THE RIGHT TO KNOW IN THE EUROPEAN UNION

Comparative Study on Access to Classified Data in National Security Related Immigration Cases

CONFIDENTIAL

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HUNGARIAN HELSINKI COMMITTEE

WRITTEN BY

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This study was written based on the national research conducted by the national experts of respective European Union Member States within the framework of The Right to Know 2 project.
The Hungarian Helsinki Committee and the author of this study cannot be held responsible for the accuracy of the content provided by the national experts.

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Epim European Programme for Integration and Migration

TABLE OF CONTENTS

EXECUTIVE SUMMARY

I. **State security considerations** play a key role in **immigration-related proceedings**: a foreign national who poses a threat to national security is not granted the right to enter or reside from any EU Member State concerned, be it an asylum seeker, a foreign worker, or a family member of an EU national. The **threat to national security** is **asserted by the administration**, typically by the national security body, the police or the immigration authority, **on the basis of data which are generally classified** and to which the foreign national has **access only in exceptional cases** and to a certain extent, if access is granted at all. In these proceedings, a very delicate **balance must be struck**: one in which national security or the **protection of public order does not diminish the procedural rights of individuals** to the extent that they cannot defend themselves against accusations.

II. The **Court of Justice of the European Union** and the **European Court of Human Rights** establish crucial **procedural safeguards**, derived from the **right to a fair trial and effective remedy**, which are pertinent in cases involving state security-related allegations based on classified data. Without prejudice to state security, key elements include **providing the applicant with a specific and concrete decision**, at least by **disclosing the '*essence of the grounds*'** of reasons. The **immigration authority** assessing the applicant's case **shall independently evaluate facts** based on which national security allegations may be grounded, **allowing applicants' access** to information to the extent **enabling** them to effectively exercise **defence rights**. National legislation limiting such access is deemed to be non-compliant with European standards. An **independent body** must be able to **review the lawfulness of non-disclosure** of the data at issue, including a **verification of factual allegations**. The review must not be purely formal and, **if national security considerations** are **unverified**, the **authority may be requested to disclose** the classified information, otherwise the **court decides** the case **solely on the grounds** and evidence which have been **disclosed** to the individual. Even if the review results in the **national security** considerations being **verified**, **the essence of the grounds must always be revealed** to the person concerned.

III. This **comparative study**, based on research conducted by national experts, has comprehensively **explored** and **compared** the extent to which these European standards are applied in respective **EU Member States**, with the exception of Denmark and Italy. The study **underscores the significance** of the utilisation of the **essence of the grounds concept** in defining national frameworks concerning applicants' defence. However, **the absence of the essence of reasons** in administrative decisions **does not** necessarily **render** the entire **system non-compliant** with EU law, provided that **defence rights may be exercised effectively** in subsequent **judicial procedures**. **Comprehensive assessment**, as has been presented in this study, must consider **every element of national frameworks** which may define whether equality of arms may prevail between the individual and the state. The elements around which this study has been built, country by country and comparatively, are: the **content of administrative and judicial decisions**, relevant **actors' rights to access classified information**, **judicial supervision of non-disclosure** of data, and substantive **judicial oversight of national security accusations**. The study concludes with how these elements and the **interpretation of the *'equality of arms'*** principle of the jurisprudence of Member States may or may not render national systems compliant with European standards.

IV. The study reveals that **12 of 25 researched EU countries do not adhere to the required standards of administrative decisions** based on classified data, **six countries apply the essence of the grounds concept to some extent but inconsistently**, and only **seven countries comply fully** with European law in this regard. Countries such as **Bulgaria, Croatia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, and Slovakia** are identified as **not incorporating the 'essence of the grounds'** concept **in their administrative decisions**. In some of these jurisdictions, non-reasoned administrative decisions asserting national security threats lack substantive justification and rely on opinions from security agencies. Notably, **administrative decisions** in **Bulgaria, Hungary**, and **Slovakia** are **made by administrative authorities** that generally do **not have access to justifications** based on classified data. In **Bulgaria** and in **Finland**, however, some **reasons** for the underlying administrative decisions **may be provided** regarding national security accusations **in the judicial phase**. Nonetheless, this practice is not statutory in Finland, while in Bulgaria, the probative value of the evidence provided by the security body is considered stronger by the court than the one provided by the party. In **Belgium, Cyprus, Czechia, Luxembourg, Romania**, and **Sweden**, **inconsistencies** in applying the doctrine are observed either in law or practice. Conversely, seven countries – **Austria, Estonia, Germany, France, the Netherlands, Spain, and Slovenia** – were **identified as**

complying fully with the essence of grounds standards. In these countries, the substance of reasons underlying the administrative decisions must be communicated to the applicants, a requirement consistently followed in practice and supported by jurisprudence of these Member States.

V. **National frameworks** generally do **not allow** applicants' **access to classified information** supporting decisions of state security allegations. Two main **judicial avenues for challenging access** restrictions have been identified across Member States: first, through the **review of the primary administrative decision** containing the security findings, and second, via a **separate access procedure** specifically for challenging non-disclosure. Separately established access procedures have been introduced by law in **Austria, Belgium, Bulgaria, Finland, Hungary, Luxembourg, Poland** and **Sweden**. In **Bulgaria, Finland, Hungary** and **Poland**, however, these **procedures** have **not** been found to be **effective to counterbalance the limitations** of the rights of the individual. **Review procedures** concerning administrative decisions in which national security allegations are contested **may provide more safeguards** in these countries.

Countries **lacking the provision of the *'essence of the grounds'*** in administrative or judicial phases, and where **access** to classified data **cannot be obtained via a separate procedure**, may be at **odds with European law**. This is the case in **Poland, Croatia, Greece, Lithuania**, and **Slovakia**. **Czechia**, while **lacking** such a **separate procedure, allows parties to access** classified data upon procedural commitment to data protection rules in some – but not all – immigration-related procedures, therefore its practice may not be considered disproportionately restrictive. **Access** to data in **Croatia, Greece, Lithuania, Poland**, and **Spain** is **contingent upon declassification** of the information. **Spain** offers **significant guarantees**, providing the essence of grounds and the option to contest classification at the highest judicial body. In **Greece** and **Poland**, **judges may review** whether undisclosed data was **lawfully classified**. In Greece, data can therefore become accessible, unlike in **Poland**, where such **judicial review cannot result** in instant **declassification**. Practice is gravely concerning in **Croatia** and **Lithuania**, as **lawfulness of classification** may **not be judicially reviewed** and it is **entirely at the discretion of the security agency** to decide **whether it declassifies** the data – potentially establishing national security allegations – and makes it available to the applicant. In **Slovakia** and **Romania**, **non-disclosure is not separately reviewed** either, but **legal representatives have the right** to request classified data. It should be noted that in Slovakia it is seldom granted, and even if it is, access doesn't provide substantive information. In Romania, lawyers' potential access to classified data after obtaining the necessary clearance certificate might be regarded as a more significant counterbalancing tool, especially in the face of the fact that similarly to Croatia and Lithuania, courts cannot disclose classified data but may suggest declassification to the security bodies.

National frameworks of **Cyprus, Estonia, Germany,** and the **Netherlands allow access** requests **within the judicial review procedure**. In these countries, if access is **denied**, applicants may contest denials by **initiating separate procedures**. In **Cyprus**, the **judge has the right to disclose** information and may also **order the authority to provide the documents** either to the casefile or directly to the party, but only in a few cases were judges willing to disclose part of the classified documents. In **Germany** this 'internal' access procedure is called **'in-camera procedure,'** which takes place if the administration aims to block access to data with a blocking declaration. This procedure is similar in structure to the **Dutch** one, where a unique element is nonetheless added: comprehensive **access of the court is allowed upon the consent of the applicant**.

VI. The above findings have also demonstrated that the **understanding of *'equality of arms'*** in classified data-based immigration proceedings **varies** among EU Member States. While **Slovenia** stands out with a **balanced adversarial system** by providing complete transparency to the parties, **in most countries, foreigners** facing national security charges **lack equal means** against the state. The study, in overviewing national high court jurisprudence on equality of arms and considering those guarantees or procedural deficiencies which were analysed with regards to disclosable data and consequent judicial mechanisms, suggests that **the mere judicial scrutiny of classified data-based decisions** as articulated in earlier ECtHR jurisprudence (e.g. Regner judgment) **does not suffice without the right of applicants to know at least the essence of accusations**.

Austria, Belgium, France, Germany, the Netherlands, Spain and **Slovenia** prioritise the principle of equality of arms by way of ensuring that **courts only consider information accessible equally to the applicant** and their lawyer. Other countries, including **Estonia, Bulgaria**, and **Czechia, Cyprus, Romania** and **Sweden**, adopt a system where courts access classified data comprehensively, to a certain extent and in varying ways, but applicants are provided only with the essence of the grounds. While this approach is in line with European standards, country-specific concerns may still arise. Notably, in **Bulgaria**, the **efficacy of court procedure** may be **limited** concerning potentially unlawful non-disclosure, or in **Czechia**, where **courts** do **not** aim at v**erifying the accuracy** of national security **allegations**.

In countries where equality of arms cannot prevail due to the **complete absence of** providing **the essence of the grounds** of classified data-based accusations or effective access rights, most notably in **Croatia, Cyprus, Czechia, Hungary, Poland**, and **Slovakia**, high court **jurisprudence** explicitly **asserts** that **judicial supervision might substitute the applicant's 'right to know,**' frequently with reference to ECtHR's Regner judgment. In **Finland, Greece, Ireland, Latvia, Lithuania, Luxembourg**, **Romania**, and **Sweden**, high courts have not expressly made this assertion, but the **systems** of these countries clearly **suggest** that the **perception of the equality of arms principle is the same**. Even **if judges have full access** to case files in immigration procedures involving classified data, it does **not necessarily ensure accuracy of judicial control**. **Classified data** provided **by authorities** may be **unreliable** or **contain inaccuracies** and applicants may not correct potentially erroneous information or circumstances which may all hinder comprehensive and impartial case examination. In certain Member States adopting a ‚Regner-like' approach, some **progressive developments** have been nonetheless noted. The way that the **judiciary rendered its decisions** in certain cases in **Bulgaria, Cyprus, Croatia, Greece, Hungary, Malta, Lithuania** or **Slovakia**, demonstrates **emerging recognition of applicants' rights to know**, especially following the CJEU's GM judgment in 2022, but these instances have so far been ad-hoc and have not been translated into practice consistently.

This study concludes that it is **insufficient to solely grant courts with access** to classified data; it is **essential for individuals facing national security allegations to have access to the essence of the grounds**, which empowers them to effectively exercise their defence rights. In some countries, the **willingness of the judiciary** concerning practice or legislative deficiencies to comply with European standards is **apparent**, but the **executive's compliance** with court orders is **lacking**. This phenomenon underscores the **need for legislative reform** in line with the case law of the CJEU and ECtHR.

INTRODUCTION

A number of cases have come to light in the past few years about **foreigners** who, without having been criminally prosecuted, were accused of **posing a threat to national security** in **immigration-related proceedings**. As a result of these proceedings, they have had their **residence permits** or **international protection status revoked,** or have been excluded from acquiring such legal status.[1] National security[2] is indeed a significant aspect in immigration procedures: if a foreigner is considered to be a threat to national security, that may impact their eligibility for international protection or any type of residence permit, it may result in expulsion, and is an aspect when the state considers citizenship or statelessness applications. The reasons behind perceiving an individual as a **national security threat often stem from classified data** ascertained generally by the respective national security body, to which data the **foreigner** applicant has **limited access** or **no access** at all. Consequently, both individuals and their legal representatives lack the means to contest the grounds for the decisions issued and effectively exercise defence rights. This phenomenon may have the most detrimental impact within the context of forced migration, concerning foreigners (e.g. asylum-seekers) with amplified vulnerability facing significant stakes in these proceedings.

It has to be made clear at the outset that the issue of **national security** is undoubtedly of paramount **importance** when considering the entry and stay of foreign nationals, and **those posing such a threat should not be allowed to acquire any legal status** entailing the right to reside in a country. It is also undeniable that safeguarding national security might require the **classification of information** that, if revealed, has the **potential to constitute a risk** to the security of the state. However, **in absence of sufficient procedural guarantees** that would enable affected foreigners to effectively challenge the immigration-related decisions, and the lack of access to classified information that establishes national security threats raises **doubts as to the veracity of the alleged threat**. A 2021 study has already highlighted this legal grey area within the interrelation of state interest and fundamental rights of individuals. The study, which covered Cyprus, Hungary, and Poland, revealed serious infringements of EU law, and asserted that access is typically denied to applicants and their representatives in the immigration procedures of these countries, with decisions lacking factual justifications regarding classified evidence.[3]

The **Court of Justice of the European Union (CJEU)** and the **European Court of Human Rights (ECtHR)** stipulated certain **minimum safeguards in national security cases** with regard to the **right to an effective remedy**. Preserving the applicants' rights relating to due process is perhaps even more important in such proceedings, since, as the ECtHR itself has said: "*especially where the power of the executive is exercised in secret, the **risks of arbitrariness** are evident.*"[4] Despite the safeguards laid out by the courts, **national practices of the Member States of the European Union vary** and in numerous cases **do not align with the jurisprudence of the courts**. Recently, however, no comprehensive research has been conducted as to how the issue of applicants' right to know to data establishing national security allegations and their rights to access classified information are regulated in all Member States, and whether national frameworks are in line with European standards.[5] This has indicated a clear **need for an analysis of the laws and practices of all EU Member States** concerning their compliance with the standards laid out by the ECtHR and CJEU jurisprudence on invoking national security grounds in immigration cases, as well as the scope and effectiveness of the remedy provided against administrative decisions in such cases. This **comparative pan-European mapping study** aims to fill this gap.

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1 See, for example: Hungarian Helsinki Committee: "I'm tired" - Interview with Mrs Nagy Gáborné, the embodied national security risk, 15 December 2021, available: https://bit.ly/3UUOau0/ , Gruša Matevžič: Rights of the Defence Non-Existent for Migrants when National Security is Involved?, 12 January 2022, available: https://bit.ly/3USHJru , Radio Poland, Polish MPs to Probe Iraqi Suspected of Ties with Islamic Radicals: Report, available: https://bit.ly/3IgbwTy .

2 In this study, the term 'national security' is used to refer to the opinion/decision of a competent domestic authority stating that the foreign applicant in the immigration procedure poses a threat to state national security or public order. For the interpretation of national security in EU law please see: Zita Barcza-Szabó: The Right To Know: Legal Template on EU and International Law Regarding Disclosure of Classified Information in Asylum and Return Procedures Based on National Security Grounds, page 21, (2021), available: https://bit.ly/49MOT4M .

3 Hungarian Helsinki Committee, Kisa, Polish Helsinki Foundation for Human Rights, 'Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland', September 2021, available: https://bit.ly/3lS4RUS.

4 ECtHR, Case of Malone v. United Kingdom, Appl. No. 8691/79, (26 April 1985), paragraph 67.

5 Joint legal note of ECRE and the Hungarian Helsinki Committee: Effective remedy in national security related asylum cases, with a particular focus on access to classified information, May 2022, available: https://ecre.org/wp-content/uploads/2022/05/Legal-Note-12.pdf. A general report studying all EU Member States, 'Public order, national security and the rights of third-country nationals in immigration and citizenship cases' was prepared by Jacek Chlebny for the Seminar organised by the Supreme Administrative Court of Poland and ACA Europe, in Kraków, 18–19 September 2017, available: https://bit.ly/34Hqn8R.

This study was written by **Katalin Juhász** (Hungarian Helsinki Committee) in the framework of the **'Right to Know 2'** project funded by the **European Programme for Integration and Migration** (EPIM). The study is **based on the national research** conducted by national experts identified for the purpose of this study. As no researchers could be identified in Denmark and Italy, these countries are not covered by the study. National research on European Union Member States' practices were compiled on the basis of a **commonly agreed template**, in which ten questions were phrased around the main issue of how administrative courts in respective national jurisdictions strike a balance between the rights of foreign nationals and the protection of national security in immigration cases and how 'equality of arms' between the state and foreign individuals is ensured. The questionnaire asked researchers to primarily look at **foreigners' cases** relative to **withdrawal of residence permits, expulsion, refusal of extension of a residence permit, entry into SIS II, immigration detention orders, entry bans, refusal of international protection, withdrawal of international protection, refusal of statelessness status**, and **withdrawal of statelessness status**.[6] National experts subsequently explored relevant national case law and legislation in the context of these procedures, and reflected on the practices of respective Member States. Accordingly, all information with regard to either the national jurisprudence, authorities' practice or laws referred to in this study were based on the research submitted by national experts. Consequently, neither the author of the study nor the Hungarian Helsinki Committee may be held responsible for the accuracy of the content provided herein by the national experts. Finally, national researchers have given their consent to the publication of the factual contents of this study. The draft of the study was closed on 23 February 2024, thus, no later developments are included.

Having processed the research submitted by the national experts, it has become clear that **there are three main procedural elements** that needs to be examined in order to be conclusive as to the **compliance of a national framework with European standards** and to find out how specific safeguards or the lack of thereof may contribute to the prevalence or absence of 'equality of arms' in immigration-related national security procedures, which are conducted relying on classified data. These procedural elements are: 1. **content of administrative decisions** communicated to the foreigner accused of being a national security threat based on classified data, 2. **access rights pertinent to classified data** of relevant actors (applicant, authority conducting the procedure and the judge reviewing the administrative decision), 3. **judicial mechanisms in relation to the non-disclosure of data** establishing and review of administrative decisions asserting national security allegations. This study has found that after reviewing these procedural elements and analysing how they fit with European standards, it is also possible to draw conclusions about how **each national system operates in the context of 'equality of arms'**.

Accordingly, this **comparative study** including EU Member States with the above-named exceptions, **overviews these main procedural elements**, while **grouping and comparing national jurisdictions** according to the presence or absence of procedural guarantees. Relying on the findings of the comparative overview, **the study argues the understanding of 'equality of arms' in classified data-based immigration proceedings varies among EU Member States and does not necessarily follow the progression of European standards**. The study finally **asserts that the mere judicial scrutiny of classified data-based decisions** as articulated in earlier ECtHR jurisprudence **does not suffice without the right of applicants to know at least the essence of national security accusations** brought up against them.

The structure of the study is built up as follows: **Chapter 1** will discuss the **most basic safeguards of European law and key developments** relating to asylum and migration in the jurisprudence of CJEU and ECtHR and within the underlying research issues (content of decisions based on classified data, access to classified data and related judicial mechanisms). The overview of these safeguards will serve as a reference later when assessing whether a presented national system functions in a standard or substandard manner. **Chapter 2** will then **overview and compare the legislation and/or practice in each researched EU Member State** according to **how and to what extent the 'essence of the grounds' of the decision** reached **in the administrative phase** may be known by the foreigners, and accordingly, whether legislation and/or practice can be regarded as European law-compliant from that aspect. Subsequently, **Chapter 3** will outline whether the **main actors** of national security related immigration procedures **are granted** *ex lege* **access to classified information**. The same chapter will then discuss the judicial mechanisms available in respective EU countries in the context of non-disclosure of classified data and review of national security allegations. **Finally**, the study will conclude with an evaluative chapter **placing each country in the 'equality of arms' coordinate system** by presenting the position of each country's national – primarily high court – jurisprudence on the matter.

6 When referring to immigration-related procedures, this study primarily means these types of cases of foreigners.

I. EUROPEAN LEGAL STANDARDS IN PROCEDURES CONCERNING CLASSIFIED DATA-BASED DECISIONS

To understand the good practices as well as the shortcomings of the legal regimes of EU member states referring to the concept of national/public security, it is necessary to briefly introduce the most basic safeguards of European law and key developments relating to asylum and migration jurisprudence within the underlying research issues (content of decision based on classified data, access to classified data and related judicial mechanism) subjected to this study. The below overview will accordingly discuss how, within the interrelation of fundamental rights and national security, the most essential, core legal safeguards, primarily the right to an effective remedy and to a fair trial and the rights of defence, are to be balanced between the interests of state and individual. The reason for which these standards come to the forefront of the examination is, as in the cases of foreigners deemed to be dangerous for national security or public order considerations, that applicants are frequently without tools against the state in numerous EU countries, for neither having the information, nor the platform (legal avenues) to contest the classified data-based assertions, while the State refers to the maintenance of law, order and internal security as a verification to limit the individual's right in a procedure.

1.1 General procedural safeguards as pronounced by the Court of Justice of the European Union

In the jurisprudence of the Court of Justice of the European Union (CJEU), the last ten years have seen a number of landmark judgments that have struck a balance between the need to ensure procedural fairness and the interests of national security. Concerning the tenor of the above safeguards, relative to the expulsion cases of third-country nationals, the CJEU held that within the individuals' rights of defence, the right to be heard is inherent.[7] The latter "*guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.*"[8] The right to be heard also requires authorities to give a detailed statement of reasons for their "*sufficiently specific and concrete"* decisions, following the careful and impartial examination of "*all the relevant aspects of the individual case"*[9]. The right to be heard in all proceedings is pronounced by Articles 47 and 48 of Charter of Fundamental Rights of the European Union (Charter),[10] ensuring respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, as well as by Article 41 of the Charter, which declares the right to good administration.[11]

In *ZZ*, concerning the case of an Algerian national whose entry to the UK was denied based on a decision justified by imperative grounds of public security, the CJEU stated that based on the right to an effective remedy and to a fair trial, enshrined in Article 47 of the Charter, a judicial proceeding is to be effective if the applicant may ascertain the reasons for the decision, either by being provided in the decision or by requesting and obtaining notifications of those reasons. Even if state security stands in the way of disclosure, *the applicant, however, must in any event be informed of the essence of the grounds, which constitutes the basis of the decision."*[12] For the effective exercise of that right, the court may order the authority concerned to provide that information.[13] The CJEU reaffirmed that in the Kadi case, holding that rights of the defence and the right to effective judicial protection requires the authority to disclose the summary of reasons to the person concerned at the very least, which was relied on by the authority as the basis of its decision. The disclosure is the precondition of the exercisability of the right to be heard.[14]

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7 CJEU, C-166/13, Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis, 5 November 2014, paragraph 45. and CJEU, C-249/13, Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques, 11 December 2014, paragraph 34 (hereinafter: 'Khaled Boudjlida' and 'Sophie Mukarubega').

8 Sophie Mukarubega, above n 7, paragraph 64.

9 Khaled Boudjlida, above n 7, paragraph 38.

10 Charter of Fundamental Rights of the European Union, available: https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

11 Khaled Boudjlida, above n 7, paragraph 31.

12 CJEU, C-300/11, ZZ v. Secretary of State for the Home Department, Judgement of 4 June 2013(hereinafter: ZZ), paragraphs 64-65, 68.

13 ZZ, above n 12, paragraph 53.

14 CJEU, joined cases C-584/10 P, C-593/10 P and C-595/10 P, European Commission v. Yassin Abdullah Kadi, 18 July 2013, paragraphs 141, 143, 145, 147, 149. (hereinafter: 'Kadi II').

The applicability of these safeguards asserted by the Charter is universal in the sense that they are to be complied with in every field where Member States implement EU law.[15] This means that, for instance, the safeguards of *ZZ*, which concerned a foreign family member of an EU national, hence falling under the scope of Directive 2004/38/EC, are not only applicable in cases falling under the scope of this directive, but also in all other cases, e.g. in other migration related cases, where reference to Article 47 comes up. The applicability of these standards is not only horizontal (interoperable between different legal branches), but vertical as well, in a sense that they have to be pertained in a same manner both at national and EU level. This may be deduced from the fact that the CJEU pronounced the standards of ZZ with reference to Kadi and Al Barakaat International Foundation v Council and Commission[16], where the respondent parties were EU bodies.[17] This means that standards developed concerning the operation of EU bodies may be applicable by national bodies too, if the same legal provisions are set in motion. It is worth noting nonetheless, that the right to effective remedy is also specifically pronounced by legal instruments having greater relevance from the perspective of this study, such as by Article 13 of the Return Directive[18] applicable with regard to third country nationals staying unlawfully on the territory of the Member State, and by Article 46 of the Asylum Procedures Directive[19] (APD), providing for a full and *ex nunc* examination of both facts and points of law against decisions taken in asylum procedures. The requirements of these specific provisions must, however, be read together with the general safeguards embraced by the Charter.[20] Importantly, as confirmed by the CJEU, when Member states invoke national security or public order grounds, generally with reference to their sovereign competencies in that regard provided by the Treaty on the Functioning of the European Union (TFEU)[21], they are still obliged to apply these safeguards[22].

1.2 Applicability of the European Convention on Human Rights and procedural safeguards as articulated by the European Court of Human Rights

At the level of international regional jurisprudence, the European Court of Human Rights (ECtHR) also indicates that certain procedural safeguards, rooted in the European Convention on Human Rights (ECHR)[23], are to be complied with in procedures reviewing classified data-based decisions. Importantly, however, guarantees of a fair trial stemming from Article 6 of the ECHR, mirroring Article 47 of the Charter, cannot be applied in administrative migration cases "*regarding the entry, stay and deportation of aliens*".[24] These procedures fall within the ambit of Article 13 ECHR on the right to an effective remedy, which, however, is not a free-standing right and the protection it affords must be interpreted together with other substantive ECHR rights. Accordingly, the basis of the safeguards may be deducted from Article 3, Article 5(1) and (4), Article 8 and Article 13 in conjunction with Article 3 and Article 8 of the ECHR, in cases where the state (allegedly) violates the non-refoulement principle, safeguards against the arbitrariness of detention, and guarantees stemming from the right to respect private and family file. These breaches are found predominantly in cases relative to aliens'

15 Available: https://helsinki.hu/en/legal-template/, pages 13-14.
16 ZZ, above n 12, paragraph 53.
17 Marcelle Reneman: Expulsion of EU Citizens on the Basis of Secret Information: Article 47 of the EU Charter on Fundamental Rights Requires Disclosure of the Essence of the Case, page 74. (2014), available: https://www.uitgeverijparis.nl/scripts/read_article_pdf?editie=194488&id=1001169093.
18 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115.
19 Article 46 of Directive 2013/32/EU of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, available: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032.
20 CJEU, C-348/16, Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano, 26 July 2017, paragraph 52., CJEU, joined cases C-924/19 PPU and C-925/19 PPU, FMS, FNZ, SA, SA junior v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, 14 May 2020, paragraph 127.
21 Articles 72 and 346 of the Treaty on the Functioning of the European Union, available:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
22 ZZ, above n 12, paragraph 57; CJEU, C-387/05, European Commission v. Italian Republic, 15 December 2009, paragraph 45.; CJEU, joined cases C-715/17, C-718/17 and C-719/17, European Commission v. Republic of Poland, Hungary and Czech Republic, 2 April 2020, paragraph 143; CJEU, C-808/18, European Commission v. Hungary, 17 December 2020, paragraph 215.
23 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, available:https://www.echr.coe.int/documents/d/echr/convention_ENG.
24 ECtHR, Case of Maaouia v. France, Appl. No. 39652/98 (ECtHR 5 October 2000), paragraph 40.

expulsion. Furthermore, Article 1 Protocol 7 of the ECHR sets out specific procedural safeguards to be observed in the expulsion procedures of aliens, providing that an alien, who stays lawfully on the territory of a state party at the time when the expulsion procedure is initiated, is entitled to an expulsion decision reached in accordance with the law. The alien moreover has a right to submit reasons against his expulsion, challenge the expulsion and have a representative in the procedure, unless the expulsion is necessary for public order or national security grounds. [25]

Referring to the universal concepts of lawfulness and rule of law, the ECtHR held in numerous cases concerning the expulsion of alien applicants with reference to classified data-based national security allegations, that the individual must be able to challenge the executive's assertion that national security is at stake and measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, with appropriate procedural limitations on the use of classified information if necessary. This independent authority must be able to react in cases where the administration's assertion on national security allegations has no reasonable basis in fact or reveals an interpretation of national security that is unlawful or unreasonable and arbitrary.[26] In these specific cases the ECtHR found a violation of Articles 8 and 13 for failing to comply with these safeguards.

In *Muhammad and Muhammad*, the ECtHR moreover established those minimum procedural safeguards, without which the expulsion of an alien could be deemed unlawful and arbitrary. These include the right to know the reasons for the factual grounds of the decision and the right to have access to documents and information relied on by the authority reaching the expulsion decision.[27] Article 1 Protocol 7 enshrines a right for the alien to be notified of at least the substance of accusations against him, while the court is to know the grounds for the decision and the relevant evidence.[28] Although the said article allows for limitations on national security grounds, these limitations do not qualify as arbitrary if they are examined and identified as duly justified by an independent authority and are sufficiently counterbalanced by other procedural factors**.** Most importantly, as an essence of Article 1 Protocol 7 rights, *"the alien must be offered an effective opportunity to submit reasons against his expulsion."*[29] The ECtHR defines those elements that could sufficiently compensate for such limitations: 1. the relevance of the information disclosed to the alien as to the grounds for his or her expulsion and the access provided to the content of the documents relied upon; 2. information as to the conduct of the proceedings and the domestic mechanisms in place to counterbalance rights' limitation of his or her rights; 3. if the alien was represented and if an independent authority was involved in the proceedings. These elements are not to be prevalent on a cumulative basis; it is to be decided case-by-case whether the essence of Article 1 Protocol 7 is preserved. [30]

As Article 1 Protocol 7 requires the expulsion decision to be reached in accordance with law, the *Muhammad and Muhammad* standards must also be prevalent in relation to the application of other articles of the Convention, because the term 'in accordance with the law' has the same meaning throughout the ECHR.[31] Accordingly, these safeguards were invoked *mutatis mutandis* in the recent case of *Kogan and Others v. Russia*, concerning the revocation of a residence permit based on classified national security grounds, which were completely undisclosed from the applicant. The ECtHR found in this case, amongst others, a violation of Article 8 for the proceedings related to the revocation of the applicant's residence permit having been "*tainted with gross procedural defects that undermined their fairness and went beyond the permissible procedural limitations in cases of expulsion on national security grounds*".[32]

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25 These safeguards have been recently confirmed in the case of Poklikayew v. Poland, Appl. No. 1103/16 (ECtHR, 22 June 2023), paragraphs 42-43, (hereinafter: ' Poklikayew v. Poland') where the application was admissible on a basis that the ECtHR decided to examine the application under Article 1, Protocol 7, instead of the alleged Article 6 (1) violation claimed by the applicant.

26 ECtHR, Case of Kaushal and Others v. Bulgaria, Appl. No. 1537/08 (2 September 2010), paragraph 29. (hereinafter: 'Kaushal and others'); ECtHR, Case of C.G. and Others v. Bulgaria, Appl. No. 1365/07 24 April 2008) paragraph 40 (hereinafter: 'C.G. and others'); ECtHR, Case of Al Nashif and Others v. Bulgaria, Appl. No. 50963/99 (February 2001) paragraphs 123-124 (hereinafter: 'Al Nashif and Others').

27 ECtHR, Case of Muhammad and Muhammad v. Romania, Appl. No. 80982/12 (15 October 2020) paragraphs 126, 128, 136. (hereinafter 'Muhammad and Muhammad').

28 ibid., paragraph 127.

29 ibid., paragraphs 133, 147-157.

30 ibid.

31 Zita Barcza-Szabó: The Right To Know: Legal Template on EU and International Law Regarding Disclosure of Classified Information in Asylum and Return Procedures Based on National Security Grounds, page 21, (2021), available: https://bit.ly/49MOT4M.

32 ECtHR, Case of Kogan and Others v Russia, Appl. No. 54003/20, (7 March 2023), paragraph 61.

1.3 Requirements of decisions based on national security/public order grounds

As it has been seen above, jurisprudence suggests that the right to be provided with a reasoned decision is an essential element of the right to be heard: "*the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence*."[33] In *ZZ*, the CJEU that the failure to provide full and precise reasons for the decision must be interpreted in accordance with the requirements of Article 47 of the Charter. An effective defence can only be put forward if the person knows the grounds on which the decision is based.[34] In connection with that, *ZZ* recycled the notion of 'essence of the grounds'. The CJEU stated that even if "*state security does stand in the way of disclosure of the grounds, the applicant, however, must in any event be informed* „ of the "*essence of the grounds, which constitute the basis of the decision*".[35]

It is of relevance to note that the CJEU makes a distinction between the individuals' right to the 'essence of the grounds' and the evidence underlying these factual grounds. Being provided with the essence of grounds means that the main features of factual grounds are to be revealed, merely stating the national security threat is insufficient. This notion has been discussed by *Kadi II*, which has given some guidance on what this might entail, i.e. which information provided to the applicant is satisfactory for the protection of their rights of the defence. In accordance therewith, the stating of the exact names of legal entities, identity of persons referred to and exact time of events or any other allegation concerning the applicant's conduct giving rise to the threat of national security must be unequivocally identified by the authorities.[36] The decision shall accordingly be sufficiently specific and detailed.[37] In contrast, such a partial disclosure is not applicable to the evidence if that would "*compromise State security in a direct and specific manner*".[38] Therefore, the applicant is only to be provided with the essence of the grounds "in a manner which takes due account of the necessary confidentiality of the evidence".[39] The CJEU therefore found that the *"weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State (…) is not applicable in the same way to the evidence."*[40]

Recently, the CJEU has strengthened the essence of the grounds doctrine in *G.M.,* laying out that asylum seekers and beneficiaries of international protection must be given access to the essence of the grounds of the authority's decision. The asylum authority must state in its decision the reasons for which protection is being refused and cannot rely solely on the unjustified decision of the authorities (security services), stating that the applicant threatens state security.[41] Furthermore, the *G.M.* judgment stated that the authorities must carry out the assessment of the relevant facts and circumstances alone with a view to determining the tenor of their decision and providing a full statement of reasons for withdrawing or refusing to grant international protection. The determining authority cannot, therefore, be required to rely on a non-reasoned opinion given by specialist bodies, based on an assessment for which the factual basis has not been disclosed to that authority.[42]

Lately, in two pending cases before the CJEU concerning preliminary references in the context of immigration procedures related to applicants' permanent residence rights, the opinion of the Advocate General (AG) has come out, clarifying the concept of 'essence' of the confidential grounds. The AG states that the "*concept refers to the essential information in the file allowing the person concerned to be aware of the main facts and conduct attributed to him or her so that he or she may express his or her point of view in the context of the administrative procedure and any subsequent judicial proceedings*".[43] The AG nevertheless added that "*the concept must be defined taking into account the necessary confidentiality of the evidence*", which, if disclosed, may be liable to compromise State security.[44]

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33 Sophie Mukarubega, above n 7, paragraph 48.
34 ZZ, above n 12, paragraph 65.
35 ZZ, above n 12, paragraphs 64-65, 68.
36 Kadi II, above n 14, paragraphs 141, 143, 145, 147, 149.
37 ibid.
38 ZZ, above n 12, paragraph 66.
39 ibid., paragraph 68.
40 ibid., paragraph 66.
41 GM v. Országos Idegenrendészeti Főigazgatóság and Others, C-159/21, paragraph 92, available: https://bit.ly/3IeoRM1 (hereinafter 'G.M.').
42 ibid., paragraphs 79- 80 and 83.
43 PQ, paragraph 116.
44 ibid., paragraph 118.

