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Foreword

Over the past few years, the migration related problems have been increasing. This is a trend that affects not only individual countries or geographical regions but is rather a global trend. There are a number of factors both in Europe and in the world that cause the movement of people fleeing from the threat to their lives. This is especially evident in connection with Russia's aggression against Ukraine in 2022. The issue of the protection of aliens in connection with migration is a serious challenge for the international community. This issue is particularly relevant especially in the context of international human rights law.

The aim of the research concerns an in-depth analysis of the phenomena that occur today in international human rights law and in the European regional system of their protection. This is especially important in the context of aliens and migrants coming to Europe in connection with the ongoing armed conflict.

In view of the events and problems facing Europe, the Member States of the European Union and the institutions of the European Union, it seems necessary to analyse and indicate the legal mechanisms that apply to the situation. The presented research concerns human rights, international law and European law. This scope of research consists in combining efforts and knowledge within the scope of all three mentioned areas.

In the area of human rights protection standards, the European paradigm of the protection of aliens can be observed. This paradigm is shaped by a number of instruments, both legally binding and *non-formally* binding per se (*soft law*). First of all, these are instruments in the area of the European Union system, including the Charter of Fundamental Rights of the European Union[1], followed by the documents of the Council of Europe headed by the European Convention on Human Rights[2]

1 OJ C 326, 26.10.2012, p. 393.

2 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, as amended.

and the European Social Charter[3]. In addition, this paradigm is shaped, directly or indirectly, by a number of other international regulations, especially universal law regulations, among which the Convention relating to the Status of Refugees of 1951 has a special position.[4]

It is clear that the paradigm of protection of aliens is not limited to functioning within one international organization or one legal system but must be perceived as going beyond a rigidly defined institutional framework. Therefore, it should be looked at from a slightly broader perspective encompassing mechanisms functioning not only in the legal system of the European Union or the Council of Europe, but also those resulting from the system of universal protection of human rights (UN). The attempt to carry out institutional analysis of the European paradigm of the protection of aliens and its key elements can only be made by taking into account the broad perception of the analysed issues.

The European paradigm of the protection of aliens is changing, and the dynamics of these changes is determined primarily by human rights standards. This means that the studied paradigm is not a closed normative entity, and the pace and direction in which it develops is determined by the development of human rights protection standards in Europe. These standards are the main factor in this process. The Court of Justice of the European Union and the bodies applying European human rights treaties, headed by the European Court of Human Rights, play a fundamental role in shaping the model of conduct of European countries towards aliens.

The subject of the analysis concerns the European paradigm of protection of aliens and the impact it has on the contemporary protection of individual rights. The research was carried out on the basis of a grant from the National Science Centre, Poland under the OPUS 12 Programme: *Human Rights in the European Paradigm of the Protection of Aliens* (2016/23/B/HS5/03596), headed by Professor Elżbieta Karska.

3 European Social Charter, ETS No. 035; European Social Charter (revised), ETS No. 163.

4 189 UNTS 150.

Chapter I

General characteristics of European standards
for the protection of human rights,
their legal instruments and mechanisms,
and the specificity of the European paradigm
of the protection of aliens

Before starting further analysis of the broadly understood European paradigm of the protection of aliens, attention should be paid to the standards functioning within it, as well as legal institutions and mechanisms. By way of introduction, it should be mentioned that this paradigm itself in the present study essentially covers 'aliens seeking international protection', i.e. individuals seeking a refugee status or the status of the beneficiary of international protection.

The purpose of this chapter is to introduce the institutional elements of a general, 'European' paradigm. The eponymous paradigm of protection of aliens is not limited to functioning within single international organization or single legal system but must be construed as going beyond a rigidly defined institutional framework. Therefore, it should be looked at from a slightly broader perspective, including mechanisms functioning not only in the legal system of the European Union or the Council of Europe, but also those resulting from the system of universal protection of human rights (UN). The attempt to carry out institutional analysis of the European paradigm of the protection of aliens and its key elements can be made by only taking a broad perspective of the analysed issues.

This chapter focuses on the institutional domain and attempts to characterize the institutions responsible for various aspects of the protection of aliens' rights. It addresses the issue of institutions functioning within the Council of Europe, the European Union and the United Nations.

1. Council of Europe

The Council of Europe (CoE) as a regional organisation for the protection of individual rights, whose all members accept 'the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'[1], has a significant impact

1 Statue of the Council of Europe of 5.5.1949 (Dz. U. (Journal of Laws) of 1994, no. 118, item 565), Article 3

on the European paradigm of the protection of aliens. The CoE's activities in this area are comprehensive and complement not only the standards of national law, but also affect the broadly understood European paradigm of protection of aliens.

On the one hand, the CoE shapes and develops the standards of protection of individual rights in the context of aliens, and on the other hand, it focuses on their implementation. In the area of standard-setting, it would be difficult not to mention the role of the European Court of Human Rights. The implementation and monitoring of compliance with the standards by states rests more with other institutions operating within the CoE system. In the context of the protection of the rights of aliens, asylum seekers, refugees and migrants, it is necessary to mention above all the activities of the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and the Commissioner for Human Rights of the Council of Europe.

However, it should be noted at the outset that this is not an exhaustive list. In addition to the institutions discussed in more detail below, a special note should be made, for example, of the functioning of the Network of Contact Points on Migration or the broadly understood acquis of the Council of Europe regarding child refugees. In this context, for example the principles and guidelines for assessing the age of a child in the context of migration[2] or the child-friendly approach to migration[3] should be mentioned.

2 *Human Rights Principles and Guidelines on age assessment for children in the context of migration*, 2019, https://rm.coe.int/ageassessmentchildrenmigration/168099529f [accessed on: 1.02.2023].

3 *Promoting child-friendly approaches in the area of migration - Standards, guidance and current practices*, 2019, https://edoc.coe.int/en/refugees/8047-promoting-child-friendly-approaches-in-the-area-of-migration-standards-guidance-and-current-practices.html [accessed on: 1.02.2023].

1.1. European Court of Human Rights

The European Court of Human Rights (ECtHR) plays a role difficult to overestimate in the system of the Council of Europe, despite the fact that formally it is not a body of the CoE but was established on the basis of the European Convention on Human Rights (ECHR)[4]. The Court is currently the most effective judicial human rights body in the world. In this regard, the ECtHR is also a 'victim' of its own success, since it receives the largest number of individual applications[5].

In the context of the protection of the rights of aliens, refugees, asylum seekers and migration in a broad sense, the Convention itself does not contain too many regulations. Such provisions are included only in Article 16 (prohibition of restricting the public activity of aliens)[6], Article 4 of Protocol No. 4 to the ECHR (prohibition of collective expulsion of aliens)[7] and Article 1 of Protocol No. 7 to the ECHR (procedural guarantees regarding the expulsion of aliens)[8].

Despite the rather modest number of specific guarantees concerning the protection of aliens, it would be difficult to argue that the protection of the rights and freedoms of aliens in the Convention is narrow. On the contrary, the judicial achievements of the ECtHR in this area are extremely extensive, actually incomparable to other international mechanisms for the protection of individual rights and freedoms. This follows from a broad interpretation of the guarantees provided for in the Convention. Article 1 of the ECHR guarantees the safeguarding of the rights and freedoms provided for in the ECHR to '*everyone*' under the jurisdic-

4 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 4.11.1950 (Dz. U. 1993, No. 61, item 284 as amended).

5 See, *ECHR Overview 1959–2021*, https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf [accessed on: 1.02.2023].

6 *Ibidem*, Article 16.

7 *Ibidem*, Article 4 of Protocol No. 4.

8 *Ibidem*, Article 1 of Protocol No. 7.

tion of Contracting Parties[9], and is therefore not limited to providing protection to nationals of Contracting Parties. Moreover, the vast majority of the ECtHR's acquis on the protection of individual rights and freedoms in relation to migration in the broad sense results from the Court's interpretation of the Convention's rights and freedoms.

The case-law of the ECtHR in the field of protection of aliens' rights and the issue of broadly understood migration is widely developed. The following issues can be identified in this area: collective expulsion of aliens; the so-called 'Dublin' cases and interim measures. The Court also addressed the issue of detention of migrants and the detention of migrant minors, both accompanied and unaccompanied.

The issue of collective expulsion of aliens is addressed by the Court in accordance with Article 4 of Protocol No. 4 to the ECHR, which directly prohibits such practices. In recent years, the ECtHR has had many opportunities to investigate allegations of breach of this guarantee. Thus, the Court analysed inter alia allegations of: collective expulsion of Ethiopian and Eritrean migrants travelling from Libya who were apprehended at sea by the Italian authorities and returned to Libya[10]; the practice of arrest, detention and collective expulsion of Georgian citizens by the authorities of the Russian Federation in 2006[11]; expulsions of migrants who illegally entered Italian territory from Greece, where they were returned

9 *Ibidem*, Article 1.

10 ECtHR judgment in the case of *Hirsi Jamaa and Others v. Italy* of 23.02.2012, application no. 27765/09, Paragraph 9 *ff.*

11 ECtHR judgment in the case of *Georgia v. Russia (I)* of 03.07.2014, application no. 13255/07, Paragraph 30 *ff.*; See also, the judgment of the ECtHR in the case of *Berdzenishvili and Others v. Russia* of 26.03.2009, application no. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07, 16706/07, Paragraph 2 *ff.*

and exposed to deportation to their countries of origin[12] or expulsion to Belarus of Chechen migrants seeking international protection[13].

The issue of the so-called 'Dublin cases' is linked to the legal system of the European Union and concerns the determination of which EU Member State is responsible for examining an asylum application lodged by a third-country national. The Dublin III Regulation 'establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person'[14]. Such an application shall be examined by only one Member State[15]. The aim of this legal solution is to avoid transfers of asylum seekers between EU Member States and to prevent several applications from being lodged by the same person. In the context of this category of cases, the most common problem before the ECtHR is the phenomenon of mutual transfer of responsibility for examining an application for refugee status by EU Member States[16].

The question of interim measures arises from Rule 39 of the Rules of Court of the ECtHR, according to which a judge who is the president of the section may indicate to the parties an interim measure which 'must be adopted in the interests of the parties or for the proper conduct

12 ECtHR judgment in the case of *Sharifi and Others v. Italy and Greece* of 21.10.2014, application number 16643/09, Paragraph 1 *ff.*

13 ECtHR judgment in the case of *M.K. and Others v. Poland* of 23.07.2020, application number 40503/17, 42902/17, 43643/17, Paragraph 9 *ff.*

14 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 2.

15 *Ibidem*, Article 3(1).

16 See, J. Czepek, *Problemy dotyczące rozpatrywania wniosków o azyl w systemie Unii europejskiej na gruncie orzecznictwa Europejskiego Trybunału Praw człowieka. Analiza 'spraw dublińskich'*, [in:] M. Golda-Sobczak, W. Sobczak (eds.), *Dylematy Unii Europejskiej. Studia i Szkice*, Poznań 2016, pp. 89–103.

of the proceedings"[17]. These are emergency measures which can be used by the Court only in the event of an imminent risk of irreparable damage. The ECtHR shall decide whether or not to accept them without ruling on the merits of the case. Such measures were adopted, for example, in 2022 in connection with the Russian Federation's aggression against Ukraine[18]. In the context of migration issues, most requests for interim measures concern the suspension of expulsion or extradition pending the examination of the application and the possible outcome thereof. Most often, in connection with extradition or expulsion, the applicants fear for their lives (which involves an alleged violation of Article 2)[19] or fear persecution and treatment contrary to Article 3 (prohibition of torture, inhuman or degrading treatment or punishment)[20]. In some cases, interim measures may be granted on the grounds of an alleged violation of other rights or freedoms[21]. It is worth noting that a number of applications for interim measures were submitted in connection with illegal attempts to cross the Polish-Belarusian border in 2021[22].

The ECtHR has dealt extensively with the issue of detention of migrants and accompanied and unaccompanied minors. The sheer number

17 Rules of Court of the ECtHR (in force on 3 June 2022), rule 39(1)

18 Such a request was registered under the application number: 11055/22, *Ukraine v. Russia (X)*. Interim measures had previously been adopted in relation to the case *Ukraine and the Netherlands v. Russia*, application number 8019/16, 43800/14, 28525/20. The Russian Federation has not complied with these measures and the violations have not ceased.

19 See, the judgment of the ECtHR in the case of *F.H. v. Sweden* of 20.01.2009, application no. 32621/06, Paragraph 8 *ff.*

20 See, the judgment of the ECtHR in the case of *M.A. v. Switzerland* of 18.11.2014, application no. 52589/13, Paragraph 7 *ff.*; ECtHR judgment in the case of *D. v. United Kingdom* of 2.05.1997, application no. 30240/96, Paragraph 6 *ff.*

21 For example, in the context of Article 6 of the ECHR, see communicated case *Sparrow v. Poland*, 31.03.2022, application number 6904/22, Paragraph 24.

22 See communicated case *R.A. and others v. Poland*, application number 42120/21; See also, the ECtHR press release *Update on interim decisions concerning member States' borders with Belarus*, ECHR 051 (2022), 21.02.2022, https://hudoc.echr.coe.int/eng-press?i=003–7264687–9892524 [accessed on: 1.02.2023].

of cases in this area indicates the vast nature of that problem. The detention of migrants may give rise to issues relating to the deprivation of liberty of an individual and its grounds[23] or detention conditions[24]. The ECtHR also draws attention to persons requiring care, such as pregnant women[25], children[26] or people with disabilities[27]. Due to the need for special protection of children, the Court pays considerable attention to the issue of detention of accompanied[28] and unaccompanied minor migrants[29].

At present, it would be difficult to identify a right or freedom guaranteed by the ECHR that would not in any way concern the issues of refugees, asylum or migration issues in general. The allegations most frequently raised by the applicants concern the violation of the right to life (Article 2), the prohibition of torture, inhuman or degrading treatment or punishment (Article 3) and the right to respect for private or family life (Article 8).

In the area of the right to life, as already mentioned, the most common problem concerns the applicant's fear that his extradition or expulsion to his country of origin would involve a violation of Article 2. In the context of the abolition of the death penalty, the ECtHR has held that the transfer of an individual by a State party to the ECHR to the authorities

23 See, the judgment of the ECtHR in the case of *Khlaifia and Others v. Italy* of 15.12.2016, application number 16483/12, Paragraph 55 *ff.*; ECtHR judgment in the case of *S.K. v. Russia* of 14.02.2017, application number 52722/15, Paragraphs 104–117.

24 See, the judgment of the ECtHR in the case of *Ilias and Ahmed v. Hungary* of 21.11.2019, application number 47287/15, Paragraphs 180–194; ECtHR judgment in the case of *A.A. v. Greece* of 22.07.2010, application no. 12186/08, Paragraphs 49–65; ECtHR judgment in the case of *M.S.S. v. Belgium and Greece* of 21.01.2011, application no. 30696/09, Paragraphs 216–234, 249–264.

25 See, the judgment of the ECtHR in the case of *Mahmundi and Others v. Greece* of 31.07.2012, application no. 14902/10, Paragraph 70 *ff.*

26 See, the judgment of the ECtHR in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* of 12.10.2006, application no. 13178/03.

27 See, the judgment of the ECtHR in the case of *Asalya v. Turkey* of 15.04.2014, application no. 43875/09, Paragraphs 47–55.

28 *Mahmundi and Others v. Greece*, Paragraphs 59–74.

29 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Paragraphs 50–59; ECtHR judgment in the case of *Mohamad v. Greece* of 11.12.2014, application no. 70586/11, Paragraph 6 *ff.*

of another State where there would be a significant and foreseeable risk of a person being exposed to such a penalty is contrary to Articles 2 and 3 of the Convention[30]. In addition, on the grounds of the right to life, the state has positive obligations to protect life and procedural obligations aimed at determining the course of the event causing the death and possible trial and conviction of persons guilty of violations[31]. These obligations apply in the context of migration, refugee or asylum seekers[32]. Given the nature of the right to life and the particular risk to an individual in the context of his or her deportation, the fulfilment by the State of these obligations appears to be of the utmost importance.

Allegations of violation of Article 3 of the ECHR in migration matters most often occur in the context of an individual threatened with extradition or removal being exposed to treatment contrary to Article 3 in the country of origin. Such violations may result from persecution or other forms of treatment contrary to Article 3[33]. The Court emphasizes that States Parties have the right, under well-established public international law and their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens[34]. The ECtHR also points out that the deportation, extradition and any other means of expulsion of a aliens may give rise to problems under Article 3 and thus involve the responsibility of the State Party under the Convention if there are substantial

30 ECtHR judgment in the case of *A.L (X.W.) v. Russia* of 29.10.2015, application number 44095/14, Paragraph 66; ECtHR judgment in the case of *Bader and Kanbor v. Sweden* of 8.11.2005, application no. 44095/14, Paragraph 48.

31 More on positive commitments and the standard of effective investigation: J. Czepek, *Standard skutecznego śledztwa w sferze ochrony prawa do życia w systemie Europejskiej Konwencji Praw Człowieka*, Warszawa 2021, p. 134 *ff*.

32 See, A. Kotzeva, L. Murray, R. Tam, I. Burnett (Consultant Editor), *Asylum and Human Rights Appeals Handbook*, Oxford 2008, pp. 159–163.

33 *M.A. v. Switzerland*, Paragraph 7 *ff*.; *D. v. United Kingdom*, Paragraph 6 *ff*.

34 ECtHR judgment in the case of *Khasanov and Rakhmanov v. Russia* of 29.04.2022, application number 28492/15 49975/15, Paragraph 93; *Hirsi Jamaa and Others v. Italy*, Paragraph 113; ECtHR judgment in the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom* of 28.05.1985, application no. 9214/80, 9473/81, 9474/81, Paragraph 67.

grounds for believing that the person concerned would, in the event of expulsion, face a real risk of being subjected in the host State to treatment contrary to Article 3. In such circumstances, Article 3 imposes an obligation not to return the person concerned to that State[35]. In addition, Article 3 may be raised by applicants, such as irregular migrants, asylum seekers or refugees, when they are in *de facto* detention conditions in centres for migrants and their families. The standards of such facilities may also be contrary to the Convention and give rise to a violation of Article 3 due to the conditions prevailing in them[36].

Some authors emphasize the role of Article 8 of the Convention in matters concerning migration issues, especially asylum[37]. They also point out that in this respect the guarantees provided for in Articles 3 and 8 are primarily applicable[38]. In the context of migration issues, the right to respect for private or family life, home and correspondence applies mainly in the first two areas. Allegations of violation of the right to respect for private and family life are most often raised in the context of the threat of deportation or expulsion for an individual and the resulting interference in the sphere of private or family life. The ECtHR emphasises that the Convention does not guarantee the right of an alien to enter or reside in a particular country and, in connection with their task of maintaining public order, States Parties have the right to expel an alien convicted of criminal offences. However, decisions on the subject - should these infringe a right protected under Article 8(1) - must be lawful and necessary in a democratic society, that is to say, justified by an urgent social need

35 *Ilias and Ahmed v. Hungary*, Paragraph 126; ECtHR judgment in the case of *Soering v. United Kingdom* of 7.07.1989, application no. 14038/88, Paragraphs 90–91, ECtHR judgment in the case of *Vilvarajah and Others v. United Kingdom* of 30.10.1991, application number 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Paragraph 103.

36 *A.A. v. Greece*, Paragraphs 49–65; *M.S.S. v. Belgium and Greece*, Paragraphs 216–234, 249–264.

37 See, A. Kotzeva, L. Murray, R. Tam, I. Burnett, *Op. Cit.*, p. 96 *ff.*

38 *Ibidem*, p. 42.

and, in particular, be proportionate to the justified aim[39]. In assessing the proportionality of the interference, the Court refers to the criteria set out in the case of *Üner v. the Netherlands*[40], stipulating however that the importance of those criteria may vary according to the specific circumstances of each case[41].

Particularly noteworthy are the provisions of Article 13, which guarantee that everyone whose rights and freedoms have been violated, 'shall have a right to an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'[42]. Article 13 is not independent. Therefore, the alleged infringement of that right must be raised in conjunction with another right protected by the ECHR. In the context of aliens' rights, Article 13, read in conjunction with Article 3, may apply. With such a combination, positive obligations regarding non refoulement may occur[43]. The ECtHR has also applied Article 13, read in conjunction with Article 8, in the context of the problem of depriving an individual of practical access to minimum procedural protection against arbitrary removal[44].

It would be difficult to overestimate the role of the ECHR system in shaping the European paradigm of the protection of aliens. This is due, on the one hand, to the extremely wide range of issues raised by the Court in the context of the protection of the rights of aliens, and, on the other hand, it is connected to the obligation of the States Parties to comply with the Convention and the need to enforce its judgments, for which the Committee

39 ECtHR judgment in the case of *Üner v. Netherlands* of 18.10.2006, application no. 46410/99, Paragraph 54.

40 *Ibidem*, Paragraphs 54–55, 57–58.

41 See, ECtHR judgment in the case of *Maslov v. Austria* of 23.06.2008, application no. 1638/03, Paragraph 70.

42 ECHR, Article 13.

43 V.Moreno-Lax, *op. cit.*, p. 420 *ff.*

44 ECtHR judgment in the case of *de Souza Ribeiro v. France* dated 13.12.2012, application no. 22689/07, judgment of 13.12.2012, Paragraph 97 *ff.*

of Ministers of the Council of Europe is responsible[45]. The Court in its case-law on broadly understood migration issues, complements and strengthens the standards adopted within the framework of the European paradigm of the protection of aliens. The Court's case-law is also relevant for the institutions operating within the Council of Europe.

1.2. Special Representative of the Secretary-General of the Council of Europe on Migration and Refugees

The appointment of the Special Representative of the Secretary-General of the Council of Europe on Migration and Refugees was dictated by the humanitarian crisis resulting from the increased refugee and migration flows in Europe in 2015 and its consequences. The mandate of the Special Representative was established in 2016. to provide 'immediate assistance and support to member states concerned, by complementing activities of other relevant Council of Europe bodies and by co-ordinating our action with other international partners'[46].

It is worth noting that an increasing number of Council of Europe Member States are affected by migratory challenges. Therefore, more and more attention is paid to return as a tool to ensure the credibility of the asylum system. In this context, it was considered necessary to ensure that the Council of Europe supports Member States in fulfilling their obligations under the ECHR and other CoE standards and to take steps

45 See, A. Mężykowska, *Komitet Ministrów Rady Europy w mechanizmie nadzoru nad wykonywaniem przez państwa-strony EKPC wyroków ETPC*, [in:] E. H. Morawska, K. Gałka (ed.), *Pozasądowe mechanizmy praw człowieka i podstawowych wolności Rady Europy*, Lublin 2021, p. 55 *ff.* On the role of national parliament in the implementation and execution of judgments of the European Court of Human Rights see, K. Grzelak-Bach, K. Karski, *Rola polskiego parlamentu w systemie organów wdrażających wyroki Europejskiego Trybunału Praw Człowieka*, 'Przegląd Sejmowy' 2020, No. 5(160), pp. 9–34.

