



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.





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?

- 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.

Supreme Administrative Court, in resolution II OPS 1/19 (2 December 2019), adopted by a panel of 7 judges, referred to the advisory opinion no. P-16-2018-001 (10 April 2019). This resolution contains solution of legal issues raising considerable doubts in respect of a case concerns the obligation to transcribe foreign birth certificates of children, whose one of the parents is in a same-sex partnership. The ECtHR's opinion no. P-16-2018-001 was a part of the argumentation.

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 LITIGATION²

*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 Agostinho 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.

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.

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.
- 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?

No

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

The *Klimaseniorinnen Schweiz v. Switzerland* case should have an impact on legal proceedings concerning the liability of public authorities for acts and omissions that contribute to dangerous and irreversible climate change violating the personal rights of victims affected by the progressive climate crisis. In Poland, such cases are decided by common courts. They do not fall within the jurisdiction of administrative courts.





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.

There is currently no single coherent “climate law” in Poland in the sense of a comprehensive law dedicated exclusively to climate issues, unlike in 16 EU Member States (Austria, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden) and in 5 other European countries (Iceland, Liechtenstein, Norway, Switzerland, United Kingdom). Many separate laws deal with different aspects of climate and environmental protection. The notion “climate” appears in the legal definition of the term “environment”, which is regulated in Article 3(39) of the Environmental Protection Act (consolidated text: Journal of Laws of 2024, item 54, with amendments). According to the content of this provision, environment means all natural elements, including those that have been altered by human activity, in particular the soil surface, minerals, water, air, landscape, climate and other elements of biodiversity, as well as the interactions between these elements. For example, the legal protection of the climate is part of emission law, which is regulated in the Act of 27 April 2001 Environmental Protection Act. The basic legal instrument of emission law is the emission permit, which can be controlled by administrative courts.

The case law of the administrative courts, and in particular of the Supreme Administrative Court, significantly influences the application and interpretation of environmental law by the competent authorities. It should be pointed out that Polish administrative courts do not rule on the merits, but only in terms of legality of the act, therefore their judgments and decisions per se do not replace the decisions of the public authorities. In the Supreme Administrative Court’s jurisprudence climate change issues are involved indirectly, as a part of the argumentation, in cases relating to, e.g. land use and planning, waste management, water management or environmental information. For example, according to the Supreme Administrative Court jurisprudence, municipalities may establish environmental requirements in local law and prohibit the installation of new coal-burning cookers in local development plans. Whereas anti-smog resolutions issued by regional assemblies are acts introducing restrictions or prohibitions relating to the operation of existing installations that do not meet minimum pollution emission standards. In this way, the Supreme Administrative Court demarcated the boundaries between the competences of the various bodies authorised to make local law (cases nos.: II OSK 270/20, 7 February 2023; II OSK 160/20, 26 January 2023; II OSK 3286/19, 16 December 2020). This is connected with the implementation of the governmental “Clean Air” Programme by local authorities in order to improve air quality.

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

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





concerning alleged summary returns of individuals to Belarus from neighbouring states have been grouped to be heard together on 12 February 2025 by the Grand Chamber.

25. Is there specific national legislation applicable to returns of aliens at the border within the meaning of the ECtHR case law above? In particular, are there any specific national provisions intended to cover situations where entry is attempted by aliens *en masse* and/or where migratory flows are deemed to result from actions of a third country with the aim of destabilising the receiving state (“instrumentalised migration”)³? Please briefly explain the main points of the national provisions.

In Poland there is no specific legislation applicable to returns of foreigners in situations where entry is attempted by them *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. But, in connection with the situation at the Polish-Belarusian border (migration crisis) the following regulations allowing the returns of foreigners at the border have been adopted:

1) Article 303b of the Act on Foreigners (consolidated text: Journal of Laws of 2024, item 769, with amendment). It provides a new individual legal instrument allowing for expulsion: an order to leave Poland after the foreigner has crossed the border in an illegal manner (in connection with Article 303 section 1 point 9a of this Act). The “order to leave” is accompanied by a re-entry ban covering the Schengen zone, so it has the same effect as a return decision based on the EU Return Directive (Directive 2008/115/EC).

2) Article 33 section 1a of the Act on Protection (the Act on granting protection to foreigners on the territory of the Republic of Poland, consolidated text: Journal of Laws of 2023, item 1504, with amendment). According to this Article, the Office for Foreigners has gained a power to leave without consideration an application for international protection submitted by foreigners who crossed the border illegally. There is one exception to this rule: the application is not left without consideration if (a) the applicant came directly from the territory where his/her life or freedom was threatened by persecutions or serious harm and (b) the applicant presented reliable reasons for illegal entry and (c) the applicant applied for international protection directly after crossing the border.

3) Regulation of the Minister for Internal Affairs and Administration of the 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points (Journal of Laws of 2020, item 435, with amendments), that allows for immediate pushbacks without taking any formal decision. The Voivodship Administrative Court in Białystok, in cases no. II SA/Bk 492/22, II SA/Bk 493/22 and II SA/Bk 494/22 (judgments of 15 September 2022), refused to apply provisions of this Regulation. The Court found that the expulsion of foreigners based on the Regulation was ineffective, because this act did not comply with the Polish Constitution and the 1951 Refugee Convention.

