

‘Salus rei publicae suprema lex esto’? *The use of classified data in immigration cases: analysis of the joined cases C-420/22 and C-528/22 NW and PQ*

LAURA GYENÉY*

Faculty of Law and Political Science, Pázmány Péter Catholic University, Hungary

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ABSTRACT

This paper analyses the CJEU’s *NW and PQ* judgment by examining the core dilemma facing modern states: balancing national security interests with individual freedoms. In this context, I will first examine whether the right to an effective remedy, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, requires that a third-country national whose residence permit has been withdrawn on security grounds must at least be informed of the essence of the grounds on which the decision is based. This question is particularly pressing given the wave of terrorist attacks over the last decades, which has fundamentally undermined the fragile consensus on the operation of national security services under the rule of law, reinforcing a ‘policy of prevention of terrorism and other national security threats’ (Bigo et al. 2015, 2). The study suggests that, regarding genuine national security concerns, it may be acceptable for an individual not to have direct access to their entire file, consequently not knowing in detail why the (specialist) authority considers them a threat. However, the court (or authority) must have the power to review the merits of the justification for this classification. Moreover, this power must always be exercised *ex officio* – since the very consequence of secrecy means that the person concerned is not in a legal position to challenge or contest the authorities’ findings on the merits.

KEYWORDS

Citizenship of the Union, withdrawal of residence permit, classified data, national security, right to effective judicial protection

* Corresponding author. E-mail: gyeney.laura@jak.ppke.hu

1. INTRODUCTION

Ensuring the effectiveness of the rights of EU citizens requires, in certain cases, the application of EU law in areas traditionally within the competence of the Member States, such as the entry and residence of third-country nationals in the Member States. According to the recent case-law of the Court of Justice of the European Union (CJEU), such a situation exists where a third-country national is refused the right of residence despite having a dependent relationship with a family member who is an EU citizen, which would compel the latter to accompany the third-country national and leave the territory of the EU as a whole.

This issue deserves particular attention in cases where the refusal to allow a third-country national parent to reside is based on national security grounds, while the person concerned is not informed of the grounds for the decision because they are based on classified information and therefore cannot challenge the merits of the decision in court. This paper examines, through a detailed analysis of the joined cases¹ of *NW and PQ*, whether the right to an effective remedy, as guaranteed by Article 47 of the Charter of Fundamental Rights, requires that a third-country national whose residence permit has been withdrawn on the grounds of national security should at least be informed of the essence of the grounds on which the decision is based.

2. THE FACTS OF THE CASE

The case concerns two third-country nationals – a Turkish and a Nigerian national – who had been legally resident in Hungary for some time when the main proceedings arose. The applicant in the *NW* case, a Turkish national, married a Hungarian citizen in 2004 and had one child of Hungarian nationality. The parents have joint custody of the child, while *NW* provides for the family's financial well-being. Accordingly, the Hungarian immigration authorities issued *NW* with a permanent residence card, which was later withdrawn based on a non-reasoned opinion of the Constitution Protection Office that *NW*'s stay posed a threat to national security. The immigration authorities also ordered *NW* to leave the country. The Constitution Protection Office categorized the data on which the opinion was based as classified, so that neither the immigration authorities dealing with the case nor the person concerned could access it.

The Directorate for the Immigration Police confirmed the decision, stating that it could not depart from the statement of a specialist national authority and was, therefore, obliged to withdraw *NW*'s permanent residence card following the authority's decision, regardless of his personal circumstances.

NW brought an action against the decision of the Directorate for the Immigration Police before the Szeged Regional Court. The court found that the residence withdrawal decision was based solely on the binding and non-reasoned opinions issued by the specialist State authority. The court also pointed out that neither *NW* nor the immigration authorities in charge of the stay had access to the classified data on which the opinion was based. However, the Szeged Regional Court, referring to the case law of the Curia of Hungary, held that the court reviewing the legality of the residence decision could have access to the classified data. In addition, the

¹Judgment of 25 April 2024, *Joined Cases C-420/22 and C-528/22, NW and PQ*, ECLI:EU:C:2024:344.

applicant himself or his legal representative may, exceptionally and upon specific request, have access to the data, subject to the restriction that the information thus obtained may not be used in any administrative or judicial proceedings.

The applicant in the *PQ* case is a Nigerian national who came to Hungary in 2005 as a professional footballer. Since 2011, he has been living with his partner, a Hungarian citizen, and they have two children of Hungarian nationality. The parents have joint custody. On 6 August 2020, *PQ* applied for a national settlement permit, but the immigration authorities rejected it. The reason for the refusal was, as in the case of *NW*, a non-reasoned opinion issued by the Constitution Protection Office, based on classified information that *PQ*'s residence would be contrary to Hungary's national security interests. The decision rejecting the application for a settlement permit was confirmed in this case by the Directorate for the Immigration Police, based on the same arguments as used in the *NW* case. *PQ* then appealed to the Szeged Regional Court against the decision.

3. QUESTIONS REFERRED TO THE COURT FOR A PRELIMINARY RULING

The Szeged Regional Court referred the cases of *NW* and *PQ* to the CJEU for a preliminary ruling on applying the fundamental rights guaranteed by EU law. The questions focused on the right to an effective remedy under Article 47 of the Charter of Fundamental Rights and the protection of the rights deriving from Union citizenship, in particular the applicability of the *Zambrano* doctrine.²

In its request for a preliminary ruling, the Regional Court looked for an answer from the CJEU on the compatibility with Article 20 TFEU of a Member State's practice of withdrawing or refusing to issue a residence permit to a third-country family member of a Union citizen who had not previously exercised his right to free movement, without examining the relationship of dependence between the family members. The purpose of the question was to clarify the protection of the rights conferred by EU citizenship on third-country family members, in particular where the withdrawal or refusal of a residence permit would compel the EU citizen to leave the territory of the Union.