46 Mandate of the Special Representative of the Secretary-General on Migration and Refugees (*Mandate of the Secretary General's Special Representative on Migration and Refugees*), Strasbourg 1.7.2020, p. 1.

to develop cooperation with other international organisations[47]. This applies in particular to cooperation with the European Union, the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM) and the United Nations Children's Fund (UNICEF).

CoE activities in the context of migration were also the subject of decisions adopted by the Committee of Ministers of the CoE. In particular, attention was drawn to the need for further action on the challenges posed by global migration[48].

The tasks of the Special Representative include working with the relevant structures of the Council of Europe, the Member States, the European Union and international organisations directing support and assistance to Member States and developing international cooperation in this field[49]. The mandate of the Special Representative shall be:

a) to seek, collect and analyse information, including through-fact finding missions, on the human rights situation of refugees and migrants and report to the Secretary General, notably on the basis of the European Convention on Human Rights and other Council of Europe instruments, as well as on basis of the guidance on the 'Protection of migrants and asylum-seekers: main legal obligations under the Council of Europe Convention';
b) to liaise and exchange information with relevant international organisations and specialised agencies, as well as with migration authorities in member states;
c) to provide input to the Secretary General on ways to strengthen Council of Europe assistance and advice to member States on human rights treatment of refugees and migrants and in fulfilling the-

47 *Ibidem*.

48 See, *Ready for future challenges - Reinforcing the Council of Europe, Report by the Secretary General for the Ministerial Session in Helsinki*, 16–17 May 2019, p. 21.

49 Mandate of the Special Representative of the Secretary-General on Migration and Refugees, *op. cit.*, p. 2.

ir obligations under the European Convention on Human Rights and other Council of Europe standards;

d) to strengthen the response of the Council of Europe, working closely with the Council of Europe's Commissioner for Human Rights, Parliamentary Assembly, Congress, as well as transversally with all relevant structures within the Organisation.

In view of the co-ordination role of the Special Representative, the Secretary General mandates him to chair the Network of Focal Points on Migration and support its activity by preparing its working methods, organising meetings and consultations with its members, as well as to chair the Intersecretariat Co-ordination Group on Migration[50].

As part of the work of the Special Representative, the Council of Europe Action Plan on protecting vulnerable persons in the context of migration and asylum in Europe (2021–2025)[51] was adopted. This document is a continuation of the work undertaken in the previous Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019)[52], the implementation of which was completed in 2019. The major achievements of the action plan implemented in 2017–2019 include specifically the adoption of two recommendations of the Committee of Ministers. These included support for young refugees in transition to adulthood[53]

50 *Ibidem*.

51 *Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe* (2021–2025), Strasbourg 2021 (https://rm.coe.int/action-plan-on-protecting-vulnerable-persons-in-the-context-of-migrati/1680a409fc).

52 *Action Plan on Protecting Refugee and Migrant Children in Europe* (2017–2019), Strasbourg 2017 (https://edoc.coe.int/en/children-s-rights/7362-council-of-europe-action-plan-on-protecting-refugee-and-migrant-children-in-europe-2017–2019.html).

53 Recommendation on supporting young refugees in transition to adulthood, 24.04.2019, CM/Rec(2019)4.

and effective guardianship of unaccompanied and separated children in the context of migration[54].

In the context of the migration crisis in connection with the Russian Federation's aggression against Ukraine on 24.02.2022, the Special Representative organized a meeting with representatives of international organizations (UNHCR, IOM, UNICEF, OHCHR, EU Agency for Fundamental Rights, EU Agency for Asylum, OSCE) to exchange information on the activities carried out in the context of this crisis. The aim of the meeting was to strengthen synergies and determine how the Council of Europe, within its mandate, can best complement the undertaken efforts[55].

1.3. Commissioner for Human Rights

In the context of considerations concerning legal instruments and mechanisms regarding the protection of aliens in the approach of the Council of Europe, it would be difficult to ignore the institution of the Commissioner for Human Rights of the Council of Europe. The Office of the Commissioner for Human Rights was created in 1999 by Resolution 99 (50)[56]. Although this function was created only in the late 90s of the last century, the idea of creating this office dates back to nineteen-seventies[57]. Initially, it was linked to the need to relieve the burden on the European Commission of Human Rights (ECoHR) and then on the ECtHR in the handling of individual complaints. Ultimately, this idea was not realized. A

54 Recommendation on effective guardianship for unaccompanied and separated children in the context of migration, 11.12.2019, CM/Rec(2019)11.

55 See, Refugees fleeing Ukraine: exchange of information with international partners, 8.04.2022, (https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/-/refugees-fleeing-ukraine-exchange-of-information-with-international-partners). [accessed on: 1.02.2023].

56 T. Hammarberg, J. Dalhuisen, *The Council of Europe Commissioner for Human Rights*, [in:] G. Alfredsson (ed.), *Essays in Honour of Jakob Th. Möller*, Leiden 2009.

57 L. Sivonen, *The Commissioner for Human Rights*, [in:] G. de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, New York 2012, p. 17.

body has been established instead that undertakes preventive actions in the field of human rights and fundamental freedoms and is separate from the ECtHR[58].

The Commissioner for Human Rights has not been given the function of handling individual complaints. This is clear from Resolution 99 (50), which states: 'The Commissioner shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the European Convention of Human Rights or under other human rights instruments of the Council of Europe. The Commissioner shall not take up individual complaints'[59]. The first paragraph of the article states that the Commissioner 'shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe'[60].

The Commissioner's powers are further defined in Resolution 99 (50). Its mandate includes, above all, the promotion of education and awareness of human rights and respect for them, in accordance with human rights instruments[61]. Another important task is related to identifying shortcomings in the law and national practice of the Member States in the field of respect for human rights and fundamental freedoms guaranteed by the CoE documents[62]. In this respect, mention should also be made of the Commissioner's duty to support the Member States, as it determines how Member States are monitored. It is worth noting that this monitoring is a preliminary step in the implementation of the superior

58 See, broadly A. Wedeł-Domaradzka, *Komisarz Praw Człowieka Rady Europy*, [in:] E. H. Morawska, K. Gałka (eds.), *Pozasądowe mechanizmy praw człowieka i podstawowych wolności Rady Europy*, Lublin 2021, p. 161.

59 CoM of CoE Resolution (99) 50, Article 1.

60 *Ibidem*.

61 *Ibidem*.

62 A.Wedel-Domaradzka, *op. cit.*, p. 166.

objective, which is precisely the promotion of effective respect for human rights and fundamental freedoms[63].

Monitoring the status of observing the human rights and fundamental freedoms in the CoE member states is a very important domain of the Commissioner's activity. In this regard, he carries out national visits aimed at dialogue with the authorities. Visits may focus on one or more issues[64]. In recent years, they have been focused more on thematically defined issues arising from the specific challenges that arise in a given country in the context of the protection of individual rights[65]. The result of the visits are reports published on the CoE website[66].

The issues concerning aliens, refugees, asylum seekers and migration have been tackled multiple times[67]. In a recent report on his visit to Austria, the Commissioner already takes into account the migration consequences of the armed conflict in Ukraine. According to the report, 27,000 people have taken refuge in Austria from this conflict[68]. This report draws attention to the problems related to the reception and integration of refugees, asylum seekers and migrants. In the context of reception, the Commissioner paid particular attention to the problems related to:

63 *Ibidem.* See also, T. Hammarberg, J. Dalhuisen, *The Council of Europe Commissioner for Human Rights*, [in:] G. Alfredsson (ed.), *Essays in Honour of Jakob Th. Möller*, Leiden 2009, p. 516.

64 A.Wedel-Domaradzka, *op. cit.*, p. 167.

65 See, Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from a visit to Poland on 11–15 March 2019, Strasbourg, 28.06.2019, CommDH(2019)17; Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Austria on 13–17 December 2021, Strasbourg, 12.05.2022, CommDH(2022)10.

66 See, Council of Europe *Commissioner for Human Rights*, https://www.coe.int/en/web/commissioner/country-monitoring [accessed on: 1.02.2023].

67 See, Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from a visit to Malta on 11–16 October 2021, Strasbourg, 15.02.2022 CommDH(2022)1; Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Hungary on 4–8 February 2019, Strasburg, 21.05.2019, CommDH(2019)13; Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Greece on 25–29 June 2018, Strasbourg, 6.11.2018, CommDH(2018)24.

68 This number refers to the situation as of 25.03.2022, see: Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Austria, point 6.

access to independent legal advice of good quality[69], living conditions in receiving institutions[70], the situation of unaccompanied children[71], the impact of the COVID-19 pandemic on living conditions in receiving institutions[72], the sharing of responsibilities between federal authorities and provinces[73], transparency and accountability[74], or access to education[75]. In the context of the integration problem, the Commissioner drew attention to problems related to the implementation of the right to family reunification[76], long-term residence and access to citizenship[77], access to the labour market[78] or protection against racism and discrimination[79]. In other reports of her visits, the Commissioner also identified problems related to the reception and integration of migrants in the context of financial benefits[80], access to medical care[81], assessment of vulnerability to threats[82], right to adequate housing[83], forced expulsion and ill-treatment[84], detention of asylum seekers[85] or xenophobia and lack of integra-

69 *Ibidem*, Paragraph 13.

70 *Ibidem*, Paragraph 14.

71 *Ibidem*, Paragraph 16.

72 *Ibidem*, Paragraph 18.

73 *Ibidem*, Paragraph 19.

74 *Ibidem*, Paragraph 20.

75 *Ibidem*, Paragraph 21.

76 *Ibidem*, Paragraph 27.

77 *Ibidem*, Paragraph 31.

78 *Ibidem*, Paragraph 33.

79 *Ibidem*, Paragraph 40.

80 Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Greece, Paragraphs 36–38.

81 *Ibidem*, Paragraphs 39–44.

82 *Ibidem*, Paragraphs 45–47.

83 *Ibidem*, Paragraph 11 *ff.*

84 Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from the visit to Hungary, Paragraphs 16–21.

85 *Ibidem*, Paragraphs 22–29.

tion measures[86]. It is hard not to mention that in recent years problems related to migration, refugees and asylum seekers have been dominant in the reports from the Commissioner's visits.

In addition to visit reports, the Commissioner also formulates statements, letters and memoranda. They were not regulated in resolution (99) 50, however, as A.Wedeł-Domaradzka points out, they are part of the tasks of supporting effective observance of human rights and fundamental freedoms, promoting education and their awareness, and identifying shortcomings of Member States in law and practice in their provision[87].

The Commissioner may publish statements on current events and, in this sense, these can be considered as instruments of current interventions. Most often they concern specific situations involving a threat to the rights of an individual and postulate taking action or stopping violations. In the context of migration, the Commissioner referred to the threat of collective expulsion of migrants, the denial of access to asylum and violence against migrants by the authorities[88].

The issue of migration and the situation of broadly understood migrants was also the subject of the Commissioner's letters. In recent correspondence with the Estonian authorities, the Commissioner drew attention to the support given to people fleeing the war in Ukraine[89] and to the issue of changes to national legislation on asylum procedure in the context of the mass influx of migrants. The Commissioner expressed concerns

86 *Ibidem*, Paragraphs 34–36.

87 A.Wedel-Domaradzka, *op. cit.*, pp. 170–171.

88 Council of Europe Commissioner for Human Rights Dunja Mijatović Position published on the Commissioner's website: Croatian authorities must stop pushbacks and border violence, and end impunity, Strasbourg, 21.10.2020, https://www.coe.int/en/web/commissioner/-/croatian-authorities-must-stop-pushbacks-and-border-violence-and-end-impunity [accessed on. 1.02.2023].

89 Letter to Mr Jüri RATAS, President of the Parliament of Estonia, by Dunja Mijatović, Council of Europe Commissioner for Human Rights, concerning the bill amending the State Borders Act and Related Acts 577 SE, CommDH(2022)13 23.05.2022, https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a6891b [accessed on: 1.02.2023].

in particular about cases of pushbacks of refugees, asylum seekers and migrants[90]. It should be stressed that the correspondence with the Estonian authorities also concerned the migration crisis at the border with Belarus in 2021 and the problem of mass attempts to cross the border illegally[91].

The conflict in Ukraine and related migrations were also the subject of correspondence with the Hungarian authorities[92]. Despite the assistance provided to people fleeing the armed conflict in Ukraine, the Commissioner expressed concern that not all persons seeking refuge in Hungary could be properly informed of their rights in this regard. The Commissioner pointed out that it is necessary not only to guarantee short-term humanitarian assistance to such people, but also to provide them with clear information and legal support[93]. The Commissioner also recognised the problem of people of Roma origin who had dual Ukrainian-Hungarian citizenship. Allegations of discriminatory treatment in the context of access to temporary accommodation and humanitarian support have been raised in this context[94].

The Commissioner may also draw attention to the state's problems with ensuring human rights and fundamental freedoms through memoranda. Initially, they were similar in nature to reports, but their structure and thematic scope have changed. Currently, they are rather an extensive analysis of the problem or problems occurring in a given country[95]. Me-

90 *Ibidem*.

91 Reply by the Chair of the Constitutional Committee of the Estonian Parliament to the letter of the Council of Europe Commissioner for Human Rights, CommDH/GovRep(2022)6, 16.06.2022, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a69f26 [accessed on: 1.02.2023].

92 See: Letter Mr Sándor PINTÉR, Minister of the Interior of Hungary, by Dunja Mijatović, Council of Europe Commissioner for Human Rights, concerning the persons fleeing from Ukraine, CommDH(2022)15, 20.06.2022, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a6e578 [accessed on: 1.02.2023].

93 *Ibidem*.

94 *Ibidem*.

95 See, A.Wedeł-Domaradzka, *op. cit.*, p. 172.

moranda may also formulate conclusions and recommendations relating to a given issue[96]. The issue of migration was also the subject of the Commissioner's memoranda, albeit to a slightly narrower extent. In recent years, this issue has emerged mainly in the context of refugees caused by the Nagorno-Karabakh conflict[97] and in connection with the fight against racism and violence against women[98].

In addition to monitoring States through visits or the formulation of letters or memoranda on specific problems concerning the protection of human rights and fundamental freedoms, the Commissioner may also prepare specific thematic studies on specific human rights issues. They take the form of issue papers, opinions, recommendations or publications.

Issue papers draw attention to specific problems related to the protection of individual rights and indicate ways to prevent them. In the context of issues related to broadly understood migration, issue papers have so far addressed the issues of the implementation of the right to family reunification of refugees in Europe[99], the time for proper integration of migrants

96 Commissioner's Memorandum on the stigmatisation of LGBTI people in Poland, Strasbourg, 3.12.2020, CommDH(2020)27, https://rm.coe.int/0900001680a08b8e [accessed on: 1.02.2023].

97 Commissioner's Memorandum on the humanitarian and human rights consequences following the 2020 outbreak of hostilities between Armenia and Azerbaijan over Nagorno-Karabakh, CommDH(2021)29, 08.11.2021, https://rm.coe.int/0900001680a46e1c [accessed on: 1.02.2023].

98 Commissioner's Memorandum on combating racism and violence against women in Portugal, 24.03.2021, https://rm.coe.int/0900001680a1b977 [accessed on: 1.02.2023].

99 Commissioner for Human Rights, Realising the right to family reunification of refugees in Europe, 2017, https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0 [accessed on: 1.02.2023].

in Europe[100], the right to leave the country[101] and the human rights of illegal migrants in Europe[102].

The Commissioner's opinions are provided for in Article 3(e) of Resolution 99 (50), which instructs the Commissioner to 'identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe'. They therefore concern selected human rights issues of interest or concern and are issued by the Commissioner on his own initiative or at the request of other entities[103].

The Commissioner can also make recommendations, although he does not do so very often. The basis for issuing recommendations is similar to that of opinions and often the relevant recommendations are expressed in the form of other documents.

The Commissioner's publications are structured and supplemented versions of the Commissioner's previous papers on current affairs. They can be collections of previous comments, recommendations, issue papers, positions on a given issue or reports summarizing the study of a specific issue[104]. Issues related to migration have also been the subject of previous publications. In recent years, attention has been paid to four areas of urgent

100 Commissioner for Human Rights, Time for Europe to get migrant integration right, 2016, https://rm.coe.int/time-for-europe-to-get-migrant-integration-right-issue-paper-published/16806da596 [accessed on: 1.02.2023].

101 Commissioner for Human Rights, The right to leave a country, 2013, https://rm.coe.int/the-right-to-leave-a-country-issue-paper-published-by-the-council-of-e/16806da510 [accessed on: 1.02.2023].

102 Commissioner for Human Rights, The human rights of irregular migrants in Europe, 2007, https://rm.coe.int/ref/CommDH/IssuePaper(2007)1 [accessed on: 1.02.2023].

103 A.Wedeł-Domaradzka, *op. cit.*, p. 174.

104 *Ibidem*, pp. 175–176.

action to end human rights violations at Europe's borders[105], the protection of migrants in the Mediterranean[106] and the integration of migrants[107].

All documents formulated by the Commissioner remain directly related to other acts dealing with the protection of human rights and fundamental freedoms in the Council of Europe system. This applies to both binding international agreements in the field of protection of individual rights[108] as well as soft-law. This situation is perfectly illustrated by the Commissioner's reference to the Resolution of the Parliamentary Assembly (PA) of the European Council. When addressing the issue of irregular migrants[109], the Commissioner refers in his issue paper[110] to the Resolution of the PA of the European Council under the same title[111]. The Commissioner stressed that minimum guarantees for the rights of irregular migrants protect civil, political, economic and social rights. The rights of the first generation in respect of irregular migrants include: the right to life, freedom from torture, inhuman or degrading treatment or punishment, freedom from slavery and forced labour, detention only as a last resort, respect for the right to asylum and non-refoulement, the right to an effective remedy, the right to respect for private and family life, rights to marry and the prohibition of discrimination. The rights of the second generation in this respect include the need to ensure:

105 Commissioner for Human Rights, Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe's borders, 2022, https://rm.coe.int/pushed-beyond-the-limits--urgent-action-needed-to-end-human-rights-viol/1680a5a14d [accessed on: 1.02.2023].

106 Commissioner for Human Rights, A distress call for human rights. The widening gap in migrant protection in the Mediterranean, 2019, https://rm.coe.int/a-distress-call-for-human--rights-the-widening-gap-in-migrant-protectio/1680a1abcd [accessed on: 1.02.2023].

107 Commissioner for Human Rights, Time for Europe to get migrant integration right, 2016, https://rm.coe.int/time-for-europe-to-get-migrant-integration-right-issue-paper-published/16806da596 [accessed on: 1.02.2023].

108 Such as the ECHR.

109 Irregular or 'illegal' migrants – *irregular migrants*.

110 Commissioner for Human Rights, The human rights of irregular migrants in Europe, p. 13.

111 PA CoE, Resolution 1509 (2006), *Human rights of irregular migrants*, 27.06.2006.

adequate housing and shelter, emergency health care, social care, the right to employment, the right to education for children[112].

The Commissioner's issue paper also draws attention to the most important conditions that should be provided to irregular migrants in the context of their travel and detention conditions[113]. In this case, it should be strongly emphasised that migrants should not be treated as persons deprived of their liberty and should be placed in special places of detention and not with convicted prisoners.[114]

It is clear that those guarantees are entirely consistent with those expressed both in the ECHR, the ESC and the case-law of the ECtHR. It should be stated that the system of the Council of Europe, in the field of broadly understood protection of aliens, encompasses a complementary ecosystem of coherent guarantees found in the human rights treaties of the Council of Europe, case-law, soft-law of the Council of Europe and documents of the Commissioner for Human Rights of the Council of Europe. However, it is not a closed and self-centered ecosystem. There is also a noticeable reference by the bodies operating in the Council of Europe system to 'external' standards, such as the European Union system[115] or the universal system[116].

According to Resolution (99) 50, the Commissioner should, as far as possible, cooperate with 'the human rights structures in the Member States[117]'. This means the possibility of cooperation with national ombudsmen, non-governmental organisations, human rights institutes and all institutions

112 Commissioner for Human Rights, The human rights of irregular migrants in Europe, p. 13.

113 *Ibidem*, p. 14.

114 Commissioner for Human Rights, The human rights of irregular migrants in Europe, p. 14.

115 The so-called 'Dublin cases' are an example of this phenomenon as reviewed by the ECtHR - see more broadly: J. Czepek, *Problemy dotyczące rozpatrywania wniosków o azyl w systemie Unii europejskiej na gruncie orzecznictwa Europejskiego Trybunału Praw człowieka. Analiza 'spraw dublińskich'*, [in:] M. Golda-Sobczak, W. Sobczak (eds.), *Dylematy Unii Europejskiej. Studia i Szkice,* Poznań 2016, pp. 89–103.

116 Commissioner for Human Rights, The human rights of irregular migrants in Europe, p. 15.

117 Resolution (99) 50, Article 3 point c.

working to protect human rights and fundamental freedoms[118]. This form of activities can be carried out in the form of seminars or conferences. In addition, the Commissioner cooperates with non-governmental organisations. This is dictated primarily by the importance of information originating from these organisations or reports concerning the protection of human rights and fundamental freedoms, to which the Commissioner refers[119].

The Commissioner also draws on the work of NGOs such as Amnesty International and Human Rights Watch[120], and works closely with the UN and regional mechanisms such as the OSCE/ODIHR[121]. Such cooperation covers all the issues raised by the Commissioner, including actions on migration and its outcomes.

It is worth adding that the Commissioner also has the possibility to intervene as a third party in the proceedings by the ECtHR[122] and supports the enforcement of judgments of the Court[123]. These powers are particularly important in the context of cases concerning violations of rights and freedoms provided for in the ECHR in relation to aliens, refugees or asylum seekers. Although in recent years the issue has not often been the subject of intervention by the Commissioner as a third party[124], it is still worth noting that the ECtHR refers to the Commissioner's po-

118 A.Wedel-Domaradzka, *op. cit.*, p. 176.

119 See, Dunja Mijatović, Council of Europe Commissioner for Human Rights, Report from a visit to Poland.

120 See, on the Commissioner's website: https://www.coe.int/en/web/commissioner/human-rights-defenders [accessed on: 1.02.2023].

121 Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 6.02.2008, https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf [accessed on: 1.02.2023].

122 See, Wedeł-Domaradzka, A., *op. cit.*, p. 179 *ff.*

123 *Ibidem*.

124 See, on interventions on the Commissioner's website: https://www.coe.int/en/web/commissioner/human-rights-defenders [accessed on: 1.02.2023].

sitions in cases concerning violations of individual rights in connection with migration[125].

As already mentioned, we can observe in the system of the Council of Europe a complementary ecosystem of coherent guarantees present in the CoE human rights treaties, case-law, soft-law of the Council of Europe and documents of the Commissioner for Human Rights of the Council of Europe. It also concerns the fulfilment of these guarantees by referring by bodies operating in the system of the Council of Europe to 'external' standards, such as the European Union system or the UN system. It is worth noting that such a statement does not refer only to legal standards, but also includes institutional cooperation undertaken by the Commissioner in cooperation with national actors, non-governmental organizations or with UN structures or OSCE/ODIHR[126]. Such multi-level cooperation in the field of protection of individual rights in the context of the protection of the rights of aliens, refugees and asylum seekers is certainly part of the broadly understood European paradigm of the protection of aliens.