The ECtHR similarly addressed the question of the extent of the information which is to be provided to the applicants. In *C.G. and Others,* the ECtHR, years before CJEU's *ZZ* and *Kadi II,* asserted that "*whether the authorities were able to demonstrate the existence of specific facts serving as a basis for their assessment*" is "*a critical aspect of the case*".[45] This was further elaborated in *A. and Others*, where the ECtHR established that information on the allegations brought against the detained applicants has to be sufficiently specific.[46] Notably, the court found that the right to seek judicial review against detention stemming from Article 5(4) of the ECHR is violated if the competent authority's decision to "*maintain the detention was based solely or to a decisive degree on closed materials.*"[47] Similarly to *Kadi II*'s approach, examples of what constitutes sufficiently specific information has been presented: informing the applicants of exact dates, their whereabouts and activities, which may be exact enough to give a basis to refute them, meets the requirement of this standard. In the Grand Chamber judgment *Muhhammad and Muhhamad* concerning the applicant's expulsion, it was established that the rights of the defence involves that even in the case of justified procedural limitations the applicant must be given those factual reasons in the decision, which led the authority to the establishment of national security considerations as the indication of legal provisions is not sufficient.[48] Quite recently, this guarantee was strengthened further when the court found that even if an independent and high level judicial body is adjudicating the case, the lack of providing the main reasons as to why the applicant was considered a national security threat (e.g. alleging collaboration with foreign intelligence) in a decision is not enough, concrete activities and their factual grounds must be presented.[49]

1.4 Access to information substantiating national security grounds and judicial mechanism in relation to classified data based decisions

It stems from the right to an effective legal remedy that the individual may have the right to access those facts and documents on which decisions are based, held by the CJEU in *ZZ*[50] This means that "*the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them*".[51] This follows from the fact that the applicant must be able to put forward a defence and to that end they must be able to contest the information on which the state security assertions are based. If the authority does not provide access and the person challenges the decision, the court must be able to review the lawfulness of non-disclosure.[52] In connection with this, the national court must carry out an independent examination of all the matters of law and fact relied upon by the competent national authority. The judicial review must include a verification of the factual allegations in the summary of reasons, if there is such.[53] The burden of proof in this procedure rests on the authority, which must be able to show that disclosure would compromise state security. The court, accordingly, cannot presume that the reasons put forward by the authority exist and are valid. In case the court finds the restriction of access unlawful, it may give the competent national authority the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority does not authorise their disclosure, the court proceeds to examine the legality of such a decision solely on the basis of the grounds and evidence which have been disclosed. In case the court verifies the security considerations, guarantees presented above concerning the essence of the grounds must be followed.[54]

With regard to asylum procedures, it has to be highlighted that Article 23(1)(a) of the Asylum Procedures Directive provides that courts have access to information for which disclosure would otherwise raise state security concerns. Point (b) of the same provision asserts that Member States shall establish procedures which ensure that applicants' rights of defence are respected. The directive asserts that to that end, legal advisers who have undergone security clearance may be granted access. With reference to this provision read in conjunction with Article 45(4) of that directive (right to effective remedy) and in light of the general principle of EU law relating to the right to sound administration and of

45 C.G. and others, above n 26, paragraph 47.
46 ECtHR, Case of A and Others v. the United Kingdom, Appl. No. 3455/05 (19 February 2009), paragraphs 220-224. (hereinafter: 'A and others').
47 ibid., paragraph 220.
48 Muhammad and Muhammad, above n 27, paragraph 168.
49 Poklikayew v. Poland, above n 25, paragraphs 73 and 78.
50 ZZ, above n 12, paragraph 56.
51 ibid., paragraph 55.
52 idib., paragraph 60.
53 Kadi II, above n 14, paragraph 119.
54 ZZ, above n 12, paragraphs 59-68.

Article 47 of the Charter, the *G.M*. judgment stated that national legislation, which provides that in the asylum procedure the applicants or their legal adviser can access that information only after obtaining authorisation to that end, while they are not provided even with the substance of the grounds on which such decisions are based, and they cannot use the information to which they may have had access for the purposes of administrative procedures or judicial proceedings, is not compliant with EU law.[55] Referring to the adversarial principle, *G.M*. confirmed that the applicants or their advisers in the asylum procedure "*must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.*"[56] The judgment nonetheless underlines that the rights of defence are not absolute and may be limited for interest relating to state security, but even in this case, the applicant and his adviser is to be informed at the very least of the substance of the grounds on which the decision was taken, as described above.[57] It is crucial that the judgment clearly articulates that the rights of defence are not respected solely by the power of the national court being able to access the file. The fact that the reviewing court may see all information cannot replace the applicants' access, who have to be able to express their views on that information.[58] While the CJEU's findings in *G.M.* concern asylum procedures, the universal applicability of the principles of EU law enshrined in the Charter and referred to by the judgement make these conclusions applicable in different fields of EU law too.

As mentioned earlier under the general safeguards, the ECtHR has also asserted that the applicant has to be able to challenge the authority's national security based assertions and an independent court must be competent to review these assertions. National courts cannot confine themselves to a purely formal examination of the decision and rest their rulings solely on uncorroborated information regarding national security allegations tendered by the administration, because then protection against arbitrariness is not granted.[59] Accordingly, national courts must have full access to the full material on which the authority based its decision.[60] This standard was reiterated concerning expulsion cases in *Muhammad and Muhammad*, asserting that an independent authority must be involved in the procedure, with access to the "*totality of the file constituted by the relevant national security body*".[61] The fact, however, as it has been recently articulated in *Poklikayew v. Poland*, that the case is decided on the highest judicial level and the court having full access to documents substantiating the case brought against the applicant, is not sufficient to counterbalance any unjustified limitation on the applicant's procedural rights (e.g. right to know the factual grounds of decisions which are sufficiently specific, access to substantiating documentation, lawyer with security clearance), especially if only scarce and unspecific information is available to the applicant, which is insufficient to challenge the authorities statements of national security assertions.[62] Importantly, by means of the recent case law the ECtHR has departed from the standards laid down in the case of *Regner v. the Czech Republic*, which suggested that the principle of equality of arms and adversarial proceeding would be complied with, if the restrictions to the applicant's rights concerning access to classified data are counterbalanced solely by the power of courts being able to examine the classified documents.[63] In the dissenting opinions to the Regner judgment various arguments are raised, including inter alia, that „*the Grand Chamber judgment fails to match the progress in this area that can be seen in the case-law of the Court of Justice of the European Union, or in the case-law of certain domestic courts*." Despite the fact that the Czech law's applicable procedure in the withdrawal of security clearance „*is surrounded by certain number of guarantees*" to protect the interest of the applicant, non-disclosure of the essence of the reason that have led to the decision "*prevents him from defending himself properly, with the result that he will not have a fair hearing*", and consequently violates the Article 6 § 1 of the Convention.[64]

55 G.M. case, above n 41, paragraph 60.
56 ibid., paragraph 49.
57 ibid., paragraphs 50-51.
58 ibid., paragraphs 57-58.
59 Kaushal and others, above n 26, paragraph 32.
60 A and Others, above n 46, paragraph 210; ECtHR, Case of Chahal v. the United Kingdom, Appl. No. 22414/93 (ECtHR, 15 November 1996), paragraphs 130-131.
61 Muhammad and Muhammad, above n 27, paragraph 156 (iii).
62 Poklikayew v. Poland, above n 25, paragraphs 78-81.
63 ECtHR, Case of Regner v. Czech Republic, Appl. No.35289/11 (26 November 2015), paragraphs 151-162.
64 ibid, Dissenting opinion of judges Raimondi, Sicilianos, Spano, Ravarani and Pastor Vilanova.

For example in the *Poklikayew* and *Muhammad and Muhammad* judgements the Court also declared the applicants' right to be given access to the content of the documents and the information in the case file on which those authorities relied when deciding on their expulsion, *"without prejudice to the possibility of imposing duly justified limitations on such information if necessary."*[65] The right to have a legal representative or special advocate who may have access to the casefiles has also been established as a procedural standard and a potential counterbalancing element as to the restrictive measures applied against the applicant in expulsion cases by the ECtHR.[66]

With regards to legal representatives' access, as per both the CJEU and the ECtHR jurisprudence, the mere presence of special legal representatives and their access to the classified information without having been able to communicate with the applicant afterwards does not meet the requirements of adversarial proceedings. Consequently, if national systems provide access to classified materials for legal representatives, provided that they have gone through security clearance, the communication between the legal representative and the applicant must be ensured after having taken cognisance of classified materials.[67]

1.5 Summary of European legal standards

In order to protect the individual from arbitrariness, the CJEU and the ECtHR lay down clear procedural safeguards concerning procedures in which state security related allegations are based on classified data. The EU **safeguards may all be deducted from the right to a fair trial and effective remedy and rights of defence**, and are universally applicable in every field of law where EU law must prevail. Similarly, where a decision must be reached in accordance with the law, the **safeguards of Articles 8 and 13, as well as Article 1 Protocol 7 of ECHR** worked out by the ECtHR **have to be complied** with.

These safeguards may be summarised as follows:

- The individual must be provided with a **sufficiently specific and concrete decision,** from which it is possible to ascertain the legal and detailed factual reasons for the decision. Even **if national security considerations** and entailing procedural limitations are **duly justified**, **the individual must in any event be informed of the essence of the grounds/substance of accusations**, which constitutes the basis of the decision. The essence of confidential grounds may be defined as **essential information** in the file allowing the person concerned to be aware of the **main facts and conduct attributed to him or her**.
- The decision **must not refer to** and **may not disclose** any evidence if that **compromises state security**.
- The **authority**, while reaching a decision, must be able to **carry out the assessment of the relevant facts** and circumstances alone and cannot rely solely on the opinion of specialist bodies.
- Applicants or their advisers must have **access to the information**, on which the decision is based and **must be able to comment on them**, even **without** obtaining **prior authorisation** to that end, unless national security reasons do not allow this. In this case, **access to the essence of the grounds** must be given. National legislation, which provides that **only the reviewing court and/or the special adviser has access** to the classified information, but this cannot be communicated to the individual concerned, is **not compliant** with the jurisprudence of CJEU or ECtHR.
- The individual **must be able to put forward a defence** against national security accusations. In that regard, an **independent body (i.e. court)** – which has **access to the totality of casefiles** – **must be able to review** the **lawfulness of non-disclosure of the decision**.
- The reviewing body must carry out an **independent examination of all the matters of law and fact** relied upon by the authority. The review must include a **verification of the factual allegations**. The **burden of proof** in this phase rests **on the authority**.
- The **review** conducted by the independent body **cannot be a purely formal examination** of the decision. The ruling, accordingly, may not be solely grounded on uncorroborated information on national security allegations tendered by the administration.

65 Muhammad and Muhammad, above n 27, paragraphs 128-129.
66 ibid., paragraphs 154-155.
67 ZZ, above n 12, paragraph 44; Muhammad and Muhammad, above n 27, paragraph 155.; A and Others, above n 46, paragraphs 215-220.

- If the review results in the **national security considerations** being **unverified**, the authority may be requested to **disclose the classified information**, otherwise the **court decides the case solely on the grounds** and evidence which have been **disclosed to the individual**.
- Even if the review results in the **national security considerations being verified**, the **essence of the grounds must be revealed** to the person concerned.

II. LEGAL COMPLIANCE OF ADMINISTRATIVE DECISIONS BASED ON CLASSIFIED DATA IN THE EU

As it has been explained in Chapter 1, a classified data-based decision referring to national security/public order grounds might be in line with the standards of European law if the applicant is provided with a sufficiently specific and concrete decision, from which it is possible to ascertain the legal and detailed factual reasons for the decision. One may argue that those national legal frameworks, within which the administrative decision may contain the essence of the grounds/ substance of accusations, which is information on the main fact and conduct attributed to the applicant, and which enables the applicant to put forward a defence against the accusations before an independent body substantively assessing the national security grounds, are to be regarded as compliant with European law. Nevertheless, amongst the 25 EU countries which were subjected to research for the purpose of this study, only a very small number complies fully with the requirements articulated therein and posed by the jurisprudence of the CJEU and ECtHR. This chapter will overview the legislation and/or practice in each researched country according to how and to what extent the essence of the grounds of the decision reached in the administrative phase may be known, and accordingly, whether legislation and/or practice can be regarded as European law-compliant from that aspect. Countries will be grouped as follows: countries where the content of administrative decisions is the least compliant with the essence of the ground doctrine will be discussed first, followed in a quasi „ascending" order by countries with increasingly compliant regulations.

2.1 National frameworks not providing for the 'essence of the grounds'

Under the coming sections the present study has grouped and overviewed those national practices and legislations, within which the administrative decisions, issued in immigration-related procedures, do not comply with the requirements posed by the concept of the essence of the grounds. As opposed to European standards explained in the previous chapter, in the majority of the countries discussed below, administrative decisions are not specific and concrete enough to ascertain the – primarily – factual reasons for the decision, thereby leaving a limited space for the applicant to contest the decision and to put forward a defence. It will be shown in the coming sections that 12 of the 25 researched countries do not at all comply with the required standards of administrative decisions.

2.1.1 Non-reasoned decisions relying on (non-reasoned) opinions of security agencies: Greece, Bulgaria, Croatia, Finland, Hungary, Latvia, Lithuania, Poland and Slovakia

This overview of the content of classified data-based decisions starts with the **Greek** example, as it has been identified as one of the most deficient in terms of non-compliance amongst the researched EU countries. In those countries that are discussed under this section, administrative decisions are typically based on the non-reasoned opinions of the security agencies. In most cases, there is reference to the security agency that issued a statement, on which an administrative decision containing national security/public order grounds assertions are based. In the Greek practice, however, even that element is absent and it is frequently not known who is the owner of the classified data. If national security grounds are invoked, no reasoning is contained in the administrative decision and no access can be gained by the applicant/ lawyer to that classified information on which the decision is based (on access, see more in the coming chapter). The most substandard instance of this practice is that the decision does not even indicate the administrative authority which conducted the national security assessment. Although the law governing immigration-related procedures provides that decisions are to contain reasons in fact and in law, without listing any exceptions,[68] in practice, administrative decisions based on national security or public order grounds do not contain legal and factual reasons. This practice is endorsed by the Council of State, which is the highest judicial body in administrative cases, as it stated that "*an administrative act is based on a confidential -according to the law- element, the Administration is not obliged to mention in the Administrative*

68 E.g. Article 30(2) of Law on detention of third country nationals (L. 3907/2011), "detention decision shall contain the reasons in fact and in law and shall be issued in writing"; according to Article 50 (4) L. 4939/2022 "detention decision shall be ordered after an individual assessment and it shall state the reasons in fact and in law on which it is based", Article 87(8) L. 4939/2022 "decision rejecting an international protection application shall state reasons in fact and in law". In case of a Decision revoking the Status – Article 96(4) L. 4939/2022 "Decision revoking the status [..] shall state reasons in fact and in law".

act the actual data arising from this element", or more specific reference to elements of the case.[69] Asylum decisions referring to national security grounds are based on classified information, which is received by the Asylum Service. These decisions only mention that they are based on classified documents and in most cases not even the authority sending the documents to the Asylum Service is mentioned. Decisions issued on public order grounds mention the relevant penal/criminal involvement of the person at most, even if there is no effective conviction. Detention decisions issued on national security grounds most likely mention a SIS II registration, without the content of the registration being known/accessible.

In **Bulgaria**, administrative decisions concerning residence, entry and expulsions may not provide factual reasons by law.[70] While the regulation is one of the most restrictive on the level of administrative decisions, putting it in the same league with other tough-policy countries, such as Greece, Hungary or Slovakia, the fact that in a review procedure the underlying factual grounds may be known, does mitigate the over-generalised negative perception of the Bulgarian practice.

The Act to Interpret Article 47 of the Foreigners in the Republic of Bulgaria Act (FRBA) stipulates that "*[a]ny order … imposing coercive administrative measures[71] of a direct bearing on national security, shall be unappealable, shall be devoid of factual basis, and shall be subject to immediate execution*." Following an amendment, there is now a possibility to appeal against compulsory administrative measures and there are, thus, no unappealable orders according to the referred article at this time.[72] The translation of the law in immigration cases means the immigration authority bases its decisions on the unreasoned opinion of the Agency of National Security (SANS).[73] The immigration authority usually receives the SANS' opinion merely stating that „*the SANS has information that the person poses a threat to national security and therefore objects to him being granted protection*" without any evidence supporting that statement. SANS is not required to prove their allegations. Even if the SANS gives excerpts from their records, those are not supported by evidence and only state the conclusions of SANS. This practice is reinforced by the jurisprudence of the Bulgarian Supreme Administrative Court, which held that "*the opinion of the SANS is sufficient evidence from which to conclude that there are ‚substantial grounds for believing that the person concerned poses a threat to society or to the security of the Member State (…)".*[74] Recently, however, there has been a breakthrough in this restrictive practice and in line with CJEU's GM judgment, the Administrative Court-Sofia City ruled that the State Agency for Refugees (SAR) should make their own assessment of the facts and the evidence gathered when deciding on the withdrawal of the international protection status and not mechanically and solely on the basis of a letter from the SANS that the alien poses a threat to national security.[75] This means that the opinion of the SANS shall not be regarded as binding. The judgment also stated that "*the violations of the administrative procedural rules and the issuance of the contested decision with an unreasoned opinion of the SANS that the person poses a threat to national security/ without collecting evidence of what the threat to national security is and without giving the contestant the opportunity to familiarise himself with it by filing his objections to it and*

69 inter alia Council of State, Decision 1551/2022, Decision 1047/2019.

70 Foreigners in the Republic of Bulgaria Act (FRBA), Article 46 (2) The orders on:
1. withdrawal of the entitlement to residence in the Republic of Bulgaria on the grounds of Article 10, paragraph 1, items 1 and 1a;
2. imposing a prohibition on entering and residing in the territory of European Union Member States on the grounds of Article 10, paragraph 1, items 1 and 1a; and
3. expulsion shall be subject to appeal before the relative administrative court following the procedure set out in the Administrative Procedure Code. The court's decision shall be final. (3) Orders under paragraph (2) shall not indicate the factual grounds for imposing the coercive administrative measure.
Article 10 (1) Issuing of a visa or entry into Bulgaria shall be refused to any foreigner where:
1. by the acts thereof, the said foreigner has jeopardised or may jeopardise the interests of the Bulgarian State, or if there is reason to believe that the said foreigner acts against national security;
1a. data are available that the said foreigner commits, incites, participates in preparing, aiding, or training for the perpetration of terrorist activities, or that the purpose of his/her entry is to use the country as a transit location to a third country, on the territory of which to perpetrate these activities;

71 issued in pursuance of Article 40, paragraph 1, item 2 in reference to Article 10, paragraph 1, item 1, in pursuance of Article 42, or in pursuance of Article 10, paragraph 1, item 1 of the Foreigners in the Republic of Bulgaria Act.

72 Article 46, para.2 of FRBA.

73 Article 46, para. 3 of FRBA.

74 Judgment № 8865 of 06.07.2017 in case № 5588/2016 before the Supreme Administrative Court, 3 panel, available: https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=806128&code=vas.

75 Judgment № 2739 of 21.4.2023 in case № 2119/2023 before the Administrative Court-Sofia City, 9 panel, available: https://sofia-adms-g.justice.bg/bg/1693.

deprived him of the right to participate in the administrative proceedings, which makes the decision unlawful and requires its annulment."[76] According to the national research submitted for the purpose of this study, this judgment may cause a controversy on a judicial level as some courts are of the view that the power of the immigration authority is limited and it must be bound by the opinion of the security agency. Thus, it is yet to be seen if this recent ruling will cause any substantive and positive change in practice, at the time of writing, the judgment is subject to appeal before the Supreme Administrative Court.

Importantly, furthermore, while the administrative act itself cannot state the factual grounds, once it is appealed, the parties before the court can be given access to the factual grounds in a restricted manner under the "need-to-know" principle[77], which means to the extent it is necessary for the purpose of the procedure. In practice, this means access to the classified data on factual grounds based on which the conclusions on national security were reached, but not the underlying evidence and methodology on how conclusions were reached. This does not mean that the judge could not base its decision on facts and evidence that were not disclosed to the party and to the court itself,[78] and the practice does not make the administrative approach more compliant with the standards of European law, but certainly serves as a significant counter-balancing factor strengthening defence rights.

In **Croatia**, national jurisprudence is controversial as to how and to what extent reasons have to be provided when a foreigner is deemed to be threatening national security. In principle, administrative decision needs to be properly reasoned[79], unless they are based on national security or public order grounds concerning immigration-related procedures. Based on the Law on International and Temporary Protection and Law on Foreigners, the status based on which the foreigner might reside on the territory of Croatia, may not be granted or may be withdrawn if national security considerations come into play regarding the applicant. [80] The proceeding authority is the Ministry of Interior, which issues its decisions based on the recommendations of the Security and Intelligence Agency of the Republic of Croatia (SIA). Similarly to the Bulgarian practice, SIA provides only the opinion on the existence or non-existence of a "security obstacle" to the body that requested the security check, without reasons.[81] The proceeding authority, however, may have access to classified data grounding the opinion of SIA.[82] The Law on Foreigners prescribes that in the decision denying or terminating the residence of a citizen of a third country or expelling a citizen of a third country for reasons of national security, the legal provision will be stated without explaining the reasons that were decisive for making the decision.[83] Again, the assessment is based on classified data collected by the SIA.

The Croatian Constitutional Court (CC) has had 4 relevant judgments concerning the issue of non-reasoned administrative decisions based on state security motivations. The CC, dealing with a naturalisation decision containing no justification only a state security reference, held in 2014 that the lack of valid explanation might prevent the administrative court from performing its duty and is in breach with the principle of constitutionality and legality. Such actions were *„deemed to be contrary to the provisions of Article 98, paragraph 5 of the Law on Administrative Procedur*e"[84]. This non-compliance was noted by the Constitutional Court already in 1996, which in its decision repealed parts of the provisions of Article 209 of the Act on General Administrative Procedure (Official Gazette 53/91), which provided for the possibility that the reasons do not have to be stated in the decision when it is in the public interest or explicitly provided by law or by decree. According to the CC's assessment, the explanation of a particular decision strengthens the principle of legality

76 ibid.

77 Article 39, paragraph 3, item 3 of the Classified Information Protection Act (CIPA).

78 This may be drawn from Article 81 (4) of Rules of Court Administration, which provides that in order not to impede access to unclassified material, it shall be possible, at the discretion of the authority hearing the case, to separate an open and a classified volume of the case and Article 46 (3) of FRBA, as well as from relevant case-law (e.g. Judgment № 1830 of 19.11.2021 in case № 2402/2021 of the Administrative Court-Burgas).

79 Article 98 (5) of Law on Administrative Procedure, Zakon o općem upravnom postupku, OG 47/09, 110/21, in force since 01.01.2022., available: https://www.zakon.hr/z/65/Zakon-o-op%C4%87em-upravnom-postupku.

80 Article 50 (1.3) of Law on International and Temporary Protection, Zakon o međunarodnoj i privremenoj zaštiti, Official Gazette nr. 70/15, 127/17, 33/23, in force since 01.04.2023., available: https://www.zakon.hr/z/798/Zakon-o-me%C4%91unarodnoj-i-privremenoj-za%C5%A1titi.

81 ibid Article 41.

82 Article 20 of Data Protection Law, Zakon o tajnosti podataka, OG 79/07, 86/12, in force since 07.08.2007., available: https://www.zakon.hr/z/217/Zakon-o-tajnosti-podatak.

83 Article 5 (2) of Law on Foreigners, Zakon o strancima, OG 133/20, 114/22, 151/22, in force since 01.01.2023., available: https://www.zakon.hr/z/142/Zakon-o-strancima

84 As cited in the Decision of the Constitutional Court number U-IIIB-7838/2014, op.cit., paragraph 5.

and acts against eventual arbitrariness.[85] Despite these progressive developments, the MoI still reaches its decisions following the non-reasoned opinions of SIA. There may be some indication as to why the foreigner is to be regarded as a threat to national security, .e.g. stating 'connections with Islamic radicalism and security', as it was stated in a detention case[86], but without disclosing the basis of the accusation. In a judgment of June 2020, the CC stated that courts are allowed to communicate the content summary of the classified documents or evidence in question with the aim of providing balance between the requirements related to the right to effective judicial protection, especially in respect of the principle of fair trial, and those arising from the security of the EU or its member states.[87] This CC ruling, however, has not had any practical relevance so far, and conversely, in October 2020, shortly after this progressive decision, the CC held that "*to refrain an explanation on the grounds of a threat to national security is a legally prescribed limitation of the fundamental right to effective judicial protection of those persons whose stay in the territory of the Republic of Croatia is being decided upon.*"[88]

Finnish legislation provides that administrative decisions must be factually and legally sufficiently motivated,[89] unless an important public or private interest requires that a decision be issued immediately.[90] An important public interest may relate to maintaining public safety if, for instance, the applicant is considered to endanger public order, security, or public health.[91] Another restriction regarding reasoning applies to visa procedures more specifically. According to Section 190(b)(4) of the Aliens Act[92], covering asylum and residence permit procedures, no reasons are to be stated for a decision made on a request for an administrative review, if the decision to refuse, annul or revoke a visa is based on information concerning the visa applicant or visa holder received from the authorities of another Schengen State or third country, or on information showing that the visa applicant or visa holder might present a danger to the public order or security, national security or foreign relations of a Schengen State. This non-EU conform legislation may be counterbalanced by the fact that in the judicial phase the court may prepare a summary or abstract of the information subject to restriction, from which the protected information, in order to safeguard a highly important interest, is not disclosed.[93] This practice, however, is followed in an ad-hoc manner and its application is not statutory.

Case law also implies that the Finnish Immigration Service may also base its decision on a statement received from the Finnish Security and Intelligence Service, the content of which is not disclosed to the applicant, although by law the immigration service is not bound to the opinion of the security agency.[94] At the same time, the Finnish Immigration Service, notwithstanding non-disclosure provisions, may obtain the necessary information from the Finnish Security and Intelligence Service for the performance of their duties.[95]

The case law of the Supreme Administrative Court (SAC) implies that the jurisprudence generally does not follow European standards by enabling the practice of non-reasoned decisions' sole reliance on the opinions of security agencies. In a case where the regional administrative court overturned the decisions of the immigration authority for neither indicating on what grounds the residence permit application had been denied, nor specifying the reasons for considering national security grounds to be applicable, the SAC ruled in 2007 that the administrative court should not have overturned and referred the matter back to the Finnish Immigration Service to clarify the necessary information regarding state security, as the administrative court should have obtained the classified material from the parties (authorities) itself in order to

85 Decision of the Constitutional Court of the Republic of Croatia No. U-I-248/1994 of November 13, 1996. (Official Gazette, 103/96), available: https://narodne-novine.nn.hr/clanci/sluzbeni/1996_12_103_2002.html.

86 Decision from the Administrative Court Usl-1575/2023-7.

87 Decision of the Constitutional Court of Croatia from 24 June 2020, no. U-I-1007/12.

88 Decision of the Constitutional Court of Croatia from 20th October 2020 and three dissenting opinions of the judges, Odluka Ustavnog suda Republike Hrvatske od listopada 2020. i tri izdvojena mišljenja sudaca, No.: U-III-2039/2017, OG 143/2020, paragraph 10.1., available: https://narodne-novine.nn.hr/clanci/sluzbeni/full/2020_12_143_2755.html.

89 Section 45(1) of the Administrative Procedure Act (hallintolaki / förvaltningslag; unofficial translation in English), Act No. 434/2003, 1 January 2004., available: https://www.finlex.fi/fi/laki/ajantasa/2003/20030434#O2L7P45.

90 Section 45(2) Administrative Procedure Act, available: https://www.finlex.fi/fi/laki/ajantasa/2003/20030434#O2L7P45.

91 Kallio, H., Kotkas, T., & Palander, J. (eds.; 2018). Ulkomaalaisoikeus ('Immigration Law' [unofficial translation], Helsinki: Alma Talent.

92 Finland, Aliens Act (ulkomaalaislaki/utlänningslag; unofficial translation in English), Act No. 301/2004, 30 April 2004.

93 Mäenpää, O. (2023). Hallinto-oikeus ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

94 Finland, Regulation on Police Administration (asetus poliisin hallinnosta / polisförvaltningsförordning), Regulation No. 158/1996, 1 December 1996.

95 Section 11(1) of Act on the Processing of Personal Data in the Field of Immigration Administration (laki henkilötietojen käsittelystä maahanmuuttohallinnossa / lag om behandling av personuppgifter i migrationsförvaltningen), Act No. 615/2020, 1 September 2020.

assess whether the grounds presented for denying a residence permit on grounds of public interest, public order, and state security were sufficient.[96] In a judgment of 2020 the SAC took a similar approach.[97] In this latter case, where an applicant's asylum application was rejected by the immigration authority following the opinion of the security service, and the issue at hand was whether the applicant had the right to receive, from the Finnish Security and Intelligence Service, information on the reasoning behind the statement, the Supreme Administrative Court found that providing information on the reasoning behind the Security and Intelligence Service's statement and the background material used in preparing it would have been against an extremely important public interest related to national security, as referred to in the Act on the Openness of Government Activities.[98]

It is nevertheless worth noting that based on the Finnish SAC jurisprudence, it is theoretically possible in cases relative to national security that the court may conclude that the essence of the grounds is to be disclosed to the applicant. In 2018 the SAC held that "*it must be clarified and assessed whether, without compromising the aforementioned [security] interests, the main aspects of the security assessment and its grounds could be disclosed to the appellant.*" In this concrete case, the SAC was eventually satisfied with the reasons not having been disclosed to the applicant. While this judgment suggests that disclosure of the essence of reasons might be possible, no such case relevant to the subject matter of this study has been found in Finnish jurisprudence where disclosure took place to an applicant whose entry or stay in Finland raised security concerns.

In **Hungary**, a more worrying practice has taken shape: neither the law nor the jurisprudence of the highest court can be regarded as compliant with the European standards, notwithstanding the developments of the CJEU in *G.M*. concerning Hungarian practice. Administrative decisions in Hungary are legally reasoned, but not factually. In immigration procedures, although the Act II of 2007 on the Entry and Stay of Third Country Nationals Act (TCN Act) requires the Immigration authority to provide reasoning,[99] this is purely a formality with regard to the assessment of the national security threat as: (i) the expert authorities (e.g. security agencies) are not obliged to provide reasoning,[100] therefore the immigration authority is not able to state substantial reasons and is bound by the opinion of the security agencies[101]; and (ii) decisions merely refer to the findings of the expert authorities. The same applies to asylum procedures governed by the Act LXXX of 2007 on Asylum (Asylum Act), which also requires the authority to reason its decision[102], but this also becomes illusory as the authority is again bound by the opinion of the expert authorities (same security agencies as in immigration procedure), which in its decision states its opinion and the legal basis of decision[103], but without providing any reasons. The opinions of the security agencies, which are the Constitution Protection Office (Alkotmányvédelmi Hivatal) and the Counter Terrorism Centre (Terrorelhárítási Központ), consists of the establishment of a threat to national security posed by a third-country national and references to the law based on which security agencies conducted their procedure. There is nothing on how the conclusion regarding the national security threat has been reached. The security agencies claim that providing access to such data/or even to just a basic summary of data means disclosing information on the (secret) methods of gathering this information, which would jeopardise national security. The immigration/ asylum authority does not have access to the classified data either, therefore, they cannot actually conduct a proper proportionality assessment when reaching a decision. If the immigration or asylum authority fails to act in accordance with the expert opinions, its decision must be annulled pursuant to the General Rules of Administrative Procedures[104]. The mechanism of judicial review in relation to classified data will be explained later in the next chapter, but it is worth noting already, that judicial decisions, either reached in the judicial review procedure contesting denial of access to

96 KHO:2007:49, 12 July 2007, Korkein hallinto-oikeus / Högsta förvaltningsdomstolen, Supreme Administrative Court of Finland, available: https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701831.

97 KHO:2020:4, 20 January 2020, Korkein hallinto-oikeus / Högsta förvaltningsdomstolen, Supreme Administrative Court of Finland, available: https://www.kho.fi/fi/index/paatokset/vuosikirjapaatokset/1579174093138.html.

98 Section 11(2)(1) of Act on the Openness of Government Activities (laki viranomaisten toiminnan julkisuudesta / lag om offentlighet i myndigheternas verksamhet; unofficial translation in English), Act No. 621/1999, 1 December 1999., available: https://www.finlex.fi/fi/laki/ajantasa/1999/19990621#L3P11.

99 Section 87/M(1) of Third-Country Nationals Act.

100 Section 87/B(8) of Third-Country Nationals Act.

101 Section 87/B (4) of Act II of 2007 on Third-Country Nationals, available: https://net.jogtar.hu/jogszabaly?docid=a0700002.tv.

102 Section 32/Q (1) of Asylum Act.

103 Section 57 (6) of Asylum Act.

104 Article 123 (1) b) of Act CLV of 2016 on the General Rules of Administrative Procedures.

classified data, or reviewing the administrative decision which was based on the classified data based opinions of security agencies, do no disclose anything from the classified data, not even at least the substance of reasons allowing the party to unfold a counter-argument.

Worryingly, in the view of the Hungarian Supreme Court (Kúria), it is not unlawful for the opinion of the expert authority not to include reasons where it is based on classified information. The Kúria is of the view that neither the immigration authority nor the competent court is in the position to decide about granting access to these classified data instead of the classifier, or to allow their disclosure in the decision.[105] Most importantly and contrary to well-established CJEU and ECtHR standards, the Kúria's latest jurisprudence has explicitly stated in 2022 that within the scope of the Act on the Protection of Classified Data,[106] there can be no disclosure of the substance of reasons for a threat to national security: *"the data may fully be accessible or may not be accessible, there is no essence of the grounds".*[107] Kúria reasons this by the fact that "*the specificity of information lies in its uniqueness, to extract it is to generalise it, in which case it loses personal nature, and consequently the classification may become redundant. In the case of 'personal data with national classification', the extraction relied on by the applicant in the request for judicial review is not compatible with the legal nature of the legal instrument."*[108] The Kúria upheld this position in its later rulings, even after the CJEU's *G.M.* judgment regarding specifically the Hungarian legislation, with the reference that the *G.M.* case concerned an asylum procedure specifically, while the matter before the Kúria originated from the procedure which may be initiated under the Act on Protection of Classified Data (access procedure) with the purpose to obtain access to classified information.[109] On the one hand, some may argue that this approach is in line with EU law, due to the fact that the access to classified data is not regulated by EU law as a standalone procedure, and hence, no compliance with EU law is required. On the other hand, the access procedure is interlinked with the main asylum or immigration procedure, as the applicants are asking access for the purpose of being able to build their defence in the main procedures, therefore safeguards of effective remedy provided by the Charter shall prevail in the access procedure as well. In any case following the G.M. judgment, EU law precludes Hungarian legislation which provides that the person concerned or their legal representative can access the case file only after obtaining authorisation to that end and without being provided with the grounds of the decision. It could therefore be argued that the access procedure should not even be necessary. The compliance of Hungarian practice is thus controversial with EU law and the absence of safeguards asserted by the ECtHR, which shall prevail in a procedure where a decision was reached 'in accordance with the law', can certainly be observed in the high court jurisprudence.

In **Latvia**, the legal framework is not very detailed or specific. Decisions in principle should always contain legal and factual reasons[110], but there is the legal possibility of refraining from the provision of legal and factual reasons referring to the urgency of decision and if any delay poses a threat to national security or public order. More specifically, the Administrative Procedure Law provides for a few exceptions regarding the form and elements of administrative decisions on the basis of national security and public order grounds, providing for a possibility to refrain from reasoning. This law provides that the state authority may issue the administrative act without complying with the requirements about the form and components of an administrative act, if „*the issue of the administrative act is urgent, and any delay poses a direct threat to the national security, public order, environment, or life, health or property of a person*".[111] Based on the limited information stemming from regulation and caselaw, it seems that in immigration cases the immigration authority shall base its decision on the generally under-reasoned statements of State Security Service (Valsts drošības dienests, VDD), although the immigration authority may have access to the responsible state security institution`s report to the extent it is provided by the data owner.[112] The VDD's practice as to the extent to which its statements contain reasoning varies from case to case, primarily because these statements are not subjected to sufficiently detailed legal regulation.

105 Kfv. II. 38.329/2018/10.
106 Act CLV of 2009 on the Protection of Classified Data.
107 Kfv.I.37.259/2022/8., paragraph 50.
108 ibid.
109 Kfv.I.37.259/2022/9. and Kfv.I.37.259/2022/11.
110 Section 67 of The Administrative Procedure Law of Latvia, available: https://likumi.lv/ta/id/55567-administrativa-procesa-likums.
111 Section 69, paragraph 1.1 of the Administrative Procedure Law of Latvia, available: https://likumi.lv/ta/id/55567-administrativa-procesa-likums.
112 One of the three national security agencies in Latvia.