In its subsequent questions, the referring court sought an answer in particular to the question of the substantive and procedural conditions under which the derived right of residence under Article 20 TFEU may be restricted on the grounds of national security and/or public policy or public security.

As regards the substantive conditions, the referring court was primarily concerned with the compatibility with Article 20 TFEU of legislation under which a third-country national's residence permit is withdrawn or refused essentially automatically, on the sole basis of a non-reasoned and binding decision of the specialist authority, without any examination of the personal circumstances of the person concerned or of the proportionality of that withdrawal or refusal.

²According to the *Zambrano* doctrine, Article 20 TFEU grants the third-country family member a derivative right to reside in the EU citizen's Member State of origin if his or her departure would force the dependent EU citizen to leave the territory of the EU as a whole. Judgment of 8 March 2011, *Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi*, ECLI:EU:C:2011:124.

As regards the procedural requirements, the Szeged Regional Court referred questions to the CJEU first on the requirements applicable to administrative proceedings and then on those applicable to judicial proceedings. In particular, it asked about the obligations of the authorities deciding on the refusal of residence and of the national security authorities as regards the access of the person concerned to the classified information on which the decision is based and the use of that information in administrative or judicial proceedings, in particular with regard to the ‘principle of good administration’ enshrined in Article 41 of the Charter of Fundamental Rights and ‘right to an effective remedy and a fair trial’ guaranteed by Article 47.

Finally, regarding the judicial phase, the Szeged Regional Court sought an answer to the question of the national court’s exact powers in reviewing the legality of a decision to withdraw or refuse to issue a residence permit based on classified information. In particular, it asked whether the court must grant the person concerned or their legal representative full or partial access to the classified data.

4. THE COURT’S DECISION

In this case, the Hungarian Government argued, *inter alia*, that Article 20 TFEU was not applicable in the cases in question, since the parties to the main proceedings had not invoked it themselves, and there was no dependency between PQ and his family members that would grant a right to reside. On the other hand, the CJEU held that even if the referring court had exceeded its powers under Hungarian law (by putting forward an argument alleging infringement of Article 20 of its motion), this could not lead to the inadmissibility of the application.³ In addition, preliminary rulings are based on a clear separation of functions between the national courts and the CJEU; the national court alone has jurisdiction to find and assess the facts in the case before it, and the CJEU may not depart from its findings.⁴

On the merits, the Court concluded that Article 20 TFEU precludes the authorities of a Member State from withdrawing or refusing to issue a residence permit to a third-country family member of a non-mobile Union citizen without first examining the relationship of dependency between them. In support of this argument, the CJEU referred to its preliminary ruling in the *M.D.* case, which also concerned Hungary, on a similar issue. In that case, the CJEU held that the authorities should have examined the right of residence under Article 20 before adopting the decision banning entry and stay in the case of a third-country national who had previously been sentenced to imprisonment for trafficking in human beings and against whom the immigration authority had imposed an automatic entry ban based on a decision of the Constitution Protection Office.⁵

However, in *NW and PQ*, the CJEU considered it important to stress the subsidiary nature of the right of residence under Article 20,⁶ i.e., that this right is available to the person concerned

³Case C-420/22 and C-528/22, *NW and PQ*, para. 49.

⁴Case C-420/22 and C-528/22, *NW and PQ*, para. 50.

⁵The Court also pointed out in its reasoning in *NW and PQ* that the Article 20 in question can be invoked not only against expulsion decisions, which constitute the bulk of its previous case-law, but also against decisions revoking or refusing to issue a residence permit. Case C-420/22 and C-528/22, *NW and PQ*, para. 65.

⁶Case C-420/22 and C-528/22, *NW and PQ*, para. 66.

only if they cannot be granted a right of residence under any other provision applicable in that Member State. Finally, the CJEU held that, although the national authorities are not required to systematically and proactively (on their initiative) gather information regarding the conditions for the right of residence, they are obliged to evaluate the existence of a dependency relationship when assessing the evidence submitted.⁷

In short, authorities cannot withdraw a third-country national's residence permit without examining the existence of a dependency relationship if the person concerned has no other right to residence and the authorities are aware of the family relationship.

The CJEU then examined the conditions for restricting the right of residence, both substantive and procedural. First, it held that a restriction may indeed be justified on national security grounds if the third-country national constitutes a real, immediate, and sufficiently serious threat to national security.⁸ However, it stressed that any refusal of residence on these grounds must be based on a specific assessment of all the relevant circumstances of the case. This assessment should take into account the principle of proportionality, the fundamental rights, and the best interests of the child concerned.⁹ However, the principle of good administration under Article 41 of the Charter and the right to an effective remedy under Article 47 would not be guaranteed if the authorities of the Member States decided to withdraw or refuse to issue a residence permit solely based on a binding decision issued by the specialist authority.¹⁰

In relation to procedural conditions, the Court followed a similar line of reasoning, stressing that under the general principle of sound administration, the person concerned has the right to access the data concerning them to be able to make their views known effectively to the authorities.¹¹ In addition, the right of defence under Article 47 of the Charter requires that the applicant be given access to the grounds for the decision taken against them in the judicial proceedings and to all the elements in the file on which the authority relies.¹²

However, the Court pointed out that the rights of the defence are not absolute and that the corollary right of access to the file may be limited. At the same time, such a limitation must strike a balance between the general principle of sound administration, the right of the person concerned to an effective remedy, and the interests relied on to justify the non-disclosure of an element of the file to that person (interests relating to national security).¹³ It emphasized that information does not have to be disclosed if it is likely to jeopardize the security of the Member State concerned in a direct and specific manner, in that it may, in particular, endanger the life,

⁷Case C-420/22 and C-528/22, NW and PQ, paras. 69–70.

