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About
NEMIS is a newsletter designed for judges who need to keep up to date with EU developments in migration and borders law. This newsletter contains all European legislation and jurisprudence on access and residence rights of third country nationals. NEMIS does not include jurisprudence on free movement or asylum. We would like to refer to a separate Newsletter on that issue, the Newsletter on European Asylum Issues (NEAIS).
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Welcome to the Second issue of NEMIS in 2018. In this issue we would like to draw your attention to the following.

Family Life
On 12 April 2018, the CJEU ruled (C-550/16, A & S) on the issue of the particular moment of reference to which the age of a refugee must be assessed in order to be regarded as a minor and be able therefore to benefit from the right to family reunification under Article 10(3)(a) of the Family Reunification Directive 2003/86. The Court ruled that the date of application for asylum is determinative. Another conclusion would make the right to family reunification depending upon the moment at which the competent national authority formally adopts the decision recognising the refugee status of the person concerned and, therefore, on how quickly or slowly the application for international protection is processed by that authority. Such an interpretation would go against not only the aim of that directive, but also the principles of equal treatment and legal certainty as well as the best interests of the child.

The Advocate General delivered two opinions. On the question if an application for family reunification by a refugee can be rejected for the sole reason that it was not submitted within the three-month period of Article 12(1) 3rd par. (C-380/17, K & B), the AG concluded that an automatic rejection would violate articles 17 and 5(5) Directive and the Charter on Fundamental Rights. Furthermore the AG stipulated that these obligations apply to both the formal and material aspects of the procedure. On the question whether Member States are allowed to impose an integration requirement for the granting of an autonomous residence permit on the basis of Article 15 (C-257/17, C & A), the AG concluded that this is not allowed, as this implies a material requirement, which is not provided for in the Directive. The national requirements allowed for by the Directive in Article 15(4) only refer to formal requirements. If a Member State requires that the family member submits an application, the autonomous residence right, which has a declaratory nature, starts to apply from that moment onwards.

Return
On 8 May 2018, the CJEU ruled (K.A. et al, C-82/16) that Article 20 TFEU precludes that an application for a residence permit from a third country national family member of an EU citizen is not examined for the sole reason that he is subjected to an entry ban based on Article 11 Return Directive. The authorities have to examine whether there exists, between the third-country national and Union citizen concerned, a relationship of dependency in such a way that the EU-citizen would be compelled to leave the EU-territory if the third country national would be denied a right of residence. In that case, the EU-citizen would be deprived of the genuine enjoyment of the substance of the rights conferred on him by that status. In such circumstances, the Member State concerned must withdraw or, at the least, suspend the return decision and the entry ban to which that third-country national is subject.
1 Regular Migration

1.1 Regular Migration: Adopted Measures

**Directive 2009/50**

*On conditions of entry and residence of TCNs for the purposes of highly qualified employment*

<table>
<thead>
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<th>Case</th>
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<tr>
<td>Blue Card</td>
<td>OJ 2009 L 155/17</td>
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**Directive 2003/86**

*On the right to Family Reunification*

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<tr>
<td>Family Reunification</td>
<td>OJ 2003 L 251/12</td>
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**Case law sorted in chronological order**

- **Blue Card I**
  - CJEU C-550/16 A. & S. 12 Apr. 2018 Art. 2(f)
  - CJEU C-558/14 Khachab 21 Apr. 2016 Art. 7(1)(c)
  - CJEU C-153/14 K. & A. 9 July 2015 Art. 7(2)
  - CJEU C-338/13 Noorzia 17 July 2014 Art. 4(5)
  - CJEU C-138/13 Dogan (Naime) 10 July 2014 Art. 7(2)
  - CJEU C-87/12 Ymeraga 8 May 2013 Art. 3(3)
  - CJEU C-356/11 O. & S. 6 Dec. 2012 Art. 7(1)(c)
  - CJEU C-155/11 Imran 10 June 2011 Art. 7(2) - no adj.
  - CJEU C-578/08 Chakroun 4 Mar. 2010 Art. 7(1)(c) + 2(d)
  - CJEU C-540/03 E. v. Council 27 June 2006 Art. 8
  - CJEU pending cases pending Art. 3(3)
  - CJEU C-257/17 C. & A. pending Art. 9(2)
  - CJEU C-380/17 K. & B. pending Art. 15
  - CJEU C-484/17 K. pending Art. 16(2)(a)
  - CJEU C-557/17 Y.Z. a.o. pending Art. 3(2)(c) + 11(2)
  - EFTA pending cases pending
  - EFTA E-4/11 Claudia 26 July 2011 Art. 7(1)

**Council Decision 2007/435**

*Establishing European Fund for the Integration of TCNs for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows*

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<thead>
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<tr>
<td>Integration Fund</td>
<td>OJ 2007 L 168/18</td>
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**Directive 2014/66**

*On conditions of entry and residence of TCNs in the framework of an intra-corporate transfer*

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<tr>
<td>Intra-Corporate Transferees</td>
<td>OJ 2014 L 157/1</td>
<td>impl. date 29 Nov. 2016</td>
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**Directive 2003/109**

*Concerning the status of TCNs who are long-term residents*

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<td>OJ 2004 L 16/44</td>
<td>impl. date 23 Jan. 2006</td>
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<tr>
<td>CIEU judgments</td>
<td>CIEU C-636/16 Lopez Pastuzano 7 Dec. 2017</td>
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<td>CIEU C-309/14 CGIL 2 Sep. 2015</td>
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<td>CIEU C-579/13 P. &amp; S. 4 June 2015</td>
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<td>CIEU C-311/13 Tümner 5 Nov. 2014</td>
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<td>CIEU C-469/13 Tahir 17 July 2014</td>
<td>Art. 3(2)(e)</td>
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<td>CIEU C-40/11 Iida 8 Nov. 2012</td>
<td>Art. 11(1)(d)</td>
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<td>CIEU C-502/10 Singh 18 Oct. 2012</td>
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<tr>
<td>CIEU C-508/10 Com. v. Netherlands 26 Apr. 2012</td>
<td>Art. 11(1)(d)</td>
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<td>CIEU C-571/10 Servet Kamberaj 24 Apr. 2012</td>
<td>Art. 11(1)(d)</td>
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See further: § 1.3

**Directive 2011/51**

*Long-Term Resident status for refugees and persons with subsidiary protection*

<table>
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1.1: Regular Migration: Adopted Measures

* OJ 2011 L 132/1 (April 2011) impl. date 20 May 2013
  extending Dir. 2003/109 on LTR

Council Decision 2006/688: Mutual Information
On the establishment of a mutual information mechanism in the areas of asylum and immigration
* OJ 2006 L 283/40
  UK, IRL opt in

Directive 2005/71: Researchers
On a specific procedure for admitting TCNs for the purposes of scientific research
* Directive is replaced by Dir. 2016/801 Researchers and Students
  CJEU judgments
  CJEU C-523/08 Com. v. Spain 11 Feb. 2010
  See further: § 1.3

Recommendation 762/2005: Researchers
To facilitate the admission of TCNs to carry out scientific research
* OJ 2005 L 289/26
  Directive 2005/71 on Researchers replaced by Dir. 2016/801 Researchers and Students

Regulation 1030/2002: Residence Permit Format I
Laying down a uniform format for residence permits for TCNs
* OJ 2002 L 157/1
  amended by Reg. 330/2008 (OJ 2008 L 115/1)
  UK opt in

Regulation 2017/1954: Residence Permit Format II
On a uniform format for residence permits for third-country nationals
* OJ 2017 L 286/9
* Amending Reg. 1030/2002 on Residence Permit Format

Directive 2014/36: Seasonal Workers
On the conditions of entry and residence of TCNs for the purposes of seasonal employment

Single Application Procedure: for a single permit for TCNs to reside and work in the territory of a MS and on a common set of rights for third-country workers legally residing in a MS
  CJEU judgments
  CJEU C-449/16 Martinez Silva 21 June 2017 Art. 12(1)(e)
  See further: § 1.3

Regulation 859/2003: Social Security TCN
Third-Country Nationals’ Social Security extending Reg. 1408/71 and Reg. 574/72
* OJ 2003 L 124/1
  Replaced by Reg 1231/2010: Social Security TCN II
  CJEU judgments
  CJEU C-465/14 Wieland & Rothwangl 27 Oct. 2016 Art. 1
  CJEU C-247/09 Xhymshiti 18 Nov. 2010
  See further: § 1.3

Regulation 1231/2010: Social Security TCN II
Social Security for EU Citizens and TCNs who move within the EU
* OJ 2010 L 344/1 impl. date 1 Jan. 2011
  Replacing Reg. 859/2003 on Social Security TCN
  IRL opt in

Directive 2004/114: Students
Admission of Third-Country Nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service
* OJ 2004 L 375/12 impl. date 12 Jan. 2007
* Directive is replaced by Dir. 2016/801 Researchers and Students
  CJEU judgments
  CJEU C-491/13 Ben Alaya 10 Sep. 2014 Art. 6 + 7
  CJEU C-544/15 Fahimian 4 Apr. 2017 Art. 6(1)(d)
  CJEU C-15/11 Sommer 21 June 2012 Art. 17(3)
  CJEU C-294/06 Payir 24 Nov. 2008
  See further: § 1.3
1.1: Regular Migration: Adopted Measures

European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols
Art. 8 Family Life
Art. 12 Right to Marry
Art. 14 Prohibition of Discrimination

* ETS 005 (4 November 1950) impl. date 31 Aug. 1954

ECtHR Judgments

New ECtHR 32248/12 Ibrogimov 15 May 2018 Art. 8 + 14
New ECtHR 63311/14 Hoti 26 Apr. 2018 Art. 8
ECtHR 41215/14 Ndidi 14 Sep. 2017 Art. 8
ECtHR 33809/15 Alam 29 June 2017 Art. 8
ECtHR 41697/12 Krasniqi 25 Apr. 2017 Art. 8
ECtHR 31183/13 Abuhmaid 12 Jan. 2017 Art. 8 + 13
ECtHR 77063/11 Salem 1 Dec. 2016 Art. 8
ECtHR 56971/10 El Ghatet 8 Nov. 2016 Art. 8
ECtHR 38590/10 Biao 24 May 2016 Art. 8 + 14
ECtHR 12738/10 Jeunesse 3 Oct. 2014 Art. 8
ECtHR 32504/11 Kaplan a.o. 24 July 2014 Art. 8
ECtHR 52701/09 Mugenzi 10 July 2014 Art. 8
ECtHR 17120/09 Dhaibi 8 Apr. 2014 Art. 6, 8 + 14
ECtHR 52166/09 Hasanbasic 11 June 2013 Art. 8
ECtHR 12020/09 Udeh 16 Apr. 2013 Art. 8
ECtHR 22689/07 De Souza Ribeiro 13 Dec. 2012 Art. 8 + 13
ECtHR 47017/09 Butt 4 Dec. 2012 Art. 8
ECtHR 22341/09 Hode and Abdi 6 Nov. 2012 Art. 8 + 14
ECtHR 26940/10 Antwi 14 Feb. 2012 Art. 8
ECtHR 22251/07 G.R. 10 Jan. 2012 Art. 8 + 13
ECtHR 8000/08 A.A. 20 Sep. 2011 Art. 8
ECtHR 55597/09 Nunez 28 June 2011 Art. 8
ECtHR 38058/09 Osman 14 June 2011 Art. 8
ECtHR 34848/07 O'Donoghue 14 Dec. 2010 Art. 12 + 14
ECtHR 41615/07 Neulinger 6 July 2010 Art. 8
ECtHR 1638/03 Maslov 22 Mar. 2007 Art. 8
ECtHR 46410/00 Úner 18 Oct. 2006 Art. 8
ECtHR 54273/00 Boubif 2 Aug. 2001 Art. 8

See further: § 1.3

1.2 Regular Migration: Proposed Measures

Directive

Blue Card (amended)

On the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment.

* COM (2016) 378, 7 June 2016

1.3 Regular Migration: Jurisprudence

1.3.1 CJEU Judgments on Regular Migration

New CJEU C-550/16 A. & S. 12 Apr. 2018
* interpr. of Dir. 2003/86 Family Reunification Art. 2(f)
* Art. 2(f) (in conjunction with Art. 10(3)(a)) must be interpreted as meaning that a TCN or stateless person who is below the age of 18 at the time of his or her entry into the territory of a MS and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status must be regarded as a ‘minor’ for the purposes of that provision.