2. European Union

When analysing the European paradigm of the protection of aliens, it would be difficult to ignore the extensive achievements of the European Union in this area. This issue can already be found in the founding treaties. Particular attention is drawn to the Treaty on the Functioning of the European Union (TFEU), which in Chapter II deals with policies on border

125 See, ECtHR judgment in the case of *Rantsev v. Cyprus and Turkey* of 7.01.2010, application no. 25965/04, Paragraphs 91 *ff*., 101 *ff*.; ECtHR judgment in the case of *Biao v. Denmark* of 24.05.2016, application no. 38590/10, Paragraphs 49, 137.

126 Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities, 6.02.2008, https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/DeclarationHRDCoECommitteeMinisters.pdf [accessed on: 1.02.2023].

checks, asylum and immigration[127]. The very fact that these issues are regulated in the TFEU underlines the importance of the issues analysed.

In the context of the asylum procedure, the Treaty states that 'the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*'[128]. To this end, the European Parliament and the Council of the EU shall adopt measures relating to the Common European Asylum System[129]. In addition, the EU has the task of developing a common immigration policy. It aims to ensure the effective management of migration flows, at all stages, fair treatment of third-country nationals residing legally in the Member States, and the prevention of illegal immigration and human trafficking and the reinforced fight against them[130].

The issue of protection of aliens' rights also appears in the Charter of Fundamental Rights of the EU (EU CFR). Charter guarantees the right to asylum with respect for the principles of the Convention relating to the Status of Refugees[131] and in accordance with the TEU and the TFEU[132]. Every individual shall also enjoy protection in the event of removal, expulsion or extradition. Under Article 19, it includes the prohibition of collective expulsion of aliens and the prohibition of expulsion of an individual to a State where there is a serious risk that he or she may

127 Treaty on the Functioning of the European Union (consolidated text) of 25.03.1957 (Dz. U. 2004, No. 90, Item 864/2 as amended), Chapter 2.

128 *Ibidem*, Article 78, Paragraph 1.

129 *Ibidem*, Article 78, Paragraph 2.

130 *Ibidem*, Article 79, Paragraph 1.

131 Geneva Convention relating to the Status of Refugees of 28.07.1951, together with Protocol of 31.01.1967.

132 Charter of Fundamental Rights of the European Union of 7.12.2000 (version in force since 7.06.2016, (OJ EU. C. 2016.202.389 of 7 June 2016), Article 18; See also, V.Moreno-Lax, *op. cit.*, p. 371 *ff.*

be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment[133].

Due to the specific nature of the European Union as a specific subject of international law, it should be seen from the perspective of its fundamental assumptions. It is therefore important to bear in mind the EU's obligation to provide an area of 'freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'[134]. It is also important to bear in mind the common market of the EU[135] where fundamental freedoms are an important element thereof. The freedom of movement of individuals within the EU results not only from the free movement of persons, but indirectly also from the free movement of services or even in connection with the free movement of goods (in the context of transport).

It should be noted that within the EU regulatory framework, migration and refugees are also covered by numerous regulations in secondary legislation. Although it would be difficult at this point to carry out an extensive analysis of the entire EU legislative acquis in relation to the issues examined, it is worth mentioning a number of acts.

And so, with regard to the issues of entry and border controls, in addition to Article 77 of TFEU, mention should be made of Regulation (EC) of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code),[136] Regulation (EC) of the European

133 *Ibidem*, Article 19; See also, R. Wieruszewski, *Postanowienia Karty Praw Podstawowych w świetle wiążących Polskę umów międzynarodowych i postanowień Konstytucji z 1997 r.*, [in:] J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej*, Warszawa 2008, p. 127–128.

134 Treaty on European Union (consolidated text 7.6.2016) of 7.2.1992, (OJ. EU 2016 C 202), Article 3(1)

135 *Ibidem*, Article 3(2).

136 Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

Parliament and of the Council establishing a Community Code on Visas (Visa Code)[137], Regulations of the Council (EC) establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union[138] or Regulation (EU) of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union[139].

With regard to migration, secondary EU legislation includes inter alia: Council Directive on the right to family reunification[140]; Council Directive concerning the status of third-country nationals who are long-term residents[141]; Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[142]; Council Directive on a specific procedure for admitting third-country nationals for the purposes of scientific research[143]; Directive of the European Parliament and of the Council

137 Regulation (EC) of the European Parliament and of the Council no. 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code).

138 Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

139 Regulation (EU) No. 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

140 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

141 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

142 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

143 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research.

on common standards and procedures in Member States for returning illegally staying third-country nationals[144]; Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment[145]; Directive of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers[146] or Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer[147].

In the area of the development of a common EU asylum policy, in accordance with Article 78 of TFEU, secondary legislation in this area includes inter alia: a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[148], Directive of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible

144 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.

145 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

146 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

147 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

148 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

for subsidiary protection, and for the content of the protection granted[149]; Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection[150]; Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection[151] or Regulation (EU) of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[152].

In the area studied, the regulations of secondary EU law cover a whole range of legal acts that are comprehensive in nature. Naturally, this results from the multifaceted nature of the issues that make up the broadly understood European paradigm of protection of aliens in the EU legal system. Those referenced secondary legislation acts were also a subject of earlier analyses[153].

It should be borne in mind that the broadly understood migration issue and the protection of individual rights within the European paradigm of the protection of aliens is the subject of interest of many EU bodies, and EU law and its institutional area are actually permeated with these issues.

149 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

150 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

151 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

152 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

153 See, K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law. A Commentary*, München 2016.

It is worth paying attention to the activities of the European Commission (EC) in this area. It would be difficult not to mention the Common European Asylum System (CEAS). Its original objectives were expressed in 1999 at a special meeting of the European Council in Tampere[154]. Since then, at the initiative of the Commission, these assumptions have been constantly evolving[155]. These regulations also cover the problems resulting from the migration crisis affecting Europe in 2015. A decision by the European Commission on a wide-ranging reform of the Common European Asylum System and the development of safe and legal pathways to Europe was the result of that meeting[156]. One of the elements concerns institutional reform, including the creation in 2021 of the European Union Agency for Asylum.

In the context of the functioning of the CEAS, a number of the most important regulations concerning refugees should be mentioned. Thus, the most important regulations include: the Directive laying down standards for the reception of applicants for international protection[157]; a directive on common procedures for granting and withdrawing international protection[158]; directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status

154 European Council, Conclusions of the Finnish Presidency, Tampere, 15 and 16 October 1999.

155 See, P. Sadowski, *Wspólny Europejski System Azylowy – historia, stan obecny i perspektywy rozwoju*, Torun 2019.

156 See, Commission presents options for reforming the Common European Asylum System and developing safe and legal pathways to Europe, https://ec.europa.eu/commission/presscorner/detail/pl/IP_16_1246 [accessed on: 1.02.2023].

157 Directive of the EP and of the Council 2013/33/EU of 26.06.2013 laying down standards for the reception of applicants for international protection.

158 Directive 2013/32/EU of the EP and of the Council of 26.06.2013 on common procedures for granting and withdrawing international protection.

for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted[159] and the Dublin III Regulation[160].

Given the specificities of this Chapter and its limited framework, a thorough analysis of those acts will not be possible here. However, it is worth mentioning briefly the Dublin III Regulation. As already mentioned in the section on the case-law of the ECtHR in the so-called 'Dublin cases', its purpose is to establish criteria and mechanisms 'for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person'[161]. Such an application shall be examined by only one Member State[162].

Currently, these guarantees result from Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 2013[163]. Previously, they were based on Regulation 343/2003 of 2003[164] and the European Convention on Asylum (Dublin Convention)[165]. The Dublin system is based on the principle that Member States recognise each other as safe third countries, but the asylum seeker will only be sent back after the responsible country has consented to his transfer. Only one State can be responsible for examining an individual's application for asylum, and that State

159 Directive of EP and Council 2011/95/EU of 13.12.2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

160 Regulation (EU) No. 604/2013 of the European Parliament and of the Council.

161 Regulation (EU) No. 604/2013 of the European Parliament and of the Council, Article 2.

162 *Ibidem*, Article 3(1).

163 *Ibidem*.

164 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

165 European Convention on Asylum (Dublin Convention) of 15.6.1990; The Convention has been replaced by a Regulation (the so-called Dublin Regulation).

is responsible for guaranteeing effective access to the asylum procedure[166]. It is therefore important to determine which country will be responsible for examining the application. Objective criteria for determining the Member State responsible serve this purpose[167].

In the context of the analysed issues, it is also worth mentioning the departments and agencies supporting the EC. Thus, within the departments and agencies supporting the EC, there is the Directorate-General for Migration and Home Affairs and the Directorate-General for Humanitarian Aid and Civil Protection. Strategic Plan of DG Migration and Home Affairs for 2020–2024 consists of two parts. The former pursues specific objectives of strengthening internal security, effective asylum and migration management policies, stronger cooperation with partner countries, and a fully functioning area of free movement of persons. The latter focuses on modifying the administration[168]. In turn, the Directorate-General for Humanitarian Aid and Civil Protection focuses on providing humanitarian aid, protecting human life, assisting vulnerable groups, providing support in case of natural disasters and catastrophic disasters caused by mankind. Among its thematic policies for 2022, the DG highlights the protection of vulnerable people, sexual violence in humanitarian crises, support for children and people with disabilities[169].

When considering the issue of refugees in the EU system, it would be difficult not to take into account the role of the Court of Justice of the EU and its case-law. However, the case-law of the CJEU will be further analysed in subsequent chapters.

166 A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford 2009, p. 89.

167 Regulation (EU) No. 604/2013 of the European Parliament and of the Council, Articles 7 to 15. See also, A.Hurwitz, *op. cit*., p. 95 *ff*.

168 See, European Commission, Strategic Plan 2020–2024, DG Migration and Home Affairs, p. 3, https://ec.europa.eu/info/system/files/home_sp_2020_2024_en.pdf [accessed on: 1.02.2023].

169 See, European Commission, General Guidelines on Operational Priorities for Humanitarian Aid in 2022, 29.10.2021 SWD(2021) 312, pp., 6–8, https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/how_we_provide_aid/documents/swd_2021_312_f1_staff_working_paper_en_v5_p1_1541249.pdf [accessed on: 1.02.2023].

2.1. European Union Agency for Asylum

The European Union Agency for Asylum previously operated as the European Asylum Support Office (EASO)[170]. It is a relatively new EU agency that was created on the basis of 2021/2303 regulation[171] adopted in 2021. This agency is designed to provide operational and technical support and training to the relevant authorities in EU countries. The aim is to support the implementation of EU asylum law and the harmonisation of asylum procedures and reception conditions.

The Agency shall also improve the functioning of the Common European Asylum System, inter alia through a monitoring mechanism, and provide operational and technical support to Member States, in particular when their asylum and reception systems are subject to disproportionate pressure. The Agency is also a centre of expertise[172].

In accordance with Regulation 2021/2303, the Agency's tasks, inter alia, are to:

- facilitate, coordinate and strengthen practical cooperation and information exchange among Member States on their asylum and reception systems;
- gather and analyse information of a qualitative and quantitative nature on the situation of asylum and on the implementation of the CEAS;
- support Member States when carrying out their tasks and obligations in the framework of the CEAS;
- assist Member States as regards training and, where appropriate, provide training to Member States' experts;

170 This office was established on the basis of Regulation (EU) No. 439/2010 of the EP and of the Council of 19.05.2010 establishing a European Asylum Support Office.

171 Regulation of the European Parliament and of the Council of the EU No. 2021/2303 of 15.12.2021 establishing a European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010.

172 *Ibidem*, Article 1(2) to (3).

- draw up and regularly update reports and other documents providing information on the situation in relevant third countries;
- set up and coordinate European networks on third-country information;
- organise activities and coordinate efforts among Member States to develop common analysis on the situation in countries of origin and guidance notes;
- provide information and analysis on third countries regarding the concept of safe country of origin and the concept of safe third country;
- provide operational and technical assistance to Member States, in particular when their asylum and reception systems are subject to disproportionate pressure;
- provide adequate support to Member States in carrying out their tasks and obligations under Regulation (EU) no. 604/2013;
- assist with the relocation or transfer of applicants for or beneficiaries of international protection within the Union;
- set up and deploy asylum support teams;
- set up an asylum reserve pool in accordance;
- develop operational standards, indicators, guidelines and best practices;
- monitor the operational and technical application of the CEAS;
- support Member States in their cooperation with third countries in matters related to the external dimension of the CEAS;
- assist Member States with their actions on resettlement[173].

In the context of the Agency's rather long list of tasks, it is important to note the activities related to operational assistance to EU countries that are subject to disproportionate migratory pressure. In addition, the creation of the Agency entails the creation of a permanent network of experts who can be sent to one of the EU Member States. The substantive con-

173 *Ibidem*, Article 2.

text of the Agency's tasks is also important. It includes an extensive system of asylum training and the collection of data and the adoption of the necessary documents (operational standards, indicators, guidelines and best practices). The Agency's tasks will also include the protection of asylum seekers. In this regard, a fundamental rights officer and a complaints review mechanism will be set up. The Agency will also improve cooperation with relevant authorities, both in Member States and in non-EU countries.

2.2. Frontex

Although Frontex can hardly be seen as an agency for the protection of aliens, it is worth noting the way it operates, especially in the context of its increasing role in recent years. As the authority responsible for managing the EU's external borders, Frontex can have a significant impact on the situation of refugees. In view of the possibility of abuse, its activities should be subject to scrutiny.

The European Border and Coast Guard Agency (Frontex) has been operating since 2004. The creation and functioning of Frontex within the institutional system of the European Union is the result of two factors. One of them was the practical implementation of the EU's fundamental freedoms, including in particular the free movement of persons. The second factor results from the abolition of border controls at the EU's internal borders in connection with the Schengen Agreement[174] and then the Schengen Convention[175]. As a result of the adoption of the Schengen acquis, initially five countries (Belgium, France, the Netherlands, Luxembourg and Germany) concluded an agreement aimed at abolishing border controls between these countries. Subsequently, the Schengen Conven-

174 Schengen Agreement of 14.06.1985

175 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19.06.1990; See also, A.Hurwitz, *op. cit.*, pp. 33–35.

tion complemented the Agreement and provided safeguards for the creation of an area free from internal border controls. It was signed in 1990 and entered into force in 1995.

As M. Fink points out, despite the subsequent transfer of important competences for the administration of the external borders to the EU, they remain the external borders of the Member States of the European Union. Therefore, it is the primary responsibility of the Member States' agencies to protect the external borders[176]. It quickly became clear that this approach raises a number of challenges. The diversity of national authorities present at the external borders has significantly hampered the uniform application of the Schengen rules. The unequal financial burden associated with the control of external borders was also a problem.

In response to these challenges, the Commission (EC) has proposed the adoption of common rules; a common mechanism for coordination and operational cooperation; common integrated risk analysis; training of staff with a European dimension and burden-sharing among Member States in preparation for the creation of a European Border Guard Corps[177]. The EC has proposed the creation of the External borders practitioners common unit[178]. This body met for the first time in 2002 and was composed of persons in charge of national agencies responsible for border control. Shortly thereafter, the Commission identified structural constraints on the joint entity for the effective coordination of operational cooperation, concluding that the joint entity was rather qualified for strategic tasks[179].

176 M. Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor situations' under the ECHR and EU Public Liability Law*, Oxford 2018, p. 25.

177 European Commission, Commission Communication to the Council and the European Parliament: Towards integrated management of the external borders of the Member States of the European Union, COM(2002)233, Paragraph 20.

178 *Ibidem*, Paragraph 28 *ff.*

179 European Commission, Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM/2003/0323, point 2.2.

The topic of the need to establish a new agency appeared at a later meeting of the European Council[180] and in the EC's proposal[181]. As a consequence, Frontex was established with its seat in Warsaw[182]. The Regulation establishing the Agency was adopted in 2004. The newly established Frontex became operational in October 2005[183].

The Regulation forming the grounds for the operation of the Agency has been subject to two major amendments. In 2007, the Rapid Border Intervention Teams (RABIT) were established[184]. The Regulation establishing them introduced powers for officers operating in the host Member State. These powers were later extended to joint operations[185]. In 2016, following the European migration crisis, the European Border and Coast Guard Regulation was adopted, which amended the existing acts governing the functioning of Frontex[186]. The regulation gave the Agency more powers and increased its financial and human resources. In addition,

180 Thessaloniki European Council 19 and 20 June 2003, Presidency conclusions, Brussels 20.06.2003.

181 European Commission Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, COM/2003/0687 final.

182 Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; See also, A. W. Neil, *Securitization and Risk at the EU Border. The Origins of FRONTEX*, 'Journal of Common Market Studies', Vol. 47, No. 2, pp. 333–356; V.Moreno-Lax, *op. cit.*, p. 155 *ff.*

183 Frontex Annual Report 2006, p. 2.

184 Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) no. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

185 See, M. Fink, *op. cit.*, p. 27.

186 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No. 2007/2004 and Council Decision 2005/267/EC

the official name of the agency has changed (European Border and Coast Guard). This change did not entail a change in colloquial nomenclature[187].

In accordance with Regulation 2016/1624, the European Border and Coast Guard is formed by the Agency and the national authorities of the Member States responsible for border management[188]. Their combined responsibility includes European integrated border management at the external borders for the efficient management of the crossing of external borders[189], measures related to the prevention and detection of cross-border crime (e.g. migrant smuggling, trafficking in human beings and terrorism)[190], integrated border management as regards the surveillance operations at sea and all other border control tasks[191].

Specific actions of Frontex include monitoring migratory flows towards and within the Union and trends and other possible challenges at the Union's external borders. To that end, the Agency shall establish a common integrated risk analysis model to be applied by the Agency and the Member States. The Agency shall also carry out a vulnerability assessment[192].

Frontex's tasks also include supervising Member States' activities in administering the external borders. That supervision may include monitoring and assessing the availability of technical equipment, systems, capabilities, resources, infrastructure, qualified and trained staff of the Member States[193]; the financial resources available at national level to carry out border control and information on contingency plans for border management[194]. The actions listed above have a preventive purpose. The vulnerability assessment itself assesses the capacity and prepa-

187 For more information: M.Fink, *op. cit.,* p. 27.

188 Regulation (EU) 2016/1624 of the European Parliament and of the Council, Article 3(1).

189 *Ibidem*, Article 1.

190 *Ibidem*, Article 4(a)

191 *Ibidem*, Article 5(1).

192 *Ibidem*, Article 11(1).

193 *Ibidem*, Article 13(2).

194 *Ibidem*, Article 13(3).

redness of Member States to face upcoming challenges, including current and future threats and challenges at the external borders and identify, in particular for those Member States facing specific and disproportionate challenges, the possible direct effects at the external borders and the resulting impact on the functioning of the Schengen area[195].

Frontex's activities include joint operations, which are by far the most visible of all the Agency's activities[196]. Their purpose is to provide assistance to one or more Member States in managing the borders of the Member States. Frontex has to take differentiated actions, which is why several types of joint operations should be distinguished. First of all, the Agency's activities are related to the protection of the EU's external borders, which implies the need to undertake joint border control operations. In this type of operation, Frontex supports one or more Member States in managing their part of the external borders. The Agency's support shall entail the provision of technical and staff support from resources made available by other Member States. The main objective of such operations is to detect, counter and respond to irregular migration[197].

As regards the return of third-country nationals who do not have a right of residence, Frontex undertakes joint return operations. This type of action is characterised by the need to organise, coordinate and finance (or co-finance) the return of a third-country national without the right of residence. Two types of this type of operation can be identified. In the former, Frontex actually assists the representatives of the Member State who carry out the return of the concerned person. In the second, the Agency's activities occur in a situation where a Member State has a problem with the implementation of its obligations to return a third-country national in respect of whom such a decision has been issued.

195 *Ibidem*, Article 13(4).

196 V.Moreno-Lax, *op. cit.*, p. 180 *ff.*

197 For more information: M.Fink, *op. cit.,* p. 35 *ff.*

In such activities, the existence of specific and disproportionate difficulties in ensuring this obligation is an important element[198].

The role and importance of Frontex has increased significantly in recent years, as evidenced by the development of the Agency's powers, for example due to Regulation 2016/1624 of the EP and of the Council. The reason for this is the recurring migration crises in Europe in recent years and the need to effectively manage the borders of the Member States, which are also the EU's external borders. For these reasons, the Agency now plays an important role in regard to operational activities. This special role concerns primarily the legal system of the EU and its external borders, but it is difficult not to perceive it more broadly as part of the broadly understood system of European protection of aliens.

3. United Nations

The UN system, as the basis of a universal system, must, for obvious reasons, be seen as 'global' rather than 'European', and for this reason it may be questionable to mention it here. Despite this, the standards developed as part of the mechanisms of universal protection of human rights have a significant impact on the protection of individual rights in the world, and thus, also shape the broadly understood European paradigm of protection of aliens.

In practice, this phenomenon is noticeable, for example, in mutual reference to UN standards, e.g. by the ECtHR in its case-law[199], in official documents of CoE bodies[200] or by establishing cooperation between international organizations. For example, the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees

198 *Ibidem*, p. 41.

199 See, the case of *Hirsi Jamaa and Others v. Italy*, Paragraphs 26, 27, 33.

200 See, Resolution 1821 (2011) of PA of CoE, The interception and rescue at sea of asylum seekers, refugees and irregular migrants, point 5.

is obliged to adhere to such cooperation[201]. In this case, it is primarily about cooperation with the EU, the United Nations High Commissioner for Refugees or the International Organization for Migration.

In the context of the protection of the rights of aliens, within the UN system, it is worth paying attention primarily to the role of the United Nations High Commissioner for Refugees and the Special Rapporteur on Human Rights with regard to migrants. Due to the subject matter of this analysis and the rich acquis of the treaty bodies and special procedures of the Human Rights Council in this area, they will not be subject to further analysis here. As an exception, however, the role of the Committee against Torture and the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment will be mentioned.

3.1. United Nations High Commissioner for Refugees

The current United Nations High Commissioner for Refugees, Filippo Grandi, stated during his inaugural speech that 'UNHCR is navigating extraordinarily difficult waters. The combination of multiple conflicts and resulting mass displacement, fresh challenges to asylum, the funding gap between humanitarian needs and resources, and growing xenophobia is very dangerous'[202]. It is difficult to describe the challenges currently facing the High Commissioner in a better and more synthetic way.

According to the Geneva Convention relating to the Status of Refugees, the High Commissioner undertakes 'the task of overseeing the application of international conventions ensuring the protection of refugees'[203].

201 Mandate of the Special Representative of the Secretary-General for Migration and Refugees, p. 1.

202 UNHCR Filippo Grandi takes helm as UN High Commissioner for Refugees, https://www.unhcr.org/news/latest/2016/1/568a3dff6/filippo-grandi-takes-helm-un-high-commissioner-refugees.html [accessed on: 1.02.2023].

203 Convention relating to the Status of Refugees, Geneva 28.07.1951 (189 UNTS 150), Preamble.

The Convention also notes that 'effective coordination of measures' concerning refugee protection depends on cooperation between States and the High Commissioner[204]. The extent of cooperation between States and the High Commissioner is further defined in Article 35. It obliges States Parties to cooperate with the Office of the High Commissioner (or any other agency of the United Nations that may replace him in the performance of its functions) primarily in the application of the Convention relating to the Status of Refugees[205]. States Parties are also obliged to provide the Office of the High Commissioner with information and statistics on: the situation of refugees, the application of the Convention and national regulations that apply to refugees[206].