⁸Case C-420/22 and C-528/22, NW and PQ, para. 76.

⁹Case C-420/22 and C-528/22, NW and PQ, para. 77. In the grounds of its judgment, the Court referred to the judgment of the Subdelegación del Gobierno en Toledo of 2022. In that case, the authorities based the restriction of the right of residence under Article 20 on the grounds of public policy on the criminal record of the third-country family member, who had been convicted on three previous occasions of driving without a licence and drink-driving. Case C-451/19, Subdelegación del Gobierno en Toledo, judgment of 5 May 2022, ECLI:EU:C:2022:354.

¹⁰Case C-420/22 and C-528/22, NW and PQ, paras. 79–85.

¹¹Case C-420/22 and C-528/22, NW and PQ, paras. 88–90.

¹²Case C-420/22 and C-528/22, NW and PQ, paras. 92–93.

¹³Case C-420/22 and C-528/22, NW and PQ, para. 94.

health, or freedom of persons or reveal the methods of investigation.¹⁴ The CJEU also stressed in its reasoning that the right of defence is not respected if access to the information is granted in a specific procedure but cannot be used by the persons concerned in administrative or judicial proceedings.¹⁵ Finally, the Court also laid down a minimum condition for the restrictions: the person concerned must at least be informed of the essence of the grounds on which the decision is based.¹⁶

As regards the powers of the court reviewing the legality of the decision, the Luxembourg forum gave a broad interpretation to the right to an effective remedy.¹⁷ This means that the court may not only take cognisance of the grounds and evidence on which the decision is based, but may also consider whether the disclosure of such evidence would undermine the national security grounds invoked. If it concludes that a full disclosure of the grounds would not jeopardize national security, it allows the authorities to disclose the missing grounds and evidence. If the authority decides not to disclose all the grounds and evidence, the court must review the legality of the decision solely based on the information provided. Article 47 of the Charter does not require the court to declassify the data, but it does effectively deprive the data of its legal effect. It states that in the event of a failure to comply with this obligation to provide information, '[...] the court having jurisdiction is required, under national law, to draw the appropriate conclusions from that failure.'¹⁸

If, on the other hand, it considers that disclosing those reasons is contrary to national security, it must review the legality of the decision in a procedure that strikes the right balance between national security and the need for an effective remedy. This should ensure that the person concerned is at least informed of the substance of the reasons on which the decision is based.¹⁹

5. EXPLANATION OF THE JUDGMENT

The issues at stake lie at the intersection of immigration policy, traditionally a national competence, and EU citizenship, which is supranational. Due to the Court's expansive case-law on EU citizenship over the decades, it is anticipated that an increasing number of cases will come before the CJEU, and it will have to decide precisely where the boundaries between these two areas of law lie.

¹⁴Case C-420/22 and C-528/22, *NW and PQ*, para. 96.

¹⁵Case C-420/22 and C-528/22, *NW and PQ*, paras. 97–98.

¹⁶Case C-420/22 and C-528/22, *NW and PQ*, para. 95. In the grounds of its judgment, the Court also referred to *GM* judgment, which held that EU law precludes national legislation which does not even allow the persons concerned to know the essence of the grounds on which the decision is based. Judgment of 22 September 2022, *Case C-159/21 GM*, ECLI:EU:C:2022:708.

¹⁷Its earlier judgment in the *ZZ* case, which is presented below, was of considerable help in this respect. See Judgment of 4 June 2013, *Case C-300/11, ZZ*, ECLI:EU:C:2013:363.

¹⁸Case C-420/22 and C-528/22, *NW and PQ*, para. 112.

¹⁹Case C-420/22 and C-528/22, *NW and PQ*, paras. 108–11.

This is well illustrated by the recent case of *E.K.*,²⁰ in which the Court was asked to rule on whether a third-country national residing under Article 20 TFEU is excluded from the personal scope of Directive 2003/109/EC and thus deprived of the possibility of acquiring long-term resident status because of the temporary nature of his stay.

The question of the temporal scope of Article 20 is just one of the many unresolved issues stemming from the highly controversial²¹ *Zambrano* judgment. For a considerable time, there was uncertainty regarding the nature of the dependency that underlies derivative residence and the criteria used to establish it. It was also unclear whether the right of residence based on Article 20 could be limited and, if so, under what substantive and procedural conditions. The judgment in *NW and PQ* addresses precisely these issues and adds to the Court's growing *Zambrano* case law.

5.1. The dependency relationship underlying the stay

The CJEU has consistently held that the question whether a third-country national has a right of residence under Article 20 TFEU is always based on the intensity of the relationship of dependency between him or her and the Union citizen.²²

Advocate General Mengozzi first defined the concept of dependency in his 2011 opinion in the *Dereci* case,²³ where he stated that

[...] the refusal to grant a residence permit to a national of a non-member country on whom one of his or her parents, who is a Union citizen, is economically and/or legally, administratively and emotionally dependent, could expose that citizen to the same risk of no longer being able to rely on his or her status and of having to leave the territory of the Union.²⁴

Based on this finding, the CJEU has already defined the relationship of dependence in *O. and S.*²⁵ as one that may involve legal, financial, and emotional dependence.