New CJEU C-491/13 Ben Alaya 10 Sep. 2014
1.3: Regular Migration: Jurisprudence: CJEU Judgments

* **CJEU C-309/14**
  * interp. of Dir. 2003/109
  * The MS concerned is obliged to admit to its territory a third-country national who wishes to stay for more than three months in that territory for study purposes, where that national meets the conditions for admission exhaustively listed in Art. 6 and 7 and provided that that MS does not invoke against that person one of the grounds expressly listed by the directive as justification for refusing a residence permit.
  * **CGIL**
  * 2 Sep. 2015

* **CJEU C-578/08**
  * interp. of Dir. 2003/86
  * The concept of family reunification allows no distinction based on the time of marriage. Furthermore, Member States may not require an income as a condition for family reunification, which is higher than the national minimum wage level. Admission conditions allowed by the directive, serve as indicators, but should not be applied rigidly, i.e. all individual circumstances should be taken into account.
  * **Chakroun**
  * 4 Mar. 2010

* **CJEU C-508/10**
  * incorp. appl. of Dir. 2003/109
  * The Court rules that the Netherlands has failed to fulfil its obligations by applying excessive and disproportionate administrative fees which are liable to create an obstacle to the exercise of the rights conferred by the Long-Term Residents Directive: (1) to TCNs seeking long-term resident status in the Netherlands, (2) to those who, having acquired that status in a MS other than the Kingdom of the Netherlands, are seeking to exercise the right to reside in that MS, and (3) to members of their families seeking authorisation to accompany or join them.
  * **Com. v. Netherlands**
  * 26 Apr. 2012

* **CJEU C-523/08**
  * non-transp. of Dir. 2005/71
  * The language requirement abroad is not in compliance with the standstill clauses of the Association Agreement. Although the question was also raised whether this requirement is in compliance with the Family Reunification Directive, the Court did not answer that question. However, paragraph 38 of the judgment could also have implications for its forthcoming answer on the compatibility of the language test with the Family Reunification: “on the assumption that the grounds set out by the German Government, namely the prevention of forced marriages and the promotion of integration, can constitute overriding reasons in the public interest, it remains the case that a national provision such as that at issue in the main proceedings goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case”. In this context it is relevant that the European Commission has stressed in its Communication on guidance for the application of Dir 2003/86, “that the objective of such measures is to facilitate the integration of family members. Their admissibility depends on whether they serve this purpose and whether they respect the principle of proportionality” (COM (2014)210, § 4.5).
  * **Com. v. Spain**
  * 11 Feb. 2010

* **CJEU C-540/03**
  * interp. of Dir. 2003/86
  * The derogation clauses (3 years waiting period and the age-limits for children) are not annulled, as they do not constitute a violation of article 8 ECHR. However, while applying these clauses and the directive as a whole, Member States are bound by the fundamental rights (including the rights of the child), the purpose of the directive and obligation to take all individual interests into account.
  * **EP v. Council**
  * 27 June 2006

* **CJEU C-544/15**
  * interp. of Dir. 2004/114
  * Art. 6(1)(d) is to be interpreted as meaning that the competent national authorities, where a third country national has applied to them for a visa for study purposes, have a wide discretion in ascertaining, in the light of all the relevant elements of the situation of that national, whether he represents a threat, if only potential, to public security. That provision must also be interpreted as not precluding the competent national authorities from refusing to admit to the territory of the Member State concerned, for study purposes, a third country national who holds a degree from a university which is the subject of EU restrictive measures because of its large scale involvement with the Iranian Government in military or related fields, and who plans to carry out research in that Member State in a field that is sensitive for public security, if the elements available to those authorities give reason to fear that the knowledge acquired by that person during his research may subsequently be used for purposes contrary to public security. It is for the national court hearing an action brought against the decision of the competent national authorities to refuse to grant the visa sought to ascertain whether that decision is based on sufficient grounds and a sufficiently solid factual basis.
  * **Fahimian**
  * 4 Apr. 2017

* **CJEU C-40/11**
  * interp. of Dir. 2003/109
  * In order to acquire long-term resident status, the third-country national concerned must lodge an application with the competent authorities of the Member State in which he resides. If this application is voluntarily withdrawn, a residence permit can not be granted.
  * **Iida**
  * 8 Nov. 2012
1.3: Regular Migration: Jurisprudence: CJEU Judgments

NEMIS 2018/2 (June)  
Newsletter on European Migration Issues – for Judges
1.3.2 CJEU pending cases on Regular Migration

- **interpr. of** Dir. 2003/109 **Long-Term Residents**
  - **The concept of ‘residence permit which has been formally limited’ as referred to in Art. 3(2)(e), does not include a fixed-period residence permit, granted to a specific group of persons, if the validity of their permit can be extended indefinitely without offering the prospect of permanent residence rights. The referring national court has to ascertain if a formal limitation does not prevent the long-term residence of the third-country national in the Member State concerned. If that is the case, this national cannot be excluded from the personal scope of this Dir.**

- **CJEU C-15/11** **Sommer** 21 June 2012
  - **interpr. of** Dir. 2004/114 **Students**
  - **The conditions of access to the labour market by Bulgarian students, may not be more restrictive than those set out in the Directive**

- **CJEU C-469/13** **Tahir** 17 July 2014
  - **interpr. of** Dir. 2003/109 **Long-Term Residents**
  - **Family members of a person who has already acquired LTR status may not be exempted from the condition laid down in Article 4(1), under which, in order to obtain that status, a TCN must have resided legally and continuously in the MS concerned for five years immediately prior to the submission of the relevant application. Art. 13 of the LTR Directive does not allow a MS to issue family members, as defined in Article 26(e) of that directive, with LTR’ EU residence permits on terms more favourable than those laid down by that directive.**

- **CJEU C-311/13** **Timmer** 5 Nov. 2014
  - **interpr. of** Dir. 2003/109 **Long-Term Residents**
  - **While the LTR provided for equal treatment of long-term resident TCNs, this ‘in no way precludes other EU acts, such as’ the insolvent employers Directive, “from conferring, subject to different conditions, rights on TCNs with a view to achieving individual objectives of those acts”.**

  - **interpr. of** Reg. 859/2003 **Social Security TCN**
  - **Art. 1**
  - **Article 2(1) and (2) of Regulation 859/2003, must be interpreted as not precluding legislation of a Member State which provides that a period of employment — completed pursuant to the legislation of that Member State by an employed worker who was not a national of a Member State during that period but who, when he requests the payment of an old-age pension, falls within the scope of Article 1 of that regulation — is not to be taken into consideration by that Member State for the determination of that worker’s pension rights.**

- **CJEU C-247/09** **Xhymshtiti** 18 Nov. 2010
  - **interpr. of** Reg. 859/2003 **Social Security TCN**
  - **In the case in which a national of a non-member country is lawfully resident in a MS of the EU and works in Switzerland, Reg. 859/2003 does not apply to that person in his MS of residence, in so far as that regulation is not among the Community acts mentioned in section A of Annex II to the EU-Switzerland Agreement which the parties to that agreement undertake to apply.**

- **CJEU C-87/12** **Ymeraga** 8 May 2013
  - **interpr. of** Dir. 2003/86 **Family Reunification**
  - **Art. 3(3)**
  - **Directives 2003/86 and 2004/38 are not applicable to third-country nationals who apply for the right of residence in order to join a family member who is a Union citizen and has never exercised his right of freedom of movement as a Union citizen, always having resided as such in the Member State of which he holds the nationality (see, also, C-256/11 Dereci a.o., par. 58).**

**1.3.2 CJEU pending cases on Regular Migration**

- **CJEU C-257/17** **C. & A.**
  - **Art. 3(3)**
  - **interpr. of** Dir. 2003/86 **Family Reunification**
  - **AG: 27 Jun 2018**
  - **Having regard to the Nolan judgment (C-538/10) does the CJEU have jurisdiction to answer questions referred for a preliminary ruling by the courts of the Netherlands concerning the interpretation of certain provisions of the Family Reunification directive in proceedings relating to the right of residence of members of the family of sponsors who have Netherlands nationality, if that directive has been declared to be directly and unconditionally applicable under Netherlands law to those family members? Should Article 15(1) and (4) be interpreted as precluding national legislation under which an application for an autonomous residence permit on the part of a foreign national who has resided lawfully for more than five years on the territory of a MS for family-reunification purposes may be rejected because of non-compliance with conditions relating to integration laid down in national law?**

- **CJEU C-635/17** **E.**
  - **Family Reunification**
  - **Art. 3(2)(c) + 11(2)**
  - **interpr. of** Dir. 2003/86
  - **On the proof of family ties and the situation in which there is a plausible explanation for the fact that no such documentary evidence is provided.**

- **CJEU C-484/17** **K.**
  - **Family Reunification**
  - **Art. 15**
  - **interpr. of** Dir. 2003/86
  - **Should Article (15)(1) and (4) be interpreted as precluding national legislation in which a request for an autonomous residence permit after lawfully staying more than five years for family reunification purposes be rejected because of non-compliance with integration conditions?**

- **CJEU C-380/17** **K. & B.**
1.3.3 EFTA judgments on Regular Migration

* of Dir. 2003/86

Family Reunification

Art. 9(2)

AG: 27 Jun 2018

Does the system of this Directive preclude national legislation under which an application for consideration for family reunification on the basis of the more favourable provisions of Chapter V of that directive can be rejected for the sole reason that it was not submitted within the period laid down in the third subparagraph of Article 12(1)?

CJEU C-557/17

Y.Z. a.o.

Interp. of Dir. 2003/86

Family Reunification

Art. 16(2)(a)

Does Art. 16(2)(a) preclude the withdrawal of a residence permit granted for the purpose of family reunification in the case where the acquisition of that residence permit was based on fraudulent information but the family member was unaware of the fraudulent nature of that information?

1.3.4 ECHR Judgments on Regular Migration

EFTA E-4/11

Clauder v. LIE

Interp. of Dir. 2003/86

Family Reunification

Art. 7(1)

An EEA national (e.g. German) with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host EEA State (e.g. Liechtenstein), may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

EFTA E-28/15

Yankuba Jabbi v. NO

Interp. of Dir. 2004/38

Right of Residence

Art. 7(1)(b) + 7(2)

Where an EEA national, pursuant to Article 7(1)(b) and Article 7(2) of Directive 2004/38/EC, has created or strengthened a family life with a third country national during genuine residence in an EEA State other than that of which he is a national, the provisions of that directive will apply by analogy where that EEA national returns with the family member to his home State.

1.3.5 ECHR Judgments on Regular Migration

ECHR 8000/08

A.A. v. UK

Violation of

ECHR

Art. 8

The applicant alleged, in particular, that his deportation to Nigeria would violate his right to respect for his family and private life and would deprive him of the right to education by terminating his university studies in the UK.

ECHR 31183/13

Abuhmaid v. UKR

No violation of

ECHR

Art. 8 + 13

The applicant is a Palestinian residing in Ukraine for over twenty years. In 2010 the temporary residence permit expired. Since then, the applicant has applied for asylum unsuccessfully. The Court found that the applicant does not face any real or imminent risk of expulsion from Ukraine since his new application for asylum is still being considered and therefore declared this complaint inadmissible.

ECHR 33809/15

Alam v. DK

No violation of

ECHR

Art. 8

The applicant is a Pakistani national who entered DK in 1984 when she was 2 years old. She has two children. In 2013 she is convicted of murder, aggravated robbery and arson to life imprisonment. She was also expelled from DK with a life-long entry ban. The Court states that it has no reason to call into question the conclusions reached by the domestic courts on the basis of the balancing exercise which they carried out. Those conclusions were neither arbitrary nor manifestly unreasonable. The Court is thus satisfied that the interference with the applicant’s private and family life was supported by relevant and sufficient reasons and that her expulsion would not be disproportionate given all the circumstances of the case.

ECHR 26940/10

Antwi v. NOR

No violation of

ECHR

Art. 8

A case similar to Nunez (ECHR 28 June 2011) except that the judgment is not unanimous (2 dissenting opinions). Mr Antwi from Ghana migrates in 1988 to Germany on a false Portuguese passport. In Germany he meets his future wife (also from Ghana) who lives in Norway and is naturalised to Norwegian nationality. Mr Antwi moves to Norway to live with her and their first child is born in 2001 in Norway. In 2005 the parents marry in Ghana and subsequently it is discovered that Mr Antwi travels on a false passport. In Norway Mr Antwi goes to trial and is expelled to Ghana with a five year re-entry ban. The Court does not find that the Norwegian authorities acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants’ need that the first applicant be able to remain in Norway, on the other hand.

ECHR 38590/10

Biao v. DK

Violation of

ECHR

Art. 8 + 14

Initially, the Second Section of the Court decided on 25 March 2014 that there was no violation of Art. 8 in the Danish case where the Danish statutory amendment requires that the spouses’ aggregate ties with Denmark has to be stronger than the spouses’ aggregate ties with another country. However, after referral, the Grand Chamber reviewed that decision and decided otherwise. The Court ruled that the so-called attachment requirement (the requirement of both spouses having stronger ties with Denmark than to any other country) is unjustified and constitutes indirect discrimination and therefore a violation of Art 8 and 14 ECHR.
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1.3: Regular Migration: Jurisprudence: ECtHR Judgments

**Expulsion of one of the spouses is a serious obstacle to family life for the remaining spouse and children in the context of article 8. In this case the ECtHR establishes guiding principles in order to examine whether such a measure is necessary in a democratic society. Relevant criteria are:**

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he is going to be expelled;
- the time elapsed since the offence was committed as well as the applicant’s conduct in that period;
- the nationalities of the various persons concerned;
- the applicant’s family situation, such as the length of the marriage;
- and other factors expressing the effectiveness of a couple’s family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- and whether there are children in the marriage, and if so, their age.

Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.