In **Lithuania**, immigration-related administrative decisions state some basic reason for which a foreigner is considered to be a threat to national security or public order, but the content of the decision, which is grounded on the non-elaborated opinion of the security body, is still far from the standards posed by the concept of the 'essence of the grounds'. In principle, administrative decisions may be legally and factually reasoned[113] and cannot be based on classified evidence. In immigration-related cases of foreigners, however, falling under the scope of the Law on the Legal Status of Foreigners[114] governing the rules of the procedure for the entry and exit, stay and residence, asylum and temporary protection of foreigners, judicial cases concerning complaints against decisions taken on the grounds of a threat posed by the foreigner to state security, public order or society may be examined using factual data constituting state secret or secret of service, with the participation of the Department of State Security, a police agency authorised by the Commissioner General of Police and/or the State Border Guard Service. These data shall not be subject to the provisions on declassification laid down in the Law on Administrative Proceedings.[115] The relevancy of that follows from a 2007 judgment of a Constitutional Court, stating that the Law on Administrative Proceedings establishes the rule that factual data constituting a state or service secret may be used as evidence in an administrative case, only after they have been declassified. The application of this standard is nevertheless not possible if an immigration-related administrative decision is based on national security or public order grounds. In those cases, the administrative decision merely refers to the specific classified document from the State Security Department, without disclosing its substance. The immigration authority, however, has access to the classified data, based on which the security agency formed its statement. For example, in the decision of the Migration Department, which did not grant asylum, there is reference to a classified specific document from the State Security Department and a statement that the applicant is a threat to national security for his association to a terrorist organisation.[116] Substantive reasons as to why the applicant was associated with the terrorist organisation were not provided. This piece of information on its own is not sufficiently specific and does not enable the applicant to exercise defence rights.

In **Poland**, the restrictive system is quite clear-cut: both in immigration and in asylum cases it is possible not to factually motivate the decisions, with reference to national security or public order.[117] Legal grounds are always given. Furthermore, specifically concerning entry decisions, the law articulates that no factual reasons of denial are to be given if the foreigner's stay in Poland is listed as undesirable or if there is a SIS alert referring to national security grounds.[118] Decisions, both administrative and judicial, may be based on data not disclosed to the party. The justification in the part concerning classified data contains only a short sentence or remark: the administration authority or the court assessed that the evidence collected in this case indicates the existence of circumstances threatening the security of the state. Administrative authorities don't have access to full documentation related to operational and reconnaissance activities or investigation leading to the finding or assessment that a foreigner poses a threat to national security.[119] This information is held by the Border Guard unit, the Voivodeship Commander of the Police and the Head of the Internal Security Agency, to whom the immigration authority turns to before issuing a decision. These bodies then indicate which elements justify their findings that foreigners pose a threat to security, but evidence underlying the data is not accessible to the immigration authority. Although the jurisprudence is aware of CJEU's 'essence of the ground' approach, the Supreme Administrative Court, similarly to the view of Hungarian Supreme Court, held that reference to national security threat would suffice as essence of the ground is not otherwise defined either in jurisprudence or in doctrine.[120]

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113 Article 10, part 5 of Law on Public Administration of the Republic of Lithuania, adopted on 17th of June, 1999, No. VIII-1234 (lastly amended on the 1st of November, 2020, No. 2020-12819), available: XIII-2987 Lietuvos Respublikos viešojo administravimo įstatymo Nr. VIII-1234 pakeitimo įstatymas (e-tar.lt).

114 Law on the Legal Status of Foreigners of the Republic of Lithuania, adopted on the 29th of April, 2004, No. IX-2206 (lastly amended on the 20th of April, 2023, No. XIV-1889) available: IX-2206 Lietuvos Respublikos įstatymas dėl užsieniečių teisinės padėties (e-tar.lt). The law is applicable in cases of the foreigners' entry and stay, international and temporary protection procedures.

115 Article 140, part 5 of Law on Public Administration of the Republic of Lithuania, adopted on 17th of June, 1999, No. VIII-1234 (lastly amended on the 1st of November, 2020, No. 2020-12819), available: XIII-2987 Lietuvos Respublikos viešojo administravimo įstatymo Nr. VIII-1234 pakeitimo įstatymas (e-tar.lt).

116 Decision adopted on the 9th of March 2017, No. (15/6-12)12PR-41.

117 Article 5 of the Act of 2003 on Granting Protection to Aliens within the Territory of the Republic of Poland, Article 6 of the Act of 2013 on Foreigners, 12 December 2013.

118 Article 444, section 12 of the Act on Foreigners.

119 Article 109, section 1 of the Act on Foreigners.

120 Supreme Administrative Court Judgments of 23 November 2022 II OSK 1397/21, II OSK 1806/21, and of 7 February 2023 II OSK 1916/22.

In some cases, however, the decision contains reference to some limited factual grounds (e.g. existence of a fear that the applicant may conduct terrorist activities).[121]

The framework in **Slovakia** is very similar to the Hungarian one, although the jurisprudence of the Slovakian Constitutional Court seems to be more inclusive with regard to the developments of EU and international law on the essence of the grounds doctrine, although the findings of the court are not consistently reflected in legislation and practice. In asylum and residence permit cases of third country nationals older than 14, decisions contain only a reference to the provision of the relevant law, but do not provide justification as to the nature of security reasons. This is because the Act on Residence of Foreigners[122] and the Act on Asylum[123] provides that the proceeding authority (Police and Ministry) shall request an opinion of the Slovak Intelligence Service and Military Intelligence, which then sends it without justification. The opinion, as to whether the person in question poses a threat to national security, is binding on the authorities. By the power of Act on the Protection of Classified Information,[124] the information cannot be disclosed and is accessible to neither the authority nor the party.

In terms of current legislation and practice of administrative authorities and courts, if certain documents/information cannot be disclosed to a party to the proceedings or their solicitor, it is not part of the reasons (grounds) of the administrative decision or judgement. The content is not mentioned in the reasons, but the classified data are actually the grounds for the decision. The administrative authority in the justification of their decision only provides reference to such document/information, and explains that the reasons cannot be provided, as this would lead to an unauthorised disclosure of classified information. Also, courts do not disclose any reasons stemming from the contents of classified information/evidence in the justification of their judgements, if those were not provided in the justification of the decision of the administrative authorities (which is always the case). Case law indicates that the courts insist that it should be the task of the administrative authority to convey to the party to the proceedings the essence/summary of the reasons why the intelligence agencies consider them a threat to the security of the Slovak Republic, in the justification of their decision, or even during the administrative procedure itself.

On 12 December 2018, the Constitutional Court of the Slovak Republic adopted a key finding, in which the court held that *"it is necessary for the person concerned to be notified in every case of the essence of the reasons on which the decision on the protection of state security is based, while the need to protect state security cannot lead to the person concerned losing his/her right to be heard and thus his/her right to an effective remedy would be ineffective."*[125] After this CC ruling, the respective administrative Regional Courts, in the majority of cases,[126] started quashing the decisions of the relevant administrative authorities, if these did not contain a justification or statement of the essence/summary. According to the administrative courts, it is the duty of the respective administrative authority to secure from the originators of the classified information the necessary abstract of relevant information that forms the essence of the reasons for the decision. In these cases that means to secure the essence of the claims about the existence of a reasonable suspicion.

In practice, however, the respective administrative authorities, even if the case was returned to them by the administrative court, always issued the same decision, referring to the fact that the Slovak Intelligence Service did not make available to them, even after they requested, an abstract of the reasons, nor did they authorise the authority to include such an abstract in the justification of the decision. Following this practice, some administrative courts or senates within certain

121 E.g. Judgment of Voivodeship Administrative Court of 5 November 2019, IV SA/Wa 2086/18., available: https://orzeczenia.nsa.gov.pl/doc/2DFFB93EA9.

122 Section 125, paragraph 6 of the Act on Residence of Foreigners, available: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2011/404/20230101.html.

123 Section 19a, paragraph 10 of the Act on Asylum, available: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/480/20230101.html.

124 Act No. 215/2004 Coll. on the Protection of Classified Information and on Amendments to Certain Acts.

125 Judgment of the Constitutional Court PL. ÚS 8/2016 of 12 December 2018, available: https://bit.ly/3uCWAfb.

126 E.g.: Decision of the Regional Court in Bratislava, case No. 5S/293/2019,April 27, 2021; Decision of the Regional Court in Banská Bystrica, case No. 71S/8/2021, March 31, 2022; Decision of the Regional Court in Košice, case No. 6S/23/2021, November 4, 2021; Decision of the Regional Court in Košice, case No. 8S/147/2020, June 3, 2021; Decision of the Regional Court in Nitra, case No. 11S/1/2021, October 6, 2021; Decision of the Regional Court in Trnava, case No. 14S/112/2021, November 3, 2022; Decision of the Regional Court in Trnava, case No. 20S/103/2019, December 9, 2020; Decision of the Regional Court in Trnava, case No. 20S/43/2021, August 17, 2022; Decision of the Regional Court in Košice, case No. 8S/141/2021, May 12, 2022; or Decision of the Regional Court in Banská Bystrica, case No. 76S/3/2020, March 24, 2021 and others. All judgments can be found through the website of the Ministry of Justice of the Slovak Republic at: https://obcan.justice.sk/infosud/-/infosud/zoznam/rozhodnutie.

administrative courts began to uphold such decisions of the respective administrative authorities, arguing that the procedure of the respective administrative authorities in these cases runs into other legal limits that were not addressed by the finding of the Constitutional Court and that the finding of the Constitutional Court did not affect the provisions of the Act on the Protection of Classified Information, or Section 125 par. 6 of the Act on Residence of Foreigners (or Section 19a par. 10 of the Act on Asylum).[127] They further argue that the respective administrative authority is not the originator of the classified information[128] and that the administrative authorities do not have the power to force the Slovak Intelligence Service to justify its findings and conclusions.

Decisions of the administrative courts that upheld the decisions of the administrative authorities without justification are rather an exception. These court decisions were further contested by legal representatives at the Supreme Administrative Court of the Slovak Republic, which had suspended all matters of this nature until the Constitutional Court decided on its proposal to declare Section 125 par. 6 of the Act on Residence of Foreigners incompatible with the Constitution.[129] After the adoption of this ruling, it can be assumed that the Supreme Administrative Court will grant the appeals and quash the challenged decisions of administrative authorities as unlawful. In the case of Section 19a par. 10 of the Act on Asylum, the Constitutional Court has already declared its incompatibility with the Constitution of the Slovak Republic in March 2023.[130] Following this finding of the Constitutional Court, Section 19a par. 10 of the Act on Asylum was amended[131], but no substantive changes have been made. The legislator did not take advantage of the opportunity to redefine the content and scope of the opinion of the security services in the Asylum Act and it only removed that part of the section, which provided that the opinion of the Slovak Intelligence Service/Military Service contained an agreement or disagreement to the granting of asylum or subsidiary protection, but these security bodies are still to send their opinions to the asylum authority regarding the applicant's national security threat. Thus, the issue of accessing the essence of the reasons on which the threat to national security was based by the security bodies has remained untouched. It is yet to be seen how this minimal legislative change will translate into practice and whether it will anyhow trigger a more EU compliant approach. In the case related to the contested provisions of the Act on the Residence of Foreigners, the Constitutional Court did not find Section 125 par. 6 unconstitutional due to its slightly different wording in comparison to Section 19a par. 10 of the Asylum Act. The Constitutional Court explained that it did not find the obligation of the administrative authority to request an opinion of the intelligence services to be constitutionally problematic, further adding that *„the Act on the Residence of Foreigners does not require the intelligence services to formulate the result of the opinion alternatively (agreement - disagreement) [as was the case of Section 19a par, 10 fo the Asylum Act], but it does not exclude another form of the opinion either."*[132] This latter opinion of the Constitutional Court is relatively brief and its interpretation is ambiguous, which in practice may once again lead to similar problems regarding the content and scope of the opinions of the intelligence services. Even in this case, it remains to be seen how the administrative authorities and intelligence services will transpose this opinion into practice.

2.1.2 Lacking 'essence of the grounds' – lacking access for the parties: Malta and Portugal

This subheading has been again created for two countries only: Malta and Portugal, as it seems that classified data-based administrative decisions in immigration-related cases in Malta and in Portugal may not state the essence of the grounds, however, in the judicial phase everyone has the same (lack of) access to the classified information, no actors involved may know the underlying classified reasons. This approach regarding access, as will be seen in the coming chapter, is not a widespread practice. It must be emphasised that with regard to Portugal, according to the national researcher, case law seems to be extremely limited and the issue of accessing classified data in immigration-related procedures is gravely underregulated by law.

127 E.g. Decision of the Regional Court in Trnava, case No. 20S/113/2021, December 7, 2022; Decision of the Regional Court in Trnava, case No. 20S/117/2021, December 7, 2022.

128 E.g. Decision of the Regional Court in Bratislava, case No. 2S/169/2020, April 20, 2022; Decision of the Regional Court in Bratislava, case No. 2S/200/2021, April 20, 2022.

129 Constitutional Court of the Slovak Republic No. PL. ÚS 17/2022-96 of 13 December 2023.

130 Judgement of the Constitutional Court PL. ÚS 15/2020-63 of 15 March 2023, available: https://bit.ly/4bRKCid.

131 Effective from 26 May 2023.

132 Constitutional Court of the Slovak Republic No. PL. ÚS 17/2022-96, dated 13 December 2023, point 75.

Maltese law does not provide detailed regulations when it comes to administrative decisions based on national security or public order grounds and is very hectic in defining if these decisions shall be reasoned. These decisions, therefore, often lack any legal and factual motivation. A worrisome Maltese trend is that if the applicant has a criminal record, it may indicate that they will be considered a threat to public order/national security. In these cases the decision mentions that criminal conviction took place but does not suggest in a clear-cut manner that the basis of national security/public order consideration is the criminal record. In some cases concerning third country nationals' right to reside or work, the law articulates that motivation may be omitted if national security grounds are involved.[133]

In residence permit cases belonging under the law on Single Application Procedure for a Single Work Permit as regards Residence and Work and a Common Set of Rights for those Third-Country Workers Legally Residing in Malta Regulations, if an application is refused on public policy, security or health grounds, the applicant shall be informed on the grounds of refusal, unless interest of national security are involved, in which case the immigration authority is not obliged to do so.[134] Decisions concerning entry ban, return and removal shall not contain reasons in fact and law, if disclosure of factual grounds endangered national security or public policy.[135] In immigration detention cases, if detention can be challenged before the Immigration Appeals Board, the law nevertheless provides that "*the Board shall not grant such release [...] where the release of the applicant could pose a threat to public security or public order.*"[136] In practice, the Board relies on the opinion of the Principal Immigration Officer (PIO) that the detainee is a threat to national security. However, the PIO does not seem to provide factual reasons for holding such an opinion and according to the research conducted for the purpose of this study, it seems that the PIO would detain applicants for national security/public order grounds if the applicant has a criminal record in Malta, or some cases, even arbitrarily, without a criminal record.[137]

In international protection cases, if the applicant is found to be dangerous to national security, their asylum application will be found manifestly unfounded and will be examined in an accelerated procedure.[138] The 2022 AIDA report on Malta highlights that decisions of such generally consist of a one-page document confirming the authority's decision but nothing else.[139] Sole reference to a criminal record and using that as an establishing fact for national security consideration has also been present in a case of withdrawing international protection. The referred offences – theft and committing damages to property – lack the level of gravity indicating preclusion of international protection. It is also worth mentioning that the principle of non-refoulement does not apply in respect of that person who is regarded as a danger to national security.[140]

Finally, in cases of those third country nationals who need an employment licence under the Immigration Act, decisions rejecting the applications on security consideration do not provide any factual or legal grounds. It seems that past criminal convictions are also the underlying reasons for rejections of this type.

It is worth mentioning herein that the Immigration Appeal Board, established under the Immigration Act[141], is a specialised tribunal in immigration matters, the first and final degree of appeal, which rarely issues final decisions indicating legal and factual reasons for its conclusions.[142] In asylum cases, the judicial-like supervisory body of the International Protection Agency is the International Protection Appeals Tribunal.[143] None of these quasi-judicial bodies work under detailed procedural regulations and their decisions are not accessible or public.

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133 JobsPlus, Employment Licences Unit Guidelines for Clients, January 2021, page 14, available: https://bit.ly/3uJjhOL. And article 10 (4) of the Immigration Regulations, Subsidiary Legislation 217.04 of the Laws of Malta, available: https://legislation.mt/eli/sl/217.4/eng.

134 Article 10(4) of Immigration Regulations, Subsidiary Legislation 217.04 of the Laws of Malta, available: https://legislation.mt/eli/sl/217.4/eng.

135 Ibid. Article 11 (2).

136 Article 25A (11) of Immigration Act, Chapter 217 of the Laws of Malta, available: https://legislation.mt/eli/cap/217/eng.

137 Based on the experience of the national researcher.

138 Articles 2 (j) and 23 (1) of International Protection Act.

139 Asylum Information Database, Country Report: Malta, 2022 Update, available: https://asylumineurope.org/wp-content/uploads/2023/04/AIDA-MT_2022-Update.pdf.

140 Article 14 (2) of International Protection Act.

141 Immigration Act, Chapter 217 of the Laws of Malta, page 18, available: https://legislation.mt/eli/cap/217/eng.

142 Id-Dritt Edition XXXIII, The Immigration Appeals Board: a compromised body and its unchecked practice, Mireille Boffa and Alexis Galand, page 328, 2023., available: https://aditus.org.mt/why-do-we-have-big-issues-with-maltas-immigrationappeals-board/.

143 International Protection Act, Chapter 420 of the Laws of Malta, page 8, available: https://legislation.mt/eli/cap/420/eng.

The lack of access to any information substantiating the unreasoned decision by any parties involved makes the **Portuguese** process quite similar to the Maltese. In Portugal**,** administrative decisions shall be factually and legally motivated in principle,[144] but the case law and related legislation is extremely limited to be conclusive as to whether this general rule prevails in case of national security or public order considerations and specifically in immigration-related cases. From the only case that has been made available for the purpose of this study, it seems that no reasons at all are provided if national security considerations are invoked. In that one case concerning refusal of an asylum claim, the application was rejected for the applicant posing a national security threat, but apart from this reference, the decision did not state anything.[145] It seems that the immigration authority based its decision on classified data undisclosed to them. In this case, however, none of the actors had access to classified data, not even the judge, but as noted by the author of national research, none of these actors had requested it from the competent authority.

2.1.3 Reasons sufficient to launch a review procedure: Ireland

There will be only one country discussed under this heading suggesting the application of a specific test concerning the content of administrative decisions: Ireland. The reason for that is that from the extremely limited case law and the absence of detailed national legislation on the issue of what decisions contain if there is a classified data-based national security/public order reference in immigration related cases, it seems that in Ireland, courts are satisfied with the decision's national legal compliance if the applicant is equipped to launch an appeal/review procedure as per the reasons provided by the administrative decision. Case law, however, does not suggest that this threshold would reach the standards posed by the concept of the essence of the grounds.

Irish national law does not expressly set out the conditions when an administrative authority may refrain in full or in part from providing reasons for the decision. There is a general requirement in Irish administrative law to give reasons for decisions. This general principle has been developed in a long line of jurisprudence of the Irish courts, in particular the case of *Mallak v Minister for Justice*.[146] In practice, some applications may have been refused without any information being provided to the applicant or their lawyer. In terms of access to classified data, in the past, where decisions were based on national security grounds, very limited or no information has been provided to applicants. There is very limited published information regarding the extent to which issues relating to national security and public policy arise in the context of international protection or other immigration cases in Ireland, although national security/public policy grounds as a basis of refusal are referred to in national immigration and asylum law.[147]

In the *Mallak case* (a naturalisation case, where the refusing decision had no reasons at all) it was established by the Supreme Court that reasons should be provided to the extent enabling the applicant to decide whether there are grounds to seek judicial remedy and also the court to carry out an effective review. The Court clarified the extent to which decision makers are obliged to disclose the reasons which support a decision, namely "it is not possible for the applicant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, it is not possible for the courts effectively to exercise their power of judicial review".[148]Although the applicant referred to Article 41 (2) c.) of the Charter (obligation of the administration to give reasons for its decisions, which, however, is only to be applied by EU institutions and not by the member states), the Court did not think it was necessary to rule on that, as case law either way suggests that giving no reasons at all indicates quashing the decision. [149]

144 Article 153 of Administrative Procedure Code.

145 Tribunal Central Administrativo Sul, Judgment of 26/11/2020, Proc. 1448/19.2 BELSB.

146 Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 29., available: https://bit.ly/3SPWqch.

147 Visas (section 17, Immigration Act 2004), entry to the state (section 4, Immigration Act, 2003), removal from the state (Immigration Act 2003) and deportation from the state (section 3, Immigration Act 1999) refers to the power of the Minister to refuse entry on grounds of national security/public policy and/or the obligation of the Minister to have regard to matters relating to national security/public policy when considering an application. Based on Section 43(9) of International Protection Act 2015 (as amended), the competent Minister may refuse to give a refugee declaration to an applicant who is a refugee where there are reasonable grounds for regarding them as a danger to the security of the State. Similarly, the Minister is empowered to revoke refugee status when satisfied that there are reasonable grounds for regarding the refugee as a danger to the security of the State or constitutes a danger to the community of the State.

148 Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 29 at paragraph 65, available: https://bit.ly/3SPWqch.

149 Ibid, paragraph 78.

A similar approach is applied in the case of *Wen Wei*[150] (refusal of entry of a foreigner on public policy ground), based on which it seems that even if the gist of reasons is omitted in the written decision, if the applicant is equipped to launch an appeal/review procedure as per the reasons provided, the court is satisfied with the decision's legal compliance. In the case at issue, the foreigner was only provided with a written notice stating that the non-national's entry into or presence in the State could pose a threat to national security or be contrary to public policy, but the grounds of that reasoning was not provided. The foreigner was, however, verbally told that the reason for refusal was the COVID pandemic. The High Court found that an obligation to give reasons for the decision to refuse permission to land, the purpose of which is to provide an affected individual with such information as is necessary to enable the foreigners to consider whether they have a reasonable chance to judicially review a decision. It was determined in the case that on the facts the applicant was fully equipped to launch court proceedings seeking. Lastly, the case of AP v Ministry of Justice (naturalisation rejection without reasons given) is to be mentioned. [151] In *AP* it was held by the Supreme Court that there is a duty on public law decision-makers to justify a decision not to disclose detailed reasons. However, the court also stated that the ultimate decision in Ireland on whether legitimate state interests outweigh the requirement to produce documents in the context of court proceedings is one which must be made by a court rather than by the state authority itself and that, if necessary, the court may itself examine the documents to enable it to make an assessment. This is a worrisome conclusion as it suggests that the authority may take an unreasoned decision without striking a balance between the rights of individuals and interest of state, and ultimately, it is only in the judicial phase where the balancing of interests is carried out by a more thorough assessment by the judge.

2.2 Approximating to European standards: national frameworks providing for the 'essence of the grounds'

Under the coming sections those national practices and legislations are grouped and overviewed within which the administrative decisions, issued in immigration-related procedures, comply, at least to a certain extent or concerning specific procedures, with the requirements posed by the concept of the essence of the grounds. The study has found that 6 of the 25 countries researched do comply with the required standards of decisions to some extent. It is important to stress that only to a certain extent, as these countries either do not apply the doctrine in all their immigration proceedings, or apply it in practice but not as a matter of law, or vice versa. The countries – where the application of doctrine is inconsistent in elements of either law or practice of differing importance – are Belgium, Cyprus, Czechia, Luxembourg, Romania and Sweden.

2.2.1 Uneven adaptation of the 'essence of the grounds' concept: Cyprus, Czechia and Romania

The system in **Cyprus** is not very articulated in terms of positive law as there is no detailed regulation governing access to classified data. Existing rules have been shaped primarily by the case law and as such, the case law has defined the required content of administrative decisions. As for immigration cases, the data that is disclosed to the party in the decision (or otherwise) seems quite accidental as the executive's 'margin of appreciation' is really broad. In any case, the immigration authority has access to classified data. Decisions sometimes only state the relevant legal grounds, although case law requires the decision to contain both the factual and legal reasons.[152] The deficiency presents itself in the jurisprudence of the Administrative Court (AC) conducting judicial review procedures in immigration matters (e.g. residence permit, visa). The grounds of national security considerations are not investigated by the the AC, it only reviews whether the relevant national security/public order considerations do exist[153] and accordingly, it regards the information provided by the state as a sufficient legal basis for national security assertions.[154] The Court does not examine whether

150 Wen Wei v Minister for Justice [2021] IEHC 227, which judgment was delivered in conjunction with another case Ting v. Minister for Justice and The Commissioner of An Garda Síochána (Unreported, High Court, Burns J., 23 March 2021.).
151 AP v Minister for Justice [2019] IESC 47., available: https://bit.ly/48sBfTj.
152 Mustafa El Hussein v. Republic of Cyprus, Civil Appeal No. 15/22, 17/11/2022, ECLI:CY:AD:2022:D443.
153 Anghel Viorel v. Republic of Cyprus, ECLI:CY:AD:2014:D338, Case No. 1064/2012, No. 20.5.2014.
154 Krisztian Befeki v. Republic, Case No. 293/2012, 7.3.2012.

the authority struck a fair balance between the individuals' rights and state interest. Even general indications may justify a negative national security based decision, and any doubt is in the authorities' favour, with reference to the state's sovereign right to control who moves and resides on its territory.[155]

In asylum cases, however, a more stringent approach prevails, drawing on the standards of European law.[156] Accordingly, in administrative decision's full factual and legal justification is to be given. This is because the Administrative Court of International Protection (ACIP), dealing with the mentioned asylum matters (asylum applications, family unity and asylum detention cases), requires a more pronounced factual and legal basis of national security accusations for the decision to be upheld. The Court has to do its own balancing exercise in the conflicting interests, the authorities have to present all the relevant facts and information relating to the foreign national, and the court can request any additional information.[157] ACIP may annul the decisions if insufficient factual and legal justifications are given in the decisions by the authorities.

In **Czechia**, the administrative decisions shall contain factual reasons and their legal interpretation in principle,[158] but in some immigration-related procedures the rule shall not apply. First, the Residence of Foreigners Act contains special provisions to the general rule, providing that only a reference to the decision documents and their classification level shall be included in the justification of the decision, if the decision is based on classified information. Reasoning may be provided in this case to the extent that it is not classified.[159] Although omitting reasoning shall be justified, this is normally done by referencing the existence of classified information. The Asylum Act furthermore provides that the Residence of Foreigners Act is to be applied when it comes to to the termination of residence and departure of a foreign national from the territory of Czechia,[160] which practically means cases when international protection is being withdrawn and an expulsion order might be issued. The Residence of Foreigners Act furthermore specifies that in visa cases, should the applicant be regarded as a threat to national security, the decision shall only state that the reason for not granting the visa is the fact that the applicant is a threat to national security.[161] The immigration authority issuing the decision has access to classified information asserting security considerations to the extent it was provided by the Police of Czechia or intelligence services.[162]

In relation to the restrictive provisions of the Residence of Foreigners Act in line with required European standards, the Czech Supreme Administrative Court clarified in 2022 that the substance of the reasons must in any case be provided. The judgment specifically stated that „*[a]n administrative body, even if its decision is based on classified information, cannot resign on giving reasons on the grounds that everything is ‚hidden' in classified documents. On the contrary, even in relation to classified information, the administrative body must at least state the considerations which guided its final assessment and decision. Likewise, the administrative body has to set out the reasons for the decision, even if only in the scope that they are not classified information (...) In this context, the administrative body should also explicitly state in its justification the „substance of the reasons" on which it based its decision, or the facts that generally result from the classified information. Only in this way can the administrative body maintain the minimum requirements of adversarial procedure, as was ruled by the CJEU in reference to Article 47 of the EU Charter*."[163] The judgment still loses some of its progressivity as it does not apply to the special provision in Section 169(3) of the Residence of Foreigners Act, which, as explained earlier, establishes that in the visa cases of applicants regarded as nationals security threats, no reasons shall

155 Eddine v. Republic (2008) 3 A.A.D. 95, Moyo v. Republic (1988) 3 C.L.R. 1203, Ananda Marga Ltd v. Republic (1985) 3 C.L.R. 2583)" Svetoslav Stoyanov v. Republic, Re. No. 718/2012, 26.2.2014.

156 Security Classified Information Order of 2013# issued under the Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2002 (Law 216(I)/2002)# which were replaced by the Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2021 (Law 84(I)/2021).

157 M Y A L v. Republic of Cyprus, Recourse No ΔΔΠ 1/2019, 16.7.2019, available: https://bit.ly/3wsfGFk , M I v. Republic of Cyprus, Recourse No ΔΔΠ 209/2019, 13.11.2019, Available: https://bit.ly/42WBdCe .

158 § 68 of Act No. 500/2004 Coll., Administrative Procedure Code (hereinafter ‚Administrative Procedure Code').

159 Section 169 (2) of the Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic (hereinafter ‚Residence of foreigners Act').

160 Section 85 of the 325/1999 Coll on the Act of Asylum of 11 November 1999 (Asylum Act).

161 Section 169(3) of The Residence of Foreigners Act.

162 Section 17(3) of the Administrative Code.

163 Judgment of the Czech Supreme Administrative Court of 7 February 2022, n. 10 Azs 438/2021-47, paragraph 49.

be given. This judgment can therefore be regarded as one step forward and one step back, as it seems that all classified data-based immigration-related decisions shall live up to the standards of European law, except decisions reached in visa cases of applicants deemed to be dangerous for state security.

In **Romania,** the application of the concept of the essence of the grounds/substance of reasons in the decisions varies from one immigration-related procedure to another: while in most procedures it is not used, in expulsion procedures, even if the foreigner was deemed to be a national security threat, it is applied. In asylum cases the authority IGI-DAI (General Inspectorate of Immigration- Asylum and Integration Directorate) has an obligation to reason negative decisions, but reference to national security threat suffices according to practice.[164] Only the fact that the intelligence service deemed the person to be a national security threat is mentioned. The Aliens Act also requires decisions to be properly motivated. In practice, however, this does not happen. The Aliens Act provides one exception from obligation of reasoning, namely when a foreigner is declared 'undesirable' by the court of appeal based on a referral made by the prosecutor's office.[165] This does not, however, appear in either the administrative or in the judicial decision. Case law shows that in long-term residence permit cases facts are not referred to either, only shortly, stating the main reason (e.g. supporting commission of terrorist acts) and the legal ground. [166] The immigration authority has access to underlying classified data on which it bases the decision to the extent it is needed for the performance of its duties, but only those IGI-DAI officers may look into the classified data who has security clearance.[167] Since 2018, in expulsion cases initiated for national security reasons, along with the subpoena to the court, the person receives information of the factual elements underlying the expulsion. This is prepared by the prosecutor's office, based on Romanian Intelligence Service's (SRI) classified information. After reviewing the legality and merits of the data and information sent by the SRI, a prosecutor of the prosecutor's office at the Bucharest Court of Appeal (P-CAB) drafts a summary supporting the proposal made by the SRI, which includes all the factual elements retained by the SRI at the expense of the foreign citizen and which are also mentioned in the unclassified letter accompanying the notification. The referral from the P-CAB prosecutor and the classified document issued by the SRI are sent to the Court of Appeal Bucharest (CAB), which then proceeds by summoning the foreign citizen. The officers of the IGI present the foreign citizen with the summons issued by the CAB, as well as the referral drawn up by the P-CAB, which contains factual elements relating to the involvement of the applicant in activities contrary to national security.[168] The IGI-DAI states that it has no competencies in declaring a person a threat to national security and as a consequence, they do not assess again what the SRI has already established.[169] Jurisprudence suggests that judges consider classified documents having the same probative force as other non-secret evidence, which is another reason why decisions are frequently based on classified data not disclosed to the party.[170]

2.2.2 Ambiguous application of the essence of the grounds concept: Luxembourg and Sweden

It is difficult to be conclusive about the regulation in **Luxembourg**, as the researchers identified no case law on the issue of accessing classified information in the realm of asylum or immigration law before the Luxembourgish administrative courts. Moreover, the issue is quite underregulated by the law too. There are no procedural details with regard to access rights. Nonetheless, for the sake of completeness of this study, some findings are to be highlighted. It seems that an obligation to provide sufficient factual reasons are laid out by law, but not followed in practice. The reasoning of decisions in immigration matters, if state security and public order grounds are referred to, are quite vague and poorly reasoned, although there is an obligation by law to provide precise reasons. In case of state security considerations, this obligation however, may not be fulfilled. As in most countries, administrative decisions in general shall be based on factual and legal grounds which are legally admissible and shall formally indicate at least the brief stating of the

164 Information provided by IGI-DAI, 12 May 2023.
165 Article 86, paragraph 5 of Aliens Act (Government Emergency Ordinance 194/2002).
166 E.g. Decision 612/2021 of 16 April 2021 Court of Appeal Bucharest, Decision 75/2021 of 27 January 2021 Court of Appeal Bucharest.
167 Article 33 of Decision 585/2002 for the approval of the Standards national protection of classified information in Romania.
168 Action Report (02/11/2022) Communication from Romania concerning the cases of Hassine v. Romania (Application No. 36328/13), available: https://bit.ly/42SuvwN]} Abu Garbieh v. Romania (Application No. 60975/13), available: https://bit.ly/3wC7JNC]} Muhammad and Muhammad v. Romania (Application No. 80982/12), available: https://bit.ly/49tCFhR]}.
169 Information provided by IGI-DAI, 12 May 2023.
170 Decision 167/2022 of 4 February 2022.

legal base and its factual circumstances.[171] The Law on the free movement of persons and immigration expressly states that in the event of a return decision based on a finding of illegal residence, in particular on the grounds of a threat to public order or security or in the event of a decision to refuse a residence permit to a third-country national or refusal or withdrawal to renew his or her residence permit, „*the precise and complete grounds of public order, public security (...)*" which are the basis for such a decision, „*shall be brought to the attention of the person concerned, unless this is precluded by reasons relating to State security*".[172] In practice, however, return decisions are not sufficiently reasoned, not even stating the brief circumstances of why, for instance, the applicant was deemed to be a threat to public order or why there is a SIS alert registered. Even if a deportation order is instantly executed, it may happen that no reasons are given.[173] In a case brought before the administrative tribunal, the court recalled the provisions of the Law of the free movement of persons and immigration.[174] It stated that although a return decision taken on grounds of threat to national security and/or public order entails a precise motivation from the administration, such a decision is "*sufficiently motivated in law*"[175] when it is based on articles 100 and 109 to 115 of the said law and when the person has neither an authorisation to stay or to work, and when the foreigner is entered in the SIS database. In the concrete case, the court did not look into the reasons as to why an entry into the SIS database by Switzerland was done, which might justify that he was a danger to public order in Luxembourg.

In **Sweden,** both legislation and practice are too inconsistent and ambiguous to allow this study to be conclusive with regard to the application of the essence of the grounds concept. Administrative decisions may, in principle, fully or partially omit decisive legal and factual reasons if it is necessary for national security considerations.[176] At the request of the individual, however, reasons may be provided to the extent necessary for exercising rights.[177] In residence permit and international protection cases, concerning those applicants who are suspected to have been involved in terrorism related activities, decisions may omit reasons if national security grounds are invoked.[178] When the foreign applicant is not involved in such activity, decisions must be reasoned, although legislation is not clear whether reasons may or may not be omitted with reference to national security. This because the Aliens Act provides for the obligation to reason decisions without exemptions,[179] but it is ambiguous whether or not the law departs from the general rules of administrative procedure. In practice, decisions contain some reasons, as well as information from the Security Police, which is disclosed to the applicant, but information classified under the Secrecy Act[180] cannot appear in the decision. The Secrecy Act, quite regardless of other relevant legislation based on which decisions are to be motivated, contains numerous detailed provisions prohibiting public officials from disclosing information which is deemed to be secret under the terms of the Act. This law does not in and of itself prevent an individual or a public authority that is a party to a case ongoing before a court or other public authority and who, due to their status as party, has a right to disclosure, from receiving a document or other material that is already in the case. However, it also sets forth that such document or material is prohibited from being disclosed to the party to the extent that, having regard to public or individual interest, it is of extraordinary importance and thus requires the authority to give the party information by other means, for example, orally, during an interview, but only general information, without revealing factual circumstances.[181] In this latter case, the information given will be very general, and not include factual circumstances for the reasons of national security assertions having been invoked.