In the case of minors, therefore, a relationship of dependence can in principle be established, in particular where the third-country parent has sole custody of the child. Of course, this does not preclude the acquisition of the right of residence even in the case of joint custody with the EU citizen's parent, since the relationship between the child and the third-country parent must be assessed on a case-by-case basis from the point of view of dependency. The CJEU therefore concluded in the *Chavez-Vilchez* case²⁶ that, even when a child has a parent who is also a Union citizen – as in the case of the two Hungarian mothers in *NW* and *PQ* – and who can assume sole responsibility for the primary day-to-day care of the child, there may be a relationship of

²⁰Judgment of 7 September 2022, *Case C-624/20, E.K.*, ECLI:EU:C:2022:639.

²¹*Stanislas and Van Elsuwege* (2012) 176. The judgment has been criticized in the literature not only for its novel restriction of the immigration powers of the 'Member State of nationality', but also for its narrow reasoning.

²²*Case C-420/22 and C-528/22, NW and PQ*, para. 63, *Case C-624/20, E.K.*, para. 38.

²³Opinion of the Advocate General delivered on 29 September 2011, *Case C-256/11, Dereci*, ECLI:EU:C:2011:626, para. 48.

²⁴This is closer to the conditions set out in Article 3(2)(a) of Directive 2024/38/EC, which provides for facilitated entry and residence for family members who are dependants living in the same household as the EU citizen or who need the personal care of the EU citizen.

²⁵Judgment of 6 December 2012, *Joined Cases C-356/11 and C-357/11, O. and S.*, ECLI:EU:C:2012:776, para. 56.

²⁶Judgment of 10 May 2017, *Case C-133/15, Chavez-Vilchez*, ECLI:EU:C:2017:354.

dependence between the child and the third-country parent such as to compel the child to leave the territory of the European Union with them.²⁷

The Member State concerned must consider all the relevant circumstances to determine whether a dependency exists. This is illustrated by the judgment in case X,²⁸ cited several times in the reasoning of *NW and PQ*, where the CJEU held that the fact that a grandparent had been the child's daily carer instead of the parent applying for residence (but currently the parent has sole custody) was not in itself decisive in determining the existence of a dependency.

In its case law, the CJEU appears to have adopted a consistently expansive interpretation of the right of residence under Article 20 TFEU and the existence of a dependency relationship, at least in the case of minors. This leads to the conclusion (as stated by the referring court) that in the case at hand, the right of residence under Article 20 TFEU can be established for NW and PQ, given that the parents in both families bring up their children together, the father provides for their maintenance and, moreover, the court documents show that the children have a close emotional bond with PQ, who has been caring for them since birth.²⁹

Finally, it should be noted that, given the subsidiary nature of the *Zambrano* doctrine, the residence of NW and PQ in Hungary can only be established if there is no other legal basis for the residence, either at the Member State or EU level. In this respect, van den Brink's view that the sharp distinction between Articles 20 and 21 TFEU is not only artificial but also completely superfluous is thought-provoking.³⁰ According to settled case-law, the latter provision applies not only when citizens exercise their right to free movement, but also when a national measure is liable to constitute an obstacle to the exercise of that right. Moreover, since national authorities may refuse to grant the derived right of residence to third-country nationals on essentially the same grounds, there is no substantive difference between the applicability of Articles 20 and 21 TFEU. In what follows, I will examine the question of the restrictibility of the right of residence, focusing in part on this issue.

5.2. National security restrictions on the right based on Article 20 TFEU

The most problematic aspect of the NW and PQ case was the immigration authorities' revocation or refusal to issue a residence permit on the basis of an unjustified administrative decision that explicitly referred to national security interests. This opinion was issued by the Constitution Protection Office, which classified the data on which it relied to give its opinion so that neither the immigration authorities nor the parties had access to it. The Court, therefore, sought to clarify the substantive and procedural conditions for derogating from the provisions of Article 20 TFEU on grounds of national security.

5.2.1. The substantive legal requirements. In its *Zambrano* case-law, the Court established at a relatively early stage that rights under Article 20 TFEU can be restricted. In its *Rendón Marin*³¹

²⁷Case C-133/15, *Chavez-Vilchez*, para. 71.

²⁸Judgment of 22 June 2023, Case C-459/20, X, ECLI:EU:C:2023:499.

²⁹Case C-528/22, *PQ*, paras. 26, and 29.

³⁰Van den Brink (2021) 13–28.

³¹Judgment of 13 September 2016, Case C-165/14, *Rendón Marin*, ECLI:EU:C:2016:675, para. 81.

and CS³² judgments, the Court stated that the right of residence under Article 20 TFEU is not an absolute right, but can be restricted on grounds of public policy or public security where the third-country national constitutes a genuine, present, and sufficiently serious threat to one of the fundamental interests of society.

However, the reference to national security is not a ‘blank cheque’ for immigration decisions.³³ According to the relevant case-law of the CJEU,³⁴ the fundamental principles of EU law apply in all such cases. This means that a decision to refuse residence under Article 20 TFEU must take into account the requirement of proportionality and fundamental rights, in particular the right to respect for private and family life under Article 7 of the Charter and the best interests of the child as recognized in Article 24(2) of the Charter. This right includes regular, personal, and direct contact with both parents, which, according to Frasca and Carlier, constitutes an additional *safeguard principle*,³⁵ ensuring the protection of the rights of the dependent child. Consequently, the authority cannot decide without taking into account all the circumstances of the case.