**At the age of 3 and 4, the Butt children enter Norway with their mother from Pakistan in 1989. They receive a residence permit on humanitarian grounds. After a couple of years the mother returns with the children to Pakistan without knowledge of the Norwegian authorities. After a couple years the mother travels - again - back to Norway to continue living there. The children are 10 and 11 years old. When the father of the children wants to live also in Norway, a new investigation shows that the family has lived both in Norway and in Pakistan and their residence permit is withdrawn. However, the expulsion of the children is not carried out. Years later, their deportation is discussed again. The mother has already died and the adult children still do not have any contact with their father in Pakistan. Their ties with Pakistan are so weak and reversely with Norway so strong that their expulsion would entail a violation of art. 8.**

**A Brazilian in French Guiana was removed to Brazil within 50 minutes after an appeal had been lodged against his removal order. In this case the Court considers that the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. The brevity of that time lapse excludes any possibility that the court seriously examined the circumstances and legal arguments in favour of or against a violation of Article 8 of the Convention in the event of the removal order being enforced. Thus, while States are afforded some discretion as to the manner in which they conform to their obligations under Article 13 of the Convention, that discretion must not result, as in the present case, in an applicant being denied access in practice to the minimum procedural safeguards needed to protect him against arbitrary expulsion. Concerning the danger of overloading the courts and adversely affecting the proper administration of justice in French Guiana, the Court reiterates that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements.**

**The ECtHR ruled that art. 6(1) also means that a national judge has an obligation to decide on a question which requests for a preliminary ruling on the interpretation of Union law. Either the national judge explicitly argues why such a request is pointless (or already answered) or the national judge requests the CJEU for a preliminary ruling on the issue. In this case the Italian Supreme Court did not answer the question at all.**

**The applicant is an Egyptian national, who applied for asylum in Switzerland leaving his son behind in Egypt. While his asylum application was rejected, the father obtained a residence permit and after having married a Swiss national also Swiss nationality. The couple have a daughter and eventually divorced. The father’s first request for family reunification with his son was accepted in 2003 but eventually his son returned to Egypt. The father’s second request for family reunification in 2006 was rejected. According to the Swiss Federal Supreme Court, the applicant’s son had closer ties to Egypt where he had been cared for by his mother and grandmother. Moreover, the father should have applied for family reunification immediately after arriving in Switzerland.**

The Court first considers that it would be unreasonable to ask the father to relocate to Egypt to live together with his son there, as this would entail a separation from the father’s daughter living in Switzerland. The son had reached the age of 15 when the request for family reunification was lodged and there were no other major threats to his best interests in the country of origin. Based on these facts, the Court finds that no clear conclusion can be drawn whether or not the applicants’ interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory. Nevertheless, the Court notes that the domestic court have merely examined the best interest of the child in a brief manner and put forward a rather summary reasoning. As such the child’s best interests have not sufficiently been placed at the centre of its balancing exercise. The Court therefore finds a violation of Art. 8.**

**The applicant did not have effective access to the administrative procedure by which he might, subject to fulfilling the conditions prescribed by domestic law, obtain a residence permit which would allow him to reside lawfully with his family in the Netherlands, due to the disproportion between the administrative charge in issue and the actual**
income of the applicant’s family. The Court finds that the extremely formalistic attitude of the Minister – which, endorsed by the Regional Court, also deprived the applicant of access to the competent administrative tribunal – unjustifiably hindered the applicant’s use of an otherwise effective domestic remedy. There has therefore been a violation of Article 8 and 13 of the Convention.

ECtHR 52166/09 Hasanbasic v. CH
violation of ECHR Art. 8

* After living in Switzerland for 23 years with a residence permit, the applicant decides to go back to Bosnia. Soon after, he gets seriously ill and wants to get back to his wife who stayed in Switzerland. However, this (family reunification) request is denied mainly because of the fact that he has been on welfare and had been fined (a total of 350 euros) and convicted for several offences (a total of 17 days imprisonment). The Court rules that this rejection, given the circumstances of the case, is disproportionate and a violation of article 8.

ECtHR 22341/09 Hode and Abdi v. UK
violation of ECHR Art. 8 + 14

* Discrimination on the basis of date of marriage has no objective and reasonable justification.

New ECtHR 63311/14 Hoti v. CRO
violation of ECHR Art. 8

* The applicant is a stateless person who came to Croatia at the age of seventeen and has lived there for almost forty years. The applicant has filed several requests for Croatian nationality and permanent residence status; these, however, were all denied. The Court does consider that, in the particular circumstances of the applicant’s case, the respondent State has not complied with its positive obligation to provide an effective and accessible procedure or a combination of procedures enabling the applicant to have the issues of his further stay and status in Croatia determined with due regard to his private-life interests.

New ECtHR 32248/12 Ibrogimov v. RUS
violation of ECHR Art. 8 + 14

* The applicant was born in Uzbekistan. After the death of this grandfather he wanted to move to his family (father, mother, brother and sister) who already lived in Russia and held Russian nationality. After a mandatory blood test he was found HIV-positive and therefore declared ‘undesirable’. The exclusion order was upheld by a District court and in appeal, the ECtHR held unanimously that the applicant has been a victim of discrimination on account of his health.

ECtHR 12738/10 Jeunesse v. NL
violation of ECHR Art. 8

* The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands.

ECtHR 32504/11 Kaplan a.o. v. NO
violation of ECHR Art. 8

* A Turkish father’s application for asylum is denied in 1998. After a conviction for aggravated burglary in 1999 he gets an expulsion order and an indefinite entry ban. On appeal this entry ban is reduced to 5 years. Finally he is expelled in 2011. His wife and children arrived in Norway in 2003 and were granted citizenship in 2012. Given the youngest daughter special care needs (related to chronic and serious autism), the bond with the father and the long period of inactivity of the immigration authorities, the Court states that it is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the child.

ECtHR 38030/12 Khan v. GER
violation of ECHR Art. 8

* This case is about the applicant’s (Khan) imminent expulsion to Pakistan after she had committed manslaughter in Germany in a state of mental incapacity. On 23 April 2015 the Court ruled that the expulsion would not give rise to a violation of Art. 8. Subsequently the case was referred to the Grand Chamber. The Grand Chamber was informed by the German Government that the applicant would not be expelled and granted a ‘Duldung’. These assurances made the Grand Chamber to strike the application out of the list.

ECtHR 41697/12 Krasniqi v. AUS
no violation of ECHR Art. 8

* The applicant is from Kosovo and entered Austria in 1994 when he was 19 years old. Within a year he was arrested for working illegally and was issued a five-year residence ban. He lodged an asylum application, which was dismissed, and returned voluntarily to Kosovo in 1997. In 1998 he went back to Austria and filed a second asylum request with his wife and daughter. Although the asylum claim was dismissed they were granted subsidiary protection. The temporary residence permit was extended a few times but expired in December 2009 as he had not applied for its renewal. After nine convictions on drugs offences and aggravated threat, he was issued a ten-year residence ban. Although the applicant is well integrated in Austria, the Court concludes that the Austrian authorities have not overstepped the margin of appreciation accorded to them in immigration matters by expelling the applicant.

ECtHR 1638/03 Maslov v. AU
no violation of ECHR Art. 8

*
### 1.3: Regular Migration: Jurisprudence: ECHR Judgments

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1.3.1: In addition to the criteria set out in Bouff and Unerte the ECtHR considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.

1.3.2: The Court noted the particular difficulties the applicant encountered in their applications, namely the excessive delays and lack of reasons or explanations given throughout the process, despite the fact that he had already been through traumatic experiences.

1.3.3: This case concerns a Nigerian national’s complaint about his deportation from the UK. Mr Ndidi, the applicant, arrived with his mother in the UK aged two. He had an escalating history of offending from the age of 12, with periods spent in institutions for young offenders. He was released in March 2011, aged 24, and served with a deportation order. All his appeals were unsuccessful. The Court pointed out in particular that there would have to be strong reasons for it to carry out a fresh assessment of this balancing exercise, especially where independent and impartial domestic courts had carefully examined the facts of the case, applying the relevant human rights standards consistently with the European Convention and its case-law.

1.3.4: The child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. For that reason, those best interests must be assessed in each individual case. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power. In this case the Court notes that the child has Swiss nationality and that he arrived in the country in June 2005 at the age of two. He has been living there continuously ever since. He now goes to school in Switzerland and speaks French. Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical reports. His return to Israel cannot therefore be regarded as beneficial.

1.3.5: Although Ms Nunez was deported from Norway in 1996 with a two-year ban on her re-entry into Norway, she returned to Norway, got married and had two daughters born in 2002 and 2003. It takes until 2005 for the Norwegian authorities to revoke her permits and to decide that Mrs Nunez should be expelled. The Court rules that the authorities had not struck a fair balance between the public interest in ensuring effective immigration control and Ms Nunez’s need to remain in Norway in order to continue to have contact with her children.

1.3.6: The UK Certificate of Approval required foreigners, except those wishing to marry in the Church of England, to pay large fees to obtain the permission from the Home Office to marry. The Court found that the conditions violated the right to marry (Article 12 of the Convention), that it was discriminatory in its application (Article 14 of the Convention) and that it was discriminatory on the ground of religion (Articles 9 and 14 of the Convention).

1.3.7: The Court concluded that the denial of admission of a 17 years old Somali girl to Denmark, where she had lived from the age of seven until the age of fifteen, violated Article 8. For a settled migrant who has lawfully spent all of the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion. The Danish Government had argued that the refusal was justified because the applicant had been taken out of the country by her father, with her mother’s permission, in exercise of their rights of parental responsibility. The Court agreed that ‘the exercise of parental rights constitutes a fundamental element of family life’, but concluded that ‘in respecting parental rights, the authorities cannot ignore the child’s interest including its own right to respect for private and family life’.

1.3.8: Mr Ramadan, originally an Egyptian citizen, acquired Maltese citizenship after marrying a Maltese national. It was revoked by the Minister of Justice and Internal Affairs following a decision by a domestic court to annul the marriage on the ground that Mr Ramadan’s only reason to marry had been to remain in Malta and acquire Maltese citizenship. Meanwhile, the applicant remarried a Russian national. The Court found that the decision depriving him of his citizenship, which had had a clear legal basis under the relevant national law and had been accompanied by hearings and remedies consistent with procedural fairness, had not been arbitrary.
1.3: Regular Migration: Jurisprudence: ECTHR Judgments

* no violation of ECHR Art. 8

The applicant is a stateless Palestinian from Lebanon. In 1994, having married a Danish woman he is granted a residence permit, and in 2000 he is also granted asylum. In June 2010 the applicant - by then father of 8 children - is convicted of drug trafficking and dealing, coercion by violence, blackmail, theft, and the possession of weapons. He is sentenced to five years imprisonment, which decision is upheld by the Supreme Court in 2011 adding a life-long ban on his return. Appeals against his expulsion are refused and at the end of 2014 he is deported to Lebanon. The ECHR rules that although the applicant has 8 children in Denmark, he has an extensive and serious criminal record. Also, he is not well-integrated into Danish society (still being illiterate and not being able to speak Danish).

** ECHR 12020/09 Udeh v. CH 16 Apr. 2013

* violation of ECHR Art. 8

In 2001 a Nigerian national, was sentenced to four months’ imprisonment for possession of a small quantity of cocaine. In 2003 he married a Swiss national who had just given birth to their twin daughters. By virtue of his marriage, he was granted a residence permit in Switzerland. In 2006 he was sentenced to forty-two months’ imprisonment in Germany for a drug-trafficking offence. The Swiss Office of Migration refused to renew his residence permit, stating that his criminal conviction and his family’s dependence on welfare benefits were grounds for his expulsion. An appeal was dismissed. In 2009 he was informed that he had to leave Switzerland. In 2011 he was made the subject of an order prohibiting him from entering Switzerland until 2020. Although he is divorced in the meantime and custody of the children has been awarded to the mother, he has been given contact rights. The court rules that deportation and exclusion orders would prevent the immigrant with two criminal convictions from seeing his minor children: deportation would constitute a violation of article 8.

** ECHR 46410/99 Üner v. NL 18 Oct. 2006

* violation of ECHR Art. 8

The expulsion of an alien raises a problem within the context of art. 8 ECHR if that alien has a family whom he has to leave behind. In Boultif (54273/00) the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. In this judgment the Court adds two additional criteria:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

– the solidarity of social, cultural and family ties with the host country and with the country of destination.

** ECHR 7994/14 Ustinova v. RUS 8 Nov. 2016

* violation of ECHR Art. 8

The applicant, Anna Ustinova, is a national of Ukraine who was born in 1984. She moved to live in Russia at the beginning of 2000. In March 2013 Ms Ustinova was denied re-entry to Russia after a visit to Ukraine with her two children. This denial was based on a decision issued by the Consumer Protection Authority (CPA) in June 2012, that, during her pregnancy in 2012, Ms Ustinova had tested positive for HIV and therefor her presence in Russia constituted a threat to public health.

This decision was challenged but upheld by a district Court, a Regional Court and the Supreme Court. Only the Constitutional Court declared this incompatible with the Russian Constitution. Although Ms Ustinova has since been able to re-enter Russia via a border crossing with no controls, her name has not yet been definitively deleted from the list of undesirable individuals maintained by the Border Control Service.
## 2 Borders and Visas

### 2.1 Borders and Visas: Adopted Measures

**Regulation 2016/1624**

**Creating a Borders and Coast Guard Agency**

* OJ 2016 L 251/1

**Regulation 562/2006**

**Borders Code**

Establishing a Community Code on the rules governing the movement of persons across borders

* OJ 2006 L 105/1
* This Regulation is replaced by Regulation 2016/399 Borders Code (codified).