The mandate of the High Commissioner includes the provision of international protection and is not limited to States Parties to the Convention relating to the Status of Refugees. As A. Hurwitz emphasizes, the role of the High Commissioner is special in the international system, because he does not have to be explicitly invited by states to be involved in protective activities and he has the capability to carry out protective activities due to his presence in most countries[207].

According to the Statute, the High Commissioner shall in particular be responsible for:

a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
b) promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

204 *Ibidem*.

205 *Ibidem*, Article 35(1).

206 *Ibidem*, Article 35(2). See also, Protocol relating to the Status of Refugees, New York, 31.1.1967 (606 UNTS 267), Article II.

207 A. Hurwitz, *op. cit*., p. 255.

c) assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
d) promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
e) endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
f) obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
g) keeping in close touch with the Governments and inter-governmental organizations concerned;
h) establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
i) facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees[208].

When considering the role of the UNHCR, it is also worth mentioning the Executive Committee of the High Commissioner (ExCom). It consists of 85 members and holds one session per year. This body contributes to the development of the international normative structure by adopting conclusions on various aspects of international cooperation in the area of protection of refugee rights[209]. Initially, the Executive Committee was set up to provide advisory support to the UNHCR, but very often it addresses its findings to the states. Each year, the Committee adopts general proposals on international protection, which are compilations of general statements on the protection of refugee rights[210]. It is worth mentioning

208 *Statute of the office of the United Nations High Commissioner for Refugees,* UNGA Resolution 428 (V) of 14.12.1950, point 8.

209 A. Hurwitz, *op. cit*., p. 253.

210 *Ibidem.*

that in 2021 the Executive Committee addressed the issue of illegal migration across the Polish and Belarus border[211].

3.2. Special Rapporteur on the human rights of migrants

The mandate of the Special Rapporteur on the human rights of migrants was created in 1999 by the Commission on Human Rights under Resolution 1999/44[212]. Subsequently, it was extended by the Commission[213] and the Human Rights Council[214]. The term of office shall be renewed for a period of three years. In accordance with Human Rights Council Resolution 43/6, the Special Rapporteur's tasks are to include:

a) to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation;
b) to request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;
c) to formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
d) to promote the effective application of relevant international norms and standards on the issue;

211 See, The 72nd session of the UNHCR Executive Committee was held in Geneva, https://www.gov.pl/web/onz/72-sesja-komitetu-wykonawczego-unhcr-odbyla-sie-w-genewie [accessed on: 1.02.2023].

212 Resolution of the Committee on Human Rights, Human rights of migrants, 27.04.1999, 1999/44, point 3.

213 See, Human Rights Committee Resolutions 2002/62 and 2005/47.

214 See, Human Rights Council Resolutions 8/10, 17/12, 26/19, 34/21, 43/6.

e) to recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants;
f) to take into account a gender perspective when requesting and analysing information, and to give special attention to the occurrence of multiple forms of discrimination and violence against migrant women;
g) to give particular emphasis to recommendations on practical solutions with regard to the implementation of the rights relevant to the mandate, including by identifying best practices and concrete areas and means for international cooperation;
h) to report regularly to the Human Rights Council, according to its annual programme of work, and to the General Assembly, bearing in mind the utility of maximizing the benefits of the reporting process[215].

In addition, the Special Rapporteur should take into account relevant UN instruments in this regard in the implementation of his mandate[216], receive and exchange information on migrant human rights violations with states, treaty bodies and non-governmental organizations[217]. The Special Rapporteur may also visit countries within the scope of exercising his or her mandate.

3.3. Committee against Torture and Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In addition to the aforementioned bodies, it is worth mentioning the important role played by the Committee against Torture (CAT)

215 Human Rights Council Resolution, *Human rights of migrants: mandate of the Special Rapporteur on the human rights of migrants* of 30.06.2020, No. 43/6, Paragraph 1.

216 *Ibidem*, Paragraph 2.

217 *Ibidem*, Paragraph 3.

and the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Subcommittee on Prevention) in protecting the rights of aliens. The functioning of the CAT derives directly from the Convention against Torture[218], while the mandate of the Subcommittee is based on the Optional Protocol to the Convention[219]. The role of both bodies is not directly aimed at protecting the rights of aliens, but through the implementation of their mandates including the prevention of torture and the obligation of states to criminalise and prosecute any case of torture.

Indirectly, however, both mandates contribute to the protection of aliens against torture, cruel, inhuman or degrading treatment. The Convention prohibits the expulsion, return or surrender to another State of a person if there are serious grounds for believing that he or she may be there at risk of torture[220].

The Committee concluded that Member States should inter alia ensure in other ways the existence of procedural safeguards against expulsion and the availability of effective remedies against expulsion claims in expulsion proceedings. Expulsion decisions should be subject to judicial review on a case-by-case basis and should be subject to a right of appeal. In addition, national authorities should establish effective and fully accessible referral and complaint mechanisms from the moment of expressing their intention to seek asylum and step up their efforts to ensure the criminal liability of perpetrators of acts that threaten the life and safety of migrants and asylum seekers, ensure

218 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984 (1465–UNTS 85).

219 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations in New York on 18 December 2002 (2375 UNTS 237).

220 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3(1).

the protection of victims, witnesses and applicants from ill-treatment or intimidation, which may be a consequence of their complaints[221].

The mandate of the Subcommittee is preventive and focuses on visiting places of detention. In the context of protecting the rights of migrants, refugees and asylum seekers, the standards of such places are becoming important for the protection of their rights. The subcommittee has repeatedly stated that states must take the necessary steps to prevent torture in migrant detention centres and conduct thorough investigations into such cases. States Parties must also provide adequate support and protection to migrants[222]. The Sub-Committee also examines the conditions in which such persons are detained, the provision of appropriate medical care and access to national and international procedures.

4. Conclusion

The assumptions of the 'European paradigm of the protection of aliens' are not limited only to the legal or institutional guarantees present in European systems. Naturally, this paradigm consists of institutions and standards functioning within the structures of the Council of Europe and the European Union. This does not mean, however, that the European paradigm of the protection of aliens is shaped solely on the basis of the achievements of these two international organisations. Therefore, the UN system should be seen as complementary to this paradigm.

Formally, various institutions operate within these three organizations, which sometimes partially duplicate their competences. In the sphere of protection of aliens' rights, however, it is difficult to identity a competition be-

221 See, Committee against Torture, Concluding remarks on the third interim report of Montenegro, 2.06.2022, CAT/C/MNE/CO/3, Paragraph 21.

222 Sub-Committee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report to a State Party from its Visit to Spain, 15–26.10.2017, 2.10.2019, para. 84.

tween these structures. In fact, it would be closer to the truth that all these systems complement and supplement mutual protection of individual rights.

Within the institutional framework, this phenomenon is noticeable in the already mentioned mutual reference of its standards, e.g. by the ECtHR in its case-law[223], in official documents of authorities[224] or through establishing cooperation between international organizations. The analysis of other elements of the studied paradigm will be undertaken in the following chapters.

223 See, the case of *Hirsi Jamaa and Others v. Italy*, Paragraphs 26, 27, 33.

224 See, Resolution 1821 (2011) of PA of CoE, The interception and rescue at sea of asylum seekers, refugees and irregular migrants, point 5.

Chapter II

Prohibition of penalisation of the entry
and stay of a refugee in good faith
in the territory of the country of refugee

1. Introduction

The 1951 Convention relating to the Status of Refugees (1951 Geneva Convention, 1951 GC)[1] is the main treaty of international refugee law. It is widely believed to be the basis for a universal system of international refugee protection[2]. It is today 'one of the most widely accepted international norms and remains the only legally binding instrument for the international protection of refugees'[3]. In the words of the United Nations High Commissioner for Refugees (UNHCR)[4] it is the 'cornerstone' and 'foundation"[5] of this protection.

The 1951 Geneva Convention was amended by the 1967 Protocol relating to the Status of Refugees (the 1967 New York Protocol; NYP of 1967)[6]. It has removed its time and geographical restrictions on the classification of refugees, but reiterated its provisions on the role of the UNHCR and took into account all its definitions and obligations of the Contracting States. This time limit determined the subjective scope of the application

1 The United Nations Convention referring to the status of Refugees was adopted in December 1951 as a consequence of the Resolution of the UN General Assembly from 1950 and came into force in April 1954, (189 UNTS 150). The Convention was adopted by the United Nations Conference of Plenipotentiaries for the Status of Refugees and Stateless Persons, which took place in Geneva from 2 to 25.07.1951. The Conference was convened on the basis of Resolution 429 (V), adopted by the General Assembly of the United Nations on 14.12.1950.

2 For a description of the context of the formation of the 1951 GC and the first years of its application, see S. Collinson, *Beyond borders: West European Migration Policy Towards the 21stt Century*, London 1993.

3 L. Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 'International Journal of Refugee Law' 2002, Vol. 14, No. 2–3, 2002, p. 246: 'The Cold War had an overwhelming influence on the norms and rules of this regime, and in the post-Cold War era the regime has struggled to reflect and adapt to emerging global concerns — from internally displaced persons to gender and race distributional issues'.

4 See, General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, Resolution 428 (V), 325th plenary meeting, 14 December 1950.

5 See, UN News, *Migrants and Refugees*, United Nations, 28 July 2021; https://news.un.org/en/story/2021/07/1096562 [accessed on: 1.02.2023].

6 *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267: https://www.refworld.org/docid/3ae6b3ae4.html [accessed on: 1.02.2023].

of the 1951 GC to persons who became refugees 'as a result of events occurring before 1 January 1951'. (Art.1 A. point 2) of 1951 GC). The geographical limitation, on the other hand, essentially limited these events to those that took place in Europe. However, the States had the option of derogating from this restriction. Namely, they could have made a statement that, fulfilling the obligations arising from the 1951 GC, they intend to use the expression 'events occurring in Europe or elsewhere before 1 January 1951'. (Art.1 B. pt. 1) b. of 1951 GC)[7]. It is worth noting that most of the first signatories of the GC took advantage of this opportunity, thus giving some impetus to the expansion of the international refugee system beyond Europe[8].

In the light of *travaux préparatoires*, there is no doubt that the foundations of this system were based on an evolutionary method aimed at balancing the interests of states with the need to protect people fleeing persecution. This can be seen in the memorandum of the UN Secretary-General addressed to the UN *Ad Hoc Committee on Refugees and Stateless Persons*[9], according to which the provisions of the 1951 GC were to be formulated so that

> 'the greatest possible number of States should become parties to the new convention. For this purpose, it is essential that the convention should not impose upon them

7 J. Ramasubramanyam, *Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?*, 'Asian Yearbook of International Law' 2018, Vol. 24, pp. 60–79; J. Tolay, *Inadvertent reproduction of Eurocentrism in IR: The politics of critiquing Eurocentrism*, Review of International Studies, First View, pp. 1 – 22; As a result of these limitations the GC has not provided support inter alia for millions of displaced persons as a result of division of British India in 1947, on the other hand a separate UN agency, UNRWA, supported 700,000 Palestinians displaced as a result of the creation of the state of Israel in 1948; time limit on the other hand caused a situation where later refugees, mainly resettled outside Europe, were not covered by the protection of international law.

8 As of 17.08.2021 some 137 States Parties of 1951GC made the declaration *(b) 'Events occurring in Europe or elsewhere before January 1, 1951'*, i.e. resigned from the geographical limitation. See, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en. [accessed on: 1.02.2023].

9 Preparatory work of this committee is https://www.refworld.org/publisher,AHCRSP,LEGHISTo.html [accessed on: 01.02.2023].

> obligations greater than those which they are prepared to accept. Nevertheless, it would be undesirable in order to gain wider accession to the convention, to adopt a rudimentary convention containing the minimum number of obligations and falling short of what some States might be prepared to grant. The solution would be to adopt a flexible system which would meet the various requirements of States. The convention should contain a minimum of obligations that would be binding on all the States which would become parties to it. On the other hand, it should contain other obligations in respect of which the States might make reservations"[10].

Originally, the 1951 Geneva Convention was signed by 26 UN member states, mainly representing North America and Europe[11]. Currently, the 1951 GC has 146 States Parties, and the NYP of 1967 was signed by 147 parties[12].

In general, by ratifying the Geneva Convention of 1951 or the New York Protocol of 1967, the states committed themselves to ensuring certain standards of treatment and rights for refugees. In addition, they have

10 UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, 3 January 1950, E/AC.32/2, https://www.refworld.org/docid/3ae68c280.html [accessed on: 1.02.2023]

11 See, United Nations, *Convention relating to the Status of Refugees*, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en [accessed on: 1.02.2023].

12 See, *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, Harvard Law Review, 31 Harv. L. Rev. 1399, p. 131:1399, https://harvardlawreview.org/2018/03/american-courts-and-the-u-n-high-commissioner-for-refugees-a-need-for-harmony-in-the-face-of-a-refugee-crisis/ [accessed on: 1.02.2023]; See also, M. Janmyr, *No Country of Asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention*, 'International Journal of Refugee Law' 2017, Vol. 29, No. 3, 438–465.

undertaken to implement the provisions of those instruments in good faith[13]. This means that, as Guy S. Goodwin-Gill rightly observes,

> '[t]he formal compliance is not in itself sufficient to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.'[14]

The issues raised in this paper concern the issue of entry and stay of refugees on the territory of the States Parties to the GC of 1951. The main attention will therefore be focused on the provisions of Article 31(1) of the 1951 GC. It codifies the principle of non-penalisation of refugees who arrive directly from a territory in which their life or freedom is in danger, enter or stay in the country without authorisation, provided that they report to the authorities without delay and show a legitimate reason for their illegal entry or stay. Accordingly, an attempt is made below to interpret Article 31(1) of the 1951 GC in accordance with the directives for the interpretation of the Treaties under Article 33(1) of the 1969 Vienna Convention on the Law of Treaties [VCLT][15]. Particular attention was paid to the 'the normal meaning of terms', taking into account their context as well as the subject matter and purpose of the Treaty. Consequently, the subject of analysis will concern the interpretation of such concepts as: 'coming directly from a ter-

13 G. S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, [in:] E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Oxford 2003, at: https://www.unhcr.org/publications/legal/419c778d4/refugee-protection-international-law-article-31–1951-convention-relating.html, p. 218, [accessed on: 1.02.2023].

14 *Ibidem*.

15 1155 UNTS 331.

ritory', notification 'without delay', 'good cause'. They will lead to the effective application of the principle of not penalising the illegal entry and bona fide stay of a refugee in the territory of the country of refuge. This principle will be considered one of the main principles of the 1951 GC. It confirms essentially humanitarian, human-rights and well-being-oriented purpose of the Convention[16].

Finally, an attempt will be made to answer the question whether the States Parties to the 1951 GC meet international standards for ensuring access to asylum procedures for persons fleeing persecution both at the level of actual practices and applicable law. This attempt will also take into account the changes introduced to Polish law at the end of 2021, i.e. the Act on Aliens[17] and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland[18], made in connection with the ongoing migration crisis at the Polish border with Belarus[19].

2. The principle of not penalising the illegal entry and stay of a refugee in good faith in the territory of the country of refuge.

2.1. Limits of the State's power to control the entry and stay of aliens on its territory

International law recognizes the right of States to control and regulate the rules of entry, stay and expulsion of aliens from their territory,

16 See, in particular Paragraph 4 of the 1951 Preamble to the GC.

17 Act of 12 December 2013 on aliens, consolidated text in Dz. U. 2013, item 1650, as amended.

18 Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland, (Dz. U. 2003 No. 128 item 1176, as amended).

19 Statement of the Civic Rights Ombudsman, M. Wiącek to the Marshall of the Senate of the Republic of Poland, Tomasz Grodzki, dated 03–10–2021, XI.543.13.2018; See also, the explanatory memorandum to the government bill amending the act on aliens and the act on granting protection to aliens on the territory of the Republic of Poland, print no. 1507 (1507-uzas.DOCX (25 KB).

since each sovereign State has exclusive control over its territory and thus over persons residing on its territory[20]. Therefore, in the absence of different treaty obligations, a State has the right to grant or refuse asylum to persons residing within its borders[21]. This right of the State derives from the principle of territorial integrity and from the principle of territorial sovereignty of States, which are pillars of international law[22]. The reference to the principle of sovereignty in the context of the right of asylum is characteristic for documents of refugee law[23]. It can be found, for example, in the UN Declaration on Territorial Asylum adopted by the UNGA in 1967 in Article 1(1), which states that 'asylum granted by a State, exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, (...) shall be respected by all other States'[24].

The European Court of Human Rights (Court, ECtHR), also draws attention to the principle of '*undeniable sovereign right to control aliens' entry into and residence in their territory*' which is well established in international law[25].

20 F. Morgenstern, *The Right of Asylum*, 'British Yearbook of International Law' 1949, Vol. 26, p. 327.

21 A. Grahl-Madsen, *Territorial Asylum*, Stockholm-London-Rome-New York 1980, p. 50; K. Hailbronner, *Molding a New Human Rights Agenda: Refugees and Asylum: The West German Case*, 'The Washington Quarterly 1989', Vol. 8, No. 4, pp. 183–184; F. Morgenstern, *The Right of Asylum*, 'British Yearbook of International Law' 1949, Vol. 26, p. 327.

22 F. Morgenstern, *The Right of Asylum*, 'British Yearbook of International Law' 1949, Vol. 26, p. 327 *ff*.; See also, H. Lauterpacht, *The Universal Declaration of Human Rights*, 'British Yearbook of International Law' 1948, pp. 354 and 373.

23 R. Boed, *The State of the Right of Asylum in International Law*, 'Duke Journal of Comparative and International Law' 1994, Vol. 5, No. 1, pp. 3–6.

24 UN General Assembly, Article 1 *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), https://www.refworld.org/docid/3b00f05a2c.html [accessed on: 1.02.2023].

25 ECtHR, case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application no. 9214/80, 9473/81, 9474/81, judgment of 28.05.1985, Paragraph 67; ECtHR, case of *Amuur v. France,* application no. 19776/92, judgment of 25.06.1996, Paragraph 41; ECtHR, case of *Mohammadi v. Austria,* application no. 71932/12, judgment of 03.07.2014, Paragraph 58; ECtHR, case of *Filias and Ahmed v. Hungary,* application no. 47287/15, judgment of GC of 21.11.2019, Paragraph 125. See also, M. Lubiszewski, *Europejska Konwencja Praw Człowieka wobec 'Innego'*, [in:] W. Pływaczewski, M. Ilnicki (eds.), *Ochrona praw człowieka w polityce migracyjnej Polski i Unii Europejskiej*, Olsztyn 2016, pp. 72–91.

In that sense, 'according to general international law in its present form, the so-called right of asylum is a right of states rather than that of the individual'[26], albeit it is not unlimited. Some of its limits result from international law relating to aliens or international protection of human rights[27]. The ECtHR clearly states this and the limits of the margin of discretion in this case are set for the States Parties to the European Convention on Human Rights (Convention, ECHR)[28] by 'treaty obligations, including those arising from the ECHR and the Geneva Convention of 1951'[29].

26 P. Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 'British Yearbook of International Law' 1953, Vol. 30, p. 481.

27 ECtHR, case of *Amuur v. France*, Application no. 19776/92, judgment of 25.06.1996, Paragraph 43, *mutatis mutandis.*

28 CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms,* ETS No. 005, Rome 04/11/1950; Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as The European Convention on Human Rights contains a number of fundamental rights and freedoms (the right to life, the prohibition of torture, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the prohibition of punishment without law, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy, prohibition of discrimination). Additional protocols to the Convention (Protocols 1 (ETS No. 009), No. 4 (ETS No. 046), No. 6 (ETS No. 114), No. 7 (ETS No. 117), No. 12 (ETS No. 177), No. 13 (ETS No. 187), No. 14 (CETS No. 194), No. 15 (CETS No. 213) and No. 16 (CETS No. 214)) provide more rights.

29 ECtHR, case of *Z. A. and Others v. Russia,* application no. 61411/15 61420/15 61427/15., GC judgment of 21.11.2019, Paragraph 160: '[S]tates' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions [the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights]'.

2.2. The principle of not penalising the illegal entry and bona fide stay of a refugee in the territory of the country of refuge as the object and purpose of the 1951 Geneva Convention

From the perspective of the principle of non-penalisation of illegal entry and stay on the territory of a country of asylum by a bona fide refugee (principle of non-penalisation), Article 31 (1)[30] is of key importance in the legal order of the 1951 GC. It is entitled '*Refugees unlawfully in the country of refuge' (Réfugiés en situation irrégulière dans le pays d'accueil)* and stipulates that

> '[T]he Contracting States shall not impose penalties *(sanctions pénales)*, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

The wording of Article 31(1) gives grounds to assume that the intention of the authors of the 1951 Geneva Convention was to establish, among other principles, the principle of *immunity from penalties for refugees*[31] who 'coming directly from a territory where their life or freedom was threate-

30 G. S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, [in:] E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Oxford 2003, pp. 425–478.

31 V. Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, [in:] R. Rubio-Marín (ed.), *Human Rights and Immigration,* Oxford 2014, p. 29; G. S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*. A paper prepared at the request

ned in the sense of article 1, enter or are present (...) without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'[32]. It should be noted, as Guy S. Goodwill-Gill did, that the term '*penalties/sanctions pénales*' is not defined in Article 31(1) of the 1951 GC, but that the authors of that convention appear to have had in mind measures such as prosecution, the imposition of a fine or arrest[33].

This provision had no equivalent in previous conventions on the international protection of refugees. Its implementation is consistent with the object and purpose of the 1951 Geneva Convention, as reflected in its preamble, in particular the provision stating 'that it is desirable to revise and consolidate previous international agreements relating to the status of refugees' (1951 GC, preamble). It was proposed in the Secretary-General's Memorandum to the *Ad Hoc* Committee because

> '[T]he refugee, whose departure from his country of origin is usually an escape, is rarely able to meet the requirements for legal entry (possession of a national passport and visa) into the country of refuge. It would therefore be consistent in accordance with the concept of asylum to exempt from penalties a refugee fleeing persecution who, after secretly crossing the border, re-

of the Department of International Protection for the UNHCR Global Consultations, pkt. 36, https://www.unhcr.org/3bcfdf164.pdf., accessed on: 1.02.2023].

32 *Summary Conclusions: Article 31 of the 1951 Convention.* Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, in the context of the Global Consultations on International Protection (Geneva, Switzerland, 8-November 9, 2001); Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003: https://www.refworld.org/docid/470a33b20.html [accessed on: 1.02.2023].

33 G. S. Goodwill, *Article 31 of the 1951 Convention,* Paragraph 29.

> ports to the authorities of the country of asylum as soon as possible and is recognised as a *bona fide refugee*'[34].