Furthermore, although the CJEU has not explicitly stated in its case-law under Article 20 TFEU that the requirements of Directive 2004/38/EC³⁶ apply by analogy, this is the substance of its relevant judgments and the reasoning behind them.³⁷ Thus, the concepts of ‘public policy’ and ‘public security’ must be interpreted strictly when they are used to justify a derogation from the right of residence of EU citizens or their family members.³⁸

Similarly, the principles applied to determine the risk posed by the person concerned and the restrictive consequences of a criminal record are the same as the considerations relating to free movement under the Directive. Thus, a refusal of residence on grounds of public policy or public security cannot be based solely on the criminal record of the person concerned. The assessment must take into account, *inter alia*

the personal conduct of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent

³²Judgment of 13 September 2016, *Case C-304/14*, CS, ECLI:EU:C:2016:674, para. 36.

³³Salomon (2024) 2.

³⁴*Case C-304/14*, CS, para. 48, Judgment of 26 October 2017, *Case C-82/16*, KA, ECLI:EU:C:2018:308, para. 90, *Case C-165/14*, *Rendón Marin*, para. 85, *Cases C-451/19 and C-532/19*, *Subdelegación del Gobierno en Toledo*, para. 53, Judgment of 27 February 2020, *Case C-836/18 Subdelegación del Gobierno en Ciudad Real*, ECLI:EU:C:2020:119, para. 47.

³⁵Frasca and Carlier (2023) 345–90.

³⁶Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ L 158, 30.4.2004, 77–123 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV).

³⁷Shuibhe (2023) 254.

However, the CJEU expressly excludes the above analogous interpretation in relation to the requirement of sufficient resources, so that van den Brink’s position (above) is open to question. See *Case C-836/18*, *Subdelegación del Gobierno en Ciudad Real*, para. 49.

³⁸*Case C-165/14*, *Rendon Marin*, para. 82.

to which the person concerned is currently a danger to society, the age of the children at issue and their state of health, as well as their economic and family situation.³⁹

The Court's cautious approach seems entirely justified, particularly where the restrictions are based on the commission of previous, less serious offences. Thus, in *CS, Rendon Marin* and *Subdelegación del Gobierno en Toledo*, the public interest restriction was based solely on the criminal record, which in many cases consisted only of a suspended sentence. Similarly, in *KA*, the public interest restriction concerned third-country nationals who had failed to comply with their obligation to return and had been found guilty of petty theft.

There is no doubt that, in such cases, consideration of the other circumstances is essential to a fair decision. This is illustrated by the *Rendon Marin* case, in which a father of a family of Colombian origin, born and resident in Spain, who was an EU citizen with children, was refused an extension of his residence permit solely because he had been sentenced to a suspended prison term. It can therefore be concluded that the legislation of a Member State which 'establishes a systematic and automatic link between the criminal conviction of the person concerned and the expulsion measure applicable to him or her'⁴⁰ may, in most cases, lead to a genuinely unfair decision.

The situation is quite different where the seriousness of the offence committed or intended to be committed by the person concerned constitutes such a threat to society that it alone justifies a restriction on public security on its own, without taking account of other circumstances.⁴¹ In its case-law on expulsion, the CJEU has taken a strict approach to offences which, because of their seriousness, may constitute a serious threat to public security. This is well illustrated by the case of *K and HF*,⁴² in which the Court recently ruled that a war crime committed decades ago and in a specific historical context, with a low likelihood of recurrence, may still constitute an imminent threat to society.⁴³

The two Luxembourg judgments concerning Hungary (*NW and PQ*) are questionable in the light of the CJEU's restrictive jurisprudence on expulsion. They require a thorough assessment of other circumstances, even where there are serious public security concerns.

In addition to the substantive aspects, there was another compelling reason which led the immigration authorities in the main proceedings to base its decision solely on the Constitution Protection Office's opinion. Hungarian administrative procedural rules – such as Act CL of 2016⁴⁴ on the Code of General Administrative Procedure and Act XC of 2023 on the Entry and

³⁹Case C-165/14, *Rendon Marin*, para. 86.

⁴⁰Case C-304/14, *CS*, para. 44.

⁴¹In some cases, the recent case-law on inactive citizens also allows the proportionality test to be disregarded when refusing applications for social benefits, making it de facto impossible for the person concerned to remain in the Member State. See Judgment of 15 September 2015, Case C-67/14, *Alimanovic*, ECLI:EU:C:2015:597.

⁴²Judgment of 2 May 2018, *Joined Cases C-331/16 and C-366/16, K. and H.F.*, ECLI:EU:C:2018:296. From the latest case-law, see e.g. Judgment of 13 June 2024, Case C-62/23, *Pedro Francisco*, ECLI:EU:C:2024:502.

⁴³In my view, in the case in question, it is not the threat to society that persists decades after the commission of the previous serious offence, but the gravity of the offence that can be considered such that no subsequent exemption from the consequences of the commission of that offence can be granted.

See more: [Coutts \(2018\)](#) 833–41.

⁴⁴Section 55(1) of Act CL of 2016 on the Code of General Administrative Procedure.

Residence of Third-Country Nationals – clearly state that the specialist authority’s position regarding the specialized issue is binding on the acting immigration police authority.⁴⁵

An expert opinion is obtained when the competent authority lacks the necessary expertise to make an informed assessment of the technical issues related to a permit. The competent authority is therefore bound by a legally sound opinion in its decision. However, the question arises as to what precisely this constraint means. On the one hand, it means that the opinion of the specialist authority is binding on the competent authority, especially if the latter does not agree to grant the permit. In the present case, if the Constitution Protection Office is of the opinion that the third-country national in question constitutes a risk to national security, the immigration authorities may not issue a residence permit. If the authorities were to disregard the opinion of the competent authority and issue a permit, such a decision would be fundamentally flawed, rendering it null and void and unable to be remedied subsequently.