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See further: § 2.3

**Regulation 2016/399**

Borders Code (codified)

On the rules governing the movement of persons across borders. Codification of all previous amendments of the (Schengen) Borders Code

* OJ 2016 L 77/1
* This Regulation replaces Regulation 562/2006 Borders Code

**New**

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See further: § 2.3

**Decision 574/2007**

Borders Fund I

Establishing European External Borders Fund

* OJ 2007 L 144
* This Regulation is repealed by Regulation 515/2004 (Borders Fund II)

**Regulation 515/2014**

Borders Fund II

Borders and Visa Fund

* OJ 2014 L 150/143
* This Regulation repeals Decision No 574/2007 (Borders Fund I)

**Regulation 2017/2226**

EES

Establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders

* OJ 2017 L 327/20
2.1: Borders and Visas: Adopted Measures

**Regulation 1052/2013**

Establishing the European Border Surveillance System (Eurosur)

* OJ 2013 L 295/11

**CJEU judgments**

- CJEU C-44/14 *Spain v. EP & Council* 8 Sep. 2015

See further: § 2.3

**Regulation 2007/2004**

Establishing External Borders Agency

* OJ 2004 L 349/1


**Regulation 1931/2006**

Local Border traffic

* OJ 2006 L 405/1

This Regulation is replaced by Regulation 2016/1624 Border and Coast Guard Agency and by Reg. 1342/2011 (OJ 2011 L 347/41): On definition of border area

**CJEU judgments**

- CJEU C-254/11 *Shomodi* 21 Mar. 2013 Art. 2(a) + 3(3)

See further: § 2.3

**Regulation 656/2014**

Maritime Surveillance

Rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex

* OJ 2014 L 189/93

**Directive 2004/82**

On the obligation of carriers to communicate passenger data

* OJ 2004 L 261/24

UK opt in

**Regulation 2252/2004**

On standards for security features and biometrics in passports and travel documents

* OJ 2004 L 385/1

This Regulation is replaced by Regulation 2004/82

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- CJEU C-446/12 *Willems a.o.* 16 Apr. 2015 Art. 4(3)
- CJEU C-101/13 *U.* 2 Oct. 2014 Art. 6
- CJEU C-139/13 *Com. v. Belgium* 17 Oct. 2013 Art. 1(2)

See further: § 2.3

**Recommendation 761/2005**

On uniform short-stay visas for researchers from third countries

* OJ 2005 L 289/23

**Convention**

Implementing the Schengen Agreement of 14 June 1985

* OJ 2000 L 239

**CJEU judgments**

- CJEU C-240/17 *E.* 16 Jan. 2018 Art. 25(1) + 25(2)

See further: § 2.3

**Regulation 1053/2013**

Schengen Evaluation

* OJ 2013 L 295/27

**Regulation 1987/2006**

Establishing 2nd generation Schengen Information System

* OJ 2006 L 381/4

Replacing:

- Reg. 378/2004 (OJ 2004 L 64)
- Reg. 2424/2001 (OJ 2001 L 328/4)

Ending validity of:


**Council Decision 2016/268**

List of competent authorities which are authorised to search directly the data contained in the 2nd generation SIS

* OJ 2016 C 268/1

**Council Decision 2016/1209**

SIS II Manual
2.1: Borders and Visas: Adopted Measures

On the SIRENE Manual and other implementing measures for SIS II
* OJ 2016 L 203/35

Council Decision 2017/818
Temporary Internal Border Control
Setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk
* OJ 2017 L 122/73

Decision 565/2014
Transit Bulgaria a.o. countries
Transit through Bulgaria, Croatia, Cyprus and Romania
* OJ 2014 L 157/23

Regulation 693/2001
Transit Documents
Establishing a specific Facilitated Transit Document (FTD) and a Facilitated Rail Transit Document (FRTD)
* OJ 2003 L 99/8

Regulation 694/2003
Transit Documents Format
Format for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD)
* OJ 2003 L 99/15

Decision 586/2008
Transit Switzerland
Transit through Switzerland and Liechtenstein
* OJ 2008 L 162/27

Decision 1105/2011
Travel Documents
On the list of travel documents which entitle the holder to cross the external borders
* OJ 2011 L 287/9

Regulation 767/2008
VIS
Establishing Visa Information System (VIS) and the exchange of data between MS
* OJ 2008 L 218/60
* Third-pillar VIS Decision (OJ 2008 L 218/129)

Decision 512/2004
VIS (start)
Establishing Visa Information System (VIS)
* OJ 2004 L 213/5

Council Decision 2008/633
VIS Access
Access for consultation of the Visa Information System (VIS) by designated authorities of Member States and Europol
* OJ 2008 L 218/129

Regulation 1077/2011
VIS Management Agency
Establishing an Agency to manage VIS, SIS & Eurodac
* OJ 2011 L 286/1

Regulation 810/2009
Visa Code
Establishing a Community Code on Visas
* OJ 2009 L 243/1

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☞ CJEU C-84/12 Koushakki 19 Dec. 2013 Art. 23(4) + 32(1)
☞ CJEU C-39/12 Dang 18 June 2012 Art. 21 + 34 - deleted
☞ CJEU C-83/12 Vo 10 Apr. 2012 Art. 21 + 34

cjEU pending cases
☞ CJEU C-680/17 Vethanayagam pending Art. 8(4) + 32(3)

See further: § 2.3

Regulation 1683/95.
Visa Format
Uniform format for visas
* OJ 1995 L 164/1
* UK opt in

am by Reg. 334/2002 (OJ 2002 L 53/7)
am by Reg. 856/2008 (OJ 2008 L 235/1)
am by Reg. 1370/2017 (OJ 2017 L 198/24)

Regulation 539/2001
Visa List
Listing the third countries whose nationals must be in possession of visas
* OJ 2001 L 81/1
2.1: Borders and Visas: Adopted Measures

- **CJEU C-88/14 Com. v. EP**
  - 16 July 2015
  - See further: § 2.3

- **Regulation 333/2002**
  - Uniform format for forms for affixing the visa
  - * OJ 2002 L 53/4
  - UK opt in

- **ECtHR**
  - Anti-torture
    - * Art. 3 Prohibition of Torture, Degrading Treatment
    - impl. date 31 Aug. 1954

  - **ECtHR Judgments**
    - ECtHR 19356/07 Shioshvili a.o. 20 Dec. 2016 Art. 3 + 13
    - ECtHR 53608/11 B.M. 19 Dec. 2013 Art. 3 + 13
    - ECtHR 55352/12 Aden Ahmed 23 July 2013 Art. 3 + 5
    - ECtHR 11463/09 Samaras 28 Feb. 2012 Art. 3
    - ECtHR 27765/09 Hirsi 21 Feb. 2012 Art. 3 + 13

- **Regulation amending Regulation**
  - New
  - On the European Agency for large-scale IT systems
    - * Com (2017) 352, 29 June 2017

- **Regulation amending Regulation**
  - New
  - On temporary reintroduction of checks at internal borders
    - * Com (2017) 571, 27 Sep 2017
    - * amending Borders Code (Reg. 2016/399)

- **Regulation**
  - New
  - On interoperability of visas and borders legislation
    - * Com (2017) 193, 12 Dec 2017
    - * No Council or EP position yet

- **Regulation**
  - New
  - Codifying Visa List Regulation
    - * Com (2018) 139, 14 Mar 2018
    - * No Council or EP position yet

- **Regulation**
  - New
  - Amending Cisa Code Regulation
    - * Com (2018) 252, 14 Mar 2018
2.3 Borders and Visas: Jurisprudence

case law sorted in alphabetical order

2.3.1 CJEU Judgments on Borders and Visas

A. Borders Code

* CJEU C-9/16 21 June 2017
  * interp. of Reg. 562/2006
  * Art. 20 + 21
  * Art. 20 and 21 must be interpreted as precluding national legislation, which confers on the police authorities of a MS the power to check the identity of any person, within an area of 30 kilometres from that MS’s land border with other Schengen States, with a view to preventing or terminating unlawful entry into or residence in the territory of that Member State or preventing certain criminal offences which undermine the security of the border, irrespective of the behaviour of the person concerned and of the existence of specific circumstances, unless that legislation lays down the necessary framework for that power ensuring that the practical exercise of it cannot have an effect equivalent to that of border checks, which is for the referring court to verify.
  
  Also, Art. 20 and 21 must be interpreted as not precluding national legislation, which permits the police authorities of the MS to carry out, on board trains and on the premises of the railways of that MS, identity or border crossing document checks on any person, and briefly to stop and question any person for that purpose, if those checks are based on knowledge of the situation or border police experience, provided that the exercise of those checks is subject under national law to detailed rules and limitations determining the intensity, frequency and selectivity of the checks, which is for the referring court to verify.

* CJEU C-278/12 (PPU) 19 July 2012
  * interp. of Reg. 562/2006
  * Art. 20 + 21
  * The Schengen Borders Code must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographic area 20 kilometres from the land border between a MS and the State parties to the CISA, with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the MS concerned, when those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, when they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and when the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency.

* CJEU C-575/12 4 Sep. 2014
  * interp. of Reg. 562/2006
  * Art. 5
  * The Borders Code precludes national legislation, which makes the entry of TCNs to the territory of the MS concerned subject to the condition that, at the border check, the valid visa presented must necessarily be affixed to a valid travel document.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Case</th>
<th>Decision Date</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>CJEU C-575/12</td>
<td>Air Baltic</td>
<td>4 Sep. 2014</td>
<td>interpr. of Reg. 810/2009 Visa Code Art. 24(1) + 34</td>
</tr>
<tr>
<td>CJEU C-241/05</td>
<td>Bot</td>
<td>4 Oct. 2006</td>
<td>interpr. of Schengen Agreement Art. 20(1)</td>
</tr>
<tr>
<td>CJEU C-257/01</td>
<td>Com. v. Council</td>
<td>18 Jan. 2005</td>
<td>validity of Visa Applications</td>
</tr>
<tr>
<td>CJEU C-39/12</td>
<td>Dang</td>
<td>18 June 2012</td>
<td>interpr. of Reg. 810/2009 Visa Code Art. 21 + 34 - deleted</td>
</tr>
<tr>
<td>CJEU C-240/17</td>
<td>E.</td>
<td>16 Jan. 2018</td>
<td>interpr. of Schengen Acquis Art. 25(1) + 25(2)</td>
</tr>
<tr>
<td>CJEU C-17/16</td>
<td>El Dakkak</td>
<td>4 May 2017</td>
<td>interpr. of Reg. 562/2006 Borders Code Art. 4(1)</td>
</tr>
</tbody>
</table>

The principles of legal certainty and protection of legitimate expectations did not require the provision of transitional measures for the benefit of TCNs who had left the territory of a MS when they were holders of temporary residence permits issued pending examination of a first application for a residence permit or an application for asylum and wanted to return to that territory (after the entry into force of this Regulation).
### Borders and Visas: Jurisprudence: CJEU Judgments

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision Date</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>CJEU C-355/10 EP v. Council</td>
<td>5 Sep. 2012</td>
<td>* violation of Reg. 562/2006 Borders Code * annulment of measure supplementing Borders Code * The CJEU decided to annul Council Decision 2010/252 of 26 April 2010 supplementing the Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. According to the Court, this decision contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Art. 12(5) of the Borders Code. As only the European Union legislature was entitled to adopt such a decision, this could not have been decided by comitology. Furthermore the Court ruled that the effects of decision 2010/252 maintain until the entry into force of new rules within a reasonable time.</td>
</tr>
<tr>
<td>CJEU C-261/08 &amp; C-348/08 García &amp; Cabrera</td>
<td>22 Oct. 2009</td>
<td>* interpr. of Reg. 562/2006 Borders Code * Member States are not obliged to expel a third-country national who is unlawfully present on the territory of a Member State because the conditions of duration of stay are not or no longer fulfilled * Where a TCN is unlawfully present on the territory of a MS because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that MS is not obliged to adopt a decision to expel that person.</td>
</tr>
<tr>
<td>CJEU C-430/10 Gaydarov</td>
<td>17 Nov. 2011</td>
<td>* interpr. of Reg. 562/2006 Borders Code * Reg. does not preclude national legislation that permits the restriction of the right of a national of a MS to travel to another MS in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law.</td>
</tr>
<tr>
<td>CJEU C-88/12 Jaoo</td>
<td>14 Sep. 2012</td>
<td>* interpr. of Reg. 562/2006 Borders Code * On statutory provision authorising, in the context of countering illegal residence after borders have been crossed, police checks in the area between the land border of the Netherlands with Belgium or Germany and a line situated within 20 kilometres of that border</td>
</tr>
<tr>
<td>CJEU C-84/12 Koushaki</td>
<td>19 Dec. 2013</td>
<td>* interpr. of Reg. 810/2009 Visa Code * Art. 23(4) + 32(1) * Art. 23(4), 32(1) and 35(6) must be interpreted as meaning that the competent authorities of a MS cannot refuse a visa to an applicant unless one of the grounds for refusal of a visa listed in those provisions can be applied to that applicant. In the examinations of those conditions and the relevant facts, authorities have a wide discretion. The obligation to issue a uniform visa is subject to the condition that there is no reasonable doubt that the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.</td>
</tr>
<tr>
<td>CJEU C-139/08 Kaiku</td>
<td>2 Apr. 2009</td>
<td>* interpr. of Dec. 896/2006 Transit Switzerland * on transit visa legislation for third-country nationals subject to a visa requirement * Residence permits issued by the Swiss Confederation or the Principality of Liechtenstein to TCNs subject to a visa requirement are considered to be equivalent to a transit visa only.</td>
</tr>
<tr>
<td>CJEU C-188/10 &amp; C-189/10 Melki &amp; Abdeli</td>
<td>22 June 2010</td>
<td>* interpr. of Reg. 562/2006 Borders Code * Art. 20 + 21 * consistency of national law and European Union law, abolition of border control and the area of 20 kilometres from the land border * The French 'stop and search' law, which allowed for controls behind the internal border, is in violation of article 20 and 21 of the Borders code, due to the lack of requirement of &quot;behaviour and of specific circumstances giving rise to a risk of breach of public order&quot;. According to the Court, controls may not have an effect equivalent to border checks.</td>
</tr>
<tr>
<td>CJEU C-291/12 Schwarz</td>
<td>17 Oct. 2013</td>
<td>* interpr. of Reg. 2252/2004 Passports * Art. 1(2) * Although the taking and storing of fingerprints in passports constitutes an infringement of the rights to respect for private life and the protection of personal data, such measures are nonetheless justified for the purpose of preventing any fraudulent use of passports.</td>
</tr>
<tr>
<td>CJEU C-254/11 Shomodi</td>
<td>21 Mar. 2013</td>
<td>* interpr. of Reg. 1931/2006 Local Border traffic * Art. 2(a) + 3(3) * The holder of a local border traffic permit must be able to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted. There is such an interruption of stay upon the crossing of the border irrespective of the frequency of such crossings, even if they occur several times daily.</td>
</tr>
<tr>
<td>CJEU C-44/14 Spain v. EP &amp; Council</td>
<td>8 Sep. 2015</td>
<td>* non-transp. of Reg. 1052/2013 EUROSUR * Limited forms of cooperation do not constitute a form of taking part within the meaning of Article 4 of the Schengen Agreement.</td>
</tr>
</tbody>
</table>
Protocol. Consequently, Article 19 of the Eurosur Regulation cannot be regarded as giving the Member States the option of concluding agreements which allow Ireland or the United Kingdom to take part in the provisions in force of the Schengen acquis in the area of the crossing of the external borders.

