whose removal from the UK would be conducive to the public good.

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 has jurisdiction in the field of immigration law. However, to date, there have not been any cases involving alleged summary returns of aliens or cases where the notion of collective expulsion of aliens would have been invoked or applied.

A recent case, *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department)*, [2023] UKSC 42 involved the legality of the UK government's plan to send asylum seekers to Rwanda. While this case didn't explicitly address "summary returns," it raised concerns about expedited removals without proper individual assessment.

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.

To our knowledge, the Court's interpretation of the scope of Article 4 of Protocol No. 4 had not had an impact on the content of the national legislation and/or on its interpretation by the national courts. The Article is neither referenced in UK government legislation, and its related cases have not been referenced by UK national courts.

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 the United Kingdom in the ECtHR alleging a violation of Article 4 of Protocol No. 4.