The Hungarian legal system is very strict when it comes to taking into account the opinions of the specialist authorities, as they play a fundamental role in the legal and well-founded decision-making of the competent authorities. A good example is the building control authority procedure, where the authorities play a key role. In each country, legislation determines which authorities the building authority must consult on various issues. For example, a demolition permit cannot be issued if a building is listed as a historic monument. On the other hand, if the authority concludes that the building is a danger to life, demolition must be ordered. This also shows that the authorities’ opinion cannot deviate from this arbitrarily. This legislation ensures that decisions are made professionally and that the competent authorities cannot ignore aspects that require specific expertise. The same logic applies to other areas, such as the environment, health, or immigration procedures.⁴⁶

The above parallel shows that in cases of extreme gravity, where the lives and safety of others are at stake, it is reasonable not to subject the matter to further review. In such situations, the position of a specialist authority is a sufficient basis for taking the necessary action. Under this approach, the existence of a risk to national security is established by the specialist authority and cannot be ignored by the immigration authorities. It is interesting to note that a constitutional requirement based on an essentially similar approach was formulated by the Constitutional Court in its Decision 4/2019 (III.7.) AB, when it stipulated that the environmental authority may not subordinate environmental considerations to other considerations in its decision-making.⁴⁷

5.2.2. Procedural requirements. The attacks in New York on 11 September 2001 and the wave of terrorist attacks that followed fundamentally shattered the fragile consensus on the rule of law in the national security services and reinforced the policy of preventing terrorism. In response to terrorism, Member State authorities are increasingly taking into account classified information in administrative and judicial proceedings without disclosing its content to the persons

⁴⁵In the cited cases the Hungarian authorities’ and courts’ procedure was based on Section 87/B (4) of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals. The text of the previous law was essentially identical to the text currently in force.

⁴⁶However, this approach seems to be contrary to the guiding practice of the ECtHR and the CJEU.

⁴⁷Decision 4/2019 (III. 7.) AB, operative part, para. 1.

concerned. However, this may raise concerns about the EU's fundamental principles of the protection of human rights, in particular the rights of the defence and the principle of a fair trial.

The central question in the *NW and PQ* case was precisely how the use of information classified for reasons of national security in administrative and judicial procedures for the withdrawal of residence permits could be reconciled with the right to good administration (Article 41 of the Charter) and the requirement of the right to an effective defence (Article 47 of the Charter). In *NW and PQ*, the CJEU ultimately upheld the protection of the right to a fair trial, stating that the citizens concerned must at least be informed of the essence of the grounds for the decision of the competent authorities.

The reasoning of *NW and PQ* was based on *ZZ*,⁴⁸ which arose in the context of terrorism. Indeed, the two cases can be seen as parallel, as procedural safeguards were the central issue in both cases. However, it is important to note that in *ZZ*, the case concerned a mobile EU citizen to whom Directive 2004/38/EC provisions apply. In contrast, the case *NW and PQ* concerned third-country nationals with a derived right of residence under Article 20 of the TFEU.⁴⁹ Consequently, while in the case of *ZZ* the administrative decision of refusing entry led to a prohibition of entry into the territory of only one Member State, the minor children of *NW* and *PQ* would have been obliged to leave not only the Member State concerned but the European Union itself as a consequence of the decision.⁵⁰

According to the facts of the case, *ZZ*, a man with dual French and Algerian nationality, married a British citizen and had eight children during a decade and a half of legal residence in the United Kingdom. After he left the United Kingdom in 2005 to travel to Algeria, the authorities issued a refusal of entry order on the grounds that his presence in the UK constituted a threat to public security. The preliminary ruling concerned the extent to which the UK Special Immigration Appeals Commission (SIAC) is required to disclose to the person concerned the public security grounds on which the decision to refuse entry was based.⁵¹ In its judgment, the Court concluded that, in exceptional circumstances, national authorities may refuse full and precise disclosure of the reasons for a decision restricting EU citizens' right to entry and residence on public security grounds. However, the Court made this prohibition subject to two conditions, which are also set out in the reasoning of *NW and PQ*. First, an effective judicial review must be able to assess both the existence and the validity of the grounds of national security invoked and the lawfulness of the decision to issue an expulsion order. Secondly,

the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State

⁴⁸Case C-300/11, *ZZ*, see more about the case: [Boer \(2014\)](#) 1235–62.

⁴⁹It should be stressed that the rights of the minor in this case do not depend on his or her own conduct, but on the conduct of his or her parents, over which he or she has no control. See [Coutts \(2021\)](#) 42.

⁵⁰At this point we can return to van den Brink's question of how artificial the distinction between residing under Article 20 and residing under Article 21 is.

⁵¹Article 30(2) of the Directive states that 'The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security'.

security considerations [...] and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.⁵²

With this requirement in mind, the Court held in *ZZ*, the case on which *NW and PQ* were based, that the citizens concerned must at least be informed of the essence of the grounds for the decision (and not of the evidence itself⁵³). This allows the person concerned to react to the allegations against them and to check their reliability.