171 Article 6 of the Grand-Ducal Regulation of 8 June 1979 on the procedure to be followed by the administrations of the State and the communes/Règlement grand-ducal d'application du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes.

172 Article 109 of Law of 29 August 2008 on the free movement of persons and immigration /Loi du 29 août 2008 1) portant sur la libre circulation des personnes et l'immigration; 2) modifiant – la loi modifiée du 5 mai 2006 relative au droit d'asile et à des formes complémentaires de protection,– la loi modifiée du 29 avril 1999 portant création d'un droit à un revenu minimum garanti, – le Code du travail, – le Code pénal; 3) abrogeant – la loi modifiée du 28 mars 1972 concernant 1. l'entrée et le séjour des étrangers; 2. le contrôle médical des étrangers; 3. l'emploi de la main-d'œuvre étrangère, – la loi du 26 juin 1953 portant fixation des taxes à percevoir en matière de cartes d'identité pour étrangers, – la loi du 28 octobre 1920 destinée à endiguer l'affluence exagérée d'étrangers sur le territoire du Grand-Duché.

173 E.g. Trib. Adm., 13 juillet 2022, n°47541 du rôle, page 9.

174 Trib. adm., 13 octobre 2022, n°45642 du rôle, page 5.

175 Ibid. The original version in French being: „*motivé à suffisance de droit*".

176 Section 32 (1)-(2) of Public Administration Act (2017:900).

177 ibid. subsection (3).

178 Chapter 6, Section 10 of the Act on Special Controls of Certain Aliens (2022:700) and Section 32 of Public Administration Act (2017:900).

179 Chapter 13, Section 10 of Aliens Act (2005:716).

180 Public Access to Information and Secrecy Act (2009:400).

181 Chapter 10, Section 3 of Secrecy Act.

2.2.3 Restrictive law, compliant jurisprudence: Belgium

The Belgian jurisprudence also follows a legally compliant approach. The law states that administrative decisions are legally justified and factually motivated, and decisions must indicate the elements on which they are based,[182] except for reasons relating to State security,[183] or because the decision may be prejudicial to the external security of the State or to public order.[184] Nonetheless, the administrative file normally contains the intelligence services notes on which the decision is based. The reports and facts on which these notes are based are, of course, not communicated.[185] This practice follows from the approach taken by Council for Alien Law Litigation (CALL), which sanctioned the fact that no precise and concrete elements were revealed in the decision or in the administrative file. It considered that a balance must be found between the security concerns and the procedure respecting the rights to defence, while allowing the Council to exercise its control of legality.[186] If some elements are not communicated to the parties, justification is to be given.[187] In one of its decisions the CALL also sanctioned the fact that the decision did not indicate the reasons regarding national security[188]. The Belgian Constitutional Court has also emphasised the significance of considering proven and objective facts, and ruled that the authority must carry out "*an individual examination and to give reasons for its decision with reference to concrete, relevant and proven acts committed by the person concerned.*"[189] While this practice is in line with the European standards, national researchers found that the applicants' defence rights might be still impaired by the fact that decisions are frequently not communicated within the deadline to appeal them. The CALL found, however, that the failure to provide the applicant with the administrative file, which contains the elements on which the contested decision is based, before the expiration of the time limit for appeal, does not entail a violation of the rights of the defence, as the applicant can access the administrative file at the CALL registry after submitting their application.[190]

2.3 Consequent application of the essence of the grounds: the Netherlands, Austria, Estonia, France, Germany, Spain, Slovenia

Only seven of the 25 countries were identified, in which classified data-based administrative decisions reached in asylum or immigration procedures, typically fully complied with the standard of the 'essence of grounds'. These are: Austria, Estonia, Germany, France, the Netherlands, Spain and Slovenia. In these countries decisions are taken on grounds which are known to the applicant or if it is not known, then it is not or may be not known by the court adjudicating the case either.

2.3.1 Law and practice harmonised: challenged decision relies on data by the consent of the party: the Netherlands

A quite unique, single-country practice is discussed under this heading: the regulation of **the Netherlands**. The content of the administrative decision and the issue of access to classified information based on which the decision is grounded are closely linked in this system, hence the issue of access will also be briefly addressed herein. First, it shall be noted that in administrative decisions solid legal and factual reasoning is to be provided, even if the decision is based on national

182 Article 62 of the law of 15 December 1980 on foreigners - Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, M.B., 31 décembre 1980 and Articles 1 and 4 of the law of 29 July 1991 on the formal motivation of administrative acts -Loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs, M.B., 12 septembre 1991.

183 Article 62 of the Law on Foreigners.

184 Article 4 of the Law of 1991.

185 Article 3 of the Law of 11 December 1998 on classification and security clearances, certificates and notices, Loi du 11 décembre 1998 relative à la classification et aux habilitations, attestations et avis de sécurité, M.B., 7 mai 1999.

186 C.A.L.L., 16/12/2021 nr. 265 593, available: https://www.rvv-cce.be/sites/default/files/arr/a265593.an_.pdf and 04/10/2018 nr. 210 556.

187 C.A.L.L., 25 September 2020, nr. 241 399.

188 C.A.L.L., 4 October 2018, nr. 210 556, available: https://www.rvv-cce.be/sites/default/files/arr/a210556.an_.pdf and 25 September 2020, nr. 241 399, available: https://www.rvv-cce.be/sites/default/files/arr/a241399.an_.pdf.

189 Ruling n°112/2019 on 18 July 2019, available: https://www.const-court.be/public/f/2019/2019-112f.pdf.

190 ibid., see also CALL, 16 November 2018, nr. 212 381, available: https://www.rvv-cce.be/sites/default/files/arr/a212381.an_.pdf .

security or public order grounds.[191] A potential lack of sufficient legal and factual reasoning is one of the main grounds on which administrative courts uphold appeals of foreign nationals against decisions taken by the Dutch immigration authority: the Deputy Minister for Justice and Security (staatssecretaris van Justitie & Veiligheid) (hereafter: Deputy Minister), who is usually represented by the Immigration and Naturalisation Service (Immigratie- en Naturalisatiedienst or IND). An exception to this general rule may occur when the state (which may not always be the immigration authority, but the secret service, for instance) has submitted classified information to the court and requested the court not to share this information with the foreign national or his lawyer (secrecy request). The secrecy request is decided by the Secrecy Chamber within the regional court or within the Administrative Jurisdiction Division of the Council of State (hereinafter: 'Division', the highest administrative court in the Netherlands), consisting of different judges than the court chamber deciding on the administrative claim. If the Secrecy Chamber grants this request (this procedure is explained later in the next chapter) and the foreigner may not see the data, the foreign national can refuse the court to use the classified information in its assessment of the decision.[192] If, however, the foreign national does not consent to the fact that the court may use the data undisclosed before the foreigner, the lack of a reasoning in the decision is attributed to the foreigner and his/her appeal is unlikely to be upheld.[193] The Division noted in a case that if the Secrecy Chamber grants the request, the decision must still contain the essence of the grounds.[194] If the court obtains access to the classified documents and on their basis concludes that the essence of the grounds is contained by the decision, the Division finds it compliant with the requirements of Article 47 of the Charter.[195]

2.3.2 Law and practice harmonised: decision relies on facts known to the party: Austria, Estonia, France, Germany, Spain

In **Austria**, every administrative decision ("Bescheid") must state the reasons it is based on, including the results of the investigation, considerations of evidence and legal assessment.[196] Generally, parts of files can be excluded from inspection by the parties in the administrative procedure, if it would cause damage to the legitimate interests of a party or third persons, jeopardise the tasks of the authority, or impair the purpose of the proceedings.[197] In the latter case, the decision must still be substantiated to ensure a fair trial.[198] Decisions are thus exclusively based on evidence that was not excluded from the file or an abstract description of the file is given, so the parties may exercise their defence rights. The withheld information is to be limited to the extent absolutely necessary.[199] In any case, blanket reference to unspecified safety concerns is not sufficient and the grounds for the decision to restrict the access must be substantiated.[200]

In **Estonia,** law and practice concerning the content of decisions, similarly to Austria, also follows a simple and expedient approach: decisions are to be based on facts which are known to the party. If an administrative decision is based on

191 Article 3:46 of the General Administrative Law Act (in Dutch: *Algemene wet bestuursrecht*, hereafter: 'Awb').

192 Article 8:29(5) of Awb.

193 Administrative Jurisdiction Division of the Council of State, 4 September 2002, ECLI:NL:RVS:2022:AE7215, available:https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2002:AE7215., L.M. Koenraad and G. Lodder, Annotation to CJEU judgment C-159/21, 22 September 2022, (GM), published in Jurisprudentie Vreemdelingenrecht JV 2023/18.

194 ECLI:NL:RVS:2022:1267, paragraph 9.4.

195 ibid.

196 General Administrative Procedure Act 1991 (AVG) Federal Law Gazette No. 51/1991 as amended by Federal Law Gazette I No. 58/2018, § 60.

197 § 17 (3) AVG; Ro 2019/04/0021; VwGH, 22.7.2020, RA 2019/03/0163, ECLI:AT:VWGH:2020:RA2019030163.L07, available: https://bit.ly/3wk8V8d

198 § 45 (3) AVG; VwGH 05.04.2023, Ra 2021/19/0294, available: https://bit.ly/431J5T3 ECLI:AT:VWGH:2023:RA2021190294.L02. The case concerned the application for international protection by a stateless woman. The immigration authority found that she was Armenian and rejected her application on the basis of a speech analysis that was not fully disclosed to her. See further VwGH 25.9.2014, 2011/07/0006, ECLI:AT:VWGH:2014:2011070006.X02, available: https://bit.ly/4bN9RCl.

199 VwGH 22.7.2020, Ra 2019/03/0163, ECLI:AT:VWGH:2020:RO2019040021.J22 with reference to VfGH 10.10.2019, E 1025/2018, available: https://bit.ly/49FBVWr.

200 VwGH 25.09.2019, Ra 2019/19/0380, ECLI:AT:VWGH:2019:RA2019190380.L06., available: https://bit.ly/48ohc8F The case concerned a citizen of Afghanistan who applied for a visa for the purpose of family reunification at the Austrian embassy in Islamabad. The Austrian immigration authority requested an expert opinion stating the age of the applicant. In the appeals procedure, the Federal Administrative Court (BVwG) concluded that the finding of the expert opinion was not logically comprehensible and that its conclusiveness could not be checked. However, it later relied on this very expert opinion, which was not part of the file anymore, to confirm the second decision of the immigration authority rejecting the application.

national security or public order grounds, it should always contain legal and factual reasons. While making a decision, the administrative body should take all personal circumstances into account and prove that a real and sufficiently serious threat to public order or security exists.[201] The Supreme Court affirmed that the administrative body and administrative courts should avoid relying on classified evidence as much as possible, they should rather gather the same information from other public sources, and the party to the proceedings should know the main circumstances that are the basis of the decision made about them.[202]

The **French** system as a whole is straightforward, transparent and is in line with European standards and accordingly, there is also an obligation to reason all administrative decisions, even if they are based on national security or public order grounds.[203] The standard for sufficient motivation is whether or not it enables the party to contest the allegations and whether, based on the information provided, a contradictory debate can be conducted. It shall be noted, however, that underlying evidence may be quite vague ("notes blanches", i.e. anonymous police notes).[204] Decisions of these kinds of underlying data risk, nonetheless, that in case they are challenged, the court may rule that there is not enough evidence supporting the public order / national security threat claim.

Sufficient reasons known to the parties to the extent which facilitates an adversarial procedure are also to be provided in the **German** model. Administrative decisions that interfere with individual rights must be sufficiently specific in terms of content.[205] The justification must communicate the essential factual and legal aspects on which an authority bases its decision. If an administrative decision based on reasons of national security or public order interferes with individual rights, it must be justified.[206] The statement of reasons must state the essential factual and legal reasons that were decisive. A statement of reasons is not required, among other things, if this results from a legal provision,[207] such an exception is when the statement of reasons may not disclose any facts which are to be kept secret or treated confidentially. If reasons are not given, this „waiver due to protection of secrets" must always be justified. The authority must point out the need for secrecy and explain the reasons for its decision in such a way that the parties involved can still recognise them as sufficient. The person concerned, his or her legal representatives, and the court must at least be allowed to check as to why the information was withheld. In court practice, if information requires secrecy (e.g. intelligence findings), a „witness" is usually offered for questioning in court by the authority that issued the administrative act. A German court may only base its judgment on facts and evidence on which the parties involved were able to comment.[208]

It may be argued that in **Spain,** regardless of the minor inconsistencies of the practice, the concept of essence of the grounds prevails in immigration-related, classified data-based decisions. The administration is under the general obligation to provide legal and factual grounds for their decisions,[209] at least succinctly, even if the legal basis refers to national security or public order grounds. Nevertheless, it might happen in practice that the administrative file only contains a brief statement from the Spanish security body (Centro Nacional de Inteligencia) on the fact that the foreigner stay might give rise to national security considerations, without providing any factual grounds.[210] Supreme Court and Constitutional Court case law have remarked that the obligation on the administration to provide the legal and factual grounds in their decisions stems from the right to an effective judicial remedy and the prohibition of legal

201 Supreme Court, Legan information and training department, Supreme Court practice in administrative cases May–August 2019, Overview of current practice, page 5, available: https://bit.ly/42UpOmj .

202 Supreme Court 01.10.2018 decision in administrative case nr. 3-17-1026, page 39., available: https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=234822439.

203 Article L.211-2 Public-Administration Relations Code, "Legal persons have the right to be informed without delay of the reasons for individual adverse administrative decisions affecting them", *CE, 24 july 1981, Belasri* "The reproduction of a stereotyped formula does not satisfy the obligation to state reasons."

204 CE Section 11 December 2015, n° 394989.

205 Section 37 (1) of VwVfG.

206 Section 39 (1) of VwVfG.

207 Section 39 (2) No. 4 of VwVfG.

208 Article 103 of Basic Law, Section 108 (2) of VwGO.

209 Article 35 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.

210 E.g. Judgment of the National High Court of 5 October 2019, ECLI: ES:AN:2019:3945.

defencelessness embodied in the Constitution.[211] Besides, motivation of decisions in administrative immigration procedures is explicitly envisaged by the Organic Law 4/2000 regarding the rights and freedoms of foreign nationals living in Spain and their social integration ('Immigration Law'). In cases of expulsion of foreigners, the Constitutional Court has notably and repeatedly stated that the Administration is not only under a legal obligation to motivate their decisions but a constitutional obligation (for rights to effective judicial remedy and prohibition of legal defencelessness) too, and that such motivation should include factual and legal grounds.[212] While naturalisation cases are out of the scope of this study, it is still worth noting that the Supreme Court held in such a case that the administration, while respecting the duties of confidentiality and secrecy, must provide at least a minimum amount of information on the reasons for the administrative decision, allowing the appellant to articulate his/her defence, referring to the constitutional right of adequate legal protection.

2.3.3 Full transparency: Slovenia

A separate category had to be created for Slovenia, as it is the only EU country under this research, where all actors involved in the procedure have access to the classified data on which the administrative decision is based. The Slovenian General Administrative Procedure Act states that a party to the procedure has the right to inspect documents that contain classified information, if they were used in the procedure and are a part of the grounds of the decision.[213] The party, however, is not allowed to make copies or notes of the decision.[214] The Asylum authority ignored this obligation in the one and only case that could be traced for the purpose of this study. The decision on exclusion from subsidiary protection based on suspicion of commission of the acts contrary to the UN principles was based on classified data (classified by the Slovene Intelligence and Security Agency - SOVA) and the Asylum authority refused to disclose the factual reasons for exclusion that were classified, claiming that it would breach the Classified Information Act, as SOVA did not want to lift the classification. The case reached the Supreme Court twice,[215] which ruled that the Administrative Procedure Act had to be used, which does not allow the omission of informing the client of classified information on which the administrative body's decision is based.[216] The Supreme Court, among others, based its arguments on Art. 23(1) of Asylum Procedures Directive and CJEU's G.M. judgment, emphasising that it is not enough that classified information is accessible to the court, it must also be ensured that the person's right to defence is respected. After the Supreme Court's ruling, the Administrative court had to disclose the classified data to the applicant and his lawyer.[217] During the hearing, the court first made the classified documents available to the parties (the translation was provided), then the judge-reporter read the documents, and the panel of judges heard the applicant about the allegations at the lawyer's request. It is questionable if such disclosure actually fully guarantees the applicant's rights to defence, as if the amount of files is excessive, it is hard to make comments without the possibility to take notes and without prior preparation.

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211 Supreme Court judgments of 30 January 2001, ECLI:ES:TS:2001:523. Constitutional Court judgments, 23 March 2009, ECLI:ES:TC:2009:82; 1 October 1990, ECLI:ES:TC:2009:146; 3 May 1993, ECLI:ES:TC:1993:150; 18 September 2000, ECLI:ES:TC:2000:214; 30 September 2002, ECLI:ES:TC:2002:171; 19 May 2004, ECLI:ES:TC:2004:91; 23 October, ECLI:ES:TC:2006:308; and 26 January ECLI:ES:TC:2009:14; among others. The right to an effective judicial remedy and the prohibition of the legal defencelessness is embodied in article 24.1 of the Spanish Constitution passed by the Cortes Generales on October 31, 1978, which states that: 'Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended'.

212 Judgments of the Constitutional Tribunal of 18 July 2016, ECLI:ES:TC:2016:13; 15 July 2009, ECLI:ES:TC:2009:140.

213 Article 82(5) of the Slovenian General Administrative Procedure Act, available: https://www.aca-europe.eu/seminars/2017_Cracow/Slovenia.pdf.

214 Article 332.č of Civil Procedure Act

215 Supreme Court, X Ips 68/2021, 16.12.2021, available: https://bit.ly/3OZ0HsF.

216 The Supreme Court based its arguments on Article 23(1) of Asylum Procedures Directive and CJEU case law GM, C-159/21, 22.9. 2022, emphasising that it is not enough that classified information is accessible to the court, it must also be ensured that the person's right to defence is respected.

217 During the hearing, the court first made the classified documents available to the parties (the translation was provided), then the judge-reporter read the documents, and the panel of judges heard the applicant about the allegations at the lawyer's request. It is questionable if such disclosure actually fully guarantees the applicant's rights to defence, as, if the amount of files is big, it is hard to make comments without the possibility to take notes and without prior preparation.

2.4 Summary

This chapter, without the aim to reach any final conclusion as to the compliance of the national systems with European standards, has shown which of the researched countries apply the essence of the grounds concept in administrative decisions reached typically in immigration related procedures either in law and/or in practice. The study has found that **the majority, 12 of 25 countries**, do **not** at all **comply with** the required **standards of the content of administrative decisions, six countries apply** the essence of the grounds concept to a **certain extent**, although in an **inconsistent manner,** and **only seven countries comply fully** with that particular requirement of European law. These findings are summarised in Table 1.

Countries in which the **essence of the grounds concept is not applied in the administrative** phase are **Bulgaria, Croatia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portuga**l and **Slovakia**. It shall be nonetheless stressed that the absence of the essence of the grounds in the administrative decision alone does not make the whole system non-compliant with European standards, only if no defence can be put forward in the judicial phase either. Therefore, in **Bulgaria** for instance, **while decisions are non-compliant with the essence of the grounds concept in the administrative phase**, in the **judicial procedure**, where the appellant may be provided with the substance of accusations to the extent it is necessary to exercise defence rights, this **deficiency might be remedied**. As discussed above, certain Slovak and Croatian constitutional court judgments have embraced this approach, but they have triggered no substantive practical change so far.

Non-reasoned administrative decisions asserting national security threats and not revealing the substance of accusations normally **rely on the opinion of specifically named security agencies** in **Bulgaria, Croatia, Finland, Hungary, Latvia, Lithuania, Poland and Slovakia**, while in **Greece, the decision does not even indicate the source of the national security assertion**. The substance of accusations made by these authorities is not revealed in the administrative decisions. This is a significant instance of the procedure because CJEU case law suggests, as explained in the previous chapter, that the authority, while reaching a decision, must be able to carry out the assessment of the relevant facts and circumstances alone and cannot rely solely on the opinion of specialist bodies. In **Bulgaria, Hungary, Slovakia, the proceeding administrative authorities reach decisions without knowing the reasons** as to why they have to decide in a certain way, as they do not receive any justification for the opinion of the security agency/police body, nor may they have access to the classified data. In other countries the **security agency might provide at least some explanation to the immigration authority (Poland)**, or the **authority issuing the decision may have access to the classified data** owned by the security agency (**Croatia, Finland, Latvia, Lithuania**).

The **Maltese and Portuguese system** has been discussed under separate sections for having established a framework in which **none of the relevant actors know the underlying classified reasons indicating security consideration**, but the mechanism based on which administrative decisions grounded on national security assertions are made in immigration-related procedures are quite similar to the previously mentioned countries. **Ireland** has also been discussed separately, as from the limited and not explicitly relevant case law it seemed that while the application of the essence of the grounds concept is absent in the administrative phase, the **judiciary established its own standard** regarding the content of decisions and **requires the administration to provide just as much information** as is **needed for the applicant to launch an appeal/review procedure** as per the reasons provided by the administrative decision.

In six countries, namely in **Belgium, Cyprus, Czech Republic, Luxembourg, Romania** and **Sweden**, the application of essence of the grounds doctrine is inconsistent in elements of either law or practice. In **Cyprus, the Czech Republic** and **Romania**, there is **no uniform practice** regarding the content of administrative decisions based on classified data in immigration-related procedures. In **some** of these **procedures** (e.g. expulsion), the **inclusion of the substance of the reasons / essence of the grounds** in the decision is **applied to a certain extent**, while in other procedures (e.g. asylum procedure) it is not. In **Luxembourg** it seems that an **obligation to provide sufficient factual reasons are laid out by law**, but **not followed in practice**, while in **Belgium** the opposite can be stated, and while t**he law does not prescribe the obligation** to provide the substance of accusations, the **practice follows** an EU-compliant approach. **Swedish law and practice** may be regarded as **ambiguous**: decisions generally contain some reasons but the information is very general in nature, without including factual circumstances.

Seven countries were found in which the researched administrative decisions **fully comply** with the standard of the 'essence of grounds'. In **Austria, Estonia, Germany, France, the Netherlands, Spain** and **Slovenia**, there is an obligation articulated by law to communicate the gist of reasons based on which the decision is based to the applicant, and this obligation is followed in practice and embraced by the jurisprudence. While in **Austria, Estonia, France, Germany, Spain the decision relies on facts known to the party**, the **Netherlands** follows quite a unique approach and the decision, while it must contain the essence of the grounds, may only be assessed by the **Dutch court using classified data** not revealed to the applicant, **if the applicants consent to tha**t. Only one country follows the approach of **full transparency**, where all data on which the decision is based must be available to all parties: **Slovenia**.

The existence or absence of the application of the essence of the grounds concept in the administrative decision is a significant element of the regulation of respective jurisdictions, as it may define the framework within which the applicant can put forward a defence. It shall be nonetheless stressed that **the absence of the essence of the grounds in the administrative decision alone does not make the whole system non-compliant with EU law, only if defence rights cannot be exercised** in a relevant manner in **the judicial phase** either, for instance, by being provided access to the essence of information on which the contested decision is based in a judicial phase or in a separate procedure established for this specific purpose. These mechanisms will be overviewed in the next chapter.

Table 1. Summary of the application of the essence of the grounds concept in administrative decisions with regard to the compliance of respective Member States

Non-compliance with the 'essence of the grounds'	
Non-reasoned decisions based on the opinion of security agencies	Bulgaria, Croatia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Slovakia
Decisions lacking essence of the grounds, all actors lacking access to data	Malta, Portugal
Special standard: reasons sufficient for review	Ireland
Partial compliance with the 'essence of the grounds'	
Uneven adaption of the essence of the grounds per procedures	Cyprus, Czechia, Romania
Ambiguous and inconsistent application of the essence of the grounds	Luxembourg, Sweden
Applying in practice but not in law	Belgium
Full compliance with the 'essence of the grounds'	
Decision based on data with the party's consent	the Netherlands
Decision based on data known to the parties	Austria, Estonia, France, Germany, Spain
Full transparency: all actors know all classified data on which the decision is based	Slovenia

III. ACCESS TO CLASSIFIED INFORMATION AND RELATING JUDICIAL MECHANISMS

In addition to the content of decisions asserting national or public security allegations, access to classified information based on which the decision is based and related judicial mechanisms are those aspects of national legal frameworks which have to be examined to understand whether or not there is a European standard compliant practice in a given country. The reason for that is, as it has been asserted in Chapter 1, that applicants or their advisers must have access to the information, on which the decision is based and must be able to comment on them, even without obtaining prior authorisation to that end, unless national security reasons do not allow this. In this latter case, at least (access to) the essence of the grounds of the classified data based decision must be given. It has been furthermore argued that national legislation, which provides that only the reviewing court and/or the special adviser has access to the classified information, but this cannot be communicated to the applicant, is not compliant with the jurisprudence of CJEU or ECtHR. The lawfulness of non-disclosure, especially if no essence of the grounds was indicated in the decision, must be reviewable by an independent body, i.e. court, which has to be able to verify the factual allegations. Conclusively, it needs to be seen which of the main actors involved (typically the applicant and their legal representative, decision-making immigration/asylum authority and court) have access to the classified information of which the decision consists and how access restrictions may be legally challenged.

The coming chapter will thus first overview whether the main actors are granted *ex lege* access to classified information. Given the complexity and technicality of access rules of national legislations, this study will present the access rights of respective countries in a table. The chapter will then discuss the judicial mechanisms available in the respective EU countries in the context of non-disclosure of classified data.

3.1 Access to classified information

Table 2 below shows whether the applicant or his/her legal representative, the decision-making authority and the court have automatic/'upon-request' access to the classified information on which the (contested) administrative decision is based, according to the national legislation in the countries surveyed. As shown in the previous chapter, in some countries, the migration/asylum authority makes the decision without knowledge of the classified information underlying the national security claim on which the decision is based, that is why the separate presentation of the authority has been necessary in the table. The information summarised in the table does not allow one to draw any meaningful conclusions for the purposes of this study, however, it is still essential to overview 'access rights' for being able later examine the judicial review of information non-disclosure or national security accusations. Even in the absence of a substantive conclusion, some patterns have emerged:

- **Equal access**, i.e. **the same (non)-access** is given to actors in **France, Germany, Malta, the Netherlands, Portugal** and **Spain**. **Slovenia** and **Latvia**, but only with regards to 'restricted access information'. This practice may be regarded as problematic in Malta and Portugal and in Latvia, as in those countries no essence of the grounds is provided either, while Slovenia is becoming European-standard compliant precisely because all actors have access to all the information;
- Only a few countries – **Estonia, Latvia, Romania, Slovakia** – have institutionalised **access to classified data by lawyers with a specific authorisation**, but it only has practical relevance in Estonia and Romania. In **Greece, Latvia** and **Slovakia**, the **lawyers' right is illusory** as a request is either never granted or does not provide access to meaningful information;
- In **Croatia, Greece, Lithuania** and **Spain**, and as it will be later seen in the judicial phase in **Poland** too, a**ccess may only be obtained if data is declassified**. The review of lawfulness of classification is therefore crucial in these countries.
- **Access may be requested** by the applicant in **Bulgaria, Cyprus, Hungary, Ireland, Luxembourg, Romania** and **Sweden**.
- **Access** to classified data is **not provided** and **may not be requested** by the applicants/lawyers in **Austria, Croatia, Czechia, Finland, Lithuania, Poland** and **Latvia**, with regard to official secrets. This has no negative connotation

in Austria, where the essence of the grounds is provided to the applicant. Also in **Czechia, access** may be granted to **data constituting the establishing facts**, but not to the underlying classified information.

- With very few exceptions, **courts generally have access to evidence**, **classified data and/or related national security documentation**, at least after requesting this from the security body.
- With the exception of **Slovenia and Poland in detention cases, none of the national frameworks provide applicants/their lawyers with access to classified information** underlying the establishing facts of decisions asserting state security allegations.

Table 2. Do actors have (automatic) access to the classified information on which the administrative decision is based?

	Applicant	Lawyer	Authority	Court
Austria (essence of the grounds)	No, but requesting access is possible.[218]		Yes, access upon request [219], may request the exemption of files from the court.[220]	Yes, access upon request.[221]
Belgium (essence of the grounds in practice but not in law)	All parties have access to the same information (access to intelligence service notes in the administrative file).[222]			
Bulgaria (no essence of the grounds)	**Admin phase:** in practice, access is never given, in law, it is possible to request from Agency for National Security Act (SANSA).[223] **Judicial phase:** access to factual grounds, to the extent that ensures their constitutional right to defence, but not to evidence.[224]		Not clear, sometimes access to factual grounds, but not to evidence. [225]	Yes, access to all level of information, in line with the 'need to know' principle (to the extent required by their duties).[226]
Croatia (no essence of the grounds)	No access,[227] unless the data is de-classified upon the suggestion of the court.		Yes, access by request, not known to what extent. [228]	Yes, access to all casefiles of SIA. [229]
Cyprus (essence of the grounds in asylum cases, not in immigration cases)	No, but access may be requested, the court decides.[230] New case law suggests party does not have to have the court's consent.		Yes, full access.	Yes, full access.

218 § 17 (3) of General Administrative Procedure Act 1991 (AVG) Federal Law Gazette No. 51/1991 as amended by Federal Law Gazette I No. 58/2018, § 60., available: https://bit.ly/3T0GjZE and § 21 (2) Federal Act on Administrative Court Proceedings (VwGVG) Federal Law Gazette I No. 33/2013 as amended by Federal Law Gazette I No. 109/2021, § 21 (2)., available: https://bit.ly/3wvIgWb.

219 § 1 (2) of Information Security Act (InfoSiG) Federal Law Gazette I No. 23/2002 as amended by Federal Law Gazette I No. 32/2018., available: https://bit.ly/3OSylk0.

220 § 21 (2) VwGVG., Administrative Court Act 1985 (VwGG) Federal Law Gazette No. 10/1985 as amended by Federal Law Gazette I No. 109/2021, available: https://bit.ly/3UTcegQ , § 25 (2).,Constitutional Court Act 1953 (VfGG) Federal Law Gazette No. 85/1953 as amended by Federal Law Gazette I No. 125/2022, § 20 (4)., available: https://bit.ly/49S8Nvr.

221 § 5 InfoSiG.

222 Several CALL rulings state that the lawyer for the Belgian State expressly confirmed during the hearing that he had no other information than that contained in the administrative file. C.A.L.L. 16 December 2021, nr. 265 592, *idem* and 13 June 2022, nr. 273 962, available: https://www.rvv-cce.be/sites/default/files/arr/a2273962.an_.pdf.

223 Article 36, paragraph 4 of the State Agency for National Security Act.

224 Article 39a of the Classified Information Protection Act (CIPA), Judgment № 1505 of 03.09.2019 in case № 1293/2019 before the Administrative Court-Burgas, XXII panel, available: https://bit.ly/4a6GERt.

225 Judgment № 1505 of 03.09.2019 in case № 1293/2019 before the Administrative Court-Burgas, XXII panel, available: https://bit.ly/4a6GERt .

226 Article 39, paragraph 3, item 3 of the Classified Information Protection Act (CIPA).

227 Article 18 (1) of Data Protection Law, Zakon o tajnosti podataka, OG 79/07, 86/12, in force since 07.08.2007., available: https://www.zakon.hr/z/217/Zakon-o-tajnosti-podataka.

228 Article 20, ibid.

229 ibid.

230 The legal basis for non disclosure is the Security Classified Information Order of 2013# issued under the Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2002 (Law 216(I)/2002)# which were replaced by the Regulations for Security Classified Information.

	Applicant	Lawyer	Authority	Court
Czechia (essence of the grounds in some cases)	No access to classified information, but if they sign confidentiality agreement and only to those parts of classified files which are used as establishing facts.[231]		Yes, access to establishing facts.[232]	Yes, full access.[233]
Estonia (essence of the grounds)	No access in principle,[234] applicants may also be removed from any procedural act if maintaining state secret or foreign intelligence requires this.[235] BUT Yes, if a lawyer with permission got access and permission to share information with the applicant.[236]	Yes, but access only to lawyer with special permission, [237] without permit in a judicial phase: only after undergoing and passing a security check requested by the court. [238] If the check is passed, a court decides if it is 'unavoidably necessary' to get access. [239] Court may deny access before the security check.[240]	In most cases, the decision-maker is the Police and Border Guard Board (PBGB), and they will have access to their own classified data. The Security Police (KAPO) is also a possible carrier of classified information, which may deny access. Generally, PBGB receives a brief explanation from KAPO.	Yes, full access.[241]
France (essence of the grounds)	All parties have access to the same information (i.e. intelligence notes), but the judge may always require additional information & documents from the State. What is disclosed to the judge is disclosed to the parties too.[242]			
Finland (no essence of the grounds)	No.[243]		Yes.[244]	Yes, full access.[245]
Germany (essence of the grounds)	Data classified for official use classification – all actors have the same access.[246]			
	"VS Confidential" or higher classification: no one has access apart from the security agency, except to evidence on which the decision is based provided by the security agency. Immigration authority occasionally has access to classified information, but may restrict parties' access even then. [247] Any actor's request to access may be decided in an in-camera procedure.[248]			

231 Sections 38 (6) and 51 of the Administrative Procedure Code and Section 17(3) of the Administrative Code.
232 Sections 6 and 11 of Act on the Protection of Classified Information.
233 Section 58 of the Act on the Protection of Classified Information.
234 Based on the State Secrets and Classified Information of Foreign State Act (SSCIFSA), available: https://www.riigiteataja.ee/en/eli/518042023010/consolide.
235 § 79 (1) of Code of Administrative Procedures.
236 § 29 (1) of SSCIFSA.
237 § 28 (1)of SSCIFSA.
238 § 29 (4) of SSCIFSA.
239 On unavoidable need see: Tallinn Circuit Court 28.11.2022 decision in administrative case nr. 3-22-1657, paragraph 11, available: https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=327133120. Please also note that according to the national researcher, it is unlikely that a security check would be passed in case of national security considerations.
240 Supreme Court 22.11.2017 decision in administrative case nr. 3-17-911, p 23., available: https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=218030286.
241 § 27 (1) of SSCIFSA.
242 E.g. CE ASS, 11 octobre 1991, 128128, Diouri: *"In return, however, only the information contained in the police files may be considered conclusive, and not the interpretations and extrapolations that the Minister may draw from them in his submissions to the judge."*
243 Section 11(1)(2) of Finland, Act on the Openness of Government Activities (laki viranomaisten toiminnan julkisuudesta / lag om offentlighet i myndigheternas verksamhet; unofficial translation in English), Act No. 621/1999, 1 December 1999., available: https://www.finlex.fi/fi/laki/ajantasa/1999/19990621#L3P11.
244 Section 11(1)(1) of Finland, Act on the Processing of Personal Data in the Field of Immigration Administration (laki henkilötietojen käsittelystä maahanmuuttohallinnossa / lag om behandling av personuppgifter i migrationsförvaltningen), Act No. 615/2020, 1 September 2020.
245 Section 9(3) of Finland, Act on the Publicity of Administrative Court Proceedings (laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa / lag om offentlighet vid rättegång i förvaltningsdomstolar;), Act No. 381/2007, 1 October 2007, see also e.g. KHO:2007:47, 12 July 2007, *Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*, Supreme Administrative Court of Finland, available: https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701829.
246 For the administrative procedure: § 29 Abs. 1 S. 1 VwVfG., for the court's procedure: § 100 Abs. 1 VwGO.
247 § 29 of VwVfG.
248 § 99 (2) of VwGO.