**2.3.3 ECtHR Judgments on Borders and Visas**

- **CJEU C-101/13**
  - interp. of Reg. 2252/2004
  - Passports
  - 2 Oct. 2014
  - *U.*
  - About the recording and spelling of names, surnames and family names in passports. Where a MS whose law provides that a person’s name comprises his forenames and surname chooses nevertheless to include (also) the birth name of the passport holder in the machine readable personal data page of the passport, that State is required to state clearly in the caption of those fields that the birth name is entered there.

- **CJEU C-77/05 & C-137/05**
  - UK v. Council
  - 18 Dec. 2007
  - *validity of Border Agency Regulation and Passport Regulation*
  - *judgment against UK*

- **CJEU C-482/08**
  - UK v. Council
  - 26 Oct. 2010
  - *annulment of decision on police access to VIS, due to UK non-participation*
  - *judgment against UK*

- **CJEU C-83/12**
  - interp. of Reg. 810/2009
  - Visa Code
  - 10 Apr. 2012
  - *First substantive decision on Visa Code. The Court rules that the Visa Code does not preclude that national legislation of one MS penalises migration-related identity fraud with genuine visa issued by another MS:*

- **CJEU C-446/12**
  - interp. of Reg. 2252/2004
  - Passports
  - 16 Apr. 2015
  - *Article 4(3) does not require the Member States to guarantee, in their legislation, that biometric data collected and stored in accordance with that regulation will not be collected, processed and used for purposes other than the issue of the passport or travel document, since that is not a matter which falls within the scope of that regulation:*

- **CJEU C-638/16 PPU**
  - interp. of Reg. 810/2009
  - Visa Code
  - 7 Mar. 2017
  - *Contrary to the opinion of the AG, the Court ruled that Article 1 of the Visa Code, must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a TCN, on the basis of Article 25 of the code, to the representation of the MS of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that MS, an application for international protection and, thereafter, to staying in that MS for more than 90 days in a 180-day period, does not fall within the scope of that code but, as EU law currently stands, solely within that of national law:*

- **CJEU C-23/12**
  - interp. of Reg. 562/2006
  - Borders Code
  - 17 Jan. 2013
  - *MSs are obliged to establish a means of obtaining redress only against decisions to refuse entry.*

**2.3.2 CJEU pending cases on Borders and Visas**

- **CJEU C-44/17**
  - interp. of Reg. 399/2016
  - Borders Code (codified)
  - 12 June 2018
  - *If border controls are reintroduced at an internal border of a Member State may this be equated with border controls at an external border, when that border is crossed by a third-country national who has no right of entry?*

- **CJEU C-341/18**
  - interp. of Reg. 399/2016
  - Borders Code (codified)
  - 2018
  - *On the necessity of providing departure stamps at (external) border crossings particularly in harbours.*

- **CJEU C-412/17 & C-474/17**
  - interp. of Reg. 362/2006
  - Borders Code
  - 22 June 2018
  - *Do Art. 22 and 23 preclude a provision of national law of a Member State which has the effect of requiring bus undertakings operating regular services across a Schengen internal border to check their passengers’ travel documents before crossing an internal border in order to prevent foreign nationals not in possession of a passport or residence permit from being brought into the territory of the Federal Republic of Germany?*

- **CJEU C-680/17**
  - interp. of Reg. 810/2009
  - Visa Code
  - *Is an interpretation of Article 8(4) and Article 32(3) of the Visa Code according to which visa applicants can lodge an appeal against the rejection of their applications only with an administrative or judicial body of the representing Member State, and not in the represented Member State for which the visa application was made, consistent with effective legal protection as referred to in Article 47 of the Charter?*

**2.3.3 ECtHR Judgments on Borders and Visas**

- **ECtHR 55352/12**
  - Aden Ahmed v. MAL
  - 23 July 2013
  - *N E M I S 2018/2 (June) Newsletter on European Migration Issues – for Judges*
### 2.3: Borders and Visas: Jurisprudence: ECtHR Judgments

<table>
<thead>
<tr>
<th>*</th>
<th>violation of</th>
<th>Case</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>*</td>
<td>ECHR</td>
<td>Art. 3 + 5</td>
<td></td>
</tr>
<tr>
<td>*</td>
<td>The case concerns a migrant who had entered Malta in an irregular manner by boat. The ECtHR found a violation of art. 5(1), mainly due to the failure of the Maltese authorities to pursue deportation or to do so with due diligence, and of art. 5(4) due to absence of an effective and speedy domestic remedy to challenge the lawfulness of their detention. Also, the ECtHR requested the Maltese authorities (Art. 46) to establish a mechanism allowing a determination of the lawfulness of immigration detention within a reasonable time-limit. In this case the Court for the first time found Malta in violation of art. 3 because of the immigration detention conditions. Those conditions in which the applicant had been living for 14½ months were, taken as a whole, amounted to degrading treatment.</td>
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<tr>
<td>ECHR 53608/11</td>
<td>Shioshvili a.o. v. RUS</td>
<td>20 Dec. 2016</td>
<td></td>
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<tr>
<td>*</td>
<td>violation of</td>
<td>ECHR</td>
<td>Art. 3 + 5</td>
</tr>
<tr>
<td>*</td>
<td>The applicant was an Iranian journalist who alleged to have been arrested and tortured due to his involvement in protests against the government. After his arrival in Greece a decision had been taken to return him to Turkey, and he had been held in custody in a police station and in various detention centres. His application for asylum was first not registered by the Greek authorities, and later they dismissed the application. The application mainly concerned the conditions of detention, in particular overcrowding, unhygienic conditions, lack of external contact, and lack of access to telephone, translators and any kind of information. Referring to its previous case law, the ECtHR held these conditions to be in violation of Art. 3. As there had been no effective domestic remedy against that situation, Art. 13 in combination with art. 3 had also been violated.</td>
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<tr>
<td>ECHR 27765/09</td>
<td>Hirsi v. IT</td>
<td>21 Feb. 2012</td>
<td></td>
</tr>
<tr>
<td>*</td>
<td>violation of</td>
<td>ECHR</td>
<td>Art. 3 + 13</td>
</tr>
<tr>
<td>*</td>
<td>The Court concluded that the decision of the Italian authorities to send TCNs - who were intercepted outside the territorial waters of Italy - back to Libya, had exposed them to the risk of ill-treatment there, as well as to the risk of ill-treatment if they were sent back to their countries of origin (Somalia and Eritrea). For the first time the Court applied Article 4 of Protocol no. 4 (prohibition of collective expulsion) in the circumstance of aliens who were not physically present on the territory of the State, but in the high seas. Italy was also held responsible for exposing the aliens to a treatment in violation with Article 3 ECHR, as it transferred them to Libya 'in full knowledge of the facts' and circumstances in Libya. The Court also concluded that they had had no effective remedy in Italy against the alleged violations (Art. 13).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ECHR 11463/09</td>
<td>Samaras v. GR</td>
<td>28 Feb. 2012</td>
<td></td>
</tr>
<tr>
<td>*</td>
<td>violation of</td>
<td>ECHR</td>
<td>Art. 3</td>
</tr>
<tr>
<td>*</td>
<td>The conditions of detention of the applicants – one Somali and twelve Greek nationals – at Ioannina prison were held to constitute degrading treatment in violation of ECHR art. 3.</td>
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<td></td>
</tr>
<tr>
<td>ECHR 19356/07</td>
<td>Shioshvili a.o. v. RUS</td>
<td>20 Dec. 2016</td>
<td></td>
</tr>
<tr>
<td>*</td>
<td>violation of</td>
<td>ECHR</td>
<td>Art. 3 + 13</td>
</tr>
<tr>
<td>*</td>
<td>Applicant with Georgian nationality, is expelled from Russia with her four children after living there for 8 years and being eight months pregnant. While leaving Russia they are taken off a train and forced to walk to the border. A few weeks later she gives birth to a dead child. Violation (also) of article 2 and 4 Protocol nr. 4.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Irregular Migration

3.1 Irregular Migration: Adopted Measures

Carrier sanctions
- Directive 2001/51
  Obligation of carriers to return TCNs when entry is refused
  * OJ 2001 L 187/45
  impl. date 11 Feb. 2003
  UK opt in

Decision 267/2005
Establishing a secure web-based Information and Coordination Network for MS’ Migration Management Services
* OJ 2005 L 83/48

Employers Sanctions
- Directive 2009/52
  Minimum standards on sanctions and measures against employers of illegally staying TCNs
  * OJ 2009 L 168/24
  impl. date 20 July 2011

Expulsion by Air
- Directive 2003/110
  Assistance with transit for expulsion by air
  * OJ 2003 L 321/26

Expulsion Costs
- Decision 191/2004
  On the compensation of the financial imbalances resulting from the mutual recognition of decisions on the expulsion of TCNs
  * OJ 2004 L 30/55
  UK opt in

Expulsion Decisions
- Directive 2001/40
  Mutual recognition of expulsion decisions of TCNs
  * OJ 2001 L 149/34
  impl. date 2 Oct. 2002
  UK opt in

  CJEU judgments
  - CJEU C-456/14 Orrego Arias
    3 Sep. 2015
    Art. 3(1)(a) - inadmissable

  See further: § 3.3

Expulsion Joint Flights
- Decision 573/2004
  On the organisation of joint flights for removals from the territory of two or more MSs, of TCNs
  * OJ 2004 L 261/28
  UK opt in

Expulsion via Land
- Conclusion
  Transit via land for expulsion
  * adopted 22 Dec. 2003 by Council
  UK opt in

Immigration Liaison Officers
- Regulation 377/2004
  On the creation of an immigration liaison officers network
  * OJ 2004 L 64/1
  UK opt in

Implementing Return Dir.
- Recommendation 2017/432
  Making returns more effective when implementing the Returns Directive
  * OJ 2017 L 66/15

Return Directive
- Directive 2008/115
  On common standards and procedures in MSs for returning illegally staying TCNs
  * OJ 2008 L 348/98
  impl. date 24 Dec. 2010

  CJEU judgments
  - CJEU C-181/16 Gnandi
    19 June 2018
    Art. 5
  - CJEU C-82/16 K.A. a.o.
    8 May 2018
    Art. 5, 11 + 13
  - CJEU C-184/16 Petrea
    14 Sep. 2017
    Art. 6(1)
  - CJEU C-199/16 Nianga
    11 Aug. 2017
    Art. 5 - deleted
  - CJEU C-225/16 Ouhrami
    26 July 2017
    Art. 11(2)
  - CJEU C-47/15 Affium
    7 June 2016
    Art. 2(1) + 3(2)
  - CJEU C-290/14 Celaj
    1 Oct. 2015
  - CJEU C-554/13 Zh. & O.
    11 June 2015
    Art. 7(4)
  - CJEU C-38/14 Zaizoune
    23 Apr. 2015
    Art. 4(2) + 6(1)
  - CJEU C-562/13 Abida
    18 Dec. 2014
    Art. 5+13
  - CJEU C-249/13 Boudjida
    11 Dec. 2014
    Art. 6
  - CJEU C-166/13 Mukarubega
    5 Nov. 2014
    Art. 3 + 7
3.1 Irregular Migration: Adopted Measures

**CJEU C-473/13 & C-514/13 Bero & Bouzalmate**  
17 July 2014  Art. 16(1)

**CJEU C-474/13 Pham**  
17 July 2014  Art. 16(1)

**CJEU C-189/13 Da Silva**  
3 July 2014  inadmissible

**CJEU C-146/14 (PPU) Mahdi**  
5 June 2014  Art. 15

**CJEU C-297/12 Filev & Osmani**  
19 Sep. 2013  Art. 2(2)(b) + 11

**CJEU C-383/13 (PPU) G. & R.**  
10 Sep. 2013  Art. 15(2) + 6

**CJEU C-534/11 Arslan**  
30 May 2013  Art. 2(1)

**CJEU C-522/11 Mbaye**  
21 Mar. 2013  Art. 2(2)(b) + 7(4)

**CJEU C-430/11 Sagor**  
6 Dec. 2012  Art. 2, 15 + 16

**CJEU C-357/09 (PPU) Kadjoev**  
30 Nov. 2009  Art. 15(4), (5) + (6)

**CJEU C-61/11 (PPU) El Dridi**  
28 Apr. 2011  Art. 15 + 16

**CJEU C-329/11 Achughhabian**  
21 Mar. 2011  Art. 15 + 16

**CJEU C-430/11 Achughhabian**  
21 Mar. 2011  Art. 15 + 16

**CJEU C-175/17 X.**  
pending  Art. 13

**CJEU C-444/17 Arib**  
pending  Art. 2(2)(a)

See further: § 3.3

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**Decision 575/2007**  
Establishing the Eur. Return Fund as part of the General Programme Solidarity and Management of Migration Flows

* **UK opt in**

**Directives**

**Directives 2011/36**  
Trafficking Persons  
On preventing and combating trafficking in human beings and protecting its victims

*  
OJ 2011 L 101/1 (Mar. 2011)  
impl. date 6 Apr. 2013  
*  
Replacing Framework Decision 2002/629 (OJ 2002 L 203/1)