In practice, however, drawing a sharp line between reasons and evidence is extremely difficult. It is almost impossible to provide reasons without some details of the evidence, as the two are often intertwined and sometimes even inseparable.⁵⁴ Equally problematic is the question of what exactly is meant by the term 'the essence of the grounds'. According to the case-law of the ECtHR, the open material cannot consist of purely general assertions.⁵⁵ On the other hand, in the famous *Kadi II* case, the Luxembourg Court considered a detailed description of the role and links of the person concerned in the terrorist organisation to be a sufficiently detailed and specific reason.⁵⁶

Beyond the requirement to disclose the merits of the grounds, *NW and PQ* provides little guidance on how national courts should balance the protection of national security with the right to a fair trial. The procedural autonomy of the Member States in this area ultimately leaves it to the national authorities and judges themselves to decide what techniques should be used in secret evidence proceedings to ensure the right to an effective defence.⁵⁷

In addition to the above uncertainties, the Court's position that the substance of the reasons must always be disclosed to the applicant is questionable. Indeed, the protection of intelligence mechanisms (sources, context, ongoing procedures) is a legitimate national security interest, particularly for the prevention of terrorist acts. It is therefore of the utmost importance to protect informants involved in intelligence operations, as the disclosure of specific evidence may not only jeopardize their safety, but may also undermine the effectiveness and future value of the intelligence in the long term. Another challenge is that intelligence is often based on

⁵²Case C-300/11, *ZZ*, paras. 57–58., Cases C-420/22 and C-528/22, *NW and PQ*, paras. 107–108.

⁵³'[...] the substance of the grounds which constitute the basis of the decision at issue is communicated to the person concerned in a manner which takes due account of the necessary confidentiality of the evidence.' Cases C-420/22 and C-528/22, *NW and PQ*, para. 111.

⁵⁴For example, if one of the reasons is that the data subject met a particular person in a private place, this could easily indicate that the person is a confidential informant, that the place is under surveillance or even that the data subject's communications are being intercepted. See [link1](#).

⁵⁵For example, in the case of *A. and Others v. United Kingdom*, the main charge against the defendants was that they were involved in financing terrorist groups linked to Al-Qaeda. However, the authorities failed to establish a specific link between the movements of funds in the bank account and terrorism. The Court therefore concluded that the applicants were not in a position to effectively challenge the charges against them. See Judgment *A. and Others v. The United Kingdom* App no 3455/05 (ECtHR 19 February 19), para. 223.

⁵⁶It revealed, among other things, that *Kadi* was a founding member of *Muwaqaf*, considered a precursor to al-Qaeda, and a leader of its activities, as well as evidence of his personal links to Osama bin Laden. See Judgment of 18 July 2013, *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission, Council, United Kingdom v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518, paragraphs 141–50.

⁵⁷Cases C-420/22 and C-528/22, *NW and PQ*, para. 107. For more information on the national practices of the EU Member States with regard to the use of intelligence information by the courts: [Bigo et al. \(2015\)](#) 9–22.

international cooperation.⁵⁸ Some countries may be reluctant to share information if it is disclosed in the course of legal proceedings.⁵⁹

The use of confidential information can, of course, raise a number of issues. First, there is no doubt that the principle of a fair trial (Article 47 of the Charter) may be violated if the defendant is not able to contest the charges against them.⁶⁰ Moreover, the reliability of the evidence may be called into question, firstly because ‘adversarial testing’ is one of the most effective methods of verifying the credibility of evidence, and secondly because it is usually the product of intelligence gathering by security and intelligence services rather than criminal investigation. This is particularly true in an administrative proceeding, where the client is necessarily in a subordinate position to the prosecuting authority (as opposed to the juxtaposition that characterises civil litigation). Finally, the use of secret evidence may also raise concerns about the democratic functioning of the state, especially when secrecy goes beyond what is necessary.⁶¹ National governments are increasingly being accused of placing too much emphasis on national security issues, to the detriment of individual rights.

On the latter point, I agree more with Advocate General Bot’s opinion in *ZZ* that full encryption can still be justified in exceptional circumstances on grounds of national security.⁶² The Advocate General places a high priority on protection against acts of terrorism. He considers that ‘the devastating impact of the acts committed requires the authorities to develop all conceivable means of prevention’ and that, therefore, ‘protecting intelligence assets and sources is an absolute priority.’⁶³ The opinion also stresses that it is essential to guarantee the rule of law to those fighting against it, but that this must not lead to the ‘suicide of democracy’.⁶⁴

Finally, it is worth comparing the case-law of the Luxembourg and Strasbourg courts on the use of classified information in immigration cases. The case of *Muhammad and Muhammad v. Romania*,⁶⁵ which raises issues similar to those of *NW* and *PQ*, provides an excellent opportunity to do so. In this case, two Pakistani citizens legally residing in Romania on student visas were declared undesirable persons by the Romanian authorities for 15 years based on a national

⁵⁸This cooperation is currently mainly transatlantic and asymmetrical. The US plays a prominent role and insists on the absolute protection of its resources. For more on this, see [Aldrich \(2009\)](#) 26–56.

⁵⁹Internationally, the principle of ‘pooling and sharing’ is becoming more common, but cooperation is Janus-faced, as sharing certain sensitive data may harm national security interests. See [Kis-Benedek \(2018\)](#) 257–59.

⁶⁰Intelligence material often includes second- or third-hand information, data from foreign intelligence liaison officers, data mining results, intercepted communications, and intelligence service hypotheses and assumptions. It is also questionable to what extent the decision-maker has experience and expertise.

⁶¹This was illustrated by the Snowden case in 2013, when Edward Snowden leaked a significant amount of classified information about the US National Security Agency’s (NSA) surveillance programme. The move highlighted the problems with the ‘catch-all’ philosophy of national security agencies. See [Greenwald \(2014\)](#) 124.

⁶²The opinion stresses that national security is linked to Article 4(2) TEU, which provides for the national identity of the Member States, and that the Union must therefore respect the protection of the national security of the Member States. In this context, Article 346(1)(a) TFEU provides that ‘No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.’ See Opinion of the Advocate General delivered on 12 September 2012 in Case C-300/11, *ZZ*, paras. 66–67.