The obligation not to penalise together with the principle of *non-refoulement* laid down in Article 33(1) of the 1951 GC[35] significantly undermines the classic prerogatives of States to control entry into their territory. States have lost their unconditional and uncontrolled freedom to refuse admission to their territory. However, this does not create an asylum obligation on the part of the State *per se*, but conditions, determines and ultimately limits its margin of discretion. Thus, 'the 1951 Convention constitutes a significant but qualified restriction on the absolute right of States (...) to receive only those whom they themselves choose'[36].

It is also worth adding that the obligation not to penalise 'a violation of a right committed for legitimate or necessary reasons while fleeing persecution or threat of persecution[37]' is seen in itself as one of the main objects and objectives of the 1951 Geneva Convention. According to the Vienna rules on the interpretation and application of the Treaties, they must be interpreted 'in good faith in accordance with the ordinary meaning

34 Ad Hoc Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, ECOSOC, 03.01.1950, https://www.unhcr.org/protection/statelessness/3ae68c280/ad-hoc-committee-statelessness-related-problems-status-refugees-stateless.html [accessed on: 1.02.2023].

35 Article 33(1) of the 1951 GC stipulates that 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. The cardinal significance of this fundamental principle was further strengthened by Article 42, prohibiting raising any reservations to Article 33.

36 V. Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, [in:] R. Rubio-Marín (ed.), *Human Rights and Immigration,* Oxford 2014: https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198701170.001.0001/acprof-9780198701170 [accessed on: 1.02.2023].

37 C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, Division of International Protection United Nations High Commissioner for Refugees (UNHCR), CP2500, 1211 Geneva 2 Switzerland.

to be given to the terms of the treaty in their context and in the light of its object and purpose'[38]. In the case of the 1951 Geneva Convention, this means interpretation by reference to the object and purpose of, inter alia, the extension of protection by the international community to refugees and the provision of 'to assure refugees the widest possible exercise of (...) fundamental rights and freedoms'. (1951 Geneva Convention, Preamble)

This obligation becomes due for States Parties after the given person enters its territory and applies for formal refugee status, which differs substantially from the prohibition of *refoulement* laid down in Article 33 of the 1951 Geneva Convention[39].

3. Conditions for the effective application of the principle of non-penalisation of the illegal entry and stay of a refugee in good faith in the country of refuge

3.1. The triad of eligibility conditions for non-penalisation of the illegal entry and stay of a refugee in good faith in the country of refuge

While the 1951 Geneva Convention prohibits the imposition of penalties on bona fide refugees who enter or stay on their territory without authorisation, it does not impose an obligation on States Parties to receive them[40]. Moreover, waiving the imposition of a penalty for entering

38 Article 31(1), United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331; https://www.refworld.org/docid/3ae6b3a10.html [accessed on: 1.02.2023] 7; S. G. Goodwin-Gill, *The Refugee in International Law*, Oxford 1996, pp. 366–368.

39 V. Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, [in:] R. Rubio-Marín (ed.), *Human Rights and Immigration,* Oxford 2014, p. 30.

40 A. Grahl-Madsen, *The Status of Refugees*, p. 196, noting that 'the states don't have international legal obligation of accepting refugees who appear at their borders and request asylum'; S. Prakash Sinha, *Asylum and International Law*, The Hague 1971, p. 109, underlines that

the territory of the country of refuge without authorisation is not of general and unconditional nature, and is therefore determined by the specific nature of the particular situation and, consequently, by the fulfilment of certain conditions by the refugee[41].

Analysis of Article 31(1) of the 1951 GC seems to present three types of conditions qualifying the entry or stay of a refugee in the country of refuge. The first condition is that of directness. Its grounds are based on the provisions of Article 31(1) of the 1951 GC, according to which the prohibition of penalisation applies to a refugee who arrives '.. directly from a territory where their life or freedom was threatened in the sense of article 1 (..)'. The second condition is the condition of immediacy, which is formulated in Article 31(1), which states that the prohibition of penalisation binds the country of refuge provided that the refugee '(..) present themselves without delay to the authorities (..)', and the third condition is the requirement for the refugee to '(..) show good cause for their illegal entry or presence'.

This triad of premises reflects the concept of good faith (*bona fide*) on the part of the refugee, as well as the desire of the authors of the Geneva Convention of 1951 to limit to a minimum the unauthorised entry and stay of refugees into the territory of the country of refuge. Hence the obligation of the refugee to apply immediately to the authorities of that country. On the other hand, however, *travaux préparatoires* show that the authors of the 1951 GC while introducing the concerned conditions, were not guided excessively by the intent to lay down as many

'[the Refugee] Convention ... prohibits only the states from imposing penalties for illegal entry or stay, but it does not put obligation on them to receive the refugees '). quote per R. Boed *op. cit.*, p. 27.

41 In this context *travaux préparatoires* mention a refugee in good faith. See, *Article 31. Refugees unlawfully in the Country of refuge*, [in:] *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, at: https://www.unhcr.org/4ca34be29.html [accessed on: 1.02.2023].

conditions as possible which would enable the State to refuse asylum to persons in the situations described[42].

In addition, commentators and the UNCHR emphasise that Article 31(1) of the GC must be interpreted in the light of Article 1 of the 1951 GC (in particular Article 1A) of the obligation of *non-refoulement* resulting from Article 33(1) of the 1995 GC[43]. That observation is important in view of the linguistic shortness of Article 31(1), which may be misunderstood, while it stems from the desire to avoid the need to repeat the entire definition of refugee contained in Article 1A of the 1951 GC and in no way demonstrates the restrictive approach of the authors of the 1951 GC to the scope of application thereof[44].

When explaining the above-mentioned grounds for the application of the prohibition of penalisation, it is worth bearing in mind the declaratory nature of refugee status, which, according to the UNCHR, means that:

> 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'[45].

42 G. S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees*, Paragraph 12.

43 U.N. Doc. A/CONF.2/SR. 14, at 5 (1951) (statement of Mr. van Heuven Goedhart of UNHCR); https://www.refworld.org/docid/3ae68cdbo.html [accessed on: 1.02.2023].

44 J. C. Hathaway, A. K. Cusick, *Refugee Rights Are Not Negotiable*, p. 254, https://repository.law.umich.edu/articles/1483 o [accessed on: 1.02.2023].

45 See, United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), p. 28 [UNHCR Handbook]; text of the handbook [UNHCR Handbook] in Polish is https://www.unhcr.org/pl/2510-plmaterialypublikacje-html.html [accessed on: 1.02.2023].

In other words, the recognition by the State of admission of a person as a refugee, in accordance with Article 1A(2) of the 1951 GC, 'does not (...) make him a refugee but declares him to be one[46].

3.2. The specificity of the condition of directness in the context of the principle of non-penalisation of illegal entry and residence of a refugee in good faith in the country of refuge

In the light of Article 31(1) of the 1951 GC, the prohibition of penalisation applies to refugees '.. coming directly from a territory where their life or freedom was threatened in the sense of article 11 ..'. Thus, the condition of directness refers to 'coming directly' not from the refugee's country of origin or residence, but rather from any 'territory' in which his life or freedom was threatened within the meaning of Article 1 of the 1951 GC.

During the drafting of the 1951 Geneva Convention, the proposal to limit the scope of this condition to the requirement of direct arrival from the country of origin was rejected. It was recognised that refugees may also experience threats to life or freedom in other countries, which may constitute a sufficient reason for fleeing and illegal entry to another country (country of refuge)[47].

These findings of the drafters of the 1951 GC were referred to by the participants of the *Geneva expert roundtable*, i.e., a seminar organized on the occasion of the fiftieth anniversary of the adoption of the 1951 GC, by the UNHCR and the Graduate Institute of International Studies in 2001, as part of the *Global Consultations on International Protection*[48].

46 UNHCR Handbook, par. 28.

47 C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, pp. 17–23.

48 Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, *Summary Conclusions: Article 31 of the 1951 Convention*, Geneva, Switzerland, 8–9 November 2001; text available at https://www.re-

In their specific comments, the experts concluded that refugees should not be required to come directly from territories where their life or freedom was threatened[49]. That observation is consistent with that of Guy S. Goodwin-Gill, in whose view

> '[t]*ravaux préparatoires*, confirm the 'ordinary meaning' of Article 31(1) of the 1951 Convention as applicable to refugees entering or staying without authorisation, whether they came directly from their country of origin or from any other territory where their life or freedom was threatened, provided that they show a valid reason for such entry or residence.'[50]

Next, the experts considered that, originally, Article 31(1) of the 1951 GC was intended to apply and was interpreted as applying to persons who moved rapidly from one country to another in search of refuge or who were unable to find effective protection in the first country or countries to which they fled, the mere fact that the UNHCR operates in the country concerned should not be used as an argument for determining the availability of effective protection in that country[51]. Consequently, the experts agreed that the intention of the drafters of the 1951 GC was to exempt from the penalization prohibition only those refugees who have found asylum or who have settled, temporarily or permanently, in a country other than the coun-

fworld.org/docid/470a33bed.html [accessed on: 1.02.2023] further: *2001 Expert Roundtable Summary Conclusions*; discussion during First on Geneva Round Table Experts was based on a paper of Professor Guy S. Goodwin-Gill entitled *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection*.

49 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(b).

50 G. S. Goodwin-Gill, *Article 31 of the 1951 Convention,* Paragraph 11.

51 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(c).

try of refuge[52]. In this regard, Mr Noll concludes that only a limited category of refugees should be subject to penalisation, namely those 'who have been granted refugee status and who have been granted the right of legal residence in a State of transit to which they can safely return'[53].

The UNHCR supported this interpretation of Article 31(1), highlighting the history of its creation and the purpose of this provision. The 1999 UNHCR Guidelines on Detention[54] state that

> 'The expression 'coming directly' in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits'[55].

52 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(c); See also, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting, 22 November 1951, A/CONF.2/SR.14; https://www.refworld.org/docid/3ae68cdb0.html [accessed on: 1.02.2023].

53 G. Noll, *Article 31 (Refugees Unlawfully in the Country of Refuge),* [in:] A. Zimmermann, J. Dörschner, F. Machts (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford 2011, p. 1254.

54 UNHCR, Guidelines on International Protection are partly the result of discussions at the Geneva Expert Roundtable; they are based on the UNHCR Statute and Article 35 of the 1951 GC and supplement and update to the UNHCR Handbook.

55 UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers'* (February 1999), Paragraph 4; https://www.unhcr.org/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention.html. [accessed on: 1.02.2023].

The constituent element of that condition is therefore the existence of a threat to life or liberty within the meaning of Article 1 of the 1951 GC. It should be stressed that the threat in question is a consequence of persecution of a refugee because of his race, religion, nationality, membership of a particular social group or because of his political opinions (Article 1 A, point 2 of the 1951 GC).

3.3. The specificity of the condition of immediacy in the context of the principle of non-penalisation of illegal entry and residence of a refugee in good faith in the country of refuge

The second qualification condition commonly called the condition of immediacy is based on a fragment of Article 31 (1) of 1951 GC which states that '(...) provided they present themselves without delay to the authorities (...)'. This implies the obligation of the refugee to notify competent authorities as soon as possible about the crossing of the border without authorisation. Thus, as rightly stressed by C. Costello, the authors of 1951 GC used this condition to protect the interest of the states in respect to establishment of the identity of persons eligible to receive asylum as soon as possible[56]. The participants of the Geneva Expert Roundtable in their conclusions point out in this context the general obligations of the refugee resulting from Article 2 of the 1951 GC, i.e., obligations which include specifically the compliance with the law and regulations and the measures undertaken in order to maintain public order[57].

The concerned condition contains two elements. First, the refugees should present themselves 'to authorities'. It seems obvious that the term 'authorities' is broad and does not refer to any specific body of public authorities

56 C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, p. 27.

57 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(f).

of the country of refuge. Deliberating in more detail on this issue, J. C. Hathaway noted that 'bad faith' of the refugee is a point of reference for exclusion from the scope of application of art. 31: if the refugee approaches incorrect 'authorities' in terms of its substantive powers or organisational level, the refugee will be still covered by art. 31 of 1951 GC[58]. Similar position was taken by G. Noll calling for prudence in the assessment of the fulfilment of the analysed condition 'because wrong beliefs of the refugee may e.g. delay or hamper contact with the authorities without bad faith on part of the refugee'[59]. It seems that G. Noll addressed the issue which has been present for a long time in the ECtHR case-law and which results from the adopted *modus operandi* of 'the authorities'[60]. The case of *M.K. and Others v. Poland* from 2000 and the case of *D. A. and Others v. Poland* from 2021[61] show that this applies to Polish 'authorities' as well.

Secondly, the refugees are required to present themselves to these authorities without delay. In addition, when describing this element of the concerned condition the experts stated that it is a *matter of fact and degree*. Therefore, it should be concluded that excessive delay in notification of 'the authorities' or the lack thereof may constitute from formal viewpoint the breach of art. 31 (1) of 1951 GC, but whether the breach of that obligation was minor or not is a *matter of fact and degree*, which 'depends on circumstances

58 J. Hathaway, *The Rights of Refugees under International Law*, Cambridge 2005, 390; C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, p. 27; it should be stressed that similar position was taken by inter alia the ECtHR. See, ECtHR, the case of *Z. A. and Others v. Russia*, application no. 61411/15 61420/15 61427/15., GC judgment of 21.11.2019, Paragraph 149.

59 G. Noll, *Article 31 (Refugees Unlawfully in the Country of Refuge)*, p. 1259.

60 ECtHR addressed this issue long before the migration crisis of 2015–2016; See, ECtHR, the case of *Amuur v. France*, application no. 19776/92, judgment of 25.06.1996, Paragraphs 43–44; while in respect to contemporary events see ECtHR, the case of *M.A. and Others v. Lithuania*, application no. 59793/17, judgment of 11.12.2018 or ECtHR, the case of *Z.A. and Others v. Russia*, application no. 61411/15, 61420/15, 61427/15., GC judgment of 21.11.2019.

61 ECtHR, the case of *D.A. and Others v. Poland*, application no. 51246/17, judgment of 08.07.2021.

of the case, including the access [of the refugee] to appropriate information'[62]. Similar position was shared by ECtHR noting that

> '[T]he Court acknowledges that, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof (...). That assessment must focus on the foreseeable consequences of the applicant's return to the country of destination, in the light of the general situation there and of his or her personal circumstances'[63].

On the other hand, UNHCR Guidelines on Detention from 1999 stipulate that

> '[g]iven the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in suspicion of those in authority, feelings of insecurity, and the fact that these and their circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression 'without delay'[64].

62 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(f).

63 ECtHR, the case of *M.K. and Others v. Poland*, application no. 40503/17 42902/17 43643/17, judgment of 23.07.2020, Paragraph 170.

64 *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, https://www.refworld.org/docid/3c2b3f844.html [accessed on: 1.02.2023].

The quoted opinions of the leading commentators of art. 31 (1) of 1951 GC and UNHCR easily demonstrate the support for flexible and at the same time individualised approach to the condition in question[65]. The materials of the Legal Intervention Association indicate that the refugees are aware of the essence of that condition as 'having crossed the border they start themselves seeking the Border Guard officers by e.g., calling out loud using flashlights so that they can be noticed by the said officers'[66].

3.4. Specificity of the condition of good cause in the context of the principle of non-penalisation of the illegal entry and stay of a refugee in good faith in the country of refuge

The last condition, called the ground of good cause, refers to that part of Article 31(1) of the 1951 GC, which provides that a refugee shall show '.. good cause for their illegal entry or presence' in the territory of the State of refuge.

At the outset, it is necessary to point out certain terminological differences between the 1951 GC in French and the 1951 GC in English as regards the interpretation of that condition. The French version refers to *des raisons reconnues valables*, which can be translated into English as *recognized valid reasons*, but the official English version of GC from 1951 defines it as a *good* cause, which in turn is closer to the French term *bonne cause*. The above discrepancies are explained in the literature on the subject by reference to the VCLT, and in particular to Article 33(4) of the VCLT, which, in conjunction with Article 33(1) of the VCLT, allows to esta-

65 Guy. S. Goodwin-Gill, *Article 31 of the 1951* Convention, p. 217; J. C. Hathaway, *The Rights of Refugees,* 391–392; G. Noll, *Article 31 (Refugees Unlawfully in the Country of Refuge)*, pp. 1258–1260; C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, p. 28.

66 Legal Intervention Association, *Karanie uchodźców za nielegalne przekroczenie granicy*, 19 July 2021, https://interwencjaprawna.pl/karanie-uchodzcow-za-nielegalne-przekroczenie-granicy/ [accessed on: 1.02.2023].

blish that, of the two versions, the one which 'best reconciles these texts in the consideration of the object and purpose of [the 1951 GC]' should be adopted. Unfortunately, these discrepancies are reinforced by the official translation of the 1951 GC into Polish, in which the English phrase *good reason* was translated as 'credible reasons'[67]. According to the Great Dictionary of the Polish Language (WSJP), the term 'credible means 'one that does not raise doubts and can be trusted'[68]. The Polish translation therefore sets a higher threshold of non-penalisation than it results from the official text of the Geneva Convention of 1951[69]. This increased threshold is difficult to reconcile with the classic commentary on the GC of 1951 by P. Weis, who states that

> 'The words 'where their life or freedom was threatened' may give the impression that a different standard is required from that of refugee status in Article 1. However, this is not the case. The draft of *the Secretariat* referred to refugees 'fleeing persecution' and to the obligation not to return refugees 'to the border of their country of origin or to territories where their life or freedom would be threatened because of their race, religion, nationality or political opinion'. During the drafting of the text, the words 'country of origin', 'territories in which their life or freedom was threatened' and 'country where he is persecuted' were used interchangeably. The reference to Article 1 of the Co-

67 The 1951 GC was translated into Polish from the English version.

68 See, https://www.wsjp.pl/index.php?id_hasla=5770&ind=0&w_szukaj=wiarygodny+ [accessed on: 1.02.2023].

69 According to the WSJP, a 'reasonable' is one that has a 'justification.' It means 'All the arguments which are supposed to explain the reasons for some conduct'. Article 31(1) of the 1951 GC refers to illegal entry into or stay on the territory of a State; in turn, the term 'reason' is what explains and clarifies why a phenomenon or event arose, or why something is what it is. WSJP: https://www.wsjp.pl/index.php?pokaz=wstep&l=21&ind=0?pwh=0.

> nvention was introduced mainly to refer to the date of 1 January 1951, but it also indicated that there was no intention to introduce stricter criteria than the 'well-founded fear of persecution' used in Article 1(A)(ii).'[70]

In the light of the conclusions of the 2001 Geneva Expert Roundtable, '*a well-founded fear of persecution*'[71] is in itself considered a 'good cause' for illegal entry. Arriving 'directly' from such a country through another country or countries where you are at risk or where protection is generally not available is also considered a 'good cause' for illegal entry. This, of course, does not preclude other facts which may constitute 'good cause'[72].

It seems, however, that from a legal point of view, the scope *ratione materiae* of the condition of a good cause cannot be the same as that of refugee status and must have certain specific elements. That is expressly supported by its reference in Article 31(1) of the 1951 GC to unlawful entry into or residence in the territory of the country of refuge. The fragments of *travaux préparatoires* quoted above allow us to see the belief of the authors of the 1951 GC as to the possibility of legal and factual difficulties, as well as threats accompanying the escape of refugees. Therefore, it cannot be ruled out that in a situation of threat to life or freedom, the refugee was not able to obtain on time a visa entitling him to legally enter the countries of refuge[73]. Moreover, it is difficult *a priori* to rule out a situation in which the official fulfilment of the entry requirements could be too risky for the refugee, since it would put him in danger. Thus, the failure

70 *The Refugee Convention 1951: The travaux préparatoires with a commentary,(1995)*, p. 303.

71 See, Article 1A(2) of the 1951 GC.

72 *2001 Expert Roundtable Summary Conclusions*, Section 10(e).

73 In this context, it should be reiterated, in favour of M.-T. Gil-Bazo, that refugee status under international law is not determined solely by international refugee law, but rather by the interaction of the different legal orders that may apply to a refugee in given circumstances, whether universal or regional. See, Idem, *The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited*, International Journal of Refugee Law, Vol. 18, Issue 3–4, 2006, pp. 571–600.

to meet the analysed condition may result from the fear of the refugee. It may, as Guy S. Goodwin-Gill aptly points out, also result from 'ignorance of procedures or actions taken at the behest or advice of a third party'[74]. J.C. Hathaway adds to these circumstances the fear of refugees of their application for international protection being rejected or refused at the border of the country of refuge[75].

3.5. Guarantees of the effectiveness of the principle of non-penalisation of illegal entry and bona fide residence of a refugee in the territory of the country of refuge

3.5.1. Difficulties in accessing the territory of the country of refuge

As we know from earlier remarks, the authors of the Geneva Convention of 1951 were well aware that refugees fleeing persecution would often not be able to meet the requirements of the immigration laws of individual countries[76]. Nevertheless, both current and past events show that since the entry into force of the GC of 1951, states have successively been developing legal and factual obstacles for refugees in seeking refuge. The observation of A. Grahl-Madsen from 1983 that 'one aspect of the tragedy of our time is that some countries take various measures to prevent refugees from reaching their borders in search of refuge or at least to prevent them from doing so'[77] is unfortunately still valid[78].

74 Guy S Goodwin-Gill *Article 31 of the 1951 Convention Relating to the Status of Refugees*, p. 217.

75 J. C. Hathaway *Rights*, p. 393.

76 As stressed inter alia by C. Costello, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, Legal and Protection Policy Research Series, No. 34, PPLA/2017/01, p. 7.

77 A. Grahl-Madsen, *Identifying the World's Refugees*, 'The Annals of the American Academy of Political and Social Science' 1983, Vol. 467, 1983, p. 20. JSTOR, www.jstor.org/stable/1044925. [accessed on: 1.02.2023].

78 See, V. Moreno-Lax, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford 2017; See also, Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025); Text

Currently, it is confirmed by the actions taken by the Polish authorities in connection with the humanitarian crisis at the Polish border with Belarus (and the EU's external border). It has been ongoing since August 2021 and was triggered by the unprecedented actions of the regime of Alexander Lukashenko, consisting in the instrumental use of migrants from third countries for political purposes, thus creating the impression of a migration crisis in Poland, leading to internal destabilization and deepening divisions in the EU. The actions taken in response to these provocations by the Polish authorities are unfortunately against the provisions of national and international law and undermine the foundations of the functioning of the Polish state and society. This was pointed out, among others, by the Ombudsman[79]. The subject of particular criticism of the Ombudsman was focused on the provisions introduced into the Polish legal system in August and October 2021, which established hitherto unknown procedures for returning aliens to the border line - that is, *de facto* to Belarus - and the issuance by the Border Guard of decisions to leave the territory of the Republic of Poland, the implementation of which is tantamount to returning to the Belarusian side[80]. Both of these pro-

https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a25afd [accessed on: 1.02.2023].

79 See, RPO (Ombudsman): not accepting applications for international protection in the border area is a violation of the law. Response of the Ministry of Interior and Administration, Date: 2021–10–19; 2021–08–20; The content of the speech is available at https://bip.brpo.gov.pl/pl/content/rpo-nieprzyjmowanie-wnioskow-o-ochrone-miedzynarodowa-w-strefie-przygranicznej-naruszenie; accessed on: 1.02.2023; RPO: stop pushbacks and decisions to leave the Republic of Poland at the Polish-Belarusian border. MSWiA (Ministry of Interior and Administration) responds, date: 2022–04–22; 2022–03–05. The RPO's comments referred to the Regulation of the Ministry of Interior and Administration of 13 March 2020 on the temporary suspension or limitation of border traffic at certain border crossing points, the so-called border regulation (Dz. U., item 435, as amended).