**Directives 2004/81**  
Trafficking Victims

**Directives 2002/90**  
Unauthorized Entry

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**ECtHR**  
Detention - Collective Expulsion  
European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols  
Art. 5 Detention  
Prot. 4 Art. 4 Collective Expulsion

*  
ETS 005 (4 November 1950)  
impl. date 31 Aug. 1954

**ECtHR Judgments**

*  
ECtHR 55352/12 **Aden Ahmed**  
23 July 2013  
Art. 3 + 5

*  
ECtHR 23707/15 **Muzamba Oyaw**  
4 Apr. 2017  
Art. 5 - inadmissable

*  
ECtHR 39061/11 **Thimothawes**  
4 Apr. 2017  
Art. 5

*  
ECtHR 3342/11 **Richmond Yaw**  
Art. 5

*  
ECtHR 53709/11 **A.F.**  
13 June 2013  
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ECtHR 13056/11 **Abdelhakim**  
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ECtHR 13457/11 **Ali Said**  
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ECtHR 50520/09 **Ahmade**  
25 Sep. 2012  
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ECtHR 14902/10 **Mahmundi**  
31 July 2012  
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ECtHR 27765/09 **Hirsi**  
21 Feb. 2012  
Prot. 4 Art. 4

*  
ECtHR 10816/10 **Lokpo & Touré**  
20 Sep. 2011  
Art. 5

See further: § 3.3

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3.2 Irregular Migration: Proposed Measures

*  
Nothing to report
3.3 Irregular Migration: Jurisprudence

3.3.1 CJEU Judgments on Irregular Migration

case law sorted in alphabetical order

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<td>Achughbabian</td>
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<td>Celaj</td>
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<td>C-266/08</td>
<td>Comm. v. Spain</td>
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The Return Directive precludes that a Member State has legislation which provides for a sentence of imprisonment to be imposed on an illegally staying TCN on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

* Directive must be interpreted as precluding a MS from providing that an expulsion or removal order which predates by five years or more the period between the date on which that directive should have been implemented and the date on which it was implemented, may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal law sanction (within the meaning of Article 2(2)(b)) and where that MS exercised the discretion provided for under that provision.

* Member States are entitled to adopt a return decision as soon as an application for international protection is rejected, provided that the return procedure is suspended pending the outcome of an appeal against that rejection.

* Art. 5 and 11 must be interpreted as not precluding a practice of a MS that consists in not examining an application for residence for the purposes of family reunification, submitted on its territory by a TCN family member of a Union citizen who is a national of that MS and who has never exercised his or her right to freedom of movement, solely on the ground that that TCN is the subject of a ban on entering the territory of that Member State.

* Any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a TCN, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision. The Dir. precludes that an initial six-month period of detention may be extended solely because the third-country national concerned has no identity documents.

* A national authority is not precluded from failing to hear a TCN specifically on the subject of a return decision where, after that authority has determined that the TCN is staying illegally in the national territory on the conclusion of a procedure which fully respected that person’s right to be heard, it is contemplating the adoption of such a decision in respect of that person, whether or not that return decision is the result of refusal of a residence permit.

* The directive does not preclude that a fine because of illegal stay of a TCN in a MS is replaced by expulsion if there is a risk of absconding.
On the best interests of the child, family life and the state of health of the TCN concerned when issuing a return decision.

**CJEU C-456/14** Orrego Arias 3 Sep. 2015
* interp. of Dir. 2001/40 Expulsion Decisions Art. 3(1)(a) - inadmissible
* This case concerns the exact meaning of the term ‘offence punishable by a penalty involving deprivation of liberty of at least one year’, set out in Art 3(1)(a). However, the question was incorrectly formulated. Consequently, the Court ordered that the case was inadmissible.

**CJEU C-225/16** Ouhrami 26 July 2017
* interp. of Dir. 2008/115 Return Directive Art. 11(2)
* Article 11(2) must be interpreted as meaning that the starting point of the duration of an entry ban, as referred to in that provision, which in principle may not exceed five years, must be calculated from the date on which the person concerned actually left the territory of the Member States.

**CJEU C-218/15** Paoletti a.o. 25 May 2016
* interp. of Dir. 2002/90 Unauthorized Entry Art. 1
* Article 6 TEU and Article 49 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the accession of a State to the European Union does not preclude another Member State imposing a criminal penalty on persons who committed, before the accession, the offence of facilitation of illegal immigration for nationals of the first State.

**CJEU C-184/16** Petra 14 Sep. 2017
* interp. of Dir. 2008/115 Return Directive Art. 6(1)
* The Return Directive does not preclude a decision to return a EU citizen from being adopted by the same authorities and according to the same procedure as a decision to return a third-country national staying illegally referred to in Article 6(1), provided that the transposition measures of Directive 2004/38 (Citizens Directive) which are more favourable to that EU citizen are applied.

**CJEU C-474/13** Phan 17 July 2014
* interp. of Dir. 2008/115 Return Directive Art. 16(1)
* The Dir. does not permit a MS to detain a TCN for the purpose of removal in prison accommodation together with ordinary prisoners even if the TCN consents thereto.

**CJEU C-430/11** Sagar 6 Dec. 2012
* interp. of Dir. 2008/115 Return Directive Art. 2, 15 + 16
* An illegal stay by a TCN in a MS:
  1. can be penalised by means of a fine, which may be replaced by an expulsion order;
  2. can not be penalised by means of a home detention order unless that order is terminated as soon as the physical transportation of the TCN out of that MS is possible.

**CJEU C-83/12** Vo 10 Apr. 2012
* interp. of Dir. 2002/90 Unauthorized Entry Art. 1
* The Visa Code is to be interpreted as meaning that is does not preclude national provisions under which assisting illegal immigration constitutes an offence subject to criminal penalties in cases where the persons smuggled, third-country nationals, hold visas which they obtained fraudulently by deceiving the competent authorities of the Member State of issue as to the true purpose of their journey, without prior annulment of those visas.

**CJEU C-38/14** Zaizoune 23 Apr. 2015
* interp. of Dir. 2008/115 Return Directive Art. 4(2) + 6(1)
* Articles 6(1) and 8(1), read in conjunction with Article 4(2) and 4(3), must be interpreted as precluding legislation of a MS, which provides, in the event of TCNs illegally staying in the territory of that Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive.

**CJEU C-554/13** Zh. & O. 11 June 2015
* interp. of Dir. 2008/115 Return Directive Art. 7(4)
* (1) Article 7(4) must be interpreted as precluding a national practice whereby a third-country national, who is staying illegally within the territory of a Member State, is deemed to pose a risk to public policy within the meaning of that provision on the sole ground that that national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law.
  2. Article 7(4) must be interpreted to the effect that, in the case of a TCN who is staying illegally within the territory of a MS and is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law, other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and the fact that that national was in the process of leaving the territory of that MS when he was detained by the national authorities, may be relevant in the assessment of whether he poses a risk to public policy within the meaning of that provision. Any matter which relates to the reliability of the suspicion that the third-country national concerned committed the alleged criminal offence, as the case may be, is also relevant to that assessment.
  3. Article 7(4) must be interpreted as meaning that it is not necessary, in order to make use of the option offered by that provision to refrain from granting a period for voluntary departure when the third-country national poses a risk to public policy, to conduct a fresh examination of the matters which have already been examined in order to establish the existence of that risk. Any legislation or practice of a MS on this issue must nevertheless ensure that a case-by-case assessment is conducted of whether the refusal to grant such a period is compatible with that person’s fundamental rights.
### 3.3.2 CJEU pending cases on Irregular Migration

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<td>* interp. of Dir. 2008/115</td>
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<td>* hearing: 12 June 2018</td>
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<td>* In the circumstances of reintroduction of controls at internal borders, does the Returns Directive permit the application to the situation of a third-country national crossing a border at which controls have been reintroduced of the power, conferred on them by Article 2(2)(a) of the directive, to continue to apply simplified national return procedures at their external borders?</td>
</tr>
<tr>
<td>If so, do the provisions of Article 2(2)(a) and of Article 4(4) of the directive preclude national legislation which penalises with a term of imprisonment the illegal entry into national territory of a third-country national in respect of whom the return procedure established by that directive has not yet been completed?</td>
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<td>CJEU C-175/17</td>
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<td>* interp. of Dir. 2008/115</td>
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<td>* AG: 24 Jan 2018</td>
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<td>* On the suspensory effect of an appeal.</td>
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### 3.3.3 ECtHR Judgments on Irregular Migration

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<td>* ECHR</td>
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<tr>
<td>* 13 June 2013</td>
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<tr>
<td>* An Iranian entering Greece from Turkey had initially not been registered as an asylum seeker by the Greek authorities, which ordered his return to Turkey. However, the Turkish authorities refused to readmit him into Turkey, and he was then detained by the Greek police.</td>
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<tr>
<td>Against the background of reports from Greek and international organisations, having visited the relevant police detention facilities either during the applicant’s detention or shortly after his release – including the European Committee for the Prevention of Torture, the UN Special Rapporteur on Torture, the German NGO ProAsyl and the Greek National Human Rights Commission – the ECtHR found a violation of art. 3 due to the serious lack of space available to the applicant, also taking the duration of his detention into account. It was thus unnecessary for the Court to examine the applicant’s other allegations concerning the detention conditions (art. 3 ECHR) which the Government disputed. Yet, the Court noted that the Government’s statements in this regard were not in accordance with the findings of the abovementioned organisations.</td>
</tr>
<tr>
<td>ECtHR 13058/11</td>
</tr>
<tr>
<td>* violation of</td>
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<tr>
<td>* ECHR</td>
</tr>
<tr>
<td>* This case concerns unlawful detention, without effective judicial review, of an asylum seeker during the examination of his asylum application. The applicant was a Palestinian who had been stopped at the Hungarian border control for using a forged passport.</td>
</tr>
<tr>
<td>ECtHR 50520/09</td>
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<td>* violation of</td>
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<td>* ECHR</td>
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<tr>
<td>* The conditions of detention of the applicant Afghan asylum seeker in two police stations in Athens were found to constitute degrading treatment in breach of ECHR art. 3. Since Greek law did not allow the courts to examine the conditions of detention in centres for irregular immigrants, the applicant did not have an effective remedy in that regard, in violation of ECHR art. 13 taken together with art. 3.</td>
</tr>
<tr>
<td>The Court found an additional violation of ECHR art. 13 taken together with art. 3, resulting from the structural deficiencies of the Greek asylum system, as evidenced by the period during which the applicant had been awaiting the outcome of his appeal against the refusal of asylum, and the risk that he might be deported before his asylum appeal had been examined.</td>
</tr>
<tr>
<td>ECtHR 59727/13</td>
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<td>* no violation of</td>
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<td>* ECHR</td>
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<td>* 2 Mar. 2017</td>
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<tr>
<td>* A fifteen year old Somali asylum seeker gets a temporary residence permit in The Netherlands in 1992. After 6 years (1998) he travels to the UK and applies - again - for asylum but under a false name. The asylum request is rejected but he is allowed to stay (with family) in the UK in 2004. In 2007 he is sentenced to four and a half months’ imprisonment and also faced with a deportation order in 2008. After the Safi and Elmi judgment (8319/07) the Somalis is released on bail in 2011. The Court states that the periods of time taken by the Government to decide on his appeals against the deportation orders were reasonable.</td>
</tr>
<tr>
<td>ECtHR 13457/11</td>
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<tr>
<td>* violation of</td>
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<tr>
<td>* ECHR</td>
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<tr>
<td>* This case concerns unlawful detention, without effective judicial review, of an asylum seeker during the examination of his asylum application. The applicants were Iraqi nationals who illegally entered Hungary, applied for asylum and then travelled illegally to the Netherlands from where they were transferred back to Hungary under the Dublin Regulation.</td>
</tr>
<tr>
<td>ECtHR 27765/09</td>
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<tr>
<td>* violation of</td>
</tr>
<tr>
<td>* ECHR</td>
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<tr>
<td>* Prot. 4 Art. 4</td>
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The Court concluded that the decision of the Italian authorities to send TCNs - who were intercepted outside the territorial waters of Italy - back to Libya, had exposed them to the risk of ill-treatment there, as well as to the risk of ill-treatment if they were sent back to their countries of origin (Somalia and Eritrea). They also had been subjected to collective expulsion prohibited by Art. 4 of Protocol No. 4. The Court also concluded that they had had no effective remedy in Italy against the alleged violations.

**ECtHR 10816/10**

**Lokpo & Touré v. HU**

20 Sep. 2011

* violation of ECHR

Art. 5

The applicants entered Hungary illegally. After their arrest and during subsequent detention they applied for asylum. They were kept however in detention.

The Court ruled that Article 5 § 1 (right to liberty and security) was violated, stating that the absence of elaborate reasoning for an applicant’s deprivation of liberty renders that measure incompatible with the requirement of lawfulness.

**ECtHR 14902/10**

**Mahmundi v. GR**

31 July 2012

* violation of ECHR

Art. 5

The conditions of detention of the applicants – Afghan nationals, subsequently seeking asylum in Norway, who had been detained in the Pagani detention centre upon being rescued from a sinking boat by the maritime police – were held to be in violation of ECHR art. 3. In the specific circumstances of this case the treatment during 18 days of detention was considered not only degrading, but also inhuman, mainly due to the fact that the applicants’ children had also been detained, some of them separated from their parents. In addition, a female applicant had been in the final stages of pregnancy and had received insufficient medical assistance and no information about the place of her giving birth and what would happen to her and her child.

ECHR art. 13, taken together with art. 3, had been violated by the impossibility for the applicants to take any action before the courts to complain of their conditions of detention.

ECHR art. 5 para. 4 was violated due to the lack of judicial competence to review the lawfulness of the deportation that constitutes the legal basis for detention.