⁶³C-300/11, *ZZ*, para. 40.

⁶⁴C-300/11, *ZZ*, para. 43.

⁶⁵*Muhammad and Muhammad v Romania* App No 80982/12 (ECtHR, 25 September 2019), [link2](#).

security decision of the Romanian Intelligence Service (SRI). However, the persons concerned were not allowed to see the documents on which the decision was based, because they were classified. In ruling on the case, the European Court of Human Rights (ECtHR) applied Article 1 of Additional Protocol No. 7 to the European Convention on Human Rights (ECHR), providing procedural safeguards for the expulsion of lawfully staying foreigners.

In the specific case, at first glance, the ECtHR and the CJEU did not adopt entirely identical approaches to ensuring access to documents containing information sensitive to national security. There are some differences regarding how they conducted (the *modus operandi*) this independent review.⁶⁶ According to the CJEU's settled case-law, a national court must, where appropriate, request that the authority restricting access to a certain document lift that restriction (inviting the authority to review the said classification). If such a request is refused, the court must draw the necessary conclusions (which likely involve excluding the document from the body of evidence, to uphold the right to a fair trial). In contrast, the ECtHR has indicated that, in certain situations, the national court may itself lift the restriction on access to a document (effectively declassify it), particularly if the competent authority is unwilling to do so for any reason.

However, this difference is merely illusory. On the one hand, the actions of national courts are always governed by the national law of the State concerned, meaning that a court can make a document available only if domestic law permits such disclosure. In contrast, the exclusion of a document from evidence is a matter that always falls within the court's discretion.

On the other hand, due to the specific nature of EU law and the fact that a preliminary ruling is given in the context of pending proceedings, the requirements arising from EU law can be applied to the specific case at hand, as they stem from the general interpretation of EU law. By contrast, an ECtHR judgment is delivered only after the conclusion of the domestic proceedings (often years later) and, while it is binding on the State concerned under Article 46 ECHR, it does not automatically entail a specific and enforceable obligation to adopt individual or general measures beyond the payment of just satisfaction. This remains the case even though the ECtHR itself (and, in many instances, the Committee of Ministers) often expects the respondent State to take additional measures beyond the payment of just satisfaction.

As a general conclusion, it can be said that the ECtHR's approach is very similar in substance to that of the CJEU, but the specificities of the two courts cannot be ignored in this context. On the one hand, the subject matter of EU law (primary and secondary), namely EU citizenship, is irrelevant for the ECtHR, which bases its decision solely on the ECHR (and its additional protocols). On the other hand, it is also true that EU law (as opposed to Strasbourg case-law) provides a mechanism for a Member State to decide in conformity with EU law, through the principle of indirect effect or the primacy of EU law. Finally, it should not be overlooked that the ECtHR proceedings are a 'final forum'. The Strasbourg judgment will be delivered years after the final judgment. Even a decision in favour of the complainant will at most lead to the obligation to conduct a new procedure. The preliminary ruling, on the other hand, is delivered while the national court proceedings are still pending, thus allowing the full implementation and enforcement of the requirements of EU law at an early stage. It is also interesting to note that

⁶⁶See more about that: [Callewaert \(2024\)](#).

only 43 of the current 45 Council of Europe Member States have ratified Additional Protocol No. 7 to the ECHR – the two ‘opt-outs’ being the founding Member States of the European Union, the Netherlands and Germany.⁶⁷

6. CONCLUDING THOUGHTS

In the words of Cicero, ‘The common good and the good of the individual are one and the same’.⁶⁸ On a philosophical level, this principle seems timeless, but it is easy to imagine situations where the common good and individual interests conflict in everyday life. In such cases, the public interest must necessarily prevail. As another saying of Cicero teaches, ‘salus res publicae suprema lex esto’,⁶⁹ i.e., ‘The welfare of the people shall be the supreme law’.

While we can agree in part with this statement – since ‘the pursuit of the individual good is an indispensable condition for the achievement of the common good’,⁷⁰ in public law structures defined by the principles of the rule of law, such as the European Union itself and its Member States, it is essential that individual procedural guarantees are generally enforced in the public interest of national security. In some cases, however, it is precisely the enforcement of these procedural guarantees, particularly the right of access to documents that may jeopardize national security interests. This issue was at the heart of the *NS and PQ case*, in which the Court ultimately concluded that, even if an independent judicial body reviewing the decision to withdraw a residence permit finds that the reasons for the decision are lawful, the substance of the grounds must at least be communicated to the person concerned.

However, in my view, in the case of a serious national security risk, such as suspected terrorism,⁷¹ the state cannot be expected to disclose even the substance of the grounds. The procedural rights of the person concerned are adequately safeguarded by an independent and impartial judicial body reviewing both the legality of the decision and the justification for the classification. However, the court must have the power to review the merits of the classification. It is also essential that it exercises this power *ex officio* (and not at the request of the applicant) in all cases, since the very consequence of secrecy is that the applicant is not legally able to challenge the (secret) findings of the preliminary statement of a specialist authority on the merits.

⁶⁷Link3. The EU’s accession to the ECHR will further prompt the Strasbourg and Luxembourg legal orders to converge. See more about that in Defitou (2022) 19–64.

⁶⁸Cicero (1913) Chapter 20–23.

⁶⁹Cicero (1928) Chapter 3.

⁷⁰Takács (2017) 55.

⁷¹The number of terrorist attacks has increased in recent years, to mention only the most dramatic: the attack on the Charlie Hebdo offices in 2015, the Paris attacks in 2015, the Manchester bombing in 2017, the Solingen knife attack in 2024, and the Breivik far-right attack in 2011. Europol (2022).

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