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 Polish Supreme Administrative Court has jurisdiction in the field of immigration law. The Court applies Article 4 of Protocol No. 4 (as connected with the *non-refoulement* principle) in its judgments. For example,

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.





in the judgment of 9 January 2024 in case no. II OSK 165/23 the Supreme Administrative Court stated that simplified expulsion procedure is permitted under EU legislation, in particular Article 2(1)(a) of the Return Directive. This case concerned the decision of the Polish Border Guard on ordering an immigrant to leave Polish territory due to the fact that he was stopped immediately after crossing the border illegally. The Court emphasised that the conduct of a simplified procedure cannot lead to a violation of the principle of *non-refoulement*. The Court also indicated that the principle of *non-refoulement* protects not only persons who have applied for refugee status, but also foreigners who have not.

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

The ECtHR case law and its interpretation of the scope of Article 4 of Protocol No. 4 has an impact on the interpretation of national law by the administrative courts, including its case law in the field of summary returns of foreigners. For example, the Voivodship Administrative Court in Białystok, in case no. II SA/Bk 492/22 (judgment of 15 September 2022) concerning pushbacks at the Polish-Belarusian border based on the Regulation of the Minister for Internal Affairs and Administration of the 13 March 2020, took into consideration the notion of collective expulsion within the meaning of Article 4 of Protocol No. 4. The Court underlined that Article 4 of Protocol No. 4, as well as Article 19 paragraph 1 of the Charter of Fundamental Rights of the European Union, imposes an obligation to individually examine the case of each of the foreigners seeking protection (including in the event of their mass migratory flows), with particular consideration of the situation in the country to which they were to be returned. Therefore, the Court stated, that the failure to conduct a thorough investigation to determine whether the removal of foreigners would expose them to the dangers described in Article 33 paragraph 1 of the Geneva Convention and Article 19 paragraph 2 of the Charter of Fundamental Rights, in particular inhuman or degrading treatment, violates Article 19, paragraph 1 of the Charter of Fundamental Rights and Article 4 of Protocol No. 4. The example is also the judgment of the Voivodship Administrative Court in Warsaw of 26 April 2022 in case no. IV SA/Wa 420/22. This case concerned an order to leave Poland on the basis of Article 303b of the Act on Foreigners, issued to a foreigner who crossed the border illegally. The Court found that failure to comply with the principle of non-refoulement may result in a violation of fundamental rights such as the right to an effective remedy and the prohibition of collective expulsion, which is set out in Article 4 of Protocol No. 4 to the ECHR and Article 19 of the Charter of Fundamental Rights of the EU. In this context the Voivodship Administrative Court in Warsaw applied, *inter alia*, the considerations from the ECtHR judgment *Chahal v. United Kingdom* (application no. 22414/93).

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.

Yes, there are cases against Poland decided by the ECtHR and pending cases in the field of migration law based on allegations of violation of Article 4 of Protocol No. 4 (alone or in conjunction with Article 13 of the ECHR).

The judgments finding Poland in violation of Article 3 ECHR, Article 4 of Protocol No. 4, Article 13 ECHR taken in conjunction with Article 3 ECHR and Article 4 of Protocol No. 4 were issued in cases: 1) M.K. and





Others v. Poland, nos. 40503/17 and 2 others, 23 July 2020; 2) D.A. and Others v. Poland, no. 51246/17, 8 July 2021; 3) A.I. and Others v. Poland, no. 39028/17, 30 June 2022; 4) A. B. and Others v. Poland, no. 42907/17, 30 June 2022; 5) T.Z. and Others v. Poland, no. 41764/17, 13 October 2022; 6) Sherov and Others v. Poland, nos. 54029/17 and 3 others, 4 July 2024. These cases concerned, respectively, the situations at the Polish-Belarusian border or the Polish-Ukrainian border, where in 2016 and 2017 the complaining foreigners (Russian, Syrian and Tajikistani nationals) repeatedly tried to submit an application for international protection.

The cases pending before the ECtHR concern a situation of foreigners, who have crossed the Polish-Belarusian border in 2021 or 2022. These cases are different from those already decided by the ECHR. They relate to the hybrid war on the Polish-Belarusian border, often referred to as the "instrumentalisation" of migrants. One of these cases – R.A. and Others v. Poland (no. 42120/21) – is pending before the Grand Chamber (the date of hearing: 12 February 2025). This case concerns a group of 32 Afghan nationals who crossed the Belarusian-Polish border in August 2021 before being forcibly pushed back to Belarus by Polish Border Guards. Relying on Article 3 ECHR, Article 4 of Protocol No. 4 and Article 13 ECHR taken together with Article 3 and Article 4 of Protocol No. 4, the applicants further complain that they have been subjected to a collective expulsion and that no effective remedy has been available to them. Other similar cases communicated to Poland by the ECtHR: 1) A.A. and Others v. Poland and M.A. v. Poland (nos. 15182/22 and 40833/22); 2) A.A. and Others v. Poland (no. 48018/21), B.H. v. Poland (no. 57554/21) and H.K. and H.U. v. Poland (no. 58103/21); 3) H.K. and Others v. Poland (no. 12752/22); 4) A.S. v. Poland (no. 15318/22); 5) I.A. and Others v. Poland (no. 53181/21) and A.H.A. and N.A.A.H. v. Poland (no. 53566/21) and Z.K. and Others v. Poland (no. 16746/22), S.H. and Others v. Poland (no. 16748/22); 6) M.M. and Others v. Poland (no. 2509/22) and N.H. v. Poland (no. 10271/22) and A.R. v. Poland (no. 10373/22); 7) F.A. and S.H.v. Poland (no. 54862/21). Some of these cases have not previously been reviewed by Polish administrative courts (i.e. the complaints have not been lodged).