**ECtHR 23707/15**

**Muzamba Oyaw v. BEL**

4 Apr. 2017

* no violation of ECHR

Art. 5 - inadmissable

The applicant is a Congolese national who is in administrative detention awaiting his deportation while his (Belgian) partner is pregnant. The ECtHR found his complaint under Article 5 § 1 manifestly ill-founded since his detention was justified for the purposes of deportation, the domestic courts had adequately assessed the necessity of the detention and its duration (less than three months) had not been excessive.

**ECtHR 3342/11**

**Richmond Yaw v. IT**


* violation of ECHR

Art. 5

The case concerns the placement in detention of four Ghanaian nationals pending their removal from Italy. The applicants arrived in Italy in June 2008 after fleeing inter-religious clashes in Ghana. On 20 November 2008 deportation orders were issued with a view to their removal. This order for detention was upheld on 24 November 2008 by the justice of the peace and extended, on 17 December 2008, by 30 days without the applicants or their lawyer being informed. They were released on 14 January 2009 and the deportation order was withdrawn in June 2010. In June 2010 the Court of Cassation declared the detention order of 17 December 2008 null and void on the ground that it had been adopted without a hearing and in the absence of the applicants and their lawyer.

Their subsequent claims for compensation for the damage were dismissed by the Rome District Court.

**ECtHR 39061/11**

**Thimothawes v. BEL**

4 Apr. 2017

* no violation of ECHR

Art. 5

The case concerned an Egyptian asylum-seeker who was detained in Belgium awaiting his deportation after his asylum request was rejected. After a maximum administrative detention period of 5 months he was released. With this (majority) judgment the Court acquits the Belgian State of the charge of having breached the right to liberty under article 5(1) by systematically detaining asylum seekers at its external border at the national airport.
4.1 External Treaties: Association Agreements

EEC-Turkey Association Agreement
* OJ 1964 217/3687
* into force 23 Dec. 1963

EEC-Turkey Association Agreement Additional Protocol
* OJ 1972 L 293
* into force 1 Jan. 1973

EEC-Turkey Association Agreement Decision 2/76
* Dec. 2/76 of 20 December 1976 on the implementation of Article 12 of the Ankara Agreement

EEC-Turkey Association Agreement Decision 1/80

CJEU judgments

- CJEU C-652/15 Tekdemir 29 Mar. 2017 Art. 13
- CJEU C-508/15 Ucar a.o. 21 Dec. 2016 Art. 7
- CJEU C-225/12 Demir 7 Nov. 2013 Art. 13
- CJEU C-268/11 Gülbalıhce 8 Nov. 2012 Art. 6(1) + 10
- CJEU C-451/11 Dülger 19 July 2012 Art. 7
- CJEU C-7/10 & C-9/10 Kahveci & Inan 29 Mar. 2012 Art. 7
- CJEU C-436/09 Belkiran 1 Jan. 2012 deleted
- CJEU C-371/08 Ziebell or Örnek 8 Dec. 2011 Art. 14(1)
- CJEU C-256/11 Dereci et al. 15 Nov. 2011 Art. 13
- CJEU C-187/10 Unal 29 Sep. 2011 Art. 6(1)
- CJEU C-484/07 Pehlivan 16 June 2011 Art. 7
- CJEU C-303/08 Metin Bozkurt 22 Dec. 2010 Art. 7 + 14(1)
- CJEU C-92/07 Comm. v. Netherlands 29 Apr. 2010 Art. 10(1) + 13
- CJEU C-14/09 Genc (Hava) 4 Feb. 2010 Art. 6(1)
- CJEU C-462/08 Bekleyen 21 Jan. 2010 Art. 7(2)
- CJEU C-242/06 Sahin 17 Sep. 2009 Art. 13
- CJEU C-337/07 Altun 18 Dec. 2008 Art. 7
- CJEU C-453/07 Er 25 Sep. 2008 Art. 7
- CJEU C-294/06 Payir 24 Jan. 2008 Art. 6(1)
- CJEU C-349/06 Polat 4 Oct. 2007 Art. 7 + 14
- CJEU C-325/05 Derin 18 July 2007 Art. 6, 7 and 14
- CJEU C-4/05 Gülzeli 26 Oct. 2006 Art. 10(1)
- CJEU C-502/04 Torun 16 Feb. 2006 Art. 7
- CJEU C-230/03 Sedef 10 Jan. 2006 Art. 6
- CJEU C-373/03 Aydınli 7 July 2005 Art. 6 + 7
- CJEU C-374/03 Gürol 7 July 2005 Art. 9
- CJEU C-383/03 Dogan (Ergül) 7 July 2005 Art. 6(1) + (2)
- CJEU C-136/03 Dörr & Unal 2 June 2005 Art. 6(1) + 14(1)
- CJEU C-467/02 Cetinkaya 11 Nov. 2004 Art. 7 + 14(1)
- CJEU C-275/02 Ayaz 30 Sep. 2004 Art. 7
- CJEU C-465/01 Comm. v. Austria 16 Sep. 2004 Art. 10(1)
- CJEU C-171/01 Birlikte 8 May 2003 Art. 10(1)
- CJEU C-188/00 Kurz (Yuze) 19 Nov. 2002 Art. 6(1) + 7
- CJEU C-89/00 Bicakci 19 Sep. 2000
- CJEU C-65/98 Eyüp 22 June 2000 Art. 7
- CJEU C-329/97 Ergat 16 Mar. 2000 Art. 7
- CJEU C-340/97 Nazlı 10 Feb. 2000 Art. 6(1) + 14(1)
4.1: External Treaties: Association Agreements

CJEU C-171/13 Demirci a.o. 14 Jan. 2015 Art. 6(1)
CJEU C-485/07 Akdas 26 May 2011 Art. 6(1)

New  CJEU pending cases

EEC-Turkey Association Agreement Decision 3/80

* Dec. 3/80 of 19 Sept. 1980 on Social Security

CJEU judgments

CJEU C-483/14 Ahmet Bozkurt 6 June 1995 Art. 6(1)
CJEU C-355/93 Ergolu 5 Oct. 1994 Art. 6(1)
CJEU C-237/91 Kus 16 Dec. 1992 Art. 6(1) + 6(3)
CJEU C-192/89 Sevince 20 Sep. 1990 Art. 6(1) + 13
CJEU C-12/86 Demirel 30 Sep. 1987 Art. 7 + 12

CJEU pending cases

New  CJEU C-123/17 Yän  pending  Art. 13
New  CJEU C-70/18 A.B. & P. pending  Art. 13
New  CJEU C-89/18 A pending  Art. 13

See further: § 4.4

4.2 External Treaties: Readmission

Albania
* OJ 2005 L 124/21 (into force 1 May 2006 (TCN: May 2008))  UK opt in

Armenia
* OJ 2013 L 289/13 (into force 1 Jan. 2014)

Azerbaijan
* OJ 2014 L 128/17 (into force 1 Sept. 2014)

Belarus
* Mobility partnership signed in 2014

Bosnia and Herzegovina
* OJ 2007 L 334/66 (into force 1 Jan. 2008 (TCN: Jan. 2010))  UK opt in

Cape Verde

Georgia
* OJ 2011 L 52/47 (into force 1 March 2011)  UK opt in
EC proposes to lift visa requirements, March 2016

Hong Kong
* OJ 2004 L 17/23 (into force 1 Mar. 2004)  UK opt in

Macao
* OJ 2004 L 143/97 (into force 1 June 2004 )  UK opt in

Macedonia
* OJ 2007 L 334/7 (into force 1 Jan. 2008 (TCN: Jan. 2010))  UK opt in

Moldova
* OJ 2007 L 334/149 (into force 1 Jan. 2008 (TCN: Jan. 2010))  UK opt in

Montenegro
* OJ 2007 L 334/26 (into force 1 Jan. 2008 (TCN: Jan. 2010))  UK opt in

Morocco, Algeria, and China
4.2: External Treaties: Readmission

* negotiation mandate approved by Council

**Pakistan**
* OJ 2010 L 287/52 (into force 1 Dec. 2010)

**Russia**
* OJ 2007 L 129 (into force 1 June 2007 (TCN: June 2010))

**Serbia**
* OJ 2005 L 124/43 (into force 1 May 2005 )

**Sri Lanka**
* OJ 2005 L 124/43 (into force 1 May 2005 )

**Turkey**
* Com (2012) 239 (into force 1 Oct. 2014)
  Additional provisions as of 1 June 2016

**Ukraine**

**Turkey (Statement)**
* Not published in OJ - only Press Release (18 March 2016)
  
  **CJEU judgments**
  
  
  See further: § 4.4

4.3 External Treaties: Other

**Armenia: visa**
* OJ 2013 L 289 (into force 1 Jan. 2014)

**Azerbaijan: visa**
* OJ 2013 L 320/7 (into force 1 Sep. 2014)

**Belarus: visa**
* council mandate to negotiate, Feb. 2011

**Brazil: short-stay visa waiver for holders of diplomatic or official passports**
* OJ 2011 L 66/1 (into force 24 Feb. 2011)

**Brazil: short-stay visa waiver for holders of ordinary passports**

**Cape Verde: visa**
* OJ 2013 L 282/3 (into force 1 Dec. 2014)

**China: Approved Destination Status treaty**
* OJ 2004 L 83/12 (into force 1 May 2004 )

**Denmark: Dublin II treaty**
* OJ 2006 L 66/38 (into force 1 April 2006 )

**Mauritius, Antigua/Barbuda, Barbados, Seychelles, St. Kitts and Nevis and Bahamas: visa abolition**
  (into force, May 2009)

**Moldova: visa**
  (into force 1 July 2013)

**Morocco: visa**
* proposals to negotiate - approved by council Dec. 2013

**Norway and Iceland: Dublin Convention**
* OJ 1999 L 176/36 (into force 1 March 2001)
* Protocol into force 1 May 2006

**Russia: Visa facilitation**
* Council mandate to renegotiate visa facilitation treaties, April 2011

**Switzerland: Free Movement of Persons**
* OJ 2002 L 114 (into force 1 June 2002)

**Switzerland: Implementation of Schengen, Dublin**
4.4.1 CJEU Judgments on EEC-Turkey Association Agreement

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<td>Supplements to social security can not be withdrawn solely on the ground that the beneficiary has moved out of the Member State.</td>
<td>Art. 6(1)</td>
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<td>CJEU C-210/97</td>
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<td>19 Nov. 1998</td>
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<tr>
<td>*</td>
<td>interpr. of</td>
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<tr>
<td>*</td>
<td>Turkish worker has left labour market.</td>
<td>Art. 7</td>
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<tr>
<td>CJEU C-337/07</td>
<td>Aylin</td>
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<td>*</td>
<td>On the rights of family members of an unemployed Turkish worker or fraud by a Turkish worker.</td>
<td>Art. 7</td>
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<tr>
<td>CJEU C-275/02</td>
<td>Ayaz</td>
<td>30 Sep. 2004</td>
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<td>*</td>
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<td>*</td>
<td>A stepchild is a family member.</td>
<td>Art. 7</td>
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<tr>
<td>CJEU C-373/03</td>
<td>Aydinli</td>
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<td>*</td>
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<td>*</td>
<td>A long detention is no justification for loss of residence permit.</td>
<td>Art. 6 + 7</td>
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<td>CJEU C-462/08</td>
<td>Bekleyen</td>
<td>21 Jan. 2010</td>
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<td>*</td>
<td>The child of a Turkish worker has free access to labour and an independent right to stay in Germany, if this child is graduated in Germany and its parents have worked at least three years in Germany.</td>
<td>Art. 7(2)</td>
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<tr>
<td>CJEU C-436/09</td>
<td>Belkiran</td>
<td>13 Jan. 2012</td>
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<tr>
<td>*</td>
<td>interpr. of</td>
<td>Dec. 1/80</td>
</tr>
<tr>
<td>*</td>
<td>Case withdrawn because of judgment C-371/08 (Ziebell). Art. 14(1) of Dec. 1/80 does not have the same scope as art. 28(3)(a) of the Directive on Free Movement.</td>
<td>deleted</td>
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<tr>
<td>CJEU C-89/00</td>
<td>Birden</td>
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<td>*</td>
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<td>*</td>
<td>Art 14 does not refer to a preventive expulsion measure.</td>
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<tr>
<td>CJEU C-171/01</td>
<td>Birlikte</td>
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<td>*</td>
<td>interpr. of</td>
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<td>*</td>
<td>Art 10 precludes the application of national legislation which excludes Turkish workers duly registered as belonging to the labour force of the host MS from eligibility for election to organisations such as trade unions.</td>
<td>Art. 10(1)</td>
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<td>CJEU C-467/02</td>
<td>Cevinkaya</td>
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<td>*</td>
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<tr>
<td>*</td>
<td>The meaning of a “family member” is analogous to its meaning in the Free Movement Regulation.</td>
<td>Art. 7 + 14(1)</td>
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<td>*</td>
<td>non-transp. of</td>
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<tr>
<td>*</td>
<td>Incorrect way of implementation by means of adjusting policy guidelines instead of adjusting legislation: the European Commission withdraws its complaint.</td>
<td>Art. 41(1) - deleted</td>
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<tr>
<td>CJEU C-465/01</td>
<td>Comm. v. Austria</td>
<td>16 Sep. 2004</td>
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* OJ 2008 L 83/37 (applied from Dec. 2008)
4.4: External Treaties: Jurisprudence: CJEU Judgments on EEC-Turkey Association

* interpr. of Dec. 1/80 Art. 10(1)
* Austria has failed to fulfil its obligations by denying workers who are nationals of other MS the right to stand for election for workers’ chambers: art. 10(1) prohibition of all discrimination based on nationality.