	Applicant	Lawyer	Authority	Court
Greece (no essence of the grounds)	No, unless data are declassified/considered as non-confidential by the Appeals Committee or a Court.[249]		Not clear to which extent administrative Authorities have access to classified data/if they are informed for the essence of the grounds or just that the person is considered to be a threat to public order / national security on classified information. **Appeals Committees (Asylum):** Yes. If needed upon request.[250]	Yes, if needed upon request.[251]
Hungary (no essence of the grounds)	No, requesting is possible from security agencies,[252] but in practice never granted.[253]		No.[254]	Yes.[255]
Ireland (no essence of the grounds)	No, in theory it might be requested [256], but no case law is known where it was granted despite national security considerations		Inconclusive findings.	Yes.[257]
Latvia (no essence of the grounds)	'Restricted access information' [258]: everyone verifying legal interest has access, shall be requested in writing.[259]			
	No access to official secrets.[260]	Yes, access to official secrets, with special permit, but in practice may be restricted.[261]	Yes official secrets, to the extent provided by the VDD.	Yes to official secrets.[262]
Lithuania (no essence of the grounds)	No, unless the data is declassified in the judicial phase by the security agency.		Yes.	Yes.[263]
Luxembourg (limited essence of the grounds)	No, [264] only upon request from the National Security Authority (NSA), [265] But in practice this never happens.		Yes.[266]	Yes.[267]

249 Article 76(4) L. 4939/2022; Decision No. 403061/2022 of the 3rd Appeals Committee; Council of State, Decision No. 4600/2005; Council of State, Decision No. 4600/2005 and Council of State, Decision No. 1116/2009.
250 Article 76(4) L. 4939/2022; Decision No. 14902/2024 of the 12th Appeals Committee.
251 Council of State, Decision No. 4600/2005; Council of State, Decision No. 4600/2005 and Council of State, Decision No. 1116/2009.
252 Section 11 (1) and 11 (3) of the Act CLV of 2009 on the protection of classified data, available: https://net.jogtar.hu/jogszabaly?docid=a0900155.tv.
253 Information received upon Freedom of Information requests from the Constitution Protection Office and Counter-Terrorism Office by the Hungarian Helsinki Committee.
254 Section 13 of Act on the Protection of Classified Data.
255 Section 13(5) ibid.
256 Section 33 (1) (a) of Freedom of Information Act 2014, available: https://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/print.
257 AP v Minister for Justice [2019] IESC 47., available: https://bit.ly/48sBfTj.
258 As regulated by Freedom of Information Law, available: https://likumi.lv/ta/id/50601-informacijas-atklatibas-likums.
259 Section 11, paragraph 4 ibid.
260 As regulated by Law on Official Secrets, available: https://likumi.lv/ta/id/41058-par-valsts-noslepumu.
261 High Court of Latvia, judgment Nr. SA-1/2021 ECLI:LV:AT:2021:0716.SA000121.5.S, available: https://www.at.gov.lv/downloadlawfile/7707.
262 Article 12 of the Law on Official Secrets.
263 Article 15 (6) of Law on the State and Service Secrets of the Republic of Lithuania, 25th of November, 1999, No. VIII-1443 (lastly amended on the 1st of October, 2016, No. 2016-14735) available: VIII-1443 Lietuvos Respublikos valstybės ir tarnybos paslapčių įstatymas (e-tar.lt).
264 Article 1 of Law of 14 September 2018 relative to a transparent and open administration.
265 Article 9 of the law of 15 June 2004.
266 Law of 14 September 2018 relative to a transparent and open administration, article 1, Trib. Adm., 2 September 2020, n°43704, p.14.
267 ibid.

	Applicant	Lawyer	Authority	Court
Malta (no essence of the grounds)	All actors have the same 'non-access' [268]; in practice it seems that judges have access to documentation relative to the national security assessment upon request.			
Netherlands (essence of the grounds)	All actors have the same (non)-access [269], unless a secrecy request is submitted by the authority, which may affect both the applicant and the court [270] (this procedure is explained later in this chapter). If a secrecy request only concerns the applicant but not the court, the applicant may decide if the court may have access. In practice, this frequently results in situations, where the court and the immigration authority have access, but the applicant does not.			
Poland (no essence of the grounds)	No (general admin. cases, e.g. immigration, asylum).[271]		Yes, access to factual basis and evidence, with regard to the 'need to know principle', but not to full documentation leading to the findings on national security.[272]	
	In detention cases of foreigners, yes, access to the extent provided by the criminal court.[273]		Yes.	Yes (criminal court proceeds).
Portugal (no essence of the grounds)	All actors have the same 'non-access'.[274]			
Romania (limited essence of the grounds, in expulsion cases)	No, as applicants in these types of procedures are generally deemed to be incompatible under the rules based on which access may be granted.[275]	Yes, with a special permit, in line with the 'need to know' principle. [276] In expulsion cases the applicant may choose a lawyer with a special permit.[277]	Yes, in line with the 'need to know' principle.[278]	Yes, full access.[279]

268 Freedom of Information Act, Chapter 496 of the Laws of Malta, articles 5(4) (f) and 32(9), available: https://legislation.mt/eli/cap/496/eng, also see See First Hall Civil Court (FHCC), Madiha M.A. Abunada (K.I. 82608A u Refcom No. 23465/18) vs Direttur tad-Dipartiment taċ-Ċittadinanza u ta' l-Expatriates, u Identity Malta, u l-Avukat Ġenerali, (1150/2018 MH), 27 March 2023., available: https://bit.ly/48vu0K j.

269 Article 8:39 Awb.

270 Article 8:29 Awb.

271 The parties' and their lawyers do not have access to classified data qualified as secret or top secret. With reference to important interest of the state, access may also be blocked to data marked as confidential or restricted. (Section 74 (1) Code of Administrative Proceedings) The authorities proceed in a discretionary manner with regard to reference to important state interest, but have an obligation to provide sufficient reasoning.

272 Article 109, section 1 of Act on Foreigners, see also on courts' access: Judgment of Supreme Administrative Court of May 30, 2020 II OSK 3615/18, available: https://orzeczenia.nsa.gov.pl/doc/0E73714244

273 Article 156, paragraph 4 of Act of 6 June 1997 of the Code of Criminal Procedure, consolidated text:Journal of Laws, 2024, item 37.

274 Given the extremely limited case law, this cannot be regarded as a conclusive finding, but see: *Tribunal Central Administrativo Sul, judgment of 26/11/2020, Proc. 1448/19.2 BELSB.*

275 For more details on this procedure: https://orniss.ro/procedures/?lang=en.

276 Classified information is conveyed to other users if they hold security certificates or access authorisations corresponding to the level of secrecy, according to the Law No. 182/2002 on the protection of secret information and Decision No. 585/2002 for the approval of the Standards national protection of classified information in Romania.

277 Action Report (02/11/2022) Communication from Romania concerning the cases of Hassine v. Romania (Application No. 36328/13), available: https://bit.ly/42SuvwN, Abu Garbieh v. Romania (Application No. 60975/13), available: https://bit.ly/3wC7JNC, Muhammad and Muhammad v. Romania (Application No. 80982/12), available: https://bit.ly/49tCFhR.

278 ibid.

279 Article 7, paragraph 4, f) of the Law No. 182/2002 on the protection of secret information, see also CAB decision No. 2966 of July 19, 2017, file No. 5318/2/2017. Also the Constitutional Court ruled in the decision No. 763/2006 that the judge has access to documents of different levels of secrecy, according to Law No. 182/2002.

	Applicant	Lawyer	Authority	Court
Slovakia (no essence of the grounds)	No.	No, unless a one-time request is submitted to Slovak Intelligence Service,[280] it is rarely granted, but even if granted, a non-disclosure agreement is to be signed.[281]	Yes, access to factual reasons, not clear to what extent to underlying evidence.[282]	Yes, access upon request.[283]
Slovenia (essence of the grounds)	Everyone has the same access to all classified documents, evidence.[284]			
Spain (essence of the grounds)	No, unless data is declassified after request.[285]		No,[286] except for Ministers themselves, as members of the Council of Ministries.[287]	No, unless data is declassified after request.[288]
Sweden (limited essence of the grounds)	No, but requesting is possible from the Security Police.[289]		Yes, access to basic factual grounds, not to evidence.[290] The Swedish Security Police issues an appendix to the statement shared with the authority, providing details regarding who could be given access to the information in the statement, and on what conditions information may be shared.[291]	Yes, if the data owner gives permission upon request.[292]

280 Employees of the competent authority may access classified information, if they have security clearance of the appropriate degree according to Section 10 and the following of Act on the Protection of Classified Information.
281 According to the national research submitted for the purpose of this study, the Slovak Intelligence Service has so far given solicitors consent only to familiarise themselves with their dissenting opinion, which generally contains no justification, only the statement that the Slovak Intelligence Service has information on the basis of which it came to a conclusion about the existence of national security, however, neither the reasons leading to this conclusion nor the information it refers to are part of these written opinions.
282 Section 34(1) f) of Act on the Protection of Classified Information.
283 Section 34, paragraph 1, letter f) of the Act on the Protection of Classified Information.
284 Available: https://www.aca-europe.eu/seminars/2017_Cracow/Slovenia.pdf.
285 Article 56.3 of the Law 29/1998 of 13 July 1998 on Contentious-Administrative Jurisdiction.
286 Judgement of the Supreme Court of 17 March 2021, ECLI:ES:TS:2021:1125.
287 Article 4 of the Law of Official Secrets.
288 Dimitri Berboff (Judge of the Contentious-Administrative Chamber of the High Court of Justice of Catalonia), 'La incorporación al proceso contencioso administrativo de informes reservados: alcance del control jurisdiccional sobre su contenido - Foro abierto' (2008) 4 Revista de Jurisprudencia El Derecho, 6, with reference to article 60 of the Contentious-Administrative Jurisdiction Law.
289 Chapter 6, Sections 7 and 8 of the 2009 Secrecy Act (2009:400).
290 Chapter 10, Sections 3 and 4 of the 2009 Secrecy Act (2009:400).
291 Chapter 1, Section 7 of the Aliens Act; Chapter 10 Sections 3 and 4 of the Secrecy Act.
292 Chapter 6, Section 5 of the 2009 Secrecy Act (2009:400).

3.2 Judicial mechanisms regarding non-disclosure of classified data

It has been shown in the previous section that none of the national frameworks provide applicants and their lawyers with access to classified information underlying the establishing facts of decisions asserting state security allegations. If non-disclosure is challenged by the applicant, an independent body must be able to review if access restriction is lawful and it also must be able to verify the factual allegations asserted by the authorities. This is especially crucial if no essence of the grounds were indicated in the decision. Under national laws, there might arguably be two types of typically judicial avenues available to challenge access restriction to classified data: firstly, where the denial of access may be challenged by requesting the review/appeal of the decision containing or referring to the national security or public order findings complained of (hereinafter 'primary administrative decision') – most Member States have institutionalised this method – and secondly, where there is a separate judicial remedy to challenge the denial of access exclusively. This latter mechanism normally complements and exists parallel to the judicial review procedure concerning the administrative decision containing the security accusations. In this case, access is usually denied in a separate decision and this is the decision that may be challenged. In the context of judicial mechanisms, it has to also be mentioned that some Member States allow the court to review not only the decision to restrict access to data or the decision containing national security grounds, but also the lawfulness of the classification. This may be regarded as a significant safeguard in countries where classified data may only be accessed by a foreigner if the data is declassified.

This research has found that in some EU countries it is not anyhow possible to challenge access restrictions and that judicial review is limited to reviewing the legality of the national security or public policy grounds. This might be considered concerning in those countries, where the applicant is not provided with a decision or access to documents containing at least the essence of the grounds. For this reason, the next sections will discuss judicial mechanisms of researched countries according to the way in which member states were grouped in the first chapter, i.e. whether the essence of the grounds concept is used. Emphasis will be put on those instances of judicial oversight which concern denial of access to classified data, however, if there are some significant elements concerning the review procedure of the primary decision, either in legislation or in jurisprudence, that will also be pointed out. The reason for this is that since in 8 countries of 25, there are no separate access procedures established and the review of primary administrative decisions and denial of access is intertwined, the procedure must anyhow be presented in a unified manner. The same applies for the review of the lawfulness of classification: since in some countries this is carried out under the review procedure concerning the primary administrative decision, it will be indicated in all jurisdictions whether this type of judicial oversight is established.

3.2.1 Judicial mechanisms in countries not applying the concept of the essence of the grounds

As it could be seen in Chapter 2, Bulgaria, Croatia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Poland and Slovakia are those countries where there is no essence of the grounds provided in administrative decisions based on classified data. The same is true for Malta and Portugal, but these countries are, again, grouped under a separate category of access rights being available to an equal extent for the parties. In Bulgaria, Croatia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Poland and Slovakia, however, access rights, as it could be seen in the table summarising these rights, applicants and their lawyers do not have automatic access to data substantiating the content of administrative decision, only the courts (and sometimes or to some extent, the administrative authority) reviewing decisions have default access to reasons/evidence/supporting documentation of national security allegations. There may be some exceptions, concerning the level of classification (e.g Latvia, where everyone has access to 'restricted access information') or procedure (e.g. Greece or, where parties may also be provided access to classified data in detention cases), but it could be argued that in these countries the judge reviewing either the refusal of access or the primary administrative decision is generally the actor who may have comprehensive access rights concerning case-files containing data with the highest classification level in immigration related-cases.

The criterion for grouping judicial mechanisms relative to access to classified information may also be, as mentioned above, whether a specific procedure for access to classified information is institutionalised in the respective country or whether the lawfulness of the refusal of access is decided in that same judicial procedure ('access procedure'), in

which the primary administrative decision is being reviewed. This research has found that in Bulgaria, Finland, Hungary, Ireland, Latvia and in Hungary, a separate procedure has been established for the enforcement of access rights, while in Croatia, Greece, Lithuania and Slovakia, there is no such procedure. The following sections will, therefore, discuss the countries' judicial mechanisms concerning classified data-based immigration-related decisions in that order.

3.2.1.1 Judicial mechanisms in countries establishing separate 'access procedure': Bulgaria, Finland, Hungary, Ireland, Latvia, and Poland

Bulgaria

Bulgaria follows a method in which denial of access might be challenged in a separate judicial procedure. This procedure is of more significance as although it is possible to request access to classified information from SANS, in practice it is never granted if national security considerations are involved. The denial of access to classified data may be appealed in accordance with the Code of Administrative Procedure.[293] If the judge finds that denial of access to classified data was not lawful, they cannot disclose it to the party but may only transmit the case file to the SANS with mandatory instructions on the interpretation and application of the law.[294] The efficacy of court instructions are dubious, however, as even if there is a judicial decision on disclosure, "*whether the provision of that information would prejudice the performance of the Agency's statutory tasks is left to the operational discretion of the administrative authority*."[295]

In the context of the review procedure aiming at remedying the potential faults of the primary administrative decision, practice suggests that the approach of the courts is not unified, with some elements following European standards and others favouring state interests to the detriment of the individual's rights of defence.

On the one hand, parties in the review procedure may be provided with some information on the basis of the decision in accordance with the 'need to know' principle as explained in Chapter 2, but this does not mean that a judgment cannot be based on evidence not known to the party. During the judicial phase of the process, the applicant has to be given access to the classified information to the extent that ensures their constitutional right to defence, as prescribed in Article 39a of the CIPA.[296] The parties get restricted access to the factual grounds, but not the methodology and the evidence, and only to the extent the SANS considers that they need to know (need-to-know principle). The possibilities for defence remain limited as parties still don't know how SANS reached those conclusions, but they know what they are accused of. The Administrative Court-Burgas held that *"Although the authority does not set out factual grounds in the specific act, this does not mean that those grounds should not be made available to the court in order to exercise effective judicial review to meet the State's obligation to provide an effective remedy (…) The foregoing does not mean that the CIPA should not be complied with; on the contrary, it is possible that the necessary information could be contained in a separate document available. This way the applicant's right to the full exercise of his rights of defence will not be infringed and the court's ability to exercise effective judicial review will not be impeded."*[297] The jurisprudence of said court does not seem to be consistent, as the same court later held that "*according to the provision of Art. 46, para. 3 of the FRBA, the orders under Art. 46, para. 2, such as the one at issue, do not state the factual grounds for the imposition of the compulsory administrative measure. In that sense, the applicant's arguments that the order is not reasoned are unfounded*."[298] Recently, as it has also been pointed out in the previous chapter, the Administrative Court-Sofia City also suggested a European law-compliant approach by ruling that a decision which may be based on data undisclosed to the party and on the unreasoned opinion of SANS requires its annulment.[299] The same judgment also held that the SAR is to conduct its own assessment "*of the*

293 Article 36, paragraph 9 SANS.
294 ibid. Article 173, paragraph 2.
295 Judgment № 6820 of 19.11.2021 in administrative case № 8299/2021 the Administrative Court – Sofia City.
296 Article 39a (1) No reliability clearance shall be carried out in respect of persons upon or in relation to the exercise of their constitutional right to defence. (2) Persons under paragraph 1 shall ex lege have access to all levels of classified information for the time required for the exercise of their right to defence and in compliance with the „need to know" principle.
297 Judgment № 1505 of 03.09.2019 in case № 1293/2019 before the Administrative Court-Burgas, XXII panel, available:https://bit.ly/4a6GERt .
298 Judgment № 1830 of 19.11.2021 in case № 2402/2021 before the Administrative Court-Burgas, 8 panel, available: https://legalacts.justice.bg/Search/Details?actId=9bzp1rvXKhc%3D.
299 Judgment № 2739 of 21.4.2023 in case № 2119/2023 before the Administrative Court-Sofia City, 9 panel, available: https://sofia-adms-g.justice.bg/bg/1693.

facts and the evidence gathered and not mechanically and solely on the basis of a letter from the SANS that the alien poses a threat to national security withdraw the granted status."[300] Reaching this breakthrough conclusion, the national court complied with the standards posed by the G.M. judgment of the CJEU that the applicant had invoked in the review procedure. The national researcher nonetheless pointed out that this judgment, pending now before the Supreme Court, may cause a controversy within the judiciary as most of the courts and their panels are of the view that the power of the immigration authority is limited and is bound to the opinion of the security body. This is the reason why there is no procedure laid down in the Bulgarian legislation in that regard.

On the other hand, judicial review of the primary administrative decision sometimes only means the formal examination of the decision, solely grounded on uncorroborated information on national security allegations provided by SANS. Concerningly, the Supreme Administrative Court held in that aspect that "*the opinion of the SANS is sufficient evidence from which to conclude that there are ,substantial grounds for believing that the person concerned poses a threat to society or to the security of the Member State…*"[301] Applicants have also complained that the interpretations of SANS are frequently islamophobic or xenophobic, but the Supreme Administrative Court has overturned such complaints.[302] Moreover, any evidence (e.g. witness testimonies, written evidence) provided by the applicants is considered by the court not to overrule the interpretation of the SANS agents. Three such cases from Bulgaria have reached the European Court of Human Rights in 2021, but have not yet been decided.[303]

Judicial review of lawfulness of classification is not possible in Bulgaria.

Finland

While there might be a separate judicial avenue used in Finland for unlawful restriction of access to classified data, case law does not suggest this procedure to be effective if national security considerations are at stake. By letter of the law, if the applicant is not provided with a requested document, the applicant receives a reasoned decision as to why the request was denied.[304] The decision may be appealed on the grounds that the decision is unlawful[305]. Unlawfulness as a basis for appeal means that the appeal may be also based, for instance, on the incorrect application of the Act on the Openness of Government Activities,[306] on an overly broad interpretation of confidentiality, the party involved not receiving requested information, or on an erroneous interpretation of the conditions for harm caused by potential disclosure.[307] An appeal against a decision of a regional administrative court issued in an administrative judicial matter may be made to the Supreme Administrative Court.[308] If the administrative court accepts the appeal, the appellant is usually entitled to receive the requested document or information. The administrative court may also partially amend the decision under appeal, for instance, by removing restrictive conditions or adding them. The matter may also be remanded to the authority for reconsideration, such as for clarifying the justifications or implementing partial disclosure.[309]

In a 2020 ruling of the Supreme Administrative Court, which originated in a case where the foreign applicant requested the disclosure of reasons from the security agency, by means of which the immigration authority considered his asylum claim to be unfounded on grounds relating to national security, it was asserted that the party's right to information was not absolute. The court held that there was no right to receive any information about the justification for the

300 ibid.

301 Judgment № 8865 of 06.07.2017 in case № 5588/2016 before the Supreme Administrative Court, 3 panel, available: https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=806128&code=vas.

302 For example, Judgment of SAC in case C-43/2020 states that SANS is the specialised body to interpret the "internal side" of the outside activities.

303 ECtHR cases of Tariq v. Bulgaria, application No. 31388/21; Malik v. Bulgaria, application No. 27677/21 and Patel v. Bulgaria, application No. 39820/21.

304 Section 6(1) of Administrative Judicial Procedure Act (*laki oikeudenkäynnistä hallintoasioissa / lag om rättegång i förvaltningsärenden*), Act No. 808/2019, 1 January 2020.

305 Section 13(1) Finland, Administrative Judicial Procedure Act (*laki oikeudenkäynnistä hallintoasioissa / lag om rättegång i förvaltningsärenden*), Act No. 808/2019, 1 January 2020.

306 Finland, Act on the Openness of Government Activities (*laki viranomaisten toiminnan julkisuudesta / lag om offentlighet i myndigheternas verksamhet*), Act No. 621/1999, 1 December 1999.

307 Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

308 Section 107(1), Administrative Judicial Procedure Act (*laki oikeudenkäynnistä hallintoasioissa / lag om rättegång i förvaltningsärenden*), Act No. 808/2019, 1 January 2020.

309 Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

security service's statement provided to the immigration authority, as it would be contrary to a very important public interest relative to national security as set forth in the Act on the Openness of Government Activities.[310] The Supreme Administrative Court also noted in this judgment that since the document request had been made to the Security and Intelligence Service and not the court adjudicating the asylum case, the accessibility and confidentiality of the documents in question were to be determined based on the provisions of the Act on the Openness of Government Activities. The court also pointed out that the provisions of APD, especially Article 23(1) providing for the right of access to information of a party to an asylum case, did not suggest that the party's access could not be limited on the basis of very important public interest in accordance with Finnish law. This judgment also suggested that the statement of the Security and Intelligence Service cannot be regarded as ,*expert advice*' as referred to in Article 10(3)(d) of APD to which legal advisers or other counsellors should have access according to Article 12(1)(d) of said directive. This recent ruling, not considering the progression of international case law, referred to three earlier judgments of the Supreme Court from 2007[311] stating that based on the case law of the ECtHR, the exclusion of material designated as confidential from the party's access for national security reasons does not in itself violate the ECHR.

Contrary to European standards, on the basis of the aforementioned 2007 rulings of the Supreme Administrative Court, it seems that Finnish jurisprudence is also satisfied with a procedure, in which no data constituting the factual grounds of the decision is disclosed to the applicant in the procedure reviewing the primary administrative decision. According to the legal principles contained in the annual decisions of the Supreme Administrative Court, administrative courts in Finland are required to independently request confidential material from the parties involved to assess whether the classification as confidential was justified and whether the decision was lawful.[312] The competent court must be able to examine the material that was not disclosed to the party concerned in order to assess whether there were grounds for the non-disclosure and the conclusions made based on the non-disclosed material. The Supreme Administrative Court stated that it is the task of administrative courts to investigate whether a fair balance has been struck between the individual's rights and the public interest, that is, public order and state security, in the matter at hand.[313] The Supreme Administrative Court found that the competent court must be able to examine the material that was not disclosed to the party concerned in order to assess whether there were grounds for the non-disclosure and the conclusions made based on the non-disclosed material. If an administrative court restricts the right of a party to access information based on the grounds provided by law, the court itself must necessarily familiarise itself with such material and assess its significance in the proceedings.[314]

As it has been mentioned in chapter 1, an alternative – not mandatory, but potentially counter-balancing – approach to the restrictive access rights is a procedure in which the court prepares a summary or abstract of the information subject to restriction, from which the protected information, in order to safeguard a highly important interest, is not disclosed.[315] This practice has no basis in legislation and the national researcher's findings were inconclusive as to the extent of how widely this practice has been used or if there has been any case where the applicant had the opportunity to learn the substance of the restricted information.

310 KHO:2020:4, 20 January 2020, *Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*, Supreme Administrative Court of Finland, available: https://www.kho.fi/fi/index/paatokset/vuosikirjapaatokset/1579174093138.html.

311 KHO:2007:47, 12 July 2007, *Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*, Supreme Administrative Court of Finland, available: https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701829; KHO:2007:48, 12 July 2007, Korkein hallinto-oikeus / Högsta förvaltningsdomstolen, Supreme Administrative Court of Finland, available: https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701830; KHO:2007:49, 12 July 2007, *Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*, Supreme Administrative Court of Finland, available:https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701831.

312 ibid.

313 KHO:2007:47, 12 July 2007, *Korkein hallinto-oikeus / Högsta förvaltningsdomstolen*, Supreme Administrative Court of Finland, available: https://finlex.fi/fi/oikeus/kho/vuosikirjat/2007/200701829.

314 Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

315 Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

Hungary

The Hungarian system too offers a separate judicial review procedure with regard to denial of access to classified data (hereinafter 'access procedure') beside the procedure reviewing the primary administrative decision. It may be argued, however, that the access procedure does not provide an effective remedy at all and does not counterbalance the fact that the applicant cannot know the essence of the grounds either. Moreover, as it has been mentioned earlier, the Hungarian Supreme Court, the Kúria, openly defies the application of principles established in European case law in national security-related immigration matters, and that defiance is the most articulated concerning the access procedure. On a positive note, however, lower courts have recently seemed to be following the standards of the G.M. judgment in the review procedure of administrative asylum decisions.

As classified data-based decisions do not provide any factual reasoning, access to the classified data might be hypothetically requested from the Constitution Protection or the Counter Terrorism Office. If these agencies refuse to grant access, which is generally the case,[316] their decision may be challenged by initiating a judicial review procedure, as provided by the Protection of Classified Data Act.[317] In the access procedure, the court cannot rule on the lawfulness of the classification and cannot declassify the data itself. The court may only examine whether the denial of access to the applicant was lawful (was the ground for refusal provided, which public interest was pursued and whether the interest pursued would be harmed if the data were disclosed). This is done by the courts by conducting a necessity-proportionality assessment, which means it is assessed whether the public interest[318] relative to the data may be overruled by the private interest of the applicant (namely the effective exercise of their procedural rights).[319] The judge may order the disclosure of the classified data if it finds that the denial was unlawful.[320] However, this has only happened once: the Kúria ordered the disclosure of the authority's decision in a way that it specifically indicated in the judgment which – very limited – parts of the document should be disclosed.[321] In this judgment, the Kúria specifically listed which pages of the specific document, and even within the pages, which sentences and words may be presented to the applicant. As a consequence, the essence of the grounds was still not disclosed to the applicant, the Kúria only authorised the disclosure of certain specific personal data relating to the applicant concerned. Worryingly, this has been highlighted as "good practice" in one of Kúria's later decisions.[322]

The review procedure in which the primary administrative decision is challenged may offer a more effective remedy to the foreigner. If the applicant wishes to challenge the primary administrative decision which is based on the security agencies' non-reasoned expert opinion, that may take place in a separate lawsuit. In this separate procedure (review procedure), judges may access the classified data, which is the ground for expert opinions. However, judges may only determine whether or not the contents of the opinion issued by the specialised authority provide sufficient grounds to demonstrate harm to national security, but cannot rule on the logical conclusion reached by that authority. Furthermore, the judge cannot refer to the content of classified data in the judgment.[323] Consequently, the court may only give an unreasoned decision as to whether the classified information relied on by the authority may support the authority's conclusion. The court must therefore review the decision, taking a final position on the applicability of the ground for refusal based on classified information, without the applicant or their representative being able to present a defence against the grounds on which the decision is based. The court may not overrule the data and the conclusions of a security agency; it may only decide whether the content of the recommendation is sufficiently justified by the data. The Kúria interprets the CJEU and ECtHR case law as not imposing an obligation to disclose at least the essence of the grounds to the applicant. The Kúria is of the view that the case law only guarantees a right to an effective remedy, which is fulfilled by the fact that the Hungarian courts have access to the classified data and may verify whether the conclusion on national security threat is justified.[324]

316 As per the experience of the HHC, there has been no cases in which access was granted in 2020, 2021 and 2022, see more at https://asylumineurope.org/wp-content/uploads/2023/04/AIDA-HU_2022-Update.pdf.
317 Section 11 (3) of Act CLV of 2009 on the Protection of Classified Data, available: https://net.jogtar.hu/jogszabaly?docid=a0900155.tv.
318 As defined in Section 5 (1) c of the Act on the Protection of Classified Data Act.
319 See for example Kúria judgment Kfv.I.37.259/2022/8., 28 April 2022.
320 Section 11 (3) of Act CLV of 2009 on the Protection of Classified Data, available: https://net.jogtar.hu/jogszabaly?docid=a0900155.tv .
321 Kúria Kfv.I. 37.931/2021/8.
322 Kúria Kfv.I.37.259/2022/8., paragraph 51.
323 Section 13 (5) of Act CLV of 2009 on the Protection of Classified Data, available: https://net.jogtar.hu/jogszabaly?docid=a0900155.tv.
324 Kúria Kfv.VI.37.640/2018/9, Kfv.III.37.039/2013/6, Kfv. II. 38.329/2018/10.

There have been some cases known to this research which have shown that the courts' review procedure concerning national security assertions call into question the conclusion of the security agencies. The Budapest Court (Fővárosi Törvényszék) decided that the conclusion on the fact that the applicant was a national security risk had been unfounded. In a 2020 case, the court stated that *"regardless of the procedural tightening necessary to protect national security, the right of appeal cannot be allowed to be emptied out on the grounds of national security. The requirement of an effective remedy necessarily implies the possibility of rejecting national security assertions by the court, if the court considers it arbitrary or unfounded."*[325] Not having found the national security assessment well-established, in this case, the court decided that the national security risk was unfounded. Consequently, the authority's decision, which rejected the claim of asylum based on the national security assertions, was also unfounded and thus unlawful. In November 2023, the Budapest Court annulled a decision of the immigration authority for basing its decision on an opinion of the security agency which was not grounded on timely data, and was thus unreasonable and unlawful.[326]

It has to be highlighted that in some recently conducted asylum review procedures, the Budapest Court, having checked the classified files, stated that it could not be clearly established that the content of the files had not manifestly given rise to a finding of a threat to national security. At the same time, following the standards of the G.M., the court quashed the reviewed decisions and ordered the asylum authority to repeat the procedure, making it possible for the applicant to be provided with the essence of the grounds of the information indicating the national security allegation. In the first such decision,[327] which was later followed in other cases,[328] the Budapest Court established a procedural order based on the standards of G.M. but adapted to the specifics of the Hungarian legal order. According to this judgment, the asylum authority cannot rely on the fact that it is bound by the expert opinion of the security body under national law and may not delegate the individual responsibility for determining whether a person should be excluded from international protection status to another authority, i.e. security body. The asylum authority must make its own decision and provide full reasoning. To that end, the security body must, upon the request of the asylum authority, grant the asylum authority access to and use of the classified documents. The expert opinion of the security body may only provide guidance to the asylum authority and not replace the decision of that authority. The statement of the competent authority that there is a threat to national security must be accompanied by factual and legal reasons. The right of access may be restricted in cases where the disclosure of evidence may directly and specifically harm national security, in that it may in particular endanger the life, health or freedom of persons or specifically jeopardise the disclosure of investigative methods used by the national security authorities and thus seriously hamper the performance of the tasks of security bodes. The reasoned opinion of the asylum authority must be communicated to the applicant or his representative in order to enable them to express their views. If the applicant considers that reasons given in the repeated procedure are not sufficient, he or she may again request a judicial review in a new administrative dispute to determine whether the scope of the information kept secret is limited to the narrowest possible scope. It is also only after the new judicial review that the applicant may ask the court to order the classifying authority (security body) to disclose the relevant information, to hear the applicant's defence in that regard and, in light of that defence, to decide on the lawfulness of the withdrawal of the status. While it seems that in asylum cases this procedural order is followed by the courts, the asylum authority could not yet comply with the presented instructions of the court, as the security bodies consistently refuse to disclose the essence of the information on which they ground national security allegations.

The separation of these judicial review procedures was explicitly articulated in numerous Kúria decisions, a reason why the G.M. standards are not used in the access procedure. As the subject matter of these rulings did not concern an asylum-related procedure, but the procedure in which denial of access was contested under Act CLV of 2009 on the Protection of Classified Data (access procedure), the Kúria stated that EU standards, and more specifically the findings of CJEU's G.M. judgment, which was reached by the CJEU following a Hungarian asylum procedure, could not be invoked in the access case.[329] As for other immigration-related (e.g. residence permit) procedures, it is yet to be seen how judicial practice will move and whether it will move in the same direction as the Budapest Courts did in the above-mentioned

325 E.g. Judgment of Budapest Court (Fővárosi Törvényszék) 9.K.705.511/2020/13. of 2 October 2020, paragraph 101.
326 Judgment of Budapest Court (Fővárosi Törvényszék), 49.K.702.940/2023/13. of 25 October 2023.
327 Judgment of Budapest Court (Fővárosi Törvényszék), 11.K.704.569/2022/7-II. of 9 February 2023, paragraph 12.
328 Judgments of Budapest Court (Fővárosi Törvényszék), 22.K.703.693/2022 of 15 February 2023 and 22.K.704.407/2022 of 23 March 2023.
329 Kúria Kfv.I.37.259/2022/8., available: https://kuria-birosag.hu/sites/default/files/hirlevel/hirlevel2211.pdf

asylum case, following the G.M. judgment. As preliminary reference procedures concerning access to classified data in residence permit procedures are pending before the CJEU,[330] this will be revealed in the near future.

Lastly, it must be noted that the Hungarian court does not in itself have the right to review the lawfulness of classification. If there is an ongoing judicial review against the administrative decision, the judge will suspend the proceedings until the Hungarian National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság, NAIH) makes its decision. An appeal may be submitted against the suspension order.[331] As this procedure is either started *ex officio* or at the initiation of the court, and its conduct is accordingly within the discretion of the NAIH, the applicant has no independent right to request the examination of the lawfulness of the classification.[332]

Ireland

In Ireland, there is limited information available both in legislation and in case law concerning the subject matter of this study. Under the Freedom of Information Act, it is theoretically possible for the applicant to request the disclosure of documents, and if the request is rejected, it is possible to appeal to the High Court.[333] The national researcher, however, is not aware of any case concerning national security-based decisions where access has been granted. There are no express statutory provisions in Irish immigration law providing for access to classified data, or regarding the powers of judges to access the same when examining administrative decisions of immigration officers / the Minister for Justice.

As for case law of judicial mechanisms available in relation to classified data-based decisions, there are two Supreme Court cases worth mentioning which set out that 1.) reasons/information have to be provided to the applicants to the extent enabling them to request a judicial review, 2.) it is only for the courts to see and examine all relevant documents supporting a decision. The subject matter of both cases was a naturalisation claim, the assessment of which may not fall under the scope of EU law, but in precedent-based Irish law, these decisions may also be utilised in other immigration-related cases.