80 See, RPO's speech of December 15, 2021; these are the provisions of the Act of 14 October 2021 amending the Act on Aliens and the Act on granting protection to aliens on the territory of the Republic of Poland (Dz. U. of 2021, item 1918). These regulations entered into force on 26.10.2021. Content of the speech at: https://bip.brpo.gov.pl/pl/content/RPO-wstrzymac-stosowanie-push-backow-granica-bialorus [accessed on: 1.02.2023].

cedures were rightly found by the Ombudsman to be contrary to inter alia the provisions of the Geneva Convention of 1951, the Charter of Fundamental Rights of the EU[81] and the ECHR[82], as well as the provisions of the Polish Constitution[83]. None of these procedures guarantees every alien the right to apply for international protection in Poland, and even does not provide for the possibility of making an individual assessment of the alien's factual situation, including assessment of the risk of violation of the right to life or the prohibition of torture or inhuman and degrading treatment, in the event of return to the border or fulfilment of the obligation to leave Poland.

In the face of the migration crisis, many countries, including Poland, while attempting to prevent migrants from entering their territory, resorted to various restrictive measures, coercive measures and punitive measures[84]. It can be said that various types of barbed wire, fences or walls erected on the borders of countries have become a symbol of that approach[85]. One of them was created on the border between Spain and Moroc-

81 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391)

82 See notes below.

83 Dz. U. of 1997 No. 78, item 483, as amended.

84 The Polish government announced the construction of a wall along the border with Belarus on 23.09.2021. See, Act of 29 October 2021 on the construction of state border protection (Dz. U. of 2021, item 1992); In turn, Lithuania has begun construction of a 550 km (320 miles) barbed wire barrier on its border with Belarus on July 9, 2021.

85 For example, in July 2015, in connection with the immigration crisis, the Hungarian authorities started to build a fence on the border with Serbia in order to combat the problem of illegal immigration flowing from the Middle East through the countries of the former Yugoslavia; In the 90s, Spain built several kilometres of border fences around Ceuta and Melilla, Spanish exclaves located on the territory of Morocco; The United States has built border barriers along the entire border with Mexico (more than 3100 km); In the 80s. Morocco has built a 2700 km belt of fortifications along the territory of Western Sahara; summer 2021, Greece has erected a 40-kilometer wall, reinforced by a specialised surveillance system on its border with Turkey, due to the expected influx of migrants from Afghanistan; in August 2021, the decision to build a wall on the border with Belarus was taken by the Polish authorities.

co[86]. In response to this practice of States, the ECtHR inter alia in the case of *N.D. and N.T. v. Spain* established that

> 'the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (...). As a constitutional instrument of European public order (...), the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless (..)'[87].

In the same case, the Court also found that

> 'The problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto'[88].

And it made it clear that

86 *Spanish Borders of Ceuta & Melilla with Morocco to Remain Closed for Another Month*; Text available at https://www.schengenvisainfo.com/news/spanish-borders-of-ceuta-melilla-with--morocco-to-remain-closed-for-another-month/ [accessed on: 1.02.2023]. https://www.schengenvisainfo.com/news/spanish-borders-of-ceuta-melilla-with-morocco-to-remain-closed-for-another-month/ [accessed on: 1.02.2023].

87 ECtHR, case of *N.D. and N.T. v. Spain*, application number 8675/15 8697/15, GC judgment of 13.02.2020, Paragraph 110 [hereinafter: ECtHR, case of *N.D. and N.T. v. Spain* of 2020].

88 ECtHR, case of *N.D. and N.T. v. Spain* of 2020, Paragraph 170.

> 'the domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4'[89].

The above findings of the ECtHR should be read from the perspective of the general obligation of the State to ensure the compatibility of domestic law with obligations arising from international law, which, as I. Brownlie rightly observes, results from the nature of treaty obligations and customary law[90].

3.5.2. Difficulties in accessing procedures for granting international protection in the country of refuge

The practice of States Parties to the 1951 Geneva Convention in the application of Article 31(1) of the 1951 GC shows that its guarantees are illusory if refugees are not ensured prompt access to procedures for granting international protection and if those procedures do not protect them from criminal liability until their status has been determined. Those procedures should be reliable and effective. This requirement is not met by special procedures, i.e. 'fast-track' and 'border'[91] procedures, as these are procedures with limited procedural guarantees[92].

89 ECtHR, case of *N.D. and N.T. v. Spain* of 2020, Paragraph 171.

90 I. Brownlie, *Principles of Public International Law*, Oxford 2008, p. 35; decisive in this regard is the binding nature of the ECHR and the Protocols and the obligation to execute judgments of the ECtHR (Article 46 of ECHR).

91 See, UNHCR *Fair and fast border procedures and solidarity in the EU. EU Pact on Migration and Asylum - Practical considerations for fair and fast border procedures and solidarity in the European Union*, at: https://www.refworld.org/publisher,UNHCR,POSITION,,,0.html [accessed on: 1.02.2023].

92 See Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the Europe-

However, it should be noted that the comments on access to these procedures have no grounds in Article 16 of the 1951 GC. It guarantees refugees the right of free access to courts in the territory of all States Parties to the Convention (Paragraph 1) and for refugees domiciled in a given State the same treatment as nationals of that State in matters relating to access to court, legal aid and exemption from *the cautio iudicatum solvi* (Paragraph 2)[93].

Although Article 16 of the 1991 GC does not specify the subject-matter of the proceedings before the General Court, according to well-established position of the UNHCR and leading commentators in regard to its subjective scope, it concerns proceedings aimed at determining whether an alien is a refugee (asylum proceedings)[94].

Furthermore, it should be added that the catalogue of human rights and fundamental freedoms of the ECHR and the Additional Protocols does not include a human right to seek and enjoy asylum in other countries[95], although there is a right to freely leave any country, including one's own (Article 2(2) of Protocol No. 4 to the ECHR)[96].

In addition, according to the established case-law, the scope of Article 6 of the ECHR, which guarantees the human right to a fair trial, '... in the determination of his civil rights and obligations or of any criminal charge against

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an Union, 13.12.2005, L 326/13; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal of the European Union of 26 June 2013, L 180/60.

93 Article 16 also contains Paragraph 3 which states that 'a refugee shall be accorded in the matters referred to in Paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence'.

94 UNHCR Handbook, Paragraph 12(b). See also, UNHCR, *Commentary of the Refugee Convention 1951 (Articles 2–11, 13 – 37)*, written by Professor A. Grahl-Madsen in 1963; Text available at https://www.refworld.org/docid/4785ee9d2.html [accessed on: 1.02.2023]. P. Weis, *The Refugee Convention (1951)* (1995), p. 134.

95 See, Article 14(1) of the Universal Declaration of Human Rights. See notes below.

96 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, CETS: No. 046.

him' (Paragraph 1), does not include the asylum procedure *as such*. However, it should not be inferred from the above that the issue of access to asylum procedures is omitted in the Strasbourg case-law. The procedural aspect of the prohibition of *ill-treatment* (Article 3 of ECHR) and the prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4 to the ECHR) play a particularly important role in this respect.

In the context of asylum procedures relating to the situation of an asylum seeker under the conditions of Article 31(1) of the 1951 GC, particular attention should be paid to cases before the ECtHR concerning *the return of asylum-seekers*. In deciding the cases in question, the Court stipulates that it does not examine specific applications for asylum, since 'its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled'[97]. It should be noted that neither the ECHR nor its protocols expressly prohibit *refoulement*, a prohibition which the bodies of the ECHR inferred from Article 3 of the ECHR[98].

Article 3 of the ECHR thus requires States Parties not to return an asylum seeker who has been denied access to the territory of the given country, where it transpires that there are substantial *grounds* in the country of destination from which it may be assumed that, in the event of deportation, the person concerned would be in *a real risk* of treatment in breach of Article 3 of the ECHR[99]. In the context of the obligation to determine whether the above grounds exist, the State Party is obliged, in particular, to ensure that the person threatened with expulsion can benefit from 'effective guarantees that would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, as well as tor-

97 ECtHR, case of *M.K. and Others v. Poland* of 2020, Paragraph 169; see the main case in this regard, i.e., the case of *M.S.S. v. Belgium and Greece*, application no. 30696/09, GC judgment of 21.01.2011, Paragraph 286.

98 ECtHR, case of *M.K. and Others v. Poland* of 2020, Paragraph 169.

99 ECtHR, case of *M.K. and Others v. Poland* of 2020, Paragraph 183.

ture"[100]. Moreover, in the case of *D.A. and Others v. Poland* of 2021 the Court pointed out that

> '[w]here a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the main issue before the expelling authorities is whether or not the individual will have access to an adequate asylum procedure in the receiving third country."[101]

Determining whether there is a real risk that in the receiving third country the asylum seeker will be refused access to an appropriate asylum procedure thus becomes a means of fulfilling the general duty of protection against *refoulement*[102]. Consequently, where it is found that the guarantees to the extent described are insufficient, 'Article 3 implies a duty that the asylum-seeker should not be removed to the third country concerned"[103]. This is obvious, given that 'protection against treatment prohibited by Article 3 is absolute and is not subject to derogation"[104].

Taking into account the initial remark that the right to seek and enjoy asylum has no legal basis in the ECHR system, such extensive findings of the Court may seem quite surprising, especially since there is more. Indeed, a review of the case-law shows that, in cases of asylum seekers, the ECtHR has also begun to draw attention to the procedural obligations of States Parties under Article 3 of the ECHR. It is apparent from the case of *M.K. and Others v. Poland* of 2000 that those obligations become enfor-

100 ECtHR, case of *M.K. and Others v. Poland* of 2020, Paragraph 184.

101 ECtHR, case of *D.A. and Others v. Poland* of 2021, Paragraph 59.

102 *Ibidem*.

103 *Ibidem*. See, ECtHR, case of *M.K. and Others v. Poland* 2000, Paragraph 173; ECtHR, case of *Ilias and Ahmed v. Hungary*, application no. 47287/15, GC judgment of 21.11.2019, Paragraph 134.

104 ECtHR, case of *Saadi v. Italy*, application no. 37201/06, GC judgment of 28.02.2008, Paragraph 138.

ceable when the applicants, who seek asylum, demonstrate that their asylum applications would be treated harshly by the authorities of the State from whose territory they came and that their return to their country of origin could infringe Article 3 of the ECHR[105].

In the context of the situation referred to in Article 31(1) of the 1951 GC, the Court's findings concerning the obligation of a State Party to ensure the safety of the applicant - asylum seeker, in particular by allowing him to remain within its jurisdiction until his application has been properly examined by the competent national authority. In view of the absolute nature of the freedom guaranteed by Article 3 of the ECHR, the Court held that the scope of that obligation did not depend on whether the applicant was in possession of documents entitling him to cross the border or whether he would be lawfully admitted to the territory on some other basis[106].

Developing the above findings, the Court added that

> 'in order for the State's obligation under Article 3 of the Convention to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his or her country of origin before such time as his or her allegations are thoroughly examined. Therefore, the Court considers that, pending an application for international protection, a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State, unless adequate measures are taken to eliminate such a risk'[107].

105 ECtHR, case of *M.K. and Others v. Poland* from 2000, Paragraph 178.

106 *Ibidem*.

107 ECtHR, case of *M.K. and Others v. Poland* of 2020, Paragraph 179.

The above findings do not exhaust the issue of access by the applicants for international protection to asylum procedures in the case-law of the ECtHR. However, the guiding line of the case-law can be read from them. Thus, by considering Article 3 of the ECHR as the normative basis for the prohibition of *refoulement*[108], the Court is gradually building up a catalogue of guarantees of the prohibition in question, ensuring that those guarantees are both effective in practice and genuine, accessible to the asylum seeker. In so doing, it considerably broadens the scope of the State's obligation under Article 3 of the ECHR in the context of *non-refoulement*[109]. This process is important not only for the legal order of the ECHR, but also for international refugee law, including the Geneva Convention of 1951. From the former *lex specialis* it is gradually becoming an integral part of the legal order of the ECHR. The limited framework of the paper does not allow for a broader reference to this process, but it should be noted that the introduction of the principle of *non-refoulement* into the legal order of the ECHR *de facto* significantly expands the scope of application of the ECHR, without the application of traditional instruments in the form of additional protocols[110].

A further observation relates to the methods of building those guarantees, since directives of interpretation of the ECHR are used in this regard, which include directives of autonomous interpretation. Their application allows us to conclude that

> 'The concept of expulsion is used in a generic sense as meaning any measure compelling the departu-

108 Principle *non-refoulment* See, A. Zimmermann, Article 33 par. 1 [in:] A. Zimmermann, J. Dörschner, F. Machts (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford 2011, pp. 1369–1376.

109 See, UNCHR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*,

110 This applies in particular to the personal scope of the 1951 GC, cf. Article 1 of the ECHR and Article 1A(2) of the 1951 GC.

> re of an alien from the territory but does not include extradition. Expulsion in this sense is an autonomous concept which is independent of any definition contained in domestic legislation'[111].

Similarly, the concept of 'collective expulsion of aliens' referred to in Article 4 of Protocol No. 4 to the ECHR appears to be autonomous. According to the Court, collective expulsion should be understood as

> 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'[112].

The above findings of the ECtHR show that through directives of autonomous interpretation, the prohibition of collective expulsion of aliens is proceduralised (Article 4 of Protocol No. 4 to the ECHR) into provisions of substantive nature. The Court 'attaches' a procedural aspect from which it derives specific procedural obligations for States Parties. Obviously, the Court assumes that the rights or freedoms of persons subject to the jurisdiction of these countries are correlated with these obligations. Therefore, in the case of *D. A. and Others v. Poland* of 2021, it states that

> 'It is undisputed that in the present case the applicants had the possibility to lodge an appeal against each of the decisions concerning refusal of entry (...). However, under Polish law such appeals would not have

111 *Explanatory Report to Protocol* No. 7, pair 10.

112 ECtHR, case *D.A. and Others v. Poland* of 2021, Paragraph 197. However, the ECtHR stipulates that compliance with that procedural condition in Article 4 of P-4 to the ECHR does not mean that 'the circumstances surrounding the execution of an expulsion order no longer play any role in determining whether Article 4 of Protocol No. 4 is complied with'.

> had automatic suspensive effect on the return process (see M.K. and Others v. Poland, cited above, § 74). It follows that the applicants had no access to a procedure by which their personal circumstances could be independently and rigorously assessed by (...) domestic authority before they were returned (..)[113].

It should be made clear that the requirements described relate not only to the prohibition of *refoulement* under Article 3 of the ECHR, but also to the prohibition of collective expulsion of aliens under Article 4 of Protocol No. 4 to the ECHR[114].

That proceduralisation therefore consists of three elements. In the first place, it is the question of access to the appeal procedure within the scope of an expulsion procedure, the purpose of which is to determine whether 'substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 of ECHR in the destination country'[115]. The second element also concerns the issue of access to procedures, meaning in this case access to appropriate asylum procedures in the receiving third country. The final element concerns a specific remedy having an '*automatic suspensive effect*' of the return procedure.[116]

113 ECtHR, case of *D.A. and Others v. Poland*, application no. 51246/17, judgment of 08.07.2021, Paragraph 39. See also, ECtHR, case of *M.A. and Others v. Lithuania* of 2018, Paragraph 84; ECtHR, case of *M.K. and Others v. Poland*, Paragraph 74.

114 ECtHR, case of *M.K. and Others v. Poland*, Paragraph 144 '(..) The notion of an effective remedy under the Convention requires that the remedy be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.'

115 ECtHR, case of *F.G. v. Sweden, no.* 43611/11, GC judgment of 23.03.2016, Paragraphs 110–111; ECtHR, case of *Filias and Ahmed v. Hungary* of 2019, para 126.

116 ECtHR, case of *D.A. and Others v. Poland*, application no. 51246/17, judgment of 08.07.2021. See also, ECtHR, case of *Čonka v. Belgium*, application no. 51564/99, judgment of 05.02.2002, Paragraphs 81–83; ECtHR, case of *Hirsi Jamaa and Others v. Italy,* application no. 27765/09, GC judgment of 23.02.2012, Paragraph 199; ECtHR, case of *Gebremedhin [Gaberamadhien] v. France*, application no. 25389/05, judgment of 26.04.2007, Paragraph 66; ECtHR, case

Article 13 of the ECHR guarantees the availability at national level of a remedy for the enforcement of the essence of human rights and fundamental freedoms guaranteed by the ECHR and the Protocols. It thus requires a national remedy to be provided for the substance of an '*arguable complaint*' under the Convention and to grant adequate redress. The scope of obligations of States Parties under Article 13 of the ECHR varies according to the nature of the violation of a right or fundamental freedom in a given case. However, in principle, in any case, the remedy required by Article 13 must be 'effective' both in practice and in law. The 'effectiveness' of that measure within the meaning of the Convention does not depend on the certainty of a favourable outcome for the applicant. On the other hand, the 'national authority' referred to in Article 13 does not need to be a judicial authority, but if it is not, the nature of its powers and the guarantees it may provide is relevant to the determination by the Court whether a measure brought before it is effective[117].

The case of *M.S.S. v. Belgium and Greece* of 2012 was a key case for the development of these findings in the case-law. It concerned transfers of asylum seekers under the Dublin procedure[118]. In that case, the Grand Chamber of the ECtHR held that Greece and Belgium had violated Article 13 in conjunction with Article 3 of the ECHR on account of the inefficiency of the asylum procedure, which exposed the applicant to the risk of being returned to Afghanistan without his application being examined and without access to an effective remedy[119].

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of *M.S.S. v. Belgium and Greece*, application no. 30696/09, GC judgment of 21.01.2011, Paragraph 293; ECtHR, case of *A.E.A. v. Greece,* no. 39034/12, judgment of 15.03.2018, Paragraph 69.

117 ECtHR, case of *Shaggy v. Poland*, application no. 30210/96, GC judgment of 26.10.2000, Paragraph 157.

118 ECtHR, case of *M.S.S. v. Belgium and Greece* of 2011; case of *I.M. v. France*, application no. 9152/09, judgment of 2.02.2012.

119 A. Foryś, *Pomoc prawna dla osób ubiegających się o nadanie statusu uchodźcy w prawie międzynarodowym i europejskim oraz w wybranych krajach Europy, Badania, Ekspertyzy, Rekomendacje*, https://www.isp.org.pl [accessed on: 1.02.2023].

4. Conclusion

The studies conducted on refugees shows that in many situations states approach the fact of illegal border crossing too formally, ignoring the object and purpose of Article 31(1) of the 1951 GC[120].

While it is true that States have a certain discretion as to the means of implementing their obligations under Article 31(1) of the 1951 GC, the fact remains that, where refugees meet the conditions for the application of Article 31(1) of the 1951 GC, criminal proceedings should not be brought for illegal entry[121]. The fact is that, even if the persons concerned are clearly not refugees, criminalisation of *migration* raises serious concerns from the point of view of the obligation to ensure human rights and fundamental freedoms[122].

Meanwhile, in the light of studies, the criminalization of illegal immigrants can be considered a recognizable symbol of modern Europe[123]: in the mass media they are portrayed as modern barbarians, strangers, and even as born criminals, so those seeking refuge have become victims

120 See, *Ocena kwestii bezpieczeństwa w procedurze o udzielenie ochrony: Polska – Słowacja – Czechy – Węgry. Polska, Raport Centrum Pomocy Prawnej im. H. Nieć*, at: https://www.pomocprawna.org › lib › Rating-kwe. [accessed on: 1.02.2023];

121 UNHCR *Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016*, (May 2016); AIDA, 'Country Report: Hungary' (2016 Update) <http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2016update.pdf> [accessed on: 1.02.2023].

122 See, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue paper, CommDH/IssuePaper(2010)1; at: www.commissioner.coe.int [accessed on: 1.02.2023]; see more in: *The Criminalization of Migration Context and Consequences,* ed. I. Atak, J. C. Simeon, Montreal, Quebec 2018.

123 This necessarily brief analysis was limited to selected issues relating specifically to European countries, while the criminalisation of immigration also applies to North America, Australia and Japan, as well as to countries of emigration and transit (and above all to the treatment of migrants passing through Libya); See, V. Junuzi, *Refugee Crisis or Identity Crisis: Deconstructing the European Refugee Narrative*, 'Journal of Identity and Migration Studies' 2019, Vol. 13, No. 2, 2019; V. Esses, S. Medianu, *Uncertainty, Threat, and the Role of the Media in Promoting the Dehumanization of Immigrants and Refugees*, 'Journal of Social Issues' 2013, Vol. 69, pp. 518–536.

of delusions and prejudices reinforced by the sense of individual threat and fear of European societies as such[124].

There is no doubt, therefore, that, unlike post-war refugees, modern refugees are received in developed countries with less enthusiasm. Provision of shelter is no longer associated with any ideological war (Cold War) or strategic advantage (ideological struggle between West and East). Today, most of them come from the civil war-torn Middle East, poor regions of Asia and Africa, and the main reasons for their escape are civil wars and ethnic, tribal and religious violence[125]. Their arrival is often socially perceived as a destructive factor, linked to organised crime, illegal arms trafficking and corruption, which threatens the stability of individual regions, then states and regions[126]. Such a social perception of refugees may lead to their discriminatory profiling, social consent to their arbitrary arrest or detention, separation of refugee families and lack of access to basic healthcare, housing, education and other rights. It should be stressed that this approach to refugees further forces them to live and work in the shadow of the new society, thus increasing their vulnerability to exploitation and abuse by state and private actors.

124 See inter alia L. Miggiano, *States of exception: securitisation and irregular migration in the Mediterranean*, UNHCR, New Issues in Refugee Research, Research Paper No. 177, https://www.unhcr.org/4b167a5a9.pdf [accessed on: 1.02.2023]. See also, The Working Group on Arbitrary Detention, *Report of Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development*, 15 January 2010, A/HRC/13/30, para. 58; W. Klaus, *Integracja-marginalizacja-kryminalizacja, czyli o przestępczości cudzoziemców w Polsce*, 'Archiwum Kryminologiczne' 2010, Vol. 32, pp. 81–155; See also, *Uchodźcy jako 'społeczność podejrzana' (suspected community). Polska. Opinia publiczna wobec udzielania pomocy uchodźcom w okresie maj 2015 –Maj 2017, [in:]*. A. Górny, H. Grzymała-Moszczyńska, W. Klaus, S. Łodziński, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, Kraków-Warszawa 2017, pp. 71–96.

125 UNHCR *Who is a refugee*? Text available at: http://www.unhcr.ch/un&ref/who/whois.htm. [accessed on: 1.02.2023].

126 P. Chlebowicz, *Kryminologia i prawa człowieka wobec migracji w XXI wieku*, [in:] W. Pływaczewski, M. Ilnicki (eds.), *Ochrona praw człowieka w polityce migracyjnej Polski i Unii Europejskiej*, Olsztyn 2016, p. 18.