** C-92/07 Comm. v. Netherlands
* Dec. 1/80 Art. 10(1) + 13
* The obligation to pay charges in order to obtain or extend a residence permit, which are disproportionate compared to charges paid by citizens of the Union is in breach with the standstill clauses of Articles 10(1) and 13 of Decision No 1/80 of the Association.

** C-225/12 Demir
* Dec. 1/80 Art. 13
* Holding a temporary residence permit, which is valid only pending a final decision on the right of residence, does not fall within the meaning of ‘legally resident’.

** C-136/13 Demirci a.o.
* Dec. 3/80 Art. 6(1)
* Art. 6(1) must be interpreted as meaning that nationals of a MS who have been duly registered as belonging to the labour force of that MS as Turkish workers cannot, on the ground that they have retained Turkish nationality, rely on Article 6 of Dec. 3/80 to object to a residence requirement provided for by the legislation of that MS in order to receive a special non-contributory benefit within the meaning of Article 4(2) of Reg. 1408/71 on social security.

** C-12/86 Demirel
* Dec. 1/80 Art. 7 + 12
* No right to family reunification.

** C-221/11 Demirkan
* Protocol Art. 41(1)
* The freedom to ‘provide services’ does not encompass the freedom to ‘receive’ services in other EU Member States.

** C-256/11 Dereci et al.
* Dec. 1/80 Art. 13
* Right of residence of nationals of third countries who are family members of Union citizens - Refusal based on the citizen’s exercise to the right to freedom of movement - Possible difference in treatment compared with EU citizens who have exercised their right to freedom of movement - EEC-Turkey Association Agreement - Article 13 of Decision No 1/80 of the Association Council - Article 41 of the Additional Protocol - ‘Standstill’ clauses.

** C-325/05 Derin
* Dec. 1/80 Art. 6, 7 and 14
* There are two different reasons for loss of rights: (a) a serious threat (Art 14(1) of Dec 1/80), or (b) if he leaves the territory of the MS concerned for a significant length of time without legitimate reason.

** C-383/03 Dogan (Ergül)
* Dec. 1/80 Art. 6(1) + (2)
* Return to labour market: no loss due to detention.

** C-138/13 Dogan (Naime)
* Protocol Art. 41(1)
* The language requirement abroad is not in compliance with the standstill clauses of the Association Agreement. Although the question was also raised whether this requirement is in compliance with the Family Reunification Dir., the Court did not answer that question.

** C-136/03 Dürr & Unal
* Dec. 1/80 Art. 6(1) + 14(1)
* The procedural guarantees set out in the Dir on Free Movement also apply to Turkish workers.

** C-451/11 Düşger
* Dec. 1/80 Art. 7
* Art. 7 is also applicable to family members of Turkish nationals who can rely on the Regulation, who don’t have the Turkish nationality themselves, but instead a nationality from a third country.

** C-386/95 Eker
* Dec. 1/80 Art. 6(1)
* On the meaning of “same employer”.

** C-453/07 Er
* Dec. 1/80 Art. 7
* On the consequences of having no paid employment.

** C-329/97 Ergat
* Dec. 1/80 Art. 7
* No loss of residence right in case of application for renewal residence permit after expiration date.

** C-355/93 Erglu
* Dec. 1/80 Art. 6(1)
* On the meaning of “same employer”. 
4.4: External Treaties: Jurisprudence: CJEU Judgments on EEC-Turkey Association

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<td>Essent</td>
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<tr>
<td>* The posting by a German company of Turkish workers in the Netherlands to work in the Netherlands is not affected by the standstill-clauses. However, this situation falls within the scope of art. 56 and 57 TFEU precluding such making available is subject to the condition that those workers have been issued with work permits.</td>
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<td>Eyüp</td>
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<td>* On the obligation to co-habit as a family.</td>
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<td>CJEU C-561/14</td>
<td>Genc (Caner)</td>
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<td>interpr. of</td>
<td>Proto</td>
<td>Art. 41(1)</td>
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<tr>
<td>* A national measure, making family reunification between a Turkish worker residing lawfully in the MS concerned and his minor child subject to the condition that the latter have, or have the possibility of establishing, sufficient ties with Denmark to enable him successfully to integrate, when the child concerned and his other parent reside in the State of origin or in another State, and the application for family reunification is made more than two years from the date on which the parent residing in the MS concerned obtained a permanent residence permit or a residence permit with a possibility of permanent residence constitutes a ‘new restriction’, within the meaning of Art. 13 of Decision 1/80. Such a restriction is not justified.</td>
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<td>CJEU C-14/09</td>
<td>Genc (Hava)</td>
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<td>* On the determining criteria of the concept worker and the applicability of these criteria on both EU and Turkish workers.</td>
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<tr>
<td>CJEU C-268/11</td>
<td>Gülbahce</td>
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<td>interpr. of</td>
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<td>Art. 6(1) + 10</td>
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<td>* A MS cannot withdraw the residence permit of a Turkish employee with retroactive effect.</td>
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<tr>
<td>CJEU C-36/96</td>
<td>Günyaydın</td>
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<td>interpr. of</td>
<td></td>
<td>Art. 6(1)</td>
</tr>
<tr>
<td>* Turkish national who has been lawfully employed in a Member State for an uninterrupted period of more than three years in a genuine and effective economic activity for the same employer and whose employment status is not objectively different to that of other employees employed by the same employer or in the sector concerned and exercising identical or comparable duties, is duly registered.</td>
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<td>CJEU C-374/03</td>
<td>Gürol</td>
<td>7 July 2005</td>
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<tr>
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<td>* On the right to an education grant for study in Turkey.</td>
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<td>CJEU C-4/05</td>
<td>Güzeli</td>
<td>26 Oct. 2006</td>
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<tr>
<td>interpr. of</td>
<td></td>
<td>Art. 10(1)</td>
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<tr>
<td>* The rights of the Ass. Agr. apply only after one year with same employer.</td>
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<tr>
<td>CJEU C-351/95</td>
<td>Kadıman</td>
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<td>* On the calculation of the period of cohabitation as a family.</td>
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<td>CJEU C-7/10 &amp; C-9/10</td>
<td>Kahveci &amp; İnan</td>
<td>29 Mar. 2012</td>
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<td>interpr. of</td>
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<td>Art. 7</td>
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<tr>
<td>* The members of the family of a Turkish worker duly registered as belonging to the labour force of a Member State can still invoke that provision once that worker has acquired the nationality of the host Member State while retaining his Turkish nationality.</td>
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<td>CJEU C-285/95</td>
<td>Kol</td>
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<td>Art. 6(1)</td>
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<td>* On the consequences of conviction for fraud</td>
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<td>CJEU C-188/00</td>
<td>Kürz (Yuze)</td>
<td>19 Nov. 2002</td>
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<td>Art. 6(1) + 7</td>
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<td>* On the rights following an unjustified expulsion measure</td>
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<td>CJEU C-237/91</td>
<td>Kus</td>
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<td>Art. 6(1) + 6(3)</td>
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<td>* On stable position on the labour market</td>
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<td>CJEU C-303/08</td>
<td>Metin Bozkurt</td>
<td>22 Dec. 2010</td>
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<tr>
<td>interpr. of</td>
<td></td>
<td>Art. 7 + 14(1)</td>
</tr>
</tbody>
</table>
| * Art. 7 means that a Turkish national who enjoys certain rights, does not lose those rights on account of his divorce, which took place after those rights were acquired. By contrast, Art. 14(1) does not preclude a measure ordering the expulsion of a Turkish national who has been
convicted of criminal offences, provided that his personal conduct constitutes a present, genuine and sufficiently serious threat to a fundamental interest of society. It is for the competent national court to assess whether that is the case in the main proceedings.

- CJEU C-340/97 
  * interpr. of Nazli 
  * On the effects of detention on residence rights. 
  * Art. 6(1) + 14(1) 
  * Dec. 1/80 
  * 10 Feb. 2000

- CJEU C-294/06 
  * Payir 
  * Residence rights do not depend on the reason for admission. 
  * Art. 6(1) 
  * Dec. 1/80 
  * 24 Jan. 2008

- CJEU C-484/07 
  * Pehlivan 
  * C-300/09 & C-301/09 
  * On the meaning of voluntary unemployment after 4 years. 
  * Art. 7 
  * Dec. 1/80 
  * 16 June 2011

- CJEU C-37/98 
  * Savas 
  * On the meaning of “same employer”. 
  * Art. 4(1) 
  * Dec. 1/80 
  * 11 May 2000

- CJEU C-230/03 
  * Sedef 
  * On the scope of the standstill obligation. 
  * Art. 6 
  * Dec. 1/80 
  * 10 Jan. 2006

- CJEU C-192/89 
  * Sevinc 
  * On the meaning of stable position and the labour market. 
  * Art. 6(1) + 13 
  * Dec. 1/80 
  * 20 Sep. 1990

- CJEU C-228/06 
  * Soysal 
  * On the standstill obligation and secondary law. 
  * Art. 4(1) 
  * Protocol 
  * 19 Feb. 2009

- CJEU C-652/15 
  * Tekdemir 
  * Art. 13 
  * Dec. 1/80 
  * 29 Mar. 2017

- CJEU C-171/95 
  * Tetik 
  * On the meaning of voluntary unemployment after 4 years. 
  * Art. 6(1) 
  * Dec. 1/80 
  * 23 Jan. 1997

- CJEU C-300/09 & C-301/09 
  * Toprak/Oguz 
  * On the reference date regarding the prohibition to introduce new restrictions for Turkish workers and their family members. 
  * Art. 13 
  * Dec. 1/80 
  * 9 Dec. 2010

- CJEU C-502/04 
  * Torun 
  * On possible reasons for loss of residence right. 
  * Art. 7 
  * Dec. 1/80 
  * 16 Feb. 2006

- CJEU C-16/05 
  * Tum & Dari 
  * On the scope of the standstill obligation. 
  * Art. 4(1) 
  * Protocol 
  * 20 Sep. 2007

- CJEU C-186/10 
  * Tural Oguz 
  * Article 41(1) must be interpreted as meaning that it may be relied on by a Turkish national who, having leave to remain in a Member State on condition that he does not engage in any business or profession, nevertheless enters
into self-employment in breach of that condition and later applies to the national authorities for further leave to remain on the basis of the business which he has meanwhile established.

**CJEU C-508/15**  
Ucar a.o.  
* interpr. of Dec. 1/80  
* Art 7 must be interpreted as meaning that that provision confers a right of residence in the host MS on a family member of a Turkish worker, who has been authorised to enter that MS, for the purposes of family reunification, and who, from his entry into the territory of that MS, has lived with that Turkish worker, even if the period of at least three years during which the latter is duly registered as belonging to the labour force does not immediately follow the arrival of the family member concerned in the host MS, but is subsequent to it.

**CJEU C-187/10**  
Unal  
29 Sep. 2011  
* interpr. of Dec. 1/80  
* Art. 6(1) must be interpreted as precluding the competent national authorities from withdrawing the residence permit of a Turkish worker with retroactive effect from the point in time at which there was no longer compliance with the ground on the basis of which his residence permit had been issued under national law if there is no question of fraudulent conduct on the part of that worker and that withdrawal occurs after the expiry of the one-year period of legal employment.

**CJEU C-371/08**  
Ziebell or Örnek  
8 Dec. 2011  
* interpr. of Dec. 1/80  
* Decision No 1/80 does not preclude an expulsion measure based on grounds of public policy from being taken against a Turkish national whose legal status derives from the second indent of the first paragraph of Article 7 of that decision, in so far as the personal conduct of the individual concerned constitutes at present a genuine and sufficiently serious threat affecting a fundamental interest of the society of the host Member State and that measure is indispensable in order to safeguard that interest. It is for the national court to determine, in the light of all the relevant factors relating to the situation of the Turkish national concerned, whether such a measure is lawfully justified in the main proceedings.

### 4.4.2 CJEU pending cases on EEC-Turkey Association Agreement

**New**  
CJEU C-89/18  
A.  
Art. 13  
* interpr. of Dec. 1/80  
* Marriage of convenience. Would a national rule under which it is a general condition for family reunification that the couple’s attachment to Denmark be greater than (in this case) to Turkey — be deemed to be ‘justified by an overriding reason in the public interest, … suitable to achieve the legitimate objective pursued and … not [going] beyond what is necessary in order to attain it’?

**New**  
CJEU C-70/18  
A.B. & P.  
Art. 13  
* interpr. of Dec. 1/80  
* On the use (processing and storage) of biometric data in databases and access to these databases for criminal law purposes, and the meaning of that in the context of the standstill Articles.

**CJEU C-677/17**  
Çoban  
Dec. 3/80  
Art. 6(1)  
* On the issue of place of residence, LTR status in the context of social security.

**New**  
CJEU C-257/18 & C-258/18  
Güler & Solak  
Art. 6  
* interpr. of Dec. 3/80  
* On the effect of the loss of (Union) citizenship.

**CJEU C-123/17**  
Yün  
Dec. 1/80  
Art. 13  
* AG: 19 April 2018  
* Meaning of the standstill clause of Art 13 Dec 1/80 and Art 7 Dec 2/76 in relation to the language requirement of visa for retiring spouses.

### 4.4.3 CJEU Judgments on Readmission Treaties

**CJEU T-192/16**  
N.F.  
27 Feb. 2017  
* validity of EU-Turkey Statement inadmr.  
* Applicant claims that the EU-Turkey Statement constitutes an agreement that produces legal effects adversely affecting applicants rights and interests as they risk refoulement to Turkey and subsequently to Pakistan. The action is dismissed on the ground of the Court’s lack of jurisdiction to hear and determine it.

Two other identical cases T-193/16 (N.G.) and T-257/16 (N.M.) were also declared inadmissible.