In the *Mallak case, as it has been explained in Chapter 2*, the applicant's claim was that he had the right to be acquainted with the reasons underlying the rejection of his naturalisation application. He had made an application under the Freedom of Information Act[334] for the disclosure of documents, which was declined. His case was also rejected by the High Court, but the Supreme Court allowed the appeal and quashed the decision of the Minister. In a leading judgment, the Court clarified the extent to which decision makers are obliged to disclose the reasons which support a decision, namely "*it is not possible for the applicant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, it is not possible for the courts effectively to exercise their power of judicial review.*"[335] In defending the case, the Minister made submissions that there were issues of public policy that leaned against the giving of reasons and claimed this was apparent from the nature of the Minister's decision, as well as the determination of the Information Commissioner to decline the application under Freedom of Information. However, the Court observed that no reasons relating to the public interest were disclosed even in the most general of terms. Furthermore, the Minister had not indicated that the applicant's rights as a refugee should be restricted on grounds of national security or public policy. The Court, quashing the Minister's decision, concluded that one could understand why

330 Case C-420/22, NW v. Országos Idegenrendészeti Főigazgatóság, Miniszterelnöki Kabinetirodát vezető miniszter and Case C-528/22, PQ v. Országos Idegenrendészeti Főigazgatóság, Miniszterelnöki Kabinetirodát vezető miniszter.

331 Section 32 d) of the Code of Administrative Procedure, available: https://net.jogtar.hu/jogszabaly?docid=a1700001.tv.

332 Sections 31 (6a) and 62 (1) and of Act CLV of 2009 on the Protection of Classified Data.

333 The application for Freedom of Information in this case predated the current legislation, the Freedom of Information Act 2014. Under the Freedom of Information Act 1997, section 24 permitted requests for information to be refused if access could reasonably be expected to adversely affect, *inter alia*, the security of the State. Similar provisions are found in section 33 (1) (a) of the 2014 Act.

334 The application for Freedom of Information in this case predated the current legislation, the Freedom of Information Act 2014, available: https://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/print. Under the Freedom of Information Act 1997, section 24 permitted requests for information to be refused if access could reasonably be expected to adversely affect, *inter alia*, the security of the State, available: https://www.irishstatutebook.ie/eli/1997/act/13/enacted/en/pdf. Similar provisions are found in section 33 (1) (a) of the 2014 Act, available: https://www.irishstatutebook.ie/eli/2014/act/30/section/33/enacted/en/html#sec33.

335 Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 29 , paragraph 65, available: https://bit.ly/3SPWqch.

the applicant was mystified and that the Minister was under an obligation to provide reasons for the decision to refuse his application.[336]

The conclusions of *AP v Ministry of Justice* have also been presented in the previous chaper. It suffices to repeat here that in that case, the Supreme Court determined that the ultimate decision in Ireland on whether legitimate state interests outweigh the requirement to produce documents in the context of court proceedings is one which must be made by a court rather than by the state authority itself and that, if necessary, the court may itself examine the documents to enable it to make an appropriate assessment.[337]

Latvia

A foreigner may contest the decision to refuse their access to classified data in a separate procedure. This procedure shall be regarded as an important safeguard in Latvia, as although applicants cannot have independent access to underlying data, their lawyers with special permits may. In practice, however, lawyers' access may also become restricted, if there are national security considerations in the background.[338] The procedure is to be started at the Prosecutor General within 14 days of receipt of the notification.[339] The Prosecutor's decision may be appealed at the Administrative Regional Court. The court shall verify whether the appealed decision is lawful. The court, when assessing the lawfulness of the decision, shall take into account not only the justification included in the decision, but also the information containing an official secret which was the basis for making the appealed decision. The amount of information containing an official secret to be disclosed to the applicant shall be determined by a state security body in accordance with the law.[340] If disclosure of information is denied, the information containing an official secret shall be verified and assessed only by the court. In such cases the court shall indicate in its ruling that the information has been assessed. The court ruling is not subject to further appeal and is to be sent to a security body for enforcement. The law prescribes the possibility to the judge to disclose such evidence to the parties if the specific procedure is obeyed.[341] Using a wide margin of appreciation as the core element of the administrative procedure in Latvia, the judge reviewing administrative decisions is allowed to review the lawfulness of classification, if it considers it necessary for the justification of the decision, but is not obliged to do so in every case.[342]

Poland

In Poland, it is also possible to initiate a separate procedure for unlawful access restrictions. However, this procedure may only be successful if the authority has refused access to data that were not classified. This means that in Poland classified data cannot be anyhow accessed, not even via an access procedure. The complainant may take advantage of a complaint (zażalenie) to be submitted to the second instance administrative body, if the first instance administrative body refuses the inspection of files containing classified information.[343] After exhausting the administrative route, a foreigner may bring a case concerning this refusal to the Voivodship Administrative Court,[344] and eventually, a cassation complaint may be submitted to the Supreme Administrative Court. In cases concerning refusal of access to case files, administrative courts examine whether the files to which the foreigners' access was refused are covered by secret or top secret clauses, or whether their disclosure could endanger important state interests. Additionally, in this judicial procedure foreigner could argue that the file should not be classified or that its secrecy was too high, and the administrative authority, as

336 Although there is no formal published decision, it is known that following the Supreme Court decision, the applicant Mallak was granted Irish citizenship but he has never been provided the reasons for the original decision to refuse. The applicant has spoken publicly about his experiences as a litigant and the case is discussed in Bacik, I. and Rogan, M. (eds.) Legal Cases That Changed Ireland (Clarus Press, 2016).

337 AP v Minister for Justice [2019] IESC 47, available: https://bit.ly/48sBfTj.

338 High Court of Latvia, judgment Nr. SA-1/2021 ECLI:LV:AT:2021:0716.SA000121.5.S., available: https://www.at.gov.lv/downloadlawfile/7707.

339 Article 16 of The Law on Official Secrets, available at: https://likumi.lv/ta/en/en/id/41058-on-official-secret.

340 Article 10 (9) ibid.

341 Article 108 of the Administrative Procedure Law, available: https://likumi.lv/ta/id/55567-administrativa-procesa-likums.

342 Article 18 of the Law on Official Secret, available: https://likumi.lv/ta/en/en/id/41058-on-official-secret.

343 Articles 74 (2) and 141 (2) of Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws 1960 No. 30 item. 168, consolidated text Journal of Laws 2023, item. 775.

344 Article 53 (1) Act of 30 August 2002 Law on Proceedings before Administrative Courts, consolidated text Journal of Laws 2023, items. 1634, 1705, 1860.

the recipient of the material, had a legal obligation to ask the authority from which the material originated to change or remove the classification[345].In the course of the procedure, courts may review the lawfulness of classification, but have no power to change the category of classification.[346] In case refusal was unlawful, the court cannot disclose the data to the applicant but may overrule the refusing decision. The administrative body is then obliged to reconsider the case.

From the case law it seems doubtful as to whether the above procedure established by law offers an effective remedy for the lack of information provision, should there be national security considerations at stake. This is because jurisprudence suggests that "*the prohibition specified in art. 74 § 1 of the Code of Administrative Procedure and relating to documents containing classified information, which have been classified as „secret" or „Top Secret", is a categorical prohibition, therefore their disclosure is not possible under any circumstances, only for persons authorised according to Act of 5 August 2010 on the Protection of Classified Information.*[347]

It should be noted that Poland has recently been condemned by the ECtHR for violating Article 1 Protocol 7 concerning the expulsion case of a Belarusian applicant who was deemed to be a national security threat. The ECtHR stated that the applicant was subjected to significant limitations in the exercise of his right to be informed of the factual elements underlying the decision to expel him and of his right to have access to the content of the documents and the information relied upon by the authority which made that decision. The applicant in the case received only very general information about the accusations against him, while no specific actions by him which allegedly endangered national security could be seen from the file. He was not provided with any information about the possibility of accessing the documents in the file through a lawyer with the required security clearance. These limitations could not be counterbalanced by the fact that the final decision had been taken by independent judicial authorities having full access to the casefiles.[348]

On the plus side, concerning the judicial review procedures of primary administrative decisions, it must be noted that that jurisprudence requires the administrative authority to refrain from basing its decision on statements of the Internal Security Agency or the Border Guard which are of "*laconic nature"* and lack evidence.[349] If the court finds that evidence is too vague, then it overrules the administrative decision and the case is back to the authority for reconsideration.[350] It is also worth noting that in detention cases, the court is obliged to adjudicate only on the basis of evidence that is available to the foreigner or his lawyer.[351]

3.2.1.2 Judicial mechanism in countries without separate 'access procedures': Croatia, Greece, Lithuania, and Slovakia

Croatia

The Croatian model is arguably not harmonised with the standards of European case law, as the review of the restriction of access to classified data does not exceed the standards of the *Regner* judgment. In Croatia, there is no separate procedure to review access denial but the judges may express their opinion of the lawfulness of non-disclosure.[352] The judge is not allowed, however, to disclose any classified data to anyone, including the party, even if s/he disagrees on the classification or deems the non-disclosure to be unlawful. They can, nonetheless, suggest the SIA to declassify the data.[353] The extent to which this is efficient, may be questionable, as the court does not have the right to officially

345 Only the authority that granted the classification can change it at the request of the administrative authority that was the recipient of the material. See Article 9(1) of Act of 10 August 2010 on the Protection of Classified Information, Journal of Laws 2010 No. 182, item 1228, consolidated text Journal of Law 2023, items 756, 1030, 1532.l.

346 Judgment of the Supreme Administrative Court of December 5, 2022, II OSK 2295/21.

347 E.g. Judgment of the Supreme Administrative Court of June 29, 2016, II OSK 2586/14, available: https://orzeczenia.nsa.gov.pl/doc/4FB0E19293, Judgment of Voivodeship Administrative Court of 12 March 2021, IV SA/Wa 2327/20 (Its content is available in the Judgment of Supreme Administrative Court of 12 July 2022 OSK 1941/21, https://orzeczenia.nsa.gov.pl/doc/581AFDCE67, Judgment of Supreme Administrative Court of 4 February 2020, II OSK 3153/19, available: https://orzeczenia.nsa.gov.pl/doc/CCAB8D94E6.

348 Poklikayew v. Poland, Appl. No. 1103/16 (ECtHR, 22 June 2023), paragraphs 79-83.

349 Judgment of Supreme Administrative Court of May 30, 2020 II OSK 3615/18, available: https://orzeczenia.nsa.gov.pl/doc/0E73714244.

350 Judgment of Supreme Administrative Court of December 5, 2022, II OSK 2603/21, available: https://orzeczenia.nsa.gov.pl/doc/8F43E02F78.

351 Article 249a, paragraph 1 of the Code of Criminal Procedure.

352 Decision of the Constitutional Court U-III-2039/2017, op.cit., paragraph 12.2.

353 Based on the practical experience of lawyers interviewed for the purpose of this research.

review lawfulness of the classification, thereby the SIA is not bound by this 'suggestion'. The lack of actual review of non-disclosure is to be regarded as a worrisome practice, viewing it together with the lack of essence of the grounds provision and absent access rights. According to the Croatian CC, judicial supervision is a substitute for the individual's defence rights impaired by the lack of their access, inasmuch as it is "*on the administrative courts to determine whether and to what extent the denial of confidential information or evidence to the person concerned and the associated inability of that person to make statements about them is such that it may affect the probative value of confidential evidence. The effectiveness of judicial supervision implies that the administrative court is convinced that the decision, which affects that person personally, is based on a sufficiently solid factual basis.*"[354]

It is worth noting that the ECtHR recently condemned Croatia for an Article 1 Protocol 7 violation for the first time. The case concerned a foreign applicant whose application for citizenship was rejected by the Croatian authorities on the grounds of national security and who was subsequently expelled on the same grounds.[355] The court found that the applicant was not protected against arbitrariness for numerous factors. The applicant was not even provided with an outline of the facts, neither by the authorities nor by the court, which would have served as a basis for the conclusion that he posed a threat to national security, thus he was not able to present his case adequately in the subsequent judicial review proceedings. The ECtHR pointed out that apart from the courts' access to classified data, no counterbalancing factors were present in the procedure which could have given the applicant an effective opportunity for defence.[356]

Judicial review of the lawfulness of classification is not possible in Croatia. The assessment of the lawfulness of the SIA's acts and opinions may be requested by the party according to the Law on the security and intelligence system from the Council for Civilian Oversight of Security Intelligence Agencies.[357] If the inspection of said council reveals that the methods of SIA were unlawful, the president of the council is to report the results of the inspection to the President of the Republic of Croatia, the President of the Croatian Parliament, the Prime Minister and the Attorney General. In practice, however, national researchers have not encountered any cases where the Council for Civilian Oversight of Security Intelligence Agencies intervened, thus it is difficult to assess the full scope and efficiency of its work.

Greece

The Greek model does not provide applicants with separate legal avenues to challenge the non-disclosure of classified data and access is only allowed if the data is declassified. The lawfulness of non-disclosure, which in practice means the review of the legality of classification, is examined within the review procedure of primary administrative decision. This consequently means that classified data is simply inaccessible in Greek procedures, which, given the absence of the application of the essence of the grounds concept, makes the Greek system non-compliant with European law. The review procedure envisaged by the legislator may be summarised as follows:

In asylum procedures, there is a two-tiered review: an appeal against the first instance administrative decision of the asylum service may be lodged before the Appeals Committees, which is an administrative body composed of three judges. Then an application for annulment may be submitted before the First Instance Administrative Court against a decision of the Appeals Committee.[358] There is no such body in other immigration-related procedures, therefore applicants may turn directly to the courts. The Greek Council of State, which is the highest administrative judicial body, held on various occasions that "*if the court by examining these data, finds that the characterization of them as confidential is justified, in view of their nature and of the reasons of public interest invoked to this regard by the Administration, proceeds in the examination of the case without putting these elements before the Applicant and without exposing, in its decision, their content. Otherwise, the Court postpones its final ruling, in order for the applicant to become aware of these data and formulate his views on them.*"[359] According to the case law of the Greek courts, access is only provided if the court considers that the classification as confidential is not justified. The judge is thus obliged to perform a review of the lawfulness of classification, as this must be part of the examination of the primary administrative act under examination.

354 Decision of the Constitutional Court U-III-2039/2017, op.cit., paragraph 10.1.
355 Case of F.S. v Croatia, 8857/16, 05/12/2023.
356 ibid. paragraphs 54-72.
357 On the scope of the council's activities see Article 111, paragraph 1 of the Act on the Security and Intelligence System of the Republic of Croatia.
358 Article 97 L. 4939/2022 and Article 114 L. 4939/2022.
359 Decision No. 4600/2005, Decision No. 4600/2005 and Decision No. 1116/2009 of Council of State.

If the court considers that the classification is justified, then it examines the documents without giving access to the applicant and issues a non-reasoned decision accordingly. It has to be pointed out that in the practice of the Appeals Committee, nevertheless, it also occurred that it revoked an international protection status of an applicant without ruling on the justification of the classified character of the documents invoked.[360]

Lithuania

The Lithuanian system, in which there is no separate procedure to adjudicate the matter of access denial and where data may only be known if declassified, is quite similar to the Greek model. Worryingly, however, the Lithuanian framework provides for even less safeguards than the Greek, as the court may not review the lawfulness of classification. If access to classified information is fully or partially denied to the party of the administrative procedure and/or their lawyers, the judge reviewing the administrative decision assesses if the information provided by the State Security Department (both classified and declassified) is sufficient to reach conclusions concerning national security / public order. During the court proceedings, the court, upon the request of the party, may ask the state security body to declassify data, but ultimately the court only suggests and it is the state security body which decides. If the data is declassified by the Department of State Security, then only a party to the procedure and a lawyer representing the party has access to the data. While there is no other mechanism to obtain access to the grounding facts, except declassification of the data during this court proceedings, declassification is also limited "*if public disclosure of the documents submitted to the court would undoubtedly be detrimental to the state and public interest in the security of the State and of society.*"[361] This makes the Lithuanian system arguably one of the most deficient in terms of safeguards suggested by the European case law, as any information based on which national security accusations may be made are, in fact, completely inaccessible. Data may only be disclosed if declassified, but, unlike in the Greek system, this is completely at the discretion of the security bodies, due to the fact that the judiciary has no competency to rule over classification.

While the availability of (classified) data grounding the primary administrative decisions is completely absent for the applicant, the judiciary at least seems to be more demanding towards the administration in terms of establishing the state security allegations. In line with the G.M. judgment, the administration is expected to carry out the assessment of the relevant facts and circumstances alone and cannot rely solely on the opinion of specialist bodies. According to the Supreme Administrative Court (SAC), the immigration authority is obliged to assess whether, based on the data received from the State Security department, national security assertions are justified. The SAC stated in its ruling of 2016 that "*the decision to issue or amend a residence permit to a foreigner, which must comply with the general requirements for an individual administrative act, including being based on objective data (facts) and legal norms, is taken by the Migration Department, which is required to assess whether the collected data, including data received from the State Security Department, are sufficient to justify its decision.*[362] Later, the SAC also confirmed that *"since the first condition for application of the legal norm (there are serious grounds to believe that his presence in the Republic of Lithuania poses a threat to the security of the State) is rather abstract and not clear (it is not a defined hypothesis), therefore, its application in each case has to be specified by the competent public administration subject. In this case, it is not sufficient to merely state that such conditions or factual circumstances have arisen, but it is necessary to identify them in a clear and specific manner."*[363] Importantly, however, the ruling does not mean that in such a case the essence of the information should be declassified to the applicant, it only implies that in the absence of a sufficiently clear and specific description of factual circumstances, the Court will not be convinced that the applicant poses a threat to national security. The Supreme Administrative Court's jurisprudence also suggests that the courts reviewing the administrative decision must require sufficient evidence to establish the national security assertion. The SAC holds that "*from the point of view of the sufficiency of the evidence, the possibility of such a threat must be proved to such a degree of probability as to make it manifest … the reality and obviousness of the possible threat to the security of the State (in terms of time and the sufficiency of the evidence) must be assessed."*[364] In the court's view, national security considerations *"must be based on established facts, in particular the person's past actions and their nature."*[365]

360 Decision No. 186250/2023 of the 9th Appeal Committee.
361 Decision of the Supreme Administrative Court of Lithuania, 23rd of October 2019, No. eA-1748-629/2019 publicly unavailable.
362 Decision of the Supreme Administrative Court of Lithuania, 25th of January, 2016, No. eA-324-624/2016 available: https://bit.ly/42VikiR .
363 Decision of the Supreme Administrative Court of Lithuania, 23rd of October, 2019, No. eA-1748-629/2019.
364 Decision of the Supreme Administrative Court of Lithuania, 25th of January, 2016, No. eA-324-624/2016, available: https://bit.ly/42VikiR.
365 ibid.

Slovakia

In Slovakia, there is neither any review mechanism available with regards to denial of access to classified information, nor may the courts review the lawfulness of the classification. Although in theory lawyers may request a one-time access from the security body, in practice this is rarely granted and even if it is, only the conclusions regarding national security consideration may be seen, not the reasons (evidence) leading to the conclusion. It is only the judge who may see all classified documents in the review procedure of the primary administrative decision. The court must request the Slovak Intelligence Service/Military Intelligence to provide these operational files from their own records. It must be noted that the courts do not use this right in every case. From the case law it follows that this right of the administrative court has been only used sporadically since 2018, in cases where the Slovak Intelligence Service refused to provide the decision-maker administrative authorities with the essence of the reasons on which the threat to national security was based and the solicitor of the party to the proceedings was not granted consent to become familiarised with the classified information.[366] Furthermore, judges may not disclose the – perhaps unlawfully – undisclosed data to parties, although parties/legal representatives and administrative authorities tried to argue that the judge may make such classified information available. In practice this has never happened. The Supreme Court relied on the approach of a lower court in this issue when stating that "*the Regional Court did not make the classified administrative file available to the plaintiff's legal representative on the grounds that „it is expressly within the competence of the director of the Slovak Intelligence Service to decide whether or not to make the classified document and its contents available."*[367]

With regard to the review procedure, there is a progressive Constitutional Court judgment aiming to ensure the party's right to be heard, but it is not applied in practice. It is worth noting regardless, that the Slovak CC, referring to the constitutional right to comment on evidence, held that *"when an administrative court has conducted or plans to conduct evidence related to classified information or other protected information, the law does not allow to exclude from inspection of the file even those parts that contain these facts. The reason for this regulation is precisely the basic right guaranteed by the Constitution to comment on all the evidence conducted according to Art. 48 par. 2 of the Constitution."*[368] This means that the party to the proceedings as well as their legal representatives should have access to the file containing classified information, if these are presented as evidence in the proceedings before the court.[369] In practice, however, courts either refer to the lack of security clearance of the party or that they do not conduct a review of that evidence.

3.2.1.3 Malta and Portugal: unnecessary judicial oversight of access restrictions

The operation of judicial mechanisms in Malta and Portugal once again requires the two countries to be brought together under the same discussion. As it could be seen in Chapter 2, neither in Malta nor in Portugal is the essence of the grounds of the administrative decisions revealed to the parties. In the table summarising access rights, it could be furthermore seen that in both countries all actors involved have the same (lack of) access, even to reasons substantiating classified data based decisions. Consequently, any discussion of access to classified data under judicial mechanisms may be pointless, since the judge may not see data either, or if they do, everyone else may also.

In **Malta,** the Freedom of Information Act precludes access to documents held by the Security Service.[370] Those documents, whose disclosure would endanger the security, defence or international relations of Malta or which were concerning intergovernmental communications, are also exempt from access.[371] It is implied by case law that in the judicial phase, the party, the lawyer and the judge have access to classified information and evidence equally, while the authority making

366 E.g. decision of the Regional Court in Bratislava, case No. 2S/200/2021, April 20, 2022 or decision of the Regional Court in Bratislava, case No. 2S/169/2020, April 20, 2022 – both of these decisions upheld the decision of the administrative authority as lawful.

367 Judgment of the Supreme Court of the Slovak Republic in case No. 10Sžak/8/2017, April 30, 2019.

368 The Constitutional Court of the Slovak Republic in its finding No. PL. ÚS 8/2016, December 12, 2018.

369 According to Section 82 of the Administrative Judicial Procedure Code in conjunction with Section 35, paragraph 3 of the Act on the Protection of Classified Information.

370 Freedom of Information Act, Chapter 496 of the Laws of Malta, article 5(4) (f), available: https://legislation.mt/eli/cap/496/eng.

371 ibid, article 32(9).

the decision does not have access to the evidence.[372] From the case law, it also seems that the party and the lawyer may request access and if it is unlawfully denied, the judge may disclose it,[373] in which case the data becomes available to all. As the issue of access is quite underregulated, it is not clear what the requirements of lawful denial are.

None of the quasi judicial bodies – the Immigration Appeal Board[374] is a specialised tribunal in immigration matters, while the International Protection Appeals Tribunal adjudicates asylum cases[375] – have detailed procedural regulations and their decisions are not accessible and not public. Their decisions, with some exceptions,[376] cannot be appealed in principle, thus judicial and academic scrutiny of these decisions is not possible. Remedy is only possible based on the grounds of claiming the violation of natural justice and constitutional rights (e.g. equality of arms). In this case judicial review is possible.

Portuguese law does not provide a special procedure on how administrative judges may have access to classified data or any special mechanism of judicial control in relation to the denial of access to a case file due to its confidentiality. In the case discussed in Chapter 2 concerning Portugal, the administrative authority followed the opinion of the security services, without access to the information. The judge did the same.

3.2.2 Judicial mechanisms in countries applying the concept of the essence of the grounds in various manners: Cyprus, Czechia, Romania, Luxembourg, Sweden, Belgium

Cyprus

In Cyprus there is no separate access procedure, but access may be requested from the judge in the judicial review procedure concerning primary administrative decisions.[377] The Court must assess whether such disclosure of a document or information may harm the vital interests of the Republic and correspondingly set such terms in the relevant disclosure order.[378] Therefore, everything depends on the discretion of the Court. The Court has the power to review whether denial of access would be justified on the grounds of the protection of national security of public order. There is no test performed by the court, however, to examine the matter the other way around and to assess whether disclosure would endanger national security or public order. Up until now, judges were only willing to disclose part of the classified documents in a few cases, and mainly in detention cases, not in administrative procedures. Recent case law suggests that the party does not have to have the court's consent to access classified data-based information.[379] In any case, the judge has the right to disclose information and may also order the authority to provide the documents either to the casefile or to the party directly. Lawfulness of the classification is not reviewed by the courts in any case.

Judicial mechanisms concerning classified data-based decisions are just as unevenly applied in respective procedures as the essence of the ground doctrine is applied differently in different procedures: the rights of access and its judicial oversight may weigh differently concerning typical immigration and in asylum cases. This is because in asylum, family unity and asylum detention cases that are adjudicated before the ACIP,[380] full factual and legal justification is to be given

372 See First Hall Civil Court (FHCC), Madiha M.A. Abunada (K.I. 82608A u Refcom no. 23465/18) vs Direttur tad-Dipartiment taċ-Ċittadinanza u ta' l-Expatriates, u Identity Malta, u l-Avukat Ġenerali, (1150/2018 MH), 27 March 2023., available: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=137993.

373 E.g. First Hall Civil Court, Salemn Almarghani Aboubakr Alzarouq vs Identity Malta, (579/2019 FDP), 9 July 2020. (hereinafter:Salemn Almarghani Aboubakr Alzarouq).

374 Established under the Immigration Act, Chapter 217 of the Laws of Malta, page 18, available: https://legislation.mt/eli/cap/217/eng.

375 International Protection Act, Chapter 420 of the Laws of Malta, page 8, available: https://legislation.mt/eli/cap/420/eng.

376 COCP, Chapter 12 of the Laws of Malta, pages 133-135, available: https://legislation.mt/eli/cap/12/eng.

377 The legal basis for non disclosure is the *Security Classified Information Order of 2013*# issued under the *Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2002* (Law 216(I)/2002)# was replaced by the *Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2021 (Law 84(I)/2021),* according to which, in the case of classified information the disclosure of which is requested before a court of law.

378 Security Classified Information Order of 2013# issued under the Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2002 (Law 216(I)/2002)# which were replaced by the Regulations for Security Classified Information, Documents and Material and Relevant Matters Law of 2021 (Law 84(I)/2021).

379 Mustafa El Hussein v. Republic of Cyprus, Civil Appeal No 15/22, 17/11/2022, ECLI:CY:AD:2022:D443.

380 The ACIP reviews all decisions in relation to asylum seekers and refugees taken under the Refugee Law (Law No. 6(I)/2000).

for decisions that are upheld, as it has been explained in Chapter 2. Hence, acquiring access to underlying data may not be essential for exercising defence rights. In immigration cases, however, the executive's 'margin of appreciation' is really broad, sometimes only stating the relevant legal grounds for the decision. These cases are reviewed before a different judicial body, the AC,[381] which seems satisfied with the decisions even if factual grounds are missing. Therefore, access rights may be more significant to be obtained in a procedure conducted before the AC, where there is a greater chance that applicants do not know of the reasons of accusations brought up against them. Nonetheless, the ACIP also recognizes broad discretionary powers to the authorities when public order or national security is at stake, including the power to classify information as top secret or confidential as a result of which it may only be disclosed to the Court.[382] Both courts, and in a procedure concerning detention of foreigners also the Supreme Court, relied on the *Regner* judgment of the ECtHR to justify the non-disclosure of classified data to the applicant on the ground that the court has full knowledge of the evidence. [383]Recently however, the Supreme Court in a Habeas Corpus Appeal followed C-159/21, GM, 22.9.2022 recognizing the right of the foreign national to have access per se if not to the full evidence against him at least to the substance of the evidence so as to be able to effectively exercise his defence rights, irrespective of the access given to the Court.[384] Since that decision, the ACIP, in the context of pending applications where disclosure is an issue, seems to have been changing its position.

As for the review of primary administrative decisions, the practice of the two courts may be described by a more divergent approach**.** The AC does not examine the substance/merits of the case, but only the legality of the decision (whether procedures have been followed and the decision is not flawed in fact or in law, as well as the justification and good faith in the procedures). The AC only reviews whether the relevant national security/public order considerations do exist, it does not investigate its grounds, as that is the obligation of the executive.[385] The information provided by the state constitutes sufficient legal basis for justifying contested decisions by foreigners.[386] The authorities only have to present the evidence, but it will not examine whether they strike a fair balance between the individuals' rights and state interest. According to the case law, it is sufficient to provide a sufficient factual basis for the negative decision if information giving rise to concern exists and is gathered from sources that are appropriate. The AC normally annuls the decision only when the authorities either do not present any evidence or when they present contradictory evidence. The ACIP, on the other hand, reviews both the factual and legal basis of a decision and in accordance with case law. The Court has to do its own balancing exercise in conflicting interests, and the authorities have to present all the relevant facts and information relating to the foreign national, the court may request any additional information.[387] Concerning substantial judicial review of the decisions, the ACIP is more demanding and requests a full factual and legal justification on behalf of the authorities and if not available, it may annul the decision.

Czechia

In Czechia, there is no separate procedure established to judicially review access (denial) to classified data, and the judge, reviewing the primary administrative decision, has no rights to review refusal of access, or to disclose or give access to classified information to a party. Lawfulness of classification may not be reviewed by courts either. This practice is not a disproportionate restriction in the vast majority of immigration-related procedures, as parties may access the part of classified information that is used to establish the factual grounds, if they sign a document containing their obligations concerning the protection of the classified data.[388] Also, as it has been explained in Chapter 2, immigration procedures

381 The AC reviews all administrative decisions (such as granting any type of residence permits, etc.) issued under the Aliens and Immigration Law.

382 M A L v. Director of CRMD, Case No. 800/2019, 19/8/2019, ECLI:CY:DDDP:2019:24, M.I. v. Republic, Case No. ΔΚ 114/21, 7/2/2022, ECLI:CY:DDDP:2022:98, B.A.M V Republic, Case No. 711/20, 9/5/2023 (not published), M Y A L v. Director of CRMD, Case No. 1/2019, 16/8/2019, ECLI:CY:DDDP:2019:22 etc.

383 Al Lakoud v. Republic of Cyprus, through the Minister of Interior, Civil Appeal No. 77/2020, 8/6/2021, available: https://bit.ly/3V2wVHc, Al Lakoud v. Republic of Cyprus, through the Minister of Interior, Civil Appeal No. 95/2020, 8/6/2021, available: https://bit.ly/42WVgjD, Abdalla v. Republic of Cyprus, through the Minister of Interior, Civil Appeal No 96/2020, 8/6/2021, available: https://bit.ly/3SWwqMb.

384 Mustafa El Hussein v. Republic of Cyprus, Civil Appeal No. 15/22, 17/11/2022, ECLI:CY:AD:2022:D443, available: https://bit.ly/3TdX6tr .

385 Anghel Viorel v. Republic of Cyprus, ECLI:CY:AD:2014:D338, Case No. 1064/2012, No. 20.5.2014.

386 Krisztian Befeki v. Republic, Case No. 293/2012, 7.3.2012.

387 M Y A L v. Republic of Cyprus, Recourse No ΔΔΠ 1/2019, 16.7.2019, available: https://bit.ly/3wsfGFk , M I v. Republic of Cyprus, Recourse No ΔΔΠ 209/2019, 13.11.2019, Available: https://bit.ly/42WBdCe.

388 Sections 38 (6) and 51 of Administrative Procedure Code.

are generally concluded by decisions containing the factual grounds of reasons, unless it concerns Section 169m (3) of the Residence of Foreigners Act, which establishes that in the visa cases of applicants regarded as nationals security threats, no reasons shall be given. In the view of the Czech Supreme Administrative Court, *"in the case of the use of classified information to which a party's access is restricted for legitimate reasons, judicial review is the only guarantee ensuring the elimination of arbitrariness in the decision-making of the administrative bodies(...)."*[389] The Constitutional Court took a similarly restrictive approach by holding that "*[i]f the complainant was not able to acquaint themselves with the document containing classified information even during the proceedings before the Regional Court, this fact cannot be regarded as a violation of constitutionally guaranteed rights and freedoms*."[390] The CC emphasised that "*the security interest of the state (…) constitutes an existential interest that legitimises a certain limitation of the individual's legal sphere; indeed, it is the state that ultimately protects the individual's position. The exclusion of the right to be acquainted with documents containing classified information represents optimisation of the possible conflicting effects of the protective mechanisms of two constitutionally protected values, namely the security interests of the State on the one hand and the right to judicial protection under Article 36(1) of the Charter of Fundamental Rights and Freedoms."*

As to the substantive review of national security accusations of the primary administrative decision, an instance of the procedure which has to be highlighted is that jurisprudence suggests that the veracity of the grounds of accusations is not to be reviewed by the court, only whether or not the presented grounds imply the establishment of accusations. The Supreme Administrative Court "*[e]xpressly emphasises that the duty of the administrative court is not to assess the truthfulness of the classified information claimed, but its credibility, persuasiveness and relevance.*"[391] The administrative courts must be able to assess the credibility and persuasiveness of the facts contained in the classified documents and their significance in relation to the matter at hand.[392] The purpose of judicial review of decision-making based on classified information is, *inter alia*, to ensure that only real and credible information is used.

Romania

There is neither an access procedure established in Romania to obtain information based on which a classified data-based decision is made, nor have the courts reviewing the primary administrative decision effective rights to give parties access to classified data which may have been unlawfully undisclosed. Lawfulness of classification is not reviewed by the court either. Similarly to Croatia and Lithuania, courts cannot disclose classified data, they may only request the SRI to fully or partially declassify the documents, or suggest a lower level of classification.[393] This practice might be counterbalanced by the fact that, as it may be seen in the table summarising access rights, lawyers may ask to be granted a security clearance certificate or access permit delivered by the ORNISS ("the ORNISS certificate"), in order to gain access to classified documents and if they receive written authorisation from the data owner. The authorization is issued on levels of secrecy, following the verifications, carried out with the written consent of the person concerned.[394] The fact that this procedure may not anyhow be supervised by the judiciary evidently weakens the effectiveness of this procedure. The potential lack of access in the judicial phase may only be somewhat counterweighted by the fact that courts do not only have access to classified data, but also to the very primary source, which must be presented to the court.[395] If there is no primary evidence, the court excludes the information which lacks this basis. Therefore, it might be argued that in case the person is declared 'undesirable' as explained in Chapter 2, the appeal courts – Court of Appeal Bucharest and the High Court of Cassation and Justice – have increased power.

389 Judgment of the Supreme Administrative Court of 12 March 2020, N. 1 Azs 330/2019-36, [25].
390 Order of the Constitutional Court of 25 May 2021, Case No: III. ÚS 466/21, (11).
391 Judgment of the Supreme Administrative Court, No. 7 Azs 313/2020-46 [26], 11 March 2021, .
392 Order of the Special Chamber of 1 March 2016, No. 4 As 1/2015 40, Court Report of the Supreme Administrative Court No. 3667/2018, section 32.
393 Action Report (02/11/2022) Communication from Romania concerning the cases of Hassine v. Romania (Application No. 36328/13), available: https://bit.ly/42SuvwN]} Abu Garbieh v. Romania (Application No. 60975/13), available: https://bit.ly/3wC7JNC]} Muhammad and Muhammad v. Romania (Application No. 80982/12), available: https://bit.ly/49tCFhR]}.
394 Article 28, paragraph 2, Law 182/2002 on the protection of secret information.
395 CAB decision No. 2966 of July 19, 2017, file No. 5318/2/2017. Also the Constitutional Court ruled in the decision No. 763/2006 that the judge has access to documents of different levels of secrecy, according to Law No. 182/2002.

Luxembourg

The issue of judicial review of non-disclosure of classified data in Luxembourg is quite underregulated by law and there also is no case law in this regard. The national research made for the purpose of this study has not identified any case in which access to classified data was requested by the party / their lawyer and no case law has been found about the issue of classified information in the realm of asylum or immigration law before the Luxembourgish administrative courts. Hypothetically, however, the legal scenario concerning the challenging of non-disclosure would be the following: the applicant may request the administration to disclose the data in question and in case of refusal, they may turn to the Commission for Access to Documents (CAD), which may advise the admin body on whether or not disclosure has to happen. Should the CAD find that the document cannot be non-disclosed because it enters one of the exclusions provided in the law[396], for instance when it is classified,[397] the CAD will issue a negative decision, stating that there is no right of access provided by the law for such classified documents. Following the opinion of the CAD, the administrative body may then disclose the data, and, if not, within three months of the receipt of the CAD opinion, the applicant may appeal the decisions at the administrative tribunal.[398] The administrative tribunal may then order the disclosure of data.[399] In addition to the review to be carried out in the context of an application for annulment, the proceeding judge may review the appropriateness of the decision and substitute his own assessment with that of the administration. It is worth noting that the burden of proof is on the administration to prove that non-disclosure is justified.[400]

In the judicial review procedure of the primary administrative decision, when a decision is based on reasons of external or internal state security, the party has the right to obtain elements of the information on which the administration based the decision, and the party has to be given the essential content of the case and opportunity to present his observations.[401] However, as stated in the relevant law, only extremely general reasons would be given to the party if such a demand is granted.