The treatment of refugees described above is contrary to the object and purpose of the 1951 Geneva Convention. There is general consensus that persons fleeing persecution have a presumed right to benefit from protection under Article 31(1) of the 1951 GC until 's/he is found not to be in need of international protection in a final decision following a fair procedure"[127].

127 *2001 Expert Roundtable Summary Conclusions*, Paragraph 10(g). See also, UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, Paragraphs 33 and 56; at https://www.refworld.org/docid/57ceb74a4.html [accessed on: 1.02.2023].

Chapter III

Categorisation of aliens seeking international protection in the European Union

1. Introduction

The main objective of this chapter is to consider the possibility of distinguishing the category of aliens seeking international protection in the European Union (hereinafter: EU). According to the dictionary of the Polish language, categorization means 'the division of things, phenomena or people into certain categories or assigning them to certain categories'[1] or 'division into categories'[2]. In turn, the category, according to the dictionary, means 'a group of people, objects, phenomena, etc. distinguished because of some common feature'[3].

The basic normative sources for the subject of the study are the so-called triad of asylum directives[4]. First of all, it is Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)[5] (hereinafter: the Qualification Directive). Secondly, it is Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)[6] (hereinafter: the Reception Directive). Thirdly, it is Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common pro-

1 PWN Dictionary of Polish Language, https://sjp.pwn.pl/sjp/kategoryzacja;2563205.html [last accessed on: 1.02.2023].

2 W. Doroszewski (ed.), *Dictionary of the Polish Language*, https://sjp.pwn.pl/doroszewski/kategoryzacja;5438736.html [last accessed on: 1.02.2023].

3 PWN Polish Language Dictionary, https://sjp.pwn.pl/sjp/kategoria;2563203.html [last accessed on: 1.02.2023].

4 B. Mikołajczyk, *Transpozycja dyrektywy ustanawiającej minimalne normy dotyczące osób ubiegających się o azyl do prawa polskiego*, 'Białostockie Studia Prawnicze' 2007, Vol. 2, pp. 11–25.

5 OJ L 337, 20.12.2011, p. 9.

6 OJ L 180, 29.6.2013, p. 96.

cedures for granting and withdrawing international protection (recast)[7] (hereinafter: the Procedural Directive). These legal acts constitute the current normative standard in the EU[8]. These directives allow to distinguish the division of the process of applying for and receiving international protection into the process of reception (reception directive), qualification (qualification directive) and procedure (procedural directive).

At this point, it is also necessary to note that in 2020 the European Commission has submitted new legislative proposals in the field of issues regulated by the above directives[9]. However, as of the date of writing this chapter, these proposals have not yet been adopted and have not entered into force, and thus have not become hard EU law. This chapter analyses the state of the applicable law, taking into account the provisions of the first directives and proposals of the European Commission from 2016.

7 OJ L 180, 29.6.2013, p. 60.

8 K. Karski, *Migration*, [in:] A. Raisz (ed.), *International Law from a Central European Perspective*, Miskolc-Budapest 2022, p. 219–238.

9 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on asylum and migration management and amending Council Directive 2003/109/EC and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 Final; Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing screening of third-country nationals at the external borders and amending Regulations (EC) No. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 Final; Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection within the Union and repealing Directive 2013/32/EU COM/2020/611 Final; Amended proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Eurodac system to match biometric data for the effective application of Regulation (EU) XXX/XXX [Asylum and Migration Management Regulation] and Regulation (EU) XXX/XXX [Resettlement Regulation] for the purpose of identifying illegally staying third-country nationals or stateless persons and requesting comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818 COM/2020/614 Final; Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on responding to crisis and force majeure situations in the field of migration and asylum COM/2020/613 Final.

2. The Common European Asylum System

The Qualification Directive, the Reception Directive and the Procedural Directive alike make it clear that 'A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union"[10]. The quoted fragment underlines the importance of the common asylum policy[11] and the common European asylum system[12] as a part of the implementation of the assumptions of the concept of a alien seeking international protection in the EU. It is clear from the quoted passage that building a common asylum policy in the EU, including a common European asylum system, is guided by the aim of enabling every alien who really needs it to benefit from international protection[13]. The literature on the subject emphasizes that the right of aliens is a component of the global normative system, which

10 For the content of Recital 2 of the Procedural Directive. See also, Recital 2 of the Qualification Directive and the Reception Directive.

11 With regard to the concept of asylum, see: M. Lis, *Azyl*, [in:] U. Kalina-Prasznic (ed.), *Encyklopedia prawa*, Warszawa 1999, p. 45; B. Hołyst, R. Hauser (eds.), *Wielka Encyklopedia Prawa*, Vol. IV: J. Symonides, D. Pyć (eds.), *Międzynarodowe prawo publiczne*, Warszawa 2014, p. 517; J. Dalli, *Asylum Seeker*, [in:] A. Bartolini, R. Cippitani, V. Colcelli (eds.), *Dictionary of Statuses within EU Law: The Individual Statuses as Pillar of European Union Integration*, Cham 2019, p. 41

12 See, V. Mitsilegas, *Solidarity and Trust in the Common European Asylum System*, 'Comparative Migration Studies' 2014, No. 2(2), pp. 181–202; B. Parusel, *Solidarity and fairness in the Common European Asylum System–failure or progress?*, 'Migration Letters' 2015, Vol. 12, No. 2, pp. 124–136; H. Lambert, *Transnational judicial dialogue, harmonization and the common European asylum system*, 'International & Comparative Law Quarterly' 2009, Vol. 58, No. 3, pp. 519–543.

13 See, A. Nitszke, *Reforma Wspólnego Europejskiego Systemu Azylowego w dobie kryzysu migracyjnego*, [in:] *Podsumowanie VIII kadencji Parlamentu Europejskiego: wyzwania integracji europejskiej w latach 2014–2019*, Kraków 2019, pp. 397–414.

aims to protect the life, health and dignity of persons[14]. Such instruments directly recognise that a number of legal guarantees also apply to aliens[15].

Importantly, Article 78 of the Treaty on the Functioning of the European Union[16] exhaustively defines what the Common European Asylum System (hereinafter: CEAS) covers. In this context, it may be important to note that such Treaty provisions show the objective that should be pursued by the EU. These provisions do not stipulate that this goal has already been achieved, nor do they constitute a finite or ready-made legal institution. These provisions clearly emphasise that the attainment of the intended objective is a process which may have its stages[17]. The implementation of the various components of the CEAS is an integral part of the EU's objective, which has already been mentioned many times, of 'establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union'. In other words, the implementation of individual elements of the CEAS leads to an increasing use of the concept of aliens seeking international protection in the EU.

The EU's history of developing the Common European Asylum System, part of the Common Asylum Policy, confirms this observation. In 1997, the Convention designating the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (hereinafter: the Dublin Convention)[18] was adopted. The Dublin Convention, as the basis of European asylum policy, regulated migration policy in the EU. It determined which EU Member State

14 S. Grover, *Child Refugee Asylum as a Basic Human Right*, Cham 2018, p. 71.

15 A. Morrone, *What Does It Mean to Be a Migrant, Asylum Seeker, or Refugee: Current Global Situation*, [in:] A. Morrone, R. Hay, B. Naafs (eds.), *Skin Disorders in Migrants*, Cham 2020, p. 1.

16 OJ C 326, 26.10.2012, p. 47.

17 One might even conclude that the EU legislature attributed to it the characteristics of a process of continuous improvement.

18 OJ C 254, 19.8.1997, p. 1.

was responsible for examining an application for refugee status[19]. The Dublin Convention stipulated that a person seeking international protection could do so only in one EU Member State, which was identified on the basis of objective criteria enshrined in that legislation[20]. The adoption of the Dublin Convention was an important step towards ensuring the effectiveness of international protection in the EU in determining the EU Member State responsible for examining asylum applications. On the other hand, in 1999, from 15 to 16 October, the European Council at its special meeting in Tampere agreed to make efforts to build the CEAS based on the full and integral application of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951 (hereinafter: Geneva Convention), supplemented by the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, thus upholding the principle of non-refoulement and ensuring that no one is sent back and persecuted again[21]. The Tampere conclusions stipulate that, as part of efforts to build the CEAS, rapid approximation of the laws of EU Member States on the recognition of refugees and the scope of refugee status is necessary[22]. It was stressed that the provisions on refugee status should be enriched with measures on subsidiary forms of protection[23]. The aim was to ensure that every person in need of international protection was granted an appropriate status. Therefore, it means striving to achieve the fullest possible fulfilment of the assumptions of the concept of a alien

19 G. Balawajder, *Instytucja granic zewnętrznych Unii Europejskiej a zapewnienie bezpieczeństwa państw członkowskich w warunkach współczesnego kryzysu migracyjnego*, 'Pogranicze. Polish Borderlands Studies' 2017, No. 5(3) 2017, pp. 216–217

20 A. Hadzińska-Wyrobek, *Stosowanie procedury dublińskiej w Polsce wobec osób niebędących obywatelami Unii Europejskiej*, [in:] S. Grochalski (ed.), *Status prawny obywatela Unii Europejskiej*, Dąbrowa Górnicza 2011, p. 173.

21 See, Recital 3 of the Qualification, Reception and Procedure Directives.

22 See, PRESIDENCY CONCLUSIONS, TAMPERE EUROPEAN COUNCIL, 15 AND 16 OCTOBER 1999, Points 13 to 27, https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf [last accessed on: 1.02.2023].

23 *Ibidem*.

seeking international protection in the EU. The Tampere meeting and its conclusions marked the first stage in the development of the CEAS, which resulted in the adoption of legal acts on the pursuit of international protection in the EU to every alien who genuinely needs it.

First of all, this concerns Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter: the Reception Directive of 2003)[24]. Secondly, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter: the Qualification Directive of 2004)[25]. Thirdly, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (2005 Procedural Directive)[26]. These three pieces of secondary EU legislation that are no longer in force are older versions of the currently binding directives. Their adoption and fulfilment of the objectives they set, closed the first stage of building the CEAS. This fact should be directly linked to the achievement of one of the EU's objectives, which is to enable any alien to benefit from international protection who genuinely demonstrates such a need. In addition, it is worth noting that Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention (EURODAC I Regulation)[27] was adopted slightly earlier, just before the above-mentioned directives. The aim of the EURODAC I Regulation was to establish a system for comparing the fingerprints of asylum seekers and certain categories of illegal immigrants, which facilitated the application of the Du-

24 OJ L 31, 6.2.2003, p. 18.

25 OJ L 304, 30.9.2004, p. 12.

26 OJ L 326, 13.12.2005, p. 13.

27 OJ L 316, 15.12.2000, p. 1.

blin II Regulation[28]. However, in parallel with the adoption of the 2003 Reception Directive, Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter: the Dublin II Regulation)[29] was adopted, which replaced the provisions of the Dublin Convention[30]. The Dublin II Regulation sets out objective and hierarchical criteria for determining for each asylum application the EU Member State responsible for examining it. The adoption of both the EURODAC I and Dublin II regulations is closely linked to the adoption of the 2003 reception directive, the 2004 qualification directive and the 2005 procedural directive. All these legal acts aim to implement the fullest possible international protection in the EU for aliens who legitimately need it. In turn, on 4 November 2004, the European Council adopted the Hague Programme, which called on the European Commission to complete the evaluation of the legal acts adopted in the first phase of the creation of the CEAS and to present to the European Parliament and the Council of the European Union the acts and measures within the second stage[31]. In this context, it is worth pointing out that on 15–16 October 2008 the European Council adopted the European Pact on Immigration and Asylum, which stressed that there are significant differences between EU Member States in respect to granting the international protection and its forms[32]. In this document, the European Council called for the completion of the CEAS, as envisaged

28 See, S. Peers, N. Rogers, *Eurodac*, [in:] S. Peers, N. Rogers (eds.), *EU Immigration and Asylum Law*, Leiden 2006, pp. 259–296.

29 OJ L 50, 25.2.2003, p. 1.

30 P. Wilczyńska, *Kształtowanie klauzul dyskrecjonalnych w systemie dublińskim*, 'Studia Prawnicze KUL' 2019, No. 3, p. 274.

31 The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3.3.2005, p. 1.

32 The European Pact on Immigration on the Control of Illegal Immigration, Population and Development Review, No. 34(4) 2008, pp. 805–807.

in the Hague Programme cited above, where the main objective is to ensure a higher level of protection[33]. The Hague Programme and the European Pact on Immigration and Asylum therefore focus on completing the first phase of the CEAS and launching the second phase. This meant that the EU would start to make efforts to regulate more fully and put into practice the assumptions of the concept of a alien seeking international protection. Subsequently, the Stockholm Programme was adopted, which stated that one of the most important objectives of EU policy should continue to be the creation of the CEAS with a view to achieving a greater degree of harmonisation[34]. Importantly, in this context, the EU legislator decided to repeal the Qualification Directive of 2004, the Reception Directive of 2003 and the Procedural Directive of 2005 and replace them with newer versions of legal acts, i.e. the Qualification, Reception and Procedural Directives. As is clear from the content of these acts, one of their objectives is to reaffirm the principles underlying the older versions of the directives, as well as to approximate more fully the laws of the EU Member States on eligibility conditions, reception conditions and asylum procedures[35]. Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter: Dublin III Regulation), which replaced the Dublin II Regulation, was also adopted within a similar timeframe. The Dublin III Regulation provides better protection for applicants until their status is established and clarifies the criteria by including for example the family reasons[36]. It should be also

33 *Ibidem*.

34 Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ C 115, 4.5.2010, p. 1.).

35 See, Recital 10 of the Qualification Directive.

36 G. Janusz, *Ewolucja polityki imigracyjnej Unii Europejskiej. Od importu siły roboczej do masowego napływu uchodźców*, [in:] A. Adamczyk, A. Sakson, C. Trosiak (eds.), *Między tolerancją a niechę-*

stressed that on the same day as the Dublin III Regulation, Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) no. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (hereinafter: Regulation EURODAC II)[37], was adopted. The purpose of the EURODAC II Regulation is to make it easier for EU Member States to determine the country responsible for examining an asylum application by comparing the fingerprints of asylum seekers and non-EU and EEA nationals with data from a central database and to allow law enforcement authorities, subject to strict conditions, to use EURODAC for the investigation, detection and prevention of terrorist offences or other serious criminal offences[38]. The adoption of the Qualification, Reception and Procedure Directives, as well as the Dublin III and EURODAC II Regulations proves that the EU has moved to the second stage of building the CEAS. This means that through the application of these legal acts and the fulfilment of their objectives in the EU, international protection is to be more fully

cią. Polityka współczesnych państw europejskich wobec migrantów i mniejszości, Poznań 2017, p. 28.

37 OJ L 180, 29.6.2013, p. 1.

38 See L. Roots, *The new EURODAC regulation: Fingerprints as a source of Informal discrimination*, 'TalTech Journal of European Studies' 2015, Vol. 5, No. 2, pp. 108–129; V. Tsianos, B. Kuster, *Eurodac in times of bigness: The power of Big Data within the emerging European IT agency*, 'Journal of Borderlands Studies' 2016, Vol. 31, No. 2, pp. 235–249.

implemented, including the concept of a alien seeking such protection[39]. In addition, as noted at the beginning of this paper, in 2020 the European Commission issued legislative proposals under the New Pact for Migration and Asylum, which, however, is not the subject of this chapter[40]. It can only be mentioned that the potential future adoption of these legislative proposals in the EU should be seen as the start of the third phase of the construction of the CEAS.3.

3. Definition of international protection in the European Union

The issue of international protection appears to be of considerable interest to researchers and deserving analyses in the literature[41]. Within the research scope analysed in this chapter, it is interesting whether the concept of international protection in the EU determines the title categorization of aliens. In order to present the importance of international protection in the EU, it is necessary to refer to the relevant provisions of the Qualification, Reception and Procedure Directives, as it is mainly them that determine the legal situation of aliens seeking international protection in one of the EU Member States[42]. However, it should be no-

39 See, International organizations as an instrument of cooperation between states: E. Karska, *International Cooperation-International Organizations*, [in:] A. Raisz (ed.), *International Law from a Central European Perspective*, Miskolc-Budapest 2022, pp. 117–132.

40 New Pact on Migration and Asylum, https://ec.europa.eu/info/strategy/priorities-2019–2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en [last accessed on: 1.02.2023].

41 See for example: E. Guild, M. Garlick, *Refugee protection, counter-terrorism, and exclusion in the European Union*, 'Refugee Survey Quarterly' 2010, No. 29(4), pp. 63–82; B. Nascimbene, *Refugees, the European Union and the 'Dublin system'. The Reasons for a Crisis*, 'European Papers' 2016, Vol. 1, pp. 101–113; G. Gyulai, *Statelessness in the EU framework for international protection*, 'European Journal of Migration and Law' 2012, No. 14(3), pp. 279–295; A. Niemann, N. Zaun, *EU refugee policies and politics in times of crisis: theoretical and empirical perspectives*, 'Journal of Common Market Studies' 2018, Vol. 56 No. 1, pp. 3–22.

42 B. Mikolajczyk, *Transpozycja dyrektywy ustanawiającej minimalne normy dotyczące osób ubiegających się o azyl do prawa polskiego*, 'Białostockie Studia Prawnicze' 2007, Vol. 2, p. 12.

ted that the purpose of these legal acts is different. The main objective of the Qualification Directive is, firstly, that EU Member States apply common criteria for identifying persons genuinely in need of international protection and, secondly, that such persons have access to a minimum level of benefits in all EU Member States[43]. The main aim of the Reception Directive is to establish common standards for the reception of applicants[44] in EU Member States[45]. The Procedural Directive is mainly aimed at further developing standards on procedures for granting and withdrawing international protection in EU Member States with a view to establishing a common asylum procedure in the EU[46]. Each of these legal acts was adopted in the context of the implementation of the concept of a alien seeking international protection in the EU and deals with its different aspect in order to create the CEAS as a whole, the aim of which is to effectively provide protection to all persons in need. From the point of view of the meaning of the concept of international protection offered in the EU, the relevant provisions of the Qualification Directive are important. According to Article 2(a) of the Qualification Directive, international protection means refugee status[47] or subsidiary protection status. Noticeable in this respect is the dichotomous division into two categories mutually exclusive and complementary. At this point, therefo-

43 See, Recital 12 of the Qualification Directive.

44 According to Article 2(b) of the Reception Directive, an applicant means a third-country national or a stateless person who has lodged an application for international protection in respect for which a final decision has not yet been taken.

45 See, Recital 31 of the Reception Directive.

46 See, Recital 12 of the Procedural Directive.

47 See, B. Wierzbicki, *Sytuacja prawna uchodźcy w systemie międzynarodowej ochrony praw człowieka*, Białystok 1993, pp. 10–16; B. Wierzbicki, *Uchodźcy w prawie międzynarodowym*, Bialystok 1993, pp. 25–28; A. Grahl-Madsen, *The Status of Refugee in International Law: Refugee character*, Leyden 1966, p. 108; B. Wierzbicki, *Ewolucja pojęcia uchodźca w prawie międzynarodowym*, 'Państwo i Prawo' 1989, No. 11, p. 53; J. Hathaway, *The Rights of Refugees under International Law*, Cambridge 2005, p. 110 *ff.*; P. Weis, *The 1967 Protocol relating to the status of refugees and some questions of the law of treaties*, 'British Year Book of International Law' 1967, No. 42, p. 39 *ff.*; G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford 2007, p. 15 *ff.*

re, two eponymous categories of aliens are visible. Based on the further content of the Qualification Directive, it should be noted that in the EU, refugee status means recognition by an EU Member State of a third-country national or stateless person as a refugee. Subsidiary protection status, on the other hand, means that an EU Member State recognises a third-country national or a stateless person as eligible for subsidiary protection. Two other terms are associated with these terms, namely refugee and person eligible for subsidiary protection.

The first of those concepts, in the light of Article 2(d) of the Qualification Directive, means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.[48]

Article 12 of the Qualification Directive provides for the institution of exclusion, under which certain third-country nationals or stateless persons are excluded from obtaining or receiving refugee status. This is important for the analysed issue, as it suggests another category of aliens seeking international protection in the EU. In addition, in the context of refugee status, the regulations contained in Articles 9 and 10 of the Qualification Directive are important. Article 9(1) of the Qualification Directive sets out the criteria that an act must meet in order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention. First, such an act must be sufficiently serious in nature or repetition as to constitute a serious violation of fundamental human rights, in particular rights which cannot be derogated from under Article 15(2) of the Convention for the Protection of Human Rights and Fun-

48 This definition is modelled on the definition of a refugee in Article 1 of the Geneva Convention.

damental Freedoms, signed in Rome on 4 November 1950[49]. These include the right to life (except in cases of death resulting from lawful acts of war), the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the prohibition of punishment without legal basis. Second, the act must be an accumulation of various measures, including human rights violations, which are serious enough to affect the individual in a manner similar to that referred to in the first criterion. The relationship between these criteria is interesting, because it was constructed on the principle of a cumulative alternative. This means that, in order for an act to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, it does not have to meet both criteria at the same time, it is sufficient if it meets at least one of them. On the other hand, Article 9(2) of the Qualification Directive indicates, by way of example, what form acts of persecution within the meaning of Article 1(A) of the Geneva Convention may take[50]. In the context of a alien's eligibility for refugee status, Article 10(1) of the Qualification Directive, which sets out in a closed manner the grounds for persecution, is also important. This is because, under Articles 2(d) and 9(3) of the Qualification Directive, there must be a link between the grounds referred to in Article 10(1) of the Qualification Directive and the acts of persecution referred to in Article 9(1) of the Qualification Directive or the lack of protection against such acts. For that reason, Recital 29 of the Qualification Directive emphasises that one of the con-

49 ETS No. 5, as amended.

50 Under Article 9(2) of the Qualification Directive, the acts of persecution referred to in Article 9(1) of the Qualification Directive may take the form, inter alia, of: '(a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature'.

ditions for eligibility for refugee status within the meaning of Article 1(A) of the Geneva Convention is a causal link between the grounds of persecution, such as race, religion, nationality, political opinion or membership of a particular social group, and acts of persecution or lack of protection against such acts. In the light of the foregoing, the grounds for persecution within the meaning of Article 10(1) of the Qualification Directive are considered to be race, religion, nationality, membership of a particular social group and political opinion. Importantly, in accordance with the principle of legal clarity, Article 10(1) of the Qualification Directive defines the concepts of race[51], religion[52], nationality[53], a particular social group[54] and political opinion[55], which makes the legal structure of qualifying

51 Under Article 10(1)(a) of the Qualification Directive, 'the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group'.

52 Under Article 10(1)(b) of the Qualification Directive, 'the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief'.

53 Under Article 10(1)(c) of the Qualification Directive, 'the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State'.

54 Under Article 10(1)(d) of the Qualification Directive, 'a group shall be considered to form a particular social group where in particular: - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group."