Strictly following the terms of jurisprudence,[402] it could also be argued that, when an administrative decision is based on classified information that the authority uses to justify its negative decision, judges are expected to examine the lawfulness of the classification. However, as such a case has never been brought to the administrative jurisdictions, the reality might be different.

Sweden

In the case of Sweden there is only a limited amount of published information about how courts exercise their rights concerning the oversight of non-disclosure of classified data and administrative decisions based on classified data in immigration-related cases, therefore, no definite conclusions may be reached regarding the operation of judicial mechanisms. In any case, the law provides that the party may request access to classified data from the Security Police. If this request is denied, the party may appeal the decision to an Administrative Court of Appeal (Kammarrätt).[403] This court has access to the information only if requested from the Security Service and information may be provided according to the Public Access to Information and Secrecy Act. If access to data was unlawfully restricted, the court may reveal the data to the party and the legal representative.[404] If the Court finds that the document or specific data in the document could not be disclosed, the court will state that for the provisions of the Secrecy Act, the document cannot be disclosed. The court may not review the lawfulness of classification.

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396 Article 1 (1) of the Law of 14 September 2018 on transparent and open administration.
397 As set out in Article 1 of Law of 14 June 2004 relative to the classification of documents and to security clearances.
398 Articles 10(3) and 10(4) of the law of 14 September 2018 on transparent and open administration.
399 Article 10(3) of the law of 14 September 2018 on transparent and open administration.
400 Trib. Adm., 27 février 2023, n°44963.
401 Article 6 of Grand ducal regulation of 8 June 1979 relative to the procedure to be followed by State and municipal administrations.
402 E.g. Trib. adm., 13 oct. 2022, n°45642 du rôle, Cour adm., 17 juin 1997, n°9481C du rôle, Pas. adm. 2021, V° Recours en annulation, n° 38 (1er tiret) et les autres références y citées, Cour adm., 4 mars 1997, n° 9517C du rôle, Pas. adm. 2021, V° Recours en annulation, n° 38 (2e tiret) et les autres références y citées.
403 Chapter 6, sections 7 and 8 of the 2009 Secrecy Act.
404 Chapter 10, sections 3 and 4 of the 2009 Secrecy Act.

As it was indicated in Chapter 2, it is difficult to be conclusive as to the extent of the application of 'the essence of the grounds' concept. Moreover, the law does not clearly provide that decisions may not rely on reasons not disclosed to the party. Consequently, in a judicial review procedure, a decision is normally not quashed as unlawful when the applicant is not provided with the substance of reasons.

Belgium

In Belgium, there are no judicial mechanisms for reviewing access to data in a 'traditional' sense. Instead, a quasi-investigative body has been established to investigate the methods that led to the existence of classified information, furthermore, an *ad hoc* commission has been set up to deal with cases in which unlawful access denial is claimed. As it could be seen earlier, all parties have access to the same information underlying an administrative decision, i.e. information notes, drawn up by the intelligence services, but not to the reports and facts on which these notes are based. No established procedure exists to grant access to the evidence that led to the establishment of these facts. The CALL has nonetheless pointed out the existence of an *ad hoc* procedure with an intelligence services control body, Committee R.[405] It aims to invite Committee R to proceed to an examination of the methods of investigation and research that led to the establishment of the intelligence notes. The CALL considered that the foreigner could not claim the violation of the rights of defence for not having access to this evidence and possibility to contest them, if he or she had not used the procedure established by Committee R.[406] In case of illegality, Committee R may order the cessation of the measure, the prohibition of exploitation, and the destruction of the illegal information.[407] It appears that in cases where foreigners have filed such a complaint with Committee R to challenge the content of intelligence notes, the committee was not able to give a timely ruling. In fact, it often takes several years after the initial complaint for the committee to respond, rather than within a month.[408] Moreover, if a foreigner or their lawyer have requested access to the administrative file from the Alien's Office (or other admin authority) but they have been denied, it is not for the CALL to handle these cases but for a separate *ad hoc commission.*[409] An appeal to the Council of State is available against the decision of this Commission.[410]

As to the review of primary administrative decisions, it might be stated that the CALL operates in an efficient way, ensuring that there is a fair balance between the rights of the defence, the right to an effective remedy, and the security reasons that may justify a restriction of these rights. A specific motivation on the reasons for which elements are not communicated to the parties seems thus required in the jurisprudence of the CALL.[411] The CALL, however, emphasised that it did not have the authority to substitute its appreciation for that of the intelligence services. Its role is limited to verifying the legality of decisions related to residence and deportation, rather than determining any finding concerning state security.[412] In asylum cases, where CALL has full litigation authority, the answer to the question may differ but has scarcely arisen. Typically, CALL finds that the evidence submitted in support of the decision is insufficient without necessarily identifying any evidence that was not provided to the parties.[413]

While the CALL does not expressly have the right to review lawfulness of classification, on some occasions, it challenged the administrative authority's characterisation of a document as confidential, when its presence in the administrative record and its title ("routine") makes it clear that the document is not to be classified.[414]

405 In accordance with articles 43/2 to 43/5 of the Organic Law of 30 November 1998 on Intelligence and Security Services, see in C.A.L.L., 9 November 2021, nr. 263 658.
406 *Ibidem.*
407 ibid. article 43/6 of the law of 30 November 1998 .
408 C.A.L.L., 16 December 2021, nr. 265 593 and 12 January 2023, nr. 283 111, available: https://www.rvv-cce.be.
409 'Commission for access to administrative documents' instituted by the law of 11 April 1994 on the publicity of the administration, Loi du 11 avril 1994 relative à la publicité de l'administration, M.B., 30 juin 1994.
410 C.A.L.L., 28 June 2019, nr. 223 442, available: https://www.rvv-cce.be/sites/default/files/arr/a223442.an_.pdf.
411 C.A.L.L., 25 September 2020, nr. 241 399.
412 C.A.L.L., 9 November 2021, nr. 263 658.
413 C.A.L.L.,27 April 2023, nr 288 183, available: https://www.rvv-cce.be/sites/default/files/arr/a288183.an_.pdf and 19 May 2020, nr. 235914.
414 ibid.

3.2.3 Judicial mechanism in countries applying the 'essence of the grounds' concept: Austria, Estonia, France, Germany, the Netherlands, Slovenia, Spain

Austria

In Austria, a separate judicial review procedure may be utilised to claim the unlawfulness of access denial. Lawfulness of classification cannot be reviewed by the court. As it could be seen in the table summarising access rights, the applicant does not have access to classified data, but even the courts' may be restricted if the applicant's request for access is not granted. If there is a separate denying decision from the data owner, this may be appealed in the ordinary legal process.[415] If the access was denied by way of procedural order, it may only be reviewed in the course of an appeal against the primary administrative decision in that procedure. If the appeal of a decision to exclude information from the file is successful in whole, the party and their representatives will be given access to the full file. The party may be granted access to the files in any technically possible form upon request.[416] The Austrian Constitutional Court has found that these rules ensure the "equality of arms".[417]

Estonia

In Estonia, the exercise of access rights concerning classified data are decided within the judicial review procedure challenging the primary administrative decision: in fact, an access procedure within the review procedure is conducted and if the applicant is not satisfied with the outcome and access is denied, the representative may appeal this decision in a separate 'access procedure'. Lawfulness of classification is not reviewed judicially.

In order to understand the operation of this type of judicial mechanism, access rights have to be briefly overviewed. The applicant's access to classified information might be restricted under the State Secrets and Classified Information of Foreign State Act (SSCIFSA).[418] The legal representative, if s/he has no special permit by which classified data may be accessed,[419] s/he may apply for access to files if it is unavoidably necessary[420] and may share it with their client if permission is granted. Additionally, according to the Code of Administrative Court Procedures (CACP)[421], a party to proceedings may be removed from any procedural act, including a trial, hearing or a part of such sessions in order to ensure national security or public policy, in particular to maintain a state secret or foreign intelligence. If classified information is presented as evidence in court proceedings, and the party and their representative do not have the right of access provided for in the SSCIFSA, the court must refuse to grant the right to have access to this information. The PoC and their representative must be removed from the proceedings. If the representative does not have permission to access classified data, the court must make a request to the institution performing the security check, on the basis of which the person undergoes a security check with their consent.[422] Based on the results of the inspection, the court issues a reasoned ruling, identifying the "unavoidable need" for access of the party to the proceedings.[423] The question of what "unavoidable need" is, has to be decided based on the weighing principles set forth in the CACP[424] and in view of the relevant fundamental rights of the applicant.[425] In practice, however, it is very unlikely that someone who was deemed to be a national security threat would pass a security check.

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415 Article 130 (1) of Federal Constitutional Act (B-VG) Federal Law Gazette No. 1/1930 as amended by Federal Law Gazette I No. 222/2022., available: https://bit.ly/3TblRpX.
416 § 17 (1) of AVG.
417 VfGH 02.07.2015, G240/2014, ECLI:AT:VFGH:2015:G240.2014.
418 State Secrets and Classified Information of Foreign State Act (SSCIFSA).
419 § 28 (1) of SSCIFSA.
420 § 29 (1) of SSCIFSA.
421 § 79 (1) p1 of CACP.
422 § 29 (4) of SSCIFSA.
423 § 29 (1) of SSCIFSA.
424 § 79 and 88 of CACP.
425 Tallinn Circuit Court 28.11.2022 decision in administrative case nr. 3-22-1657, page 11., available: https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=327133120.

The Supreme Court found that "*the person must pass a security check, and then the court may assess whether access is unavoidably necessary to solve the case.*"[426] The court found that "*access to evidence may be restricted provided that the core of the right to effective legal protection is not restricted thereby and the court takes measures to balance the access restriction*".[427] If the applicant does not agree with the order of the court, they may submit an appeal. The Tallinn Circuit Court also found that "*the court may decide that the party to the proceedings does not have a need to know, without submitting a request to the authority performing the security check and without waiting for the results of the security check.*"[428]

It means that if there is classified information used in the decision, which requires an access permit, the court will automatically deny access. The representative has to apply for access, go through the security check, and if successful, it will get full access. If access is denied, the representative may appeal this decision in a separate procedure. The court, however, may deny access even before the security check. This may happen only if the judge can already establish that there is an overriding interest in keeping the information secret.

France

In France, as classified data-based decisions have to be sufficiently motivated and the actors involved have the same access to the same information, there is no need for a procedure in which access denial may be contested. In case of a judicial challenge, evidence supporting the alleged threat must be shown to the court, which is then shown to the parties. The State may unilaterally decide what they choose to disclose. However, the court may then rule there is not enough evidence to support the public order / national security threat claim. As a general rule, the judge does not review the lawfulness of classification. If the national security or public order grounds presented are successfully contested, the judge may choose to invalidate them.[429] However, such occurrences are quite rare. Most of the time, it is the primary administrative decision which may be struck down by the court, if the threat on which it is based is not regarded as sufficiently established.

Germany

If data is not disclosed for reasons of public or national security, the German legislator opts for an interim procedure called 'in-camera procedure' to resolve the normative conflict of secrecy. This in-camera procedure is the German equivalent of separately established access procedures presented earlier in numerous jurisdictions. Importantly, however, if data is revealed to the court reviewing the primary administrative decision, it is also revealed to the party.

As it has been explained, the essential factual and legal aspects of reasons must be contained in an administrative decision. While partial elements of potentially classified documents are included in the reasons for the administrative act, this does not in itself result in a right to inspect these documents. If prerequisites for refusal of access to data exist,[430] classified information made available to the aliens authority do not have to be made accessible to the applicant. For a partial or complete refusal of the inspection of these documents, however, a written justification from the authority is required.[431]

If the party then challenges the primary administrative decision and the authority wishes to refuse disclosure of data in the judicial proceedings, its highest supervisory authority may issue a declaration – 'blocking declaration' – that the access to files is refused („blocking declaration"). If this happens, any party to the proceedings may appeal to the Higher Administrative Court or the Federal Administrative Court for clarification as to whether the refusal/non-production of the files/documents is lawful.[432] The lawfulness of non-disclosure is decided by these courts in the in-camera procedure. If in the in-camera procedure it turns out that non-disclosure was unlawful, then the in-camera court will be obliged to give the administrative court access to the documents. That court is then obliged to let the parties know about the

426 Supreme Court 22.11.2017 decision in administrative case nr. 3-17-911, page 22., available: https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=218030286.
427 ibid, page 23.
428 ibid.
429 TA Lille, 14 décembre 2017, n°1701637.
430 § 29 (2) of VwVfG.
431 § 39 (1) of VwVfG.
432 § 99 (2) of VwGO.

disclosure and hand over the documents in question. All files/information which have been made accessible to the court must also be made accessible to the parties involved.[433] If non-disclosure is lawful, then the justification as to why confidentiality had been necessary is to be disclosed. The court does not perform any review with regards to the lawfulness of classification.

The Netherlands

The Dutch legislator employs a procedure similar in structure to the German way, but adding a unique element to the access procedure, namely that not only the court which has competency decides if non-disclosure is justified, but also the applicant has a say in whether or not data, that cannot be disclosed to them following the consent of the court on access restrictions, may be used as evidence supporting the decision.

The default position in the Netherlands is that classified data-based decisions contain legal and factual reasons and that all data on which a decision is based, must be shared with the court and the court subsequently shares it with the other party/parties.[434] The immigration authority itself may have limited access to classified data if it comes from a different administrative authority. The General Intelligence and Security Service, however, normally shares information with the immigration authority,[435] which then shares it with the court and the court may disclose it to the party. Moreover, the court may on its own motion request any authority, including authorities which are not a party to the case, such as the General Intelligence and Security Service, to provide relevant data.[436] The authority cannot refuse such a request.[437]

The authority may, however, submit a 'secrecy request', if it wants to restrict the party's or parties' access to certain information, sometimes even requesting to limit the courts' access.[438] The secrecy request is decided by the Secrecy Chamber within the lower regional court or Division, consisting of different judges than the chamber deciding on the primary administrative claim. The Secrecy Chamber reviews whether compelling reasons to refuse or limit access exist.[439] Jurisprudence on the meaning of 'compelling reasons' does not provide a specific definition, but emphasises that "*because granting a request for limited access constitutes a restriction of the 'equality of arms', the Division sets strict requirements for the reasons of such a request. The applicant [(the administrative authority)] must explain why compelling reasons exist (judgment of 29 April 2019, ECLI:NL:RVS:2019:1385). Furthermore, the applicant must make clear why, in his opinion, his interest to limit access outweighs the interest of the other party to have access to the document.*"[440] The other party receives a notification of the secrecy request, including the reasons for the request, unless the party who requested secrecy, also requests that the reasons for the request remain secret.[441] The Secrecy Chamber will then determine whether secrecy of the reasons is justified. Notably, the law does not state that the other party has a right to argue why the request should not be granted.

If the Secrecy Chamber refuses the request, the classified data is returned to the authority.[442] The authority can subsequently decide if it wants to resubmit the data to the court, and consequently allow the court to share it with the parties (which may not only be the foreign national and his lawyer, but also the immigration authority, if the administrative authority sharing the information is the General Intelligence and Security Service). If the authority decides not to share the information, the court "may draw the conclusions from this in a way it deems suitable."[443] In this case, the court is likely to determine that the decision contains insufficient reasoning and quash it.[444]

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433 § 100 (1) of VwGO.
434 Articles 3:46, 8:42(1) and 8:39(1) of Awb.
435 Article 2(1) of the Covenant on cooperation between the IND and AIVD https://zoek.officielebekendmakingen.nl/stcrt-2019-15393.html.
436 Article 8:45(1) of Awb.
437 Article 8:45(2) of Awb.
438 Article 8:29(1) of Awb.
439 Article 8:29(3) of Awb.
440 Administrative Jurisdiction Division of the Council of State, 10 June 2020, ECLI:NL:RVS:2020:1367, paragraph 11., available: https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2020:1367.
441 ibid. paragraph 10.
442 Regional Courts, Article 2.8(10) and Article 2.9(9), available: https://zoek.officielebekendmakingen.nl/stcrt-2022-1480.html Division, Article 14(6), available: https://www.raadvanstate.nl/publicaties/regelingen/procesregeling/#alinea17.
443 Article 8:31 of Awb.
444 L.M. Koenraad and G. Lodder, Annotation to CJEU judgment C-159/21, 22 September 2022, (*GM*), published in *Jurisprudentie Vreemdelingenrecht* JV 2023/18.

To prevent the court from quashing the decision, the authority tends to grant the court access to the classified data from the onset and solely request the Secrecy Chamber of the court to not share the data with the other party. Secrecy Chambers tend to grant such requests. The court then has to ask the other party (the foreign national) for permission to base its assessment on the data.[445] If the foreign national refuses permission, then the case goes to another chamber of the court or Division.[446] It is worth noting, however, that in practice, the foreign national tends to grant permission because if the foreign national refuses the court's access, the consequences are attributed to him, meaning the court essentially assumes the decision is well-reasoned and the foreign national's appeal is unlikely to be upheld.[447] This procedure thus puts foreign nationals in a serious decision-making situation, as they are subjected to a decision where the reasons for the decision are in fact known either only by the executive or at least by the court as well.

Slovenia

There are no judicial mechanisms established in Slovenia enabling applicants to contest refusal of access to classified data, given the full transparency available for all actors involved in the procedures, as it has been explained in Chapter 2.

Spain

In Spain, applicants ought to receive legally and factually sufficiently motivated decisions, which, if contested, are based on reasons available to all actors equally. In the review procedure concerning a primarily administrative decision, applicants may contest that they lacked access to evidence which was the ground of that decision. Undisclosed data may, however, only be disclosable to the party if it is declassified. This means that in Spain, no access to classified data may be given: the only way to obtain access is with the declassification of data.

In the Administration, the Council of Ministers and Chief of Defence Staff have access since they conduct classification and declassification. It is possible that persons or companies are granted access to confidential information after following a specific clearance procedure and meeting a set of criteria. After the administrative proceeding has ended, the applicant is entitled to appeal the decision before the Contentious-Administrative Jurisdiction.[448] The request of any party in a contentious-administrative proceeding to have access to the excluded files from the administrative dossier, based on the right to use all evidence to substantiate his/her claim embodied by law,[449] would drive the judiciary to request such a file from the body that had previously classified it. Consequently, given the rules on state secrecy, it would force such a body to either declassify the information or refuse to do so. The Court might request the declassification of a restricted document on its own motion.[450] If the body that classified the document does not abide by the judicial petition, such refusal could be appealed by the party before the Supreme Court, which might decide to force the aforementioned body to declassify the document. A decision of the Council of Ministers refusing to declassify information was appealed before the Supreme Court, which, striking a balance between the measures adopted by the Government in support of the security of the state and the right to an adequate judicial protection of the claimants, ordered the Council of Ministers to cancel its classification.[451] It is possible that as a result of a clearance process, a judge could potentially be given access to classified data if s/he meets the legal criteria, while the party is not.[452] However, such information could not be used in the administrative-contentious proceeding since the facts of the case may only be established by the parties, generally, in the statement of claim presented by the plaintiff and the answer from the defendant.[453]

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445 Article 8:29(5) of Awb.
446 Article 8:29(5) of Awb.
447 Administrative Jurisdiction Division of the Council of State, 4 September 2002, ECLI:NL:RVS:2022:AE7215, available: https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2002:AE7215.
448 According to the Law 29/1998 of 13 July 1998.
449 Article 56.3 of the Contentious-Administrative Jurisdiction Law.
450 Dimitri Berboff (Judge of the Contentious-Administrative Chamber of the High Court of Justice of Catalonia), 'La incorporación al proceso contencioso administrativo de informes reservados: alcance del control jurisdiccional sobre su contenido - Foro abierto' (2008) 4 Revista de Jurisprudencia El Derecho, 6, with reference to article 60 of the Contentious-Administrative Jurisdiction Law.
451 Supreme Court Judgment of 4 April 1998, ECLI:ES:TS:1997:2389. See very similarly the Supreme Court Judgment of 4 April 1998, ECLI:ES:TS:1997:2359.
452 Regulations of the National Authority for the Protections of Classified Information, page 59.
453 Article 60.1 of the Contentious-Administrative Jurisdiction Law.

3.2.4 Overview of judicial mechanisms in relation to access to classified data

Based on the above overviews concerning judicial mechanisms in relation to accessing classified data, it might be stated that **those countries where the essence of the grounds concept is not used**, but where **there is a separate procedure institutionalised for accessing classified data**, the **practical relevancy of these access procedures is limited** for the strong interplay of national security considerations. While there is **not enough research data** to be conclusive concerning **Ireland** and **Latvia**, it might be argued that the **separately established access procedures** in **Bulgaria, Finland, Hungary** and in **Poland** are **not effective** enough to counterbalance those limitations of the right of the individual, which may stem from the fact that the substance of reasons of a decision referring to state security assertions cannot be known. In **Bulgaria**, even if the court holds that access was unlawfully restricted, the **security body has the final say regarding the extent of disclosure**. In **Finland** and in **Poland**, it seems that if the security of the state is at stake, the **test** applied by the courts in balancing defence rights and the interest of the state is **quite strict to leave space for successful access** requests. While there is a **separate access procedure** established in **Poland, it may only be successful if the data was wrongfully classified**. The Supreme Administrative Court of Poland considers classification to be a categorical prohibition of access. In **Hungary**, the right of the applicant to obtain access to at least the **essence of the grounds is rejected by the jurisprudence** of the highest court and the **occurrence** of the court **granting access** to at least some parts of the classified files is extremely **rare**.

It has been found that the **review procedures** conducted in relation to the **primary administrative decision** seem to **offer more safeguards** to the parties in **Bulgaria, Finland, Hungary** and in **Poland** than the access procedures, counterweighting the lack of information. In **Bulgaria** and in **Finland**, **some reasons** for the underlying administrative decisions **may be provided** regarding national security accusations in the **judicial phase**. Nonetheless, this practice is **not statutory** in Finland, thus, its application happens on an ad hoc basis, while in Bulgaria, the **probative value of the evidence** provided **by the SANS** in the review procedure is **considered stronger** by the court than the one provided by the party. As for **Hungary**, while it seems that information on **reasons substantiating the decision** are completely **unavailable**, on a positive note, **judges** reviewing the factual basis and evidence of national security allegations have on occasion **overruled the decision of the authority** because the national security opinion was **not well founded**. Moreover, **lower courts** have recently **followed the standards of the G.M.** judgment and instructed the administrative authorities to reveal the substance of accusations. Similarly, in **Poland**, jurisprudence suggests that **administrative decisions** are annulled if the security agency does not support its finding with **concrete and tangible evidence**.

Separate access procedures, which may result in the disclosure of unlawfully disclosed data, have also been established by law in **Austria, Belgium, Luxembourg** and **Sweden**. In the two latter countries, where the essence of the grounds concept is unevenly – if at all – applied for various reasons, the limited volume of case-law does not allow this study to reach conclusions as to how these procedures work in practice. In **Austria**, where decisions are based on evidence available to the parties, **procedures** resulting in access to classified information bear **no special feature**. In **Belgium**, a **special supervisory avenue** has been established to assert access rights: a quasi-investigative body – **Committee R** – has been set up to **investigate the methods** that led to the existence of classified information, furthermore, an **ad hoc commission** is to **deal** with cases in which **unlawful access denial** is claimed. Further **redress** at the **Council for Alien Law Litigation** and **judicially** can only be considered **after the proceedings of these special bodies** have been exhausted. Although the excessive length of the Committee R procedure may not efficiently guarantee the prevalence of applicants' 'right to know', on a positive note, the CALL might not consider evidence that is not provided to the party as sufficient, thereby advancing the enforcement of access rights.

It may certainly be argued that the **legal framework of those countries where the 'essence of the grounds' of** the reasons of a decision is **not provided** either in the administrative or the judicial phase, moreover, where **these grounds cannot be known by obtaining access** to classified data in a separate procedure either, **may be in breach of European law.** This concerns **Poland** and the category of countries discussed above, in which no separate access procedure is available. These countries are **Croatia, Greece, Lithuania,** and **Slovakia,** where obtaining access to undisclosed classified data is in fact not possible. While there is no separate procedure established to judicially review access (denial) to classified data, and the judge reviewing the primary administrative decision has no rights to review refusal of access, or to disclose or give access to classified information to a party in **Czechia** either, this practice is not a disproportionate restriction in the vast majority of immigration-related procedures, as parties **may access classified data establishing**

the factual grounds of the decision upon signing a document in which they **commit to respect rules concerning classified data protection.** The Czech **review procedure** of the primary administrative decision, however, **does not assess the accuracy of facts** establishing security allegations.

Obtaining access to data **is possible only if the data is declassified** in **Croatia, Greece, Lithuania, Poland** and **Spain**. The **judicial review of the lawfulness of the classification is essential** in this case. In **Spain**, a **full set of guarantees** are provided as the essence of the grounds of the decisions is attainable, and if the applicant believes data was unlawfully disclosed from them, the issue of declassification might reach the highest judicial body, if the administration does not comply with the motion of a lower judge. In **Greece** and **Poland**, no essence of the grounds is provided but **judges may review whether undisclosed data was lawfully classified**. In Greece, data can therefore become accessible in the judicial phase, unlike in Poland, where such judicial review cannot result in instant declassification. Practice may be regarded as the most concerning in **Croatia** and **Lithuania,** as **lawfulness of classification may not be judicially reviewed**, judges may just recommend declassification, but **it is entirely on the security agency to decide whether it makes the data public.** This means that even if a decision is based on data which was unlawfully classified, national law leaves the applicant completely at the discretion of the administration, without the assertion of a more independent supervisory power. It must nonetheless be pointed out that in the **review procedures**, **Lithuanian courts are more demanding** towards the decision-making authority with regard to their obligation to present sufficiently clear and specific evidence and conduct their own assessment.

The non-disclosure of data is not reviewed in a separate procedure or during the review of the primary administrative decision, but the **legal representative has the right to request access to classified data following a special procedure in Slovakia and Romania**. Institutionalising lawyers' rights to classified data can be regarded as a strong counterbalancing factor to the limitations on the applicant's right to information. In **Slovakia**, however, lawyers' one-time access requested from the security agency is **rarely granted**, its **refusal is unappealable** and even if it is granted, it does **not enable** the **attainment of substantive information**. The **review procedure** in Slovakia does **not** necessarily **compensate** for the lack of access to substantive data either, because – although courts may comprehensively review classified data based documentation – they remain of the opinion that it is not their duty to substitute the activity of administrative authorities as to conducting further evidence in cases when classified data was not made available to the administrative authority or supplement the justification of administrative decisions. In **Romania**, lawyers' potential access to classified data after obtaining the necessary clearance certificate might be regarded as a more **significant counterbalancing tool**, especially in the face of the fact that similarly to Croatia and Lithuania, courts cannot disclose classified data, but can only request the security bodies to fully or partially declassify the documents, or suggest a lower level of classification, thereby leaving a great discretion to the administration. However, unlike in Slovakia, the Romanian **court has a stricter approach to the evidence presented by the authority** and if the court finds that there is no primary evidence, it excludes the information from its assessment.

The study has found that in some countries, there is **no separate access procedure**, but **access might be requested within the judicial review procedure** concerning primary administrative decisions. This is the practice in **Cyprus, Estonia, Germany** and the **Netherlands**. In **Cyprus**, the **judge has the right to disclose** information and may also **order the authority** to provide the documents either to the casefile or directly to the party, but only in a few cases were judges willing to disclose part of the classified documents, and this was mainly in detention cases. As for the **review procedure** concerning the national security accusations as well, it seems that it **does not counterbalance** the deficiency of access rights either, as tribunals are frequently satisfied with insufficient factual grounding of decisions. In **Estonia, Germany** and **the Netherlands**, an **access procedure within the review procedure is conducted** and if the applicant is not satisfied with the outcome and **access is denied**, the representative may **appeal this decision in a separate 'access procedure'**. In Germany this **'internal' access procedure** is conducted under a so-called **in-camera procedure**, which takes place if the administration aims to block access to data by a blocking declaration. If this happens, any party to the proceedings may appeal to the higher court for clarification as to whether the refusal of access is lawful. The **Dutch** legislator employs a procedure similar in structure to the German way, but adds a unique element to the access procedure, namely that it is not only the court which has competency that decides whether the administration's secrecy request is justified, but also **the applicant has a say in whether or not the data**, that cannot be disclosed to them following the consent of the court on access restrictions, **may be used as evidence** supporting the decision.

Lastly, in **France, Malta, Portugal** and **Slovenia**, where **all actors have the same (non) access** to classified information, **no separate access procedures** have been established. The unnecessariness of this procedure is evident in Slovenia, where the full transparency of information prevails. The similarities between the judicial mechanisms in the other countries mentioned herein are just structural, of course, since France, by applying the essence of the ground concept, is a European law compliant model, while the other two countries, by not applying the concept and not having the issue of access sufficiently regulated, do not seem to be. In **France**, decisions contain the substance of underlying reasons and actors involved have the same access to the same information, **a procedure in which access denial may be contested is redundant**. In the case of a judicial challenge, **evidence supporting the alleged threat must be shown to the court**, which is then consequently shown to the parties. A structurally similar system works in **Malta**, where case law implies that in the judicial phase, the party, the lawyer and the judge have access to information and evidence equally, and **if access requested by the party is unlawfully denied, the judge may disclose it. Portuguese** law **does not provide any special mechanism of judicial control** in relation to the denial of access and it seems that **all actors just rely on the non-reasoned opinion of the security body**.

The above overview did not aim to draw any final conclusions as to whether respective jurisdictions work in a European law compliant way when it comes to the accessibility of classified information on which immigration-related decisions are based. It only aimed to present the solutions which have been established by Member States in connection with how (if at all) access to classified information could be reached through judicial supervision. Evidently, **compliance with European standards must be assessed in a manner regarding each element** (content of the decision, automatic access rights, judicial supervision of access denial and substantive judicial supervision of national security accusations) **of national frameworks as a whole**.

IV. ASSESSING 'EQUALITY OF ARMS' IN MEMBER STATES' CLASSIFIED DATA-BASED PROCEDURES

The principle of 'equality of arms' in legal proceedings generally refers to the idea that opposing parties in a case should have equal opportunity to present their arguments before the decision-making body. From the applicant's perspective, the concept is connected to the extent to which defence rights may be exercised. It could be seen in the previous chapters that in most Member States, foreigners facing national security charges do not have equal means against the state. Slovenia is the only country in which the defendant and the state are adversaries in legal proceedings possessing equal information. In other jurisdictions, even if the essence of the grounds concept is applied, foreigners do not defend themselves with the same information that the state accuses them with. In nearly half of the countries examined, the foreign applicant is forced to defend himself without knowing the charges, and in nearly a quarter of the countries, remedy is not even theoretically available to at least obtain the essence of the accusation (e.g. challenging non-disclosure judicially in Greece, Croatia or Poland). In these countries, the foreigner is entirely at the mercy of the court that has access to the classified data. Meanwhile in some jurisdictions, the court does not even examine the veracity of the charges in some cases (e.g. Czechia), only whether the charges can indicate the establishment of national security grounds. It may thus be asked whether it is sufficient for the prevalence of equality of arms in these Member States for a court to see the data on behalf of and in defence of the foreigner, and to defend and judge the matter at the same time.

This chapter argues that the fact that classified data-based decisions are subjected to thorough judicial scrutiny, judges being able to look into national-security related documentation does not suffice when it comes to the enforcement of equality of arms and adversarial proceeding if applicants have no right to know the essence of accusations brought against them.

The research carried out by national experts for the purpose of this study also looked at whether, in addition to the procedural instances already described in the previous chapters, there are additional elements or guarantees in respective jurisdictions that aim at promoting equality of arms. Thus, after a brief overview of what this concept might entail in classified data based immigration proceedings, this final evaluative chapter seeks to place each country in the equality of arms coordinate system by presenting the position of each national – primarily high court – jurisprudence on equality of arms (if there is such), drawing on the main findings of the previous chapters as well. The chapter deals in more detail with those countries where the relevant jurisprudence touched upon the issue of equality of arms, while for other countries it only briefly and evaluatively summarises the procedural elements to be considered within the concept of equality of arms as presented in the previous chapters. Finally, this chapter concludes this whole study with some closing remarks, mainly from the perspective of the principle of the equality of arms and how its prevalence or lack thereof makes the practice of respective Member State European standard (non-)compliant.

4.1 The essence of equality of arms in European case law and its interpretation by Member States

The notion of equality of arms normally appears intertwined with the concept of adversarial proceedings both in the jurisprudence of CJEU and ECtHR. According to the CJEU, *"the principle of equality of arms, which is a corollary of the very concept of a fair hearing and has the aim of ensuring a balance between the parties to proceedings by guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, is an integral part of the principle of the effective judicial protection of the rights that parties have under EU law, enshrined in Article 47 of the Charter. That principle implies, in particular, that each party must be afforded a reasonable opportunity to present its case, including its evidence, under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent*."[454]

454 Case C-580/12 P, Guardian Industries Corp.and Guardian Europe Sárl v European commission, see, to that effect, the judgments of 17 July 2014, Sánchez Morcillo and Abril García, C-169/14, EU:C:2014:2099, paragraph 49, available: https://bit.ly/3wvDk3P and the case-law cited, and of 10 February 2022, Bezirkshauptmannschaft Hartberg-Fürstenfeld (Limitation period), C-219/20, EU:C:2022:89, paragraph 46.

The ECtHR has already held in several cases that a fair hearing encompasses the principles of equality of arms and adversarial procedure.[455] Regarding the former, the ECtHR accommodated an identical interpretation with the CJEU.[456]

It is worth recalling the findings of Chapter 1 concerning European standards and highlight again that limitations concerning equality of arms in classified data-based procedures are permissible as the right to the disclosure of relevant evidence is not absolute. Limitations with regard to classified data related procedures falling under Article 6 of ECHR were first elaborated in the 2017 Regner judgment,[457] in which the Court found that the judicial supervision was sufficient to counterbalance the lack of a summary provided to the applicant. In *Regner*, the ECtHR found that the applicant's right to know the substance of accusations is not essential but only '*desirable.*'[458] As opposed to the *Regner* judgment and articulating a higher level of protection under Art 1. Protocol 7, the 2020 Muhammad and the 2023 Poklikayew judgments are not satisfied with the fact that judges have comprehensive access to classified data based documentation underlying expulsion decisions, if the substance of information grounding the decision is not provided to the applicant in a summary way.[459] The reconciliation of guarantees stemming from the adversarial principle and the interests of national security was set out by the CJEU in the *ZZ* case, and later reiterated in the GM ruling, when holding even in national security cases, notwithstanding a comprehensive judicial review, the adversarial principle is complied with if the person is informed of the essence of the grounds."[460] It may thereby be stated that the essence of the grounds concept must always prevail, even if the contested decision (either the primary administrative decision or decision on the non-disclosure of classified data) is subjected to thorough judicial supervsion.

However, the standards of equality of arms and adversarial principle as they should prevail in classified data-based procedures, are applied in various manners in the surveyed Member States, providing different levels of defence rights to the foreign applicants vis-à-vis national security allegations. The scale to which these principles are enforced in a jurisdiction are determined by the extent to which the defining elements of the research issue discussed in the previous chapters, i.e. the essence of the grounds, access to underlying data and judicial supervision, are present. Accordingly, based on these criteria, researched Member States could be grouped as follows.

4.1.1 Jurisdictions using essence of the grounds and equal (non) access: Austria, Belgium, France, Germany, the Netherlands, Spain, Slovenia

In these countries that all apply the essence of the grounds concept, 'equality of arms' is understood as guaranteeing that the court may only consider those reasons underlying the decision to which the parties have had the same access. It could be seen that in Austria, there is a separate decision denying access and this may be appealed in the ordinary legal process.[461] If the access was denied by way of procedural order, it may be reviewed in the course of an appeal against the final decision in that procedure. The Austrian Constitutional Court has found that these rules – which a court may review if non-disclosure was lawful – ensure equality of arms.[462] In the Belgian CALL's jurisprudence, which has repeatedly recalled the importance of the rights of defence and the control of legality, a specific motivation on the reasons why elements are not communicated to the parties thus seems to be required.[463] In asylum cases, the CALL might find that the evidence submitted in support of the decision is insufficient without necessarily identifying any

455 Borbála Zita Barcza-Szabó: Challenging the national security card in asylum cases: Bringing Article 6 into play, CEU, 2021, page 10, available: https://www.etd.ceu.edu/2021/barcza-szabo_zita.pdf, e.g. ECtHR, Regner v. the Czech Republic [GC], No. 35289/11, 19 September 2017(hereinafter: Regner).

456 Ibid., § 146.

457 Borbála Zita Barcza-Szabó: Challenging the national security card in asylum cases: Bringing Article 6 into play, CEU, 2021, page 10, available: https://www.etd.ceu.edu/2021/barcza-szabo_zita.pdf, e.g. ECtHR, Regner v. the Czech Republic [GC], no. 35289/11, 19 September 2017.

458 Regner, paragraph 160.

459 ECtHR, Cases of Muhammad and Muhammad v. Romania, Appl. No. 80982/12 (15 October 2020) and Poklikayew v. Poland, Appl. No. 1103/16 (22 June 2023).

460 CJEU, C-300/11, ZZ v. Secretary of State for the Home Department, Judgement of 4 June 2013 (hereinafter: ZZ), paragraph 65.

461 Article 130 (1) of Federal Constitutional Act (B-VG) Federal Law Gazette No. 1/1930 as amended by Federal Law Gazette I No. 222/2022., available: https://bit.ly/49vhCeI.

462 VfGH 02 July 2015, G240/2014, ECLI:AT:VFGH:2015:G240.2014., available: https://bit.ly/49KvDVL.

463 C.A.L.L., 25 September 2020, nr. 241 399, available:https://bit.ly/49sRqBu.

evidence that was not provided to the parties.[464] A fascinating element of the Belgian system is the procedure of the Committee R, which is in fact an intelligence service control body, and while theoretically its procedure may strengthen the parties' equality with the executive, its procedure does not seem to be effective due to the excessive procedural length. In France, no special mechanism is to be highlighted, as parties have equal access to information underlying the national security assertions and the judge may choose to invalidate a sufficiently contested decision.[465] There has also been no additional mechanism brought to light that further advances equality of arms concerning the Netherlands, but interestingly, the concept of equal access to data entirely depends on the applicant: decisions may be based on classified data not disclosed to the party, but the party has to consent to this by granting permission to the court to use the data. In Slovenia, which is the only country amongst the Member States participating in this research where full transparency prevails, the applicant and the state are completely equal adversaries. Finally, the obligation on the administration that decisions must be sufficiently motivated has been remarked by the Spanish Supreme Court and Constitutional Court case law referring to the right to an effective judicial remedy and the prohibition of legal defencelessness embodied in the Constitution.[466] If this obligation is breached, judicial supervision of classification may ensure the prevalence of equality of arms.

4.1.2 Jurisdictions using essence of the grounds, but only the reviewing judge may have access to classified information: Bulgaria,[467] Estonia (Cyprus, Czechia, Romania, and Sweden with exceptions)[468]

Amongst the countries mentioned herein, judges' access is more comprehensive than the applicants', they may generally access all national security related documentation, while applicants may see the essence of the grounds. This is always the case in Estonia and Bulgaria, while the other countries are mentioned here for the accuracy of this listing, as in some cases applicants obtain the essence of the grounds, in others, they do not (see Chapter 2). The prevalence of equality of arms in these jurisdictions, due to the inconsistency of the application of the essence of the grounds practice, will be discussed later under point 3. of this section.

The perception of Bulgarian practice might be controversial: the fact that in the appeal procedure the parties before the court can be given access to the factual grounds in a restricted manner under the "need-to-know" principle makes the national practice compliant with the European standards, notwithstanding the fact that this information is not provided in the administrative phase. However, there are some significant procedural instances counteracting the enforcement of the principle of equality of arms in practice. Such an instance is that the factual grounds – without the methodology and evidence – may only be known to the extent that the SANS considers it. The national researcher emphasised that possibilities for defence stay really limited as the parties still do not know how the SANS reached those conclusions. Moreover, the interpretations of the SANS are mostly considered irrevocable by the court. There could be only one – recent – judgment found for the purpose of this research stating the opposite, where the Administrative Court-Sofia City found fault with the fact that the SANS had not presented any real evidence to support the national security allegations. In this judgment not only were the veracity of allegations evaluated, but it also followed the standards of CJEU's GM judgment in the sense that it held that if the applicant could not familiarise himself with the evidence collected by the SANS, the decision is unlawful.[469]

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464 C.A.L.L., 27 April 2023, nr. 288 183, available: https://bit.ly/42UZKat and 19 May 2020, nr. 235914.

465 TA Lille, 14 décembre 2017, n°1701637.

466 Supreme Court judgments of 30 January 2001, ECLI:ES:TS:2001:523. Constitutional Court judgments, of 23 March 2009, ECLI:ES:TC:2009:82; 1 October 1990, ECLI:ES:TC:2009:146; 3 May 1993, ECLI:ES:TC:1993:150; 18 September 2000, ECLI:ES:TC:2000:214; 30 September 2002, ECLI:ES:TC:2002:171; 19 May 2004, ECLI:ES:TC:2004:91; 23 October, ECLI:ES:TC:2006:308; and 26 January ECLI:ES:TC:2009:14; among others. The right to an effective judicial remedy and the prohibition of the legal defenselessness is embodied in article 24.1 of the Spanish Constitution passed by the Cortes Generales on 31 October 1978, which states that: 'Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended'.

467 Bulgaria is listed in this category as in the judicial phase, the essence of the grounds might be provided. Otherwise this study discussed Bulgaria in Chapter 2 amongst countries not using the essence of the grounds in the administrative phase.

468 Please see exceptions regarding Cyprus, Czechia, Romania, Sweden in Chapter 2.

469 Judgment № 2739 of 21.4.2023 in case № 2119/2023 before the Administrative Court-Sofia City, 9 panel, available: https://sofia-adms-g.justice.bg/bg/1693).

In Estonia the party to the proceedings should know the main circumstances that are the basis of the decision made regarding them.[470] Obtaining access to classified data which underlies the national security based decision might be done under stricter rules than in those countries where the essence of the grounds is a given (see Table 2 on Access, and Chapter 3). The mechanism of the principle of „equality of arms" in legal proceedings is ensured by the control of a higher court, which, studying the case materials, checks the legality of the decisions made by the previous court regarding the applicants'/lawyers' access restrictions. It must be pointed out that Estonia is one of the few countries where a lawyer with a special permit may obtain access to classified data, which might be regarded as a special tool that also enhances equality of arms.

4.1.3 Jurisdictions not using essence of the grounds and in which only the reviewing judges may have comprehensive access to classified information: Croatia, Greece, Finland, Hungary, Ireland, Latvia, Lithuania, Poland, Slovakia (Cyprus, Luxembourg, Romania, Sweden with exceptions)

National practice and jurisdiction of these countries – considering the mentioned exceptions for reasons detailed in the previous chapters – the fact that the court can examine the classified files, while the applicant does not have access to that data underlying the contested decision, is considered as a sufficient safeguard guaranteeing the principle of equality of arms and adversarial procedure. Other mechanisms, apart from the comprehensive judicial supervision, are generally not available to ensure this principle. National laws generally allow the courts to consider evidence that has not been disclosed to the applicant during the review procedure. This legislation and practice is arguably at odds with European standards and does not promote sufficient exercise of the applicant's rights of defence.

Croatian, Cypriot, Czech, Hungarian,Polish and Slovakian high court jurisprudence explicitly articulates that applicants' procedural rights are safeguarded by the mere fact that the court reviewing the administrative decision may access the relevant classified data. In some of these jurisdictions high courts refer to the Regner judgement when justifying that enforcing equality of arms may be achieved by the mere fact that judges have access to classified data establishing the contested decision.

As it could be seen, in Croatia the immigration authority / judge can base their decision on facts/evidence that are not disclosed to the party if these are classified data, and the judge reviewing the decision has no grounds to disclose the content to the party concerned, but has full access to the documentation, without being able to review the lawfulness of classification. Despite these shortcomings, the High Administrative Court of the Republic of Croatia is satisfied that "equality of arms" prevails. In a 2017 ruling, the court found that the party to the procedure was granted the protection of the lawfulness of the procedure and the decision, based on the fact that the judges ruling in the first and second instances have had the insight to all of the documentation that SIA has collected.[471] This approach has also been approved by the Croatian CC,[472] although later in 2020, some controversial CC rulings came out, one stating that courts are allowed to communicate the content summary of the classified documents,[473] the other stating that this may be omitted if national security stands in the way.[474] It is worth recalling in that regard the recent ECtHR judgment concerning Croatia's Article 1 Protocle 7 violation, in which the Court noted that despite the requisite judicial reviews, the principle of adversarial proceeding still could not prevail as a result of the courts not giving the person concerned a summary of the content of any classified documents in their case.[475]

Similarly in Cyprus, in case evidence/facts are not disclosed to the party, there are no mechanisms ensuring equality of arms. As mentioned in the previous chapter, both the AC and the ACIP and the Supreme Court in Habeas Corpus Applications relied on the Regner judgment when stating that the courts' full knowledge of the evidence against the

470 Supreme Court 01.10.2018 decision in administrative case nr. 3-17-1026, paragraph 39, available: https://bit.ly/3wCYmgB .
471 Usž-3402/16-5 from 30 January 2017.
472 Decision of the Constitutional Court U-III-2039/2017, op.cit., paragraph 10.1.
473 Decision of the Constitutional Court of Croatia from 24 June 2020, No. U-I-1007/12.
474 Decision of the Constitutional Court of Croatia from 20 October 2020 and three dissenting opinions of the judges, Odluka Ustavnog suda Republike Hrvatske od listopada 2020. i tri izdvojena mišljenja sudaca, U-III-2039/2017, OG 143/2020, paragraph 10.1., available: https://narodne-novine.nn.hr/clanci/sluzbeni/full/2020_12_143_2755.html.
475 Case of F.S. v Croatia, 8857/16, 05 December 2023, paragraphs 66-67.

applicant substituted the applicant's right to know the reasons of accusations brought up against him.[476] On a high note, it has to be repeated that the Supreme Court in a Habeas Corpus Appeal nonetheless followed the GM standards when recognising the right of the foreign national to have access to the substance of reasons so as to be able to effectively exercise his defence rights.[477]

Regarding Czechia, procedures concerning Section 169m (3) of the Residence of Foreigners Act must be at the centre of the discussion, because those are the cases where the applicant may not receive the essence of the grounds. In the view of the Supreme Court, the inaccessibility of classified information is balanced by the specific role of the administrative court in reviewing an administrative decision based on classified information.[478] This approach has been recently reaffirmed when the Supreme Administrative Court held that the limitation of the right to a fair hearing is balanced by the power of the court to access the classified information.[479] If the court or administrative authority had to state precisely and namely the reasons for its decision and all the facts that arise from the classified information, its classification would become meaningless.[480] Concerningly, it must be also noted that according to the Supreme Administrative Court, the duty of the administrative court is not to assess the veracity of national security allegations, but the *"credibility, persuasiveness and relevance*" of the information.[481]

The Supreme Court of Hungary (Kúria) seems to hold an almost identical view to the Czech high court when suggesting that the procedural rights of the persons concerned are safeguarded by the mere fact that the court reviewing an administrative decision based on classified information is able to inspect the documents of the national security authority that contain the classified information.[482] When it comes to the right to know the reasons for a decision, the position of the Kúria is again in line with that of the Czech court when explicitly stating in 2022 that within an access procedure, there can be no disclosure of the substance of reasons: *"the data may fully be accessible or may not be accessible, there is no essence of the grounds".*[483] On a high note, as has been explained in the previous chapter, lower courts have recently started following the standards laid down in GM in asylum cases, although it is unclear how the instructions of the courts will be complied by the authorities.

Poland is also amongst the countries in which high court jurisprudence asserts that the Regner standards suffice to counterbalance procedural limitations, without other mechanisms advancing equality of arms having been introduced in practice. The Supreme Administrative Court (SAC) case law suggests that the judicial control and judges' access to classified data is to be regarded as sufficient concerning effective legal protection and specifically refers to the Regner case in that regard. The SAC is of the view that the essence of the right to a court, despite the existing limitation, has been preserved for the complainant, as an independent and impartial court decides whether the decision issued by the authority was correct.[484] It must nonetheless be highlighted that even the safeguard of judicial supervision might be impaired by the fact that the courts' access to classified documentation underlying national security allegation is not comprehensive: they have access to the factual basis and evidence, in accordance with the 'need to know principle', but not to full documentation leading to the findings on national security threats.[485] Importantly furthermore, as mentioned in Chapter 1, the Polish SAC holds, that although being aware of CJEU's 'essence of the ground' approach, reference to national security threat suffices as the essence of the grounds is not otherwise defined either in jurisprudence or in doctrine.[486] As mentioned earlier, Poland was recently condemned for this practice under Article 1 Protocol 7 ECHR. The

476 K.A.M v Republic of Cyprus, Recourse No 422/2019 , 22.4.2019, available: https://bit.ly/49nJp0y , Alabdallah v. Minister of Interior and others, Recourse No 442/2019, 25.4.2019, available: https://www.cylaw.org/cgi-bin/open.pl?file=administrative/2019/201904-442-19.html&qstring=%EA.%E1.%EC, M Y A L v. Republic of Cyprus, Recourse No ΔΔΠ 1/2019, 16.7.2019, available: https://bit.ly/3wsfGFk , M I v. Republic of Cyprus, Recourse No ΔΔΠ 209/2019, 13.11.2019, available: https://bit.ly/42WBdCe.

477 Mustafa el Hussein v. Republic, Civil Appeal No. 15/22, 17/11/2022, ECLI:CY:AD:2022:D443, available: https://bit.ly/42UVHv0 .

478 Resolution of the Special Chamber of 1 January 2005, 4 As 1/2015 - 40, Court Report of the Supreme Administrative Court No. 3667/2018.

479 Judgment of 08.03.2023, 10 Azs 12/2023-6.

480 Judgment of 07.02.2022, 10 Azs 438/2021-47, [III.A], Court Report of the Supreme Administrative Court.

481 Judgment of 11.03.2021, No. 7 Azs 313/2020-46 [26].

482 Kúria Kfv.VI.37.640/2018/9., Kfv.III.37.039/2013/6, Kfv. II. 38.329/2018/10.

483 Kfv.I.37.259/2022/8., 28 April, 2022, 2022. április 28-án kelt ítélet, paragraph 50.

484 Judgment of Supreme Administrative Court of 27 July 2018 II OSK 1084/18, available: https://orzeczenia.nsa.gov.pl/doc/DD6C86E8E8, Judgment of Supreme Administrative Court of September 9, 2016, II OSK 538/15.

485 Article 109, section 1 of the Act on Foreigners, see also on courts' access: Judgment of Supreme Administrative Court of 30 May 2020 II OSK 3615/18, available: https://orzeczenia.nsa.gov.pl/doc/0E73714244.

486 Supreme Administrative Court Judgments of 23 November 2022 II OSK 1397/21, II OSK 1806/21, and of 7 February 2023 II OSK 1916/22.

ECtHR held that the fact that the final decision had been taken by independent judicial authorities at a high level was not enough to counterbalance the limitations on the foreigner's procedural rights, especially since the applicant had been given only very general information on the accusations brought up against him.[487] It must be nonetheless pointed out that there is at least a precedent-setting SAC ruling that requires national security charges to be based on solid and accurate evidence, without which a negative decision against the applicant cannot be made.[488] Finally, for the sake of accuracy, it is worth pointing out that equality of arms is provided to the foreigner in detention cases, by means of access being given to classified data which establishes the administrative decision, but this is only in the judicial phase and to the extent provided by the criminal court.[489] The grounds for detention are provided for in immigration law, but procedurally the rules of criminal procedure apply in these cases. This may explain the application of this exceptional procedural guarantee in the otherwise stringent Polish system.

There are currently no mechanisms in the Slovak legislation or judicial practice that would promote 'equality of arms' between the parties in classified data-based proceedings as opposed to the lack of essence of the grounds and the inability to challenge data non-disclosure before the courts. While some previously presented rulings of the Constitutional Court of the Slovak Republic (CC) are quite progressive in terms of compliance with European standards, few of these CC findings have been translated in practice. In a CC judgment of 2023, the concept of equality of arms still appears primarily with reference to the Regner judgment, but this interpretation of equality of arms did not preclude the judgment from later promoting the application of the essence of the grounds concept. The CC held that "*if the party to the proceedings did not have access to certain means of evidence, then, in particular, the judiciary must review the previous decision-making procedure and ensure that the requirements for adversarial proceedings and equality of arms are applied to the highest possible extent."*[490] The judgment asserts that the relevant independent supervisory body must always be informed of the reasons for the decision, even in cases where such reasons are not publicly available, and if national security findings are unfunded or arbitrary, the appeal body must be able to reject the executive's assertion. The judgment highlights that the principle of *"adversarial proceedings must be ensured, even through a special representative after a security clearance."*[491] The referenced ruling of the CC is nonetheless quite forward-looking in terms of its approach to the application of the essence of the grounds concept by holding that "*the relevant facts should be made available to the applicant to the extent necessary through the relevant opinion of the Slovak Intelligence Service, or Military Intelligence, i.e. at least the essence of the reasons."*[492] As it has been nonetheless pointed out, the legislator, in amending the relevant provision of the Asylum Act, did not redefine the content and scope of the opinion of the security services and the issue of accessing the essence of the reasons remained untouched. Similarly, in another CC ruling adopted later in 2023, which dealt with the constitutional compliance of the provisions of the Act on the Residence, the court emphasised that "t*he right to defence is not sufficiently guaranteed only by the court's access to classified information and [the court's access to the classified information] cannot substitute access to the information in the file by the person concerned, if they cannot familiarise themselves with the essence of the reasons on which the decision is based."*[493] The CC accordingly ruled that the provisions of the Act on the Residence of Foreigners[494], which practically transferred the decision-making of residence permit applications to the intelligence services, were unconstitutional. However, concerning the legal provision of the obligatory request of the foreign police department to obtain an opinion from the intelligence services, the court did not find any constitutional concern, which again makes it questionable if there will be a substantive change in practice as to the application of the essence of the grounds concept in the decision-making.

In Finland, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania, and Sweden, high court jurisprudence has not expressly stated that the Regner standards suffice or that equality of arms is achieved by judicial scrutiny concerning classified data, but the systems functioning in these countries clearly suggest that the perception of the equality of arms principle is the same as in the countries discussed above. In any case, the elements affecting the functioning or deficiencies of the equality of arms principle will be highlighted. Of course, in countries with inconsistent or varying

487 Case of Poklikayew v. Poland, Appl. No. 1103/16 (ECtHR, 22 June 2023),(hereinafter:Poklikayew v. Poland), paragraphs 78-81.
488 Judgement of Supreme Administrative Court of May 30, 2020 II OSK 3615/18, available: https://orzeczenia.nsa.gov.pl/doc/0E73714244.
489 Article 156, paragraph 4 of the Code of Criminal Procedure.
490 Constitutional Court of the Slovak Republic No. PL. ÚS 15/2020-63, 15 March 2023, paragraph 69.
491 ibid.
492 Judgement of the Constitutional Court of the Slovak Republic No. PL. ÚS 15/2020-63 of 15 March 2023, paragraph 74 .
493 Constitutional Court of the Slovak Republic No. PL. ÚS 17/2022-96 of 13 December 2023, point 65.
494 Section 33 par. 6 let. o) and Section 48 par. 2 let.h.

application of the essence of the grounds concept, this statement might hold true only in cases where no facts/evidence were disclosed to the applicant.

Finnish jurisprudence has not indicated that any guarantee outside the review and discretion of the court is introduced in practice to compensate for the applicant's limited procedural rights concerning the lack of access to the essence of the grounds in classified data-based immigration procedures. The rulings of the Supreme Administrative Court (SAC) presented in the previous chapters have suggested that the high court is of the view that it is only for the judges to look into and assess confidential materials with regard to national security allegations. Case law could not show that applicants were provided with substantive defence rights, e.g. being able to comment on evidence, though Finnish academics suggest that the applicant might be provided with an abstract of reasons of the contested decision in the judicial phase. The SAC noted furthermore that it is the duty of the administrative court to seek to mitigate the disadvantages to the appellant caused by the restriction of access (e.g. granting oral hearing),[495] but it remains unclear how these methods could advance the applicants' arms for equality, without providing those facts to the applicant against which he might present a defence.

Apart from courts' full access to classified data and their right to review lawfulness of classification, there are no tools in the Greek national framework enforcing equality of arms and counterbalancing the limitations on applicants' restricted defence rights. In the face of the fact that classified data cannot be accessed by the party regardless, the courts' right to review lawfulness of classification is a significant guarantee, but even despite this statutory obligation, the supervisory body did not rule on the classified character of the documents but took the classified data into consideration and ruled against the applicant.[496] Otherwise, Greek legislation does not provide any mechanism for the applicant to gain effective knowledge of the substance of the decisive elements of the national security allegations, though there is some progressive recent case law implying that during oral hearings, the appellant may become aware of the substantial contents of the elements of the classified file.[497]

There is no special mechanism ensuring equality of arms in Ireland either, although the very limited case law makes it difficult to be conclusive as to what extent applicants could exercise defence rights. It seems it is only for the courts to see and examine all relevant documents supporting a classified data-based decision, but otherwise there is no provision in Irish asylum, immigration or citizenship law, general administrative law or court procedures providing for the advancement of equality of arms.

In Latvia, two judgments of the High Court demonstrate judges' comprehensive access to the classified information, including evidence that is classified as state secret.[498] While foreign applicants are not provided with the essence of the grounds, lawyers with special permits may have access to that data. In practice, however, this procedural safeguard does not work as lawyers' access is generally restricted if there are underlying national security considerations.

Lithuanian courts have comprehensive access to classified data, whereas the applicant may not know the essence of the grounds. An important safeguard has been laid down by the Supreme Administrative Court following the GM judgment: the immigration authority is obliged to assess whether, based on the data received from the State Security department, national security assertions are justified and based on clearly established facts.[499] There is no other mechanism ensuring equality of arms. Obtaining access is only possible by the declassification of the data during the court proceedings, which is also limited and cannot be carried out "*if public disclosure of the documents submitted to the court would undoubtedly be detrimental to the state and public interest in the security of the State and of society.*"[500]

The relevant Romanian jurisprudence has not manifested itself on the issue of equality of arms either, and generally there are no mechanisms promoting the principle. It must be reiterated, however, that in expulsion cases, underlying facts

495 KHO:2018:109.

496 Decision No. 186250/2023 of the 9th Appeal Committee.

497 Decision No. 403061/11-7-2022 of the 3rd Appeal's Committee.

498 High Court of Latvia, judgment No. SA-1/2021 ECLI:LV:AT:2021:0716.SA000121.5.S, available: https://www.at.gov.lv/downloadlawfile/7707. High Court of Latvia, judgment No. SA-3/2021 ECLI:LV:AT:2021:1102.SA000321.3.L, available: https://www.at.gov.lv/downloadlawfile/8345.

499 Decision of the Supreme Administrative Court of Lithuania, 25th of January 2016, No. eA-324-624/2016 available: https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=2f91411c-1c62-40d1-847c-be6d27934a27.

500 Decision of the Supreme Administrative Court of Lithuania, 23rd of October 2019, No. eA-1748-629/2019, publicly unavailable (received from lawyers).

are presented to the party. In order to comply with ECtHR's Muhammad judgment, the summons includes information on the fact that the party may choose a lawyer with special security authorisation.[501] If the party does not choose one, the court appoints one from a previously prepared list.[502] Accordingly, it can be concluded that defence rights may be sufficiently exercised in this type of procedure. In other cases, however, relevant jurisprudence suggests that judges consider classified documents to have the same probative force as other non-secret evidence, therefore, decisions are frequently based on data not disclosed to the party.[503]

As for Luxembourg and Sweden, no new-fangled aspect can be presented herein as to how equality of arms prevails, which is also the result of the very limited case law available on the issue in these countries. Apart from the access procedure through which it is theoretically possible to challenge unlawful non-disclosure in both countries, no mechanisms enhancing equality of arms are available. It might be worth recalling that in Luxembourg the obligation to provide sufficient factual reasons are laid out by the law, but not followed in practice, and only the judge and authorities have access to classified data in the review procedure. In Sweden, there is a lack of explicit legal provisions stating that decisions must not be based on undisclosed reasons to the party. Consequently, in a judicial review procedure, a decision is normally not quashed due to the absence of substance of reasons provided to the applicant.

4.1.4 Jurisdictions not using essence of the grounds and no one may have access: Malta and Portugal

This study has found that neither in Portugal, nor in Malta do relevant actors have instant access to classified data underlying a decision regarding national security allegations. The issue is underregulated in both countries. In Portugal, almost no case law has been available, but it seems that the approach of the Maltase jurisprudence is similar to that of the countries discussed under category 3 in terms of equality of arms. While in Portugal it seems no essence of the grounds is provided, no conclusive findings could be made as to whether undisclosed classified data may be a part of the reasoning of administrative or judicial decisions in Malta. Arguably, however, equality of arms might be granted in a way that in the judicial phase everyone has the same access to the same information, noting that in practice it seems that judges have access to documentation relative to the national security assessment upon request. The Maltese Court of Appeal held that the Immigration Appeals Board is bound by the principle of equality of arms and thus must have all the evidence before it when issuing any decision. Mere declarations do not suffice in this regard. The burden of proof is on the immigration authority to prove that the applicant threatens national security and, before the immigration board makes a decision, it must have all evidence before it.[504] In a residence permit refusal case it was suggested by the court that the party must be aware of the evidence brought against him.[505] While the essence of the grounds is not – consistently – provided, these mechanisms certainly advance the exercise of the applicants' defence rights. The principle of equality of arms within the context of national interest considerations was reaffirmed by the Constitutional Court, which held that it is essential that the citizen is not placed in a manifestly disadvantaged position vis-à-vis the State party. It was highlighted, however, that the state has a discretion to limit this right in order to give precedence to some superior national interest and it is up to the Court to find a balance between these interests.[506] As a consequence, in a concrete case, referring to this CC judgment, the Head of the Security Service was obliged by the judge to testify in a judicial review procedure of a renewal of residence permit case, in which the applicant was rejected on national security grounds. The case was heard behind closed doors and, in absence of a court order, documents were all sealed.[507]

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501 Action Report (02/11/2022) Communication from Romania concerning the cases of Hassine v. Romania (Application No. 36328/13), available: https://bit.ly/42SuvwN]}. Abu Garbieh v. Romania (Application No. 60975/13), available: https://bit.ly/3wC7JNC]} Muhammad and Muhammad v. Romania (Application No. 80982/12), available: https://bit.ly/49tCFhR]} .

502 ibid.

503 Decision 167/2022 of 4 February 2022.

504 Court of Appeal (Civil - Inferior), Istok Lazarevic vs Direttur tad-Dipartiment taċ-Ċittadinanza, (78/2018), 11 February 2019, available: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=115406.

505 First Hall Civil Court, Salemn Almarghani Aboubakr Alzarouq vs Identity Malta, (579/2019 FDP), 9 July 2020. (hereinafter:Salemn Almarghani Aboubakr Alzarouq)

506 Constitutional Court, Mark Formosa vs Segretarju Permanenti fi hdan il-Ministeru ghal Ghawdex u l-Kummissjoni dwar isServizz Pubbliku, (8/19 MH), 20 July 2020, available: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=122522.

507 First Hall Civil Court, Madiha M.A. Abunada (K.I. 82608A u Refcom No. 23465/18) vs Direttur tad-Dipartiment taċĊittadinanza u ta' l-Expatriates, u Identity Malta, u l-Avukat Ġenerali, (1150/2018 MH), 27 March 2023., available: https://bit.ly/49QkbHR.

4.2 Conclusive remarks concerning the prevalence of equality of arms and Member States' compliance with European standards

It could be seen that in some Member States the **principle of equality of arms prevails** as a guarantee ensuring that the **court may only consider and use information to which the applicant or/and their lawyer** concerned **have had the same access**. If based on this limited access, justification for the security risk is insufficient, then the decision should be quashed by the court. Through this reading of the equality of arms, the court could not become biased by seeing more information than the applicant may see. This interpretation is clearly manifested in practice in **Austria, Belgium, France, Germany, Spain** and **Slovenia**. As for the **Netherlands**, it must be noted that although in the default situation the applicants and the courts see the same information, obtaining the applicants' consent allows the court to gain a more comprehensive access, which may be beneficial to the applicant, if the national security allegations are not sufficiently justified. The Dutch practice is unique in this respect in that it leaves it to the applicant's discretion to place himself in an unequal position due to a belief in the reliability and impartiality of the judicial supervision. The practice of equal access and provision of the essence of the grounds is **in line with the European standards**.

As opposed to the concept of equal access, some countries prefer the system in which **courts may see all the classified data-related documentation**, whereas **the applicant is** 'merely' **provided with the essence of the grounds**. Considering European standards, this is a **fully compliant approach**. This is the case in **Estonia** and **Bulgaria**, in certain cases as explained in Chapter 2, in **Czechia, Cyprus, Romania** and – debatably and inconsistently – in **Sweden**. Notably, however, while the Bulgarian practice hypothetically corresponds to all European standards by providing for the essence of the grounds in the judicial phase, establishing an access procedure to contest unlawful non-disclosure and ensuring the possibility of judicial review, as the interpretations of the security agency are mostly considered irrevocable by courts and even if the court finds that non-disclosure was unlawful, the eventual disclosure is administrative discretion. Similarly, even in cases in which Czechia complies with the essence of the grounds concept, the factual verification of allegation is not carried out by the courts conducting review. These examples of **procedural instances** highlighted in the **Bulgarian and Czech practice**, may render the whole system, with its obviously significant procedural safeguards, **incapable of sufficiently counterbalancing the restriction** of the applicant's rights in proceedings involving classified data.

Given the conclusions on European standards, it seems evident that in countries falling either under the third or fourth group of countries above in this Chapter, the standards laid out by the case law of the CJEU and ECtHR are not enforced, notwithstanding their supremacy over national law. The **absence of the application of the essence of the grounds concept alone renders these countries non-compliant** with European standards, yet **high court jurisprudence still articulates that equality of arms prevails** in national security related procedures at issue in a number of these countries. Countries in which the national legal framework and practice do not place applicants in an 'equally armed' position in relation to the state are: **Croatia, Greece, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal,** and **Slovakia**, and with exceptions in relation to the law or practice, for the application of essence of the grounds concept as described in Chapter 1, **Cyprus, Czechia, Luxembourg, Romania,** and **Sweden**. As it could be repeatedly seen, in **Portugal** and **Malta,** generally not even judges are provided with data establishing national security allegations, but with regard to Portugal, insufficient data have been available to be definitively conclusive, while Maltese case law is quite inconsistent.

The approach of those countries according to which **judicial supervision might substitute the applicant's 'right to know'** raises numerous concerns. Such perception of equality of arms has been **expressed specifically by the high courts** of **Croatia, Cyprus, Czechia, Hungary, Poland** and **Slovakia**, while in the remaining countries, it is the operation of the system that makes it apparent that this approach is being followed. It is worth mentioning, however, that the guarantee of judicial supervision in Poland is weakened compared to the other countries listed here, as altough courts have access to the factual basis of decisions and underlying evidence with regard to the need to know principle, but not to the full documentation leading to the findings on national security. As it has been highlighted by a report written on access to classified data in immigration procedures in **Hungary**, in **Cyprus** and **Poland**, even if the judges enjoy full access to all files in the case, such judicial control might not be effective. The classified data presented to the national

court by the authorities may not be reliable or may contain incorrect information.[508] Therefore, the significance of judicial scrutiny regarding the veracity of classified information is of great importance. A further argument against courts' exclusive access to data is that **the applicant has no chance to correct potentially incorrect information** provided by the executive or present them from a different perspective before the court, which evidently hinders the court in conducting a comprehensive examination of the case. The incorrectness of the information may relate to exculpatory evidence, such as an alibi, alternative explanation or mere lack of awareness that certain actions could be associated with national security threats.[509] Furthermore, the **court cannot give any reasons** in its judgment as to why, in a given case, it rejects the applicant's request for review and accepts the grounds put forward by the national security body and/or the immigration authority. The court's judgment may thus necessarily lack the facts and circumstances on which it is based, the criteria for its assessment and the reasonableness of its conclusion. Consequently, it is clear that the **court is unable to provide the applicant with the essence of the grounds**. It follows that merely granting courts access to this information is insufficient; it is imperative that foreigners facing classified - data based allegations have access to at least the essence of the grounds, empowering individuals to meaningfully exercise their rights of defence, a crucial aspect for effectively safeguarding their fundamental rights within immigration procedures. This may be particularly important for forced migrants, including asylum seekers and beneficiaries of international protection, who face heightened vulnerability and significant stakes in these proceedings.

However, even in those Member States which follow a 'Regner-like' approach concerning equality of arms, **some forward-looking developments** must be pointed out: in 2019 in **Malta**, the Court of Appeal recognised the applicant's right to know the evidence brought against him in a classified data-related immigration procedure. A 2022 Appeal's Committee decision in **Greece**, where unclassified data is completely unavailable, held that the applicant might obtain the substantial elements of the case file during the oral hearing. Following CJEU's 2022 GM judgment, lower courts in **Hungary** and **Bulgaria**, and the Supreme Court in **Cyprus** have begun to refer to the essence of the grounds standard, instructing the authorities / security bodies to provide that to applicants. In **Lithuania**, as a result of the impact of the GM judgment, the Supreme Administrative Court obliged the immigration authority to conduct its own assessment regarding national security considerations. The Constitutional Courts in 2020 in **Croatia**, and in 2018 and 2023 in **Slovakia**, respectively, have reached some quite progressive judgments in which they recognised the applicants' right to know the essence of the grounds, altough there are controversies in both of these countries' jurisprudence regarding the prevalence of European standards and even if the progressive guidance could not be translated into practice.

It seems that the **executive apparatus** is often simply **unwilling** or **unable to act in accordance with the reformist instructions of the courts without** the necessary **change in legislation**. It has been seen that in some countries, e.g. Slovakia or Hungary, despite court orders, the administration makes the same decisions over and over again, as **the legislator does not adapt to the changes dictated by the CJEU and ECtHR**. It would therefore be essential for the legislator and the executive to have the will to act in accordance with European standards. Safeguarding national security is undeniably a vital and legitimate objective for every nation, thus well-founded national security concerns may rightfully place some limitations on individual rights to defence, but **certain safeguards**, which are otherwise below the level of general procedural guarantees for the right to know not being absolute in national security cases, **must be respected by all Member States**. As it was eloquently articulated by the Slovak CC: "*The **security of the state**, which is ensured primarily by the branches of the executive power, **must not create an insurmountable obstacle** in the exercise of the right to comment on all the evidence taken. (…) **One important constitutional interest in a democratic and legal state cannot be superior to another constitutional interest** by a sub-constitutional regulation. (...) **The absolute protection of one constitutional interest (state security), which denies another constitutionally relevant interest (the right to a fair trial), is inadmissible in a democratic and legal state**."*[510]

508 Gruša Matevžič : Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland, 2021, page 45, available: https://bit.ly/3TdeWvx .

509 ibid.

510 Constitutional Court of the Slovak Republic no. PL. ÚS 15/2020-63, 15 March 2023.