55 Under Article 10(1)(e) of the Qualification Directive, 'the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant'.

aliens for refugee status in the EU more transparent. In addition, pursuant to Article 10(2) of the Qualification Directive, when assessing whether an applicant's fear of persecution is well founded, it is irrelevant whether the applicant actually has a racial, religious, national, social or political characteristic giving rise to the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution. Recapitulating, EU Member States rely mainly on the regulations contained in Article 2(d), (9), (10) and (12) of the Qualification Directive when assessing whether an alien seeking international protection in the EU qualifies for refugee status. These provisions give a picture of the rules for qualification of aliens for refugee status in the EU, which is, in the light of Article 2(a) of the Qualification Directive, one of the two designations of the concept of international protection in the EU.

On the other hand, the concept of a person eligible for subsidiary protection under the provisions of the Qualification Directive refers to a third-country national or a stateless person who does not qualify for recognition as a refugee but in respect of whom it has been validly demonstrated that, if he returns to his country of origin or, in the case of a stateless person, to the country of his former habitual residence, he or she is indeed at risk of serious harm within the meaning of Article 15 of the Qualification Directive, and to whom Article 17(1) and (2) of the Qualification Directive do not apply and who is unable or unwilling to avail himself of the protection of that State owing to such risks[56]. Article 15 of the Qualification Directive sets out the designations of serious harm. That provision states that serious harm includes the death penalty or execution, or torture or inhuman or degrading treatment or punish-

56 See, J. McAdam, *The European Union qualification directive: the creation of a subsidiary protection regime*, 'International Journal of Refugee Law' 2005, Vol. 17, No. 3, pp. 461–464; R. Piotrowicz, C. Van Eck, *Subsidiary protection and primary rights*, 'International & Comparative Law Quarterly' 2004, Vol. 53, No. 1, pp. 107–109; B. Mikolajczyk, *Ochrona uzupełniająca a status uchodźcy*, [in:] E. Dynia (ed.), *Prawo międzynarodowe i wspólnotowe wobec wyzwań współczesnego świata*, Rzeszów 2009, p. 381.

ment of an applicant in his country of origin, or serious individual threat to the life or physical integrity of a civilian resulting from indiscriminate violence in situations of international or internal armed conflict[57]. Importantly, it is a closed catalogue, which results directly from the wording of Article 15 of the Qualification Directive. On the other hand, Article 17(1) and (2) of the Qualification Directive provide for an institution of exclusion similar to that contained in Article 12 of the Qualification Directive. We are therefore talking about circumstances excluding certain third-country nationals or stateless persons from receiving subsidiary protection[58]. In addition, according to Article 17(3) of the Qualification Directive, EU Member States may exclude a third-country national or stateless person from subsidiary protection if, prior to admission to the EU Member State concerned, he/she has committed one or more offences not covered by Article 17(1) and (2) of the Qualification Directive which, if committed in the EU Member State concerned, would be subject to imprisonment and if he left his country of origin solely in order to avoid punishment resulting from the commission of those offences.

57 See, R. Errera, *The CJEU and subsidiary protection: reflections on elgafaji-and after*, 'International Journal of Refugee Law' 2011, Vol. 23, No. 1, pp. 93–95; P. Tiedemann, *Subsidiary Protection and the Function of Article 15 (c) of the Qualification Directive*, 'Refugee Survey Quarterly' 2012, Vol. 31, No. 1, pp. 123–124; J. Eaton, *The internal protection alternative under European union law: examining the recast qualification directive*, 'International Journal of Refugee Law' 2012, Vol. 24, No. 4, pp. 765–766.

58 Under Article 17(1) and (2) of the Qualification Directive: '1. third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present. 2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein".

4. Scope of international protection in the European Union

The scope of international protection in the EU is defined in Articles 20 to 35 of the Qualification Directive. Article 20(1), (2), (3) and (5) of the Qualification Directive define general principles. According to Article 20(1) of the Qualification Directive, the provisions of the Qualification Directive relating to the scope of international protection in the EU are without prejudice to the rights deriving from the Geneva Convention. This principle therefore defines the relationship between the scope of international protection in the EU and the rights enshrined in the Geneva Convention. Moreover, this is not the principle of autonomy of the conventional system or the EU system. The essence of this principle lies in the fact that the scope of international protection in the EU must not adversely affect the exercising of rights under the Geneva Convention, but it can have a positive or complementary impact. Such a situation is not excluded in the light of the interpretation of Article 20(1) of the Qualification Directive. On the other hand, according to Article 20(2) of the Qualification Directive, unless otherwise specified, the provisions of the Qualification Directive defining the scope of international protection in the EU apply to both refugees and persons eligible for subsidiary protection. It seems that the content of this principle is fully justified from the perspective of the definition of international protection in the EU in Article 2(a) of the Qualification Directive, where it is explicitly indicated that international protection means refugee status or subsidiary protection status59. The next principle is regulated in Article 20(3) of the Qualification Directive, according to which, when implementing the provisions of the Qualification Directive within the scope of international protection in the EU, EU Member States shall take into account the specific situation of vulnerable persons. These include

59 By the way, it can be pointed out that there is also temporary protection, relocation, resettlement or repatriation. Each of these concepts has its own specificity. Nevertheless, it can generally be stated that these are instruments supporting implementation of international protection in closely defined situations enabling their application.

categories of aliens such as minors, unaccompanied minors, disabled people, the elderly, pregnant women, single parents with minor children, victims of trafficking in human beings, persons with mental disorders and victims of torture, rape or other serious forms of psychological, physical or sexual violence. In addition, under Article 20(4) of the Qualification Directive, Article 20(3) of the Qualification Directive applies only to persons who, following an individual assessment of their situation, are considered to have special needs. The principle taking into account the needs of vulnerable people and introducing an individual assessment of whether the person seeking protection is a person with special needs is important from the point of view of the title issue of this paper. This is due to the fact that it takes into account different categories of aliens seeking international protection in the EU. In addition, the principle of the best interests of the child laid down in Article 20(5) of the Qualification Directive must also be regarded as relevant in this context. According to this provision, when implementing international protection rules in the EU for children, Member States shall pay particular attention to the best interests of the child. Clearly, this principle constitutes a separate category of aliens seeking international protection in the EU.

The detailed scope of international protection in the EU is set out in Articles 21 to 35 of the Qualification Directive[60]. These include protection from refoulement (Article 21), information (Article 22), maintaining family unity (Article 23), residence permits (Article 24), travel documents (Article 25), access to employment (Article 26), access to education (Article 27), Access to procedures for recognition of qualifications (Article 28), social welfare (Article 29), healthcare (Article 30), access to accommoda-

60 However, regardless of any circumstances, the literature notes that throughout the refugee procedure, the rights of the refugee must be guaranteed in accordance with the provisions of not only the refugee law, but also of the entire international system of human rights protection (see R. Preston, *What Was Refugee Status? Legislating the Changing Practice of Refugee Law*, [in:] D. Joly (ed.), *Global Changes in Asylum Regimes. Migration, Minorities and Citizenship*, London 2002, p. 186).

tion (Article 32); access to integration facilitation (Article 34) and repatriation (Article 35). Article 31 of the Qualification Directive is missing from that list because it is of a slightly different nature. This provision regulates unaccompanied minors as a separate category of aliens seeking international protection in the EU. According to Article 2(k) of the Qualification Directive, a minor means a third-country national or a stateless person who is under 18 years of age. On the other hand, according to Article 2(l) of the Qualification Directive, an unaccompanied minor means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person. In addition, it also includes a minor who is left unaccompanied after he or she has entered the territory of the Member States. In accordance with Article 31(1) of the Qualification Directive, an unaccompanied minor, after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order. On the other hand, under Article 31(3) of the Qualification Directive, an unaccompanied minor has the right to be placed with adult relatives or in a foster family or in centres specialising in accommodation for minors or in other accommodation suitable for minors. In this context, the child's opinion according to his or her age and degree of maturity shall also be taken into account. The purpose of those provisions is to organise, as quickly as possible and appropriate in the best interests of the child, the direct and actual care of a suitably prepared person over an unaccompanied minor, so that he or she can be classified without undue delay not as an unaccompanied minor but as a minor under Article 2(k) of the Qualification Directive. Moreover, Article 31(2) of the Qualification Directive, on the one hand, confirms

this observation, as it already provides for minors and not unaccompanied minors, and, on the other hand, introduces an obligation for EU Member States to regularly assess and ensure that the needs of minors are properly met by a designated legal guardian or representative. On the other hand, Article 31(4) of the Qualification Directive is a further expression of ensuring the best interests of the child, since it provides that, if possible, siblings are not to be separated, taking into account the best interests of the minor, in particular his age and degree of maturity. The proper application of Article 31 of the Qualification Directive is safeguarded by the obligation that persons working with unaccompanied minors must receive and continue appropriate training on the needs of such minors. Article 31 of the Qualification Directive is important for the title issue, because by providing for the obligations of EU Member States, it also defines the rights for a specific category of aliens seeking international protection in the EU.

5. Categories of aliens in the European Union at the stage of reception, qualification and proceedings

All the above considerations give rise to an attempt to categorize aliens seeking international protection in the EU.

Starting from the basics, it should be recalled that, under Article 2(a) of the Qualification Directive, international protection means refugee status or subsidiary protection status. On the basis of this single provision, it can be concluded that aliens seeking international protection in the EU are divided into aliens who will be granted refugee status, aliens who will be granted the subsidiary protection status and aliens who will receive neither refugee status nor subsidiary protection status[61].

This division is a division based on whether or not the qualification conditions provided for in the relevant provisions of the Qualification Direc-

61 See, 3. Definition of international protection in the European Union.

tive are met. In addition, this division is trichotomous, where the alien can only belong to one of three categories. The division drawn, although simple in essence, is correct from a methodological point of view. t should be noted, however, that it does not constitute a basis for presenting further categories of aliens seeking international protection in the EU, as in this respect an alien may belong to only one of the three categories.

This does not mean that further categories of aliens seeking international protection in the EU cannot be proposed on the basis of other provisions of the Qualification, Reception or Procedural Directive. In such a case, it is necessary to pay attention to common features differentiating groups of aliens other than the qualification conditions. Such features may have different nature. For the purposes of this analysis, it is sufficient that they follow directly or indirectly from the relevant provisions of the abovementioned EU directives.

First, it should be noted once again that, under Article 2(k) of the Qualification Directive, a minor means a third-country national or a stateless person below the age of 18 years. This means that within aliens seeking international protection in the EU, a group of aliens under 18 years of age can be distinguished. This is of enormous normative importance, as many provisions of the Qualification, Reception or Procedural Directives provide for different and child-oriented treatment of minors. According to Recital 22 of the Reception Directive, when deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State. Article 23 of the Reception Directive, on the other hand, is a legal norm defining the rights of a minor and stressing that safeguarding the interests of the child is one of the priorities taken into account by EU Member States when implementing reception legislation. According to that provision, a minor has the right to a standard of living appropriate to his physical,

mental, spiritual, moral and social development and to participate in leisure activities, including games and leisure activities appropriate to his or her age, in premises and centres for aliens, and in open-air activities. In addition, also in the light of this provision, minors who are victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or minors who have suffered as a result of armed conflicts, have the right to access rehabilitation care and to appropriate mental health care and professional counselling. A further right of minors under Article 23 of the Reception Directive is the right of a minor to accommodation with their parents, with their unmarried minor siblings or with adults responsible for them in accordance with the law or practice of the EU Member State concerned, provided that this serves the best interests of those minors. The Procedural Directive also contains provisions aimed at promoting the best interests of the child. For example, according to Article 15(3)(e) of the Procedural Directive, EU Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions that allow applicants to present fully the reasons for their application. To this end, EU Member States shall ensure that the personal interviews of minors are conducted in a child-sensitive manner. On the other hand, according to Recital 28 of the Qualification Directive, EU Member States should pay attention to forms of persecution relating in particular to children when assessing applications for international protection lodged by minors. In addition, it is not possible to ignore the provisions contained in Article 2(l) of the Qualification Directive, Article 2(e) of the Reception Directive and Article 2(m) of the Procedural Directive. These regulations include a definition of an unaccompanied minor as a special category of minors, as already indicated above[62]. Ultimately,

62 In this context, it is worth referring to Article 31 of the Qualification Directive, where the rights of unaccompanied minors are regulated. An unaccompanied minor has the right to have a representation carried out by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or they have the right to have another kind of appropriate representation, including representation based on legislation or court order.

this means that, from the point of view of the age criterion, a category of minors can be distinguished within aliens seeking international protection in the EU, and within minors, a category of unaccompanied minors can be distinguished[63].

Secondly, the common distinguishing feature of another group of foreign nationals is inclusion within the scope of the concept of family member within the meaning of Article 2(j) of the Qualification Directive and Article 2(c) of the Reception Directive. This means that in respect to aliens seeking international protection in the EU, there are aliens who are or are not family members. According to these provisions, family members mean, if the family already existed in the country of origin, closely defined family members[64] of the applicant who are present in the same EU Member State in connection with the application for international protection[65]. The distinction between categories of aliens who are family

In turn, in in the light of Article 31 (3) of the Qualification Directive, unaccompanied minors have right to place them together with adult relatives or in foster care or in centres specialising in the accommodation of minors or in other accommodation suitable for minors. Additionally, according to Article 31(5) of the Qualification Directive, an unaccompanied minor has the right to have his or her family members traced by EU Member States.

63 For example, Article 24 of the Reception Directive provides an example of a special legal provision concerning the situation of unaccompanied minors. An example of such a regulation is also Article 25 of the Procedural Directive, which sets out procedural safeguards for unaccompanied minors.

64 According to Article 2(j) of the Qualification Directive, 'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection: - the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, - the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, - the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried.'

65 In this context, it is also worth pointing out that Recital 19 of the Qualification Directive states that the concept of 'family members' should be broadened to take account of the various speci-

members within the meaning of those directives is important from legal perspective, as evidenced by the rules of the Qualification, Reception and Procedure Directives, which provide for special regulations in relation to families[66].

Thirdly, another possible category of aliens seeking international protection in the EU concerns applicants with special reception needs. In this case, the definition of the applicant is of great importance, which has the same content in both the qualification, reception and procedural directives. According to this definition, an applicant means a third-country national or a stateless person[67] who has lodged an application for international protection in respect of which a final decision has not yet been taken[68]. On the other hand, under Article 2(k) of the Reception Directive, an applicant with special reception needs means a vulnerable person, in accordance with Article 21 of the Reception Directive, who needs special guarantees in order to exercise the rights and fulfil the obligations laid down in the Reception Directive. Thus, a category of aliens who qualify as applicants with special reception needs can be distinguished within the framework of aliens seeking international protection in the EU. Ho-

fic situations of dependency and paying particular attention to the best interests of the child.

66 According to Article 12 of the Reception Directive, 'Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant's agreement.' Another example is Article 23 of the Qualification Directive, which ensures the ability to maintain family unity. A further example is Article 14(3) of the Reception Directive, according to which in case, when access to the education system is not possible due to the particular situation of the minor, a given EU Member State shall make available other forms of education in accordance with its national law and practice.

67 B. Berkeley, *Stateless people, violent states*, 'World Policy Journal' 2009, Vol. 26, No.1, pp. 3–5; S. Parekh, *Beyond the ethics of admission: Stateless people, refugee camps and moral obligations*, 'Philosophy & Social Criticism' 2014, Vol. 40, No. 7, pp. 645–648; L. Kerber, *The stateless as the citizen's other: a view from the United States*, 'The American Historical Review' 2007, 112/1, pp. 1–3.

68 See, Article 2(i) of the Qualification Directive, Article 2(b) of the Reception Directive and Article 2(c) of the Procedural Directive.

wever, it should be supplemented that, in accordance with Article 21 of the Reception Directive, EU Member States shall take into account the specific situation of vulnerable persons in their national law implementing the Reception Directive. According to that provision, vulnerable persons are minors, unaccompanied minors, disabled persons, elderly people, pregnant women, single parents with minor children, victims of trafficking in human beings, persons suffering from serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation[69]. In addition, according to Recital 14 of the Qualification Directive, national authorities should pay particular attention to receiving persons with special reception needs, so that their reception is organised according to their specific reception needs. This therefore means that within the framework of aliens seeking international protection in the EU, a category of aliens with special needs can be distinguished. This category is a capacious category and contains many designations that may also belong to other slightly narrower categories of aliens seeking international protection in the EU. Both the category of applicants with special reception needs and the category of vulnerable persons are of enormous normative importance and are manifested in many of the norms of the Reception Directive[70].

69 According to Article 25 of the Reception Directive, persons who have been subjected to torture, rape or other serious acts of violence shall receive the necessary treatment for the damage caused by such acts, in particular shall have access to appropriate medical and psychological treatment or care. In turn, according to Article 22(3) of the Reception Directive, only vulnerable persons can be considered as having special reception needs and therefore eligible for special assistance.

70 According to Article 11 (1) and (2) of the Reception Directive '1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health. 2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively '.

Fourthly, Article 2(d) of the Procedural Directive provides the basis for proposing another category of aliens seeking international protection in the EU. That provision defines an applicant in need of special procedural guarantees. According to this definition, an applicant in need of special procedural guarantees means an applicant whose ability to benefit from the rights and comply with the obligations provided for in the Procedural Directive is limited due to individual circumstances. A further explanation is provided by Recital 29 of the Procedural Directive, which states that certain applicants may need specific procedural guarantees on the grounds, inter alia, of their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorder or the effects of torture, rape or other serious forms of psychological, physical or sexual violence. Thus, within the framework of aliens seeking international protection in the EU, a category of aliens can be distinguished who qualify for inclusion in the concept of an applicant in need of special procedural guarantees. An important legal regulation in this respect is Article 24 of the Procedural Directive, which directly concerns applicants in need of special procedural guarantees. For example, according to Paragraph 1 of this provision, EU Member States are to assess, within a reasonable period of time after the lodging of an application for international protection, whether the applicant is an applicant in need of special procedural guarantees.

In addition, the relationship between the category of applicant with special reception needs and the category of applicant in need of special procedural guarantees is interesting at this point. Both terms refer to a person who, owing to his particular situation, is unable to exercise his rights and fulfil his obligations. In this context, the Reception Directive defines a vulnerable person and the Procedural Directive lists an example of the subjective scope of applicants in need of special procedural guarantees. An analysis of the provisions of the Reception and Procedural Directives in question may lead to the conclusion that the understanding of the concept of an applicant with special reception needs

is similar in content to that of an applicant in need of special procedural guarantees. The difference between these concepts is a relevant stage for them. This means either the reception stage or the stage of proceedings in the strict sense.

Fifthly, the Qualification Directive provides the grounds for proposing another category of aliens seeking international protection in the EU. According to Recital 30 of the Qualification Directive, it is necessary to introduce a common concept of belonging to a particular social group. That Recital also underlined that, when defining a particular social group, due account should be taken of aspects related to the applicant's gender where they relate to the applicant's well-founded fear of persecution, including gender identity and sexual orientation, which may be linked to specific legal traditions and customs, leading, for example, to genital mutilation, forced sterilization or forced abortion. Under Article 10(1)(d) of the Qualification Directive, a group is to be regarded as a particular social group if, in particular, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Article 10(1)(d) of the Qualification Directive also emphasises that, depending on the situation in the country of origin, a particular social group may mean a group based on a common characteristic of sexual orientation. In this respect, also in accordance with Article 10(1)(d) of the Qualification Directive, it should be borne in mind that sexual orientation should not be understood as including acts considered criminal under the national law of the EU Member States. That provision also emphasises that gender aspects, including gender identity, shall be given special attention in order to determine membership of a particular social group or to identify a characteristic of such a group. This means that another category of aliens seeking international protection in the EU

comprises aliens belonging to a special social group. This means also a particular social group to which membership is the reason for persecution.

Sixthly, the Qualification Directive constitutes the source for proposing another category of aliens seeking international protection in the EU. Articles 12 and 17 of the Qualification Directive provide for the institution of exclusion. According to Article 12(1) of the Qualification Directive, a third-country national or a stateless person is excluded from refugee status if he or she falls within the scope of Article 1(D) of the Geneva Convention relating to protection or assistance received from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees[71] or is considered by the competent authorities of the State, in which he has taken up residence, as a person having the rights and obligations related to having the nationality of that State or having rights and obligations equivalent to them. On the other hand, under Article 12(2) of the Qualification Directive, a third-country national or a stateless person is excluded from refugee status if there are serious grounds for believing that he or she has committed a crime[72] against peace, a war crime, a crime against humanity within the meaning of international instruments drawn up to lay down regulations with respect to those crimes, or has committed a serious non-political crime outside a State, which has accepted him/her, before being admitted as a refugee[73] or is guilty of acts contrary to the purposes and principles of the United Nations as set out in the preamble and Articles 1 and 2 of the Charter of the Uni-

71 It should be noted, however, that if such protection or assistance has ceased for any reason and the position of such persons has not been definitively settled in accordance with the relevant resolutions of the General Assembly of the United Nations, such persons are thus eligible for the benefits set out in the Qualification Directive.

72 According to the article 12 (3) of the Qualification Directive, 'Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.'

73 It should be noted that particularly cruel acts, even if committed with allegedly political motives, can be classified as serious non-political crimes.

ted Nations[74]. On the other hand, under Article 17(1) of the Qualification Directive, a third-country national or a stateless person is excluded from subsidiary protection if there are serious grounds for believing that: has committed a crime against peace, a war crime, a crime against humanity within the meaning of international instruments drawn up to legislate in relation to those crimes; has committed a serious crime; has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the preamble and Articles 1 and 2 of the Charter of the United Nations; poses a threat to the community or safety of the Member State in which he or she is present[75]. In addition, in the light of Article 17(3) of the Qualification Directive, EU Member States may exclude a third--country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of article 17 (1) of the Qualification Directive, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes. Both Articles 12 and 17 of the Qualification Directive provide the grounds for proposing categories of aliens seeking international protection excluded and not excluded from the possibility of obtaining refugee status or receiving subsidiary protection.

Seventhly, the provisions of the Qualifications, Reception and Procedure Directives provide a basis for distinguishing the categories of third-country nationals and stateless persons among aliens seeking international protection. A third-country national is a person holding the citizenship of a country which is not an EU Member State. On the other hand, a stateless person is a person who does not have the citizenship of any state.

74 Charter of the United Nations, San Francisco, 26 June 1945 (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en [last access on: 1.02.2023].

75 In accordance with Article 17(2) of the Qualification Directive 'Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein'.

In addition, some provisions of the reception, qualification or procedural directive provide the basis for proposing other categories of aliens seeking international protection in the EU. However, due to the fact that their material scope is relatively narrow or, in principle, already falls within the categories presented, further considerations will be of a signalling nature. According to Article 9(7) of the Reception Directive, EU Member States may provide that free legal aid and representation are granted only to a foreign national who is deprived of sufficient resources. It can therefore be inferred from that provision that aliens seeking international protection in the EU include both persons deprived and not deprived of resources. According to Article 35 of the Qualification Directive, EU Member States may provide assistance to beneficiaries of international protection who wish to be repatriated. This means that there is also a category of repatriates among aliens seeking international protection in the EU. In accordance with Article 26 of the Qualification Directive, as soon as international protection has been granted, EU Member States authorise beneficiaries to engage in an employed or self-employed activity in accordance with the rules generally applicable to the given profession and to the civil service. This provision suggests that aliens seeking international protection in the EU include aliens who will benefit from access to employment. In accordance with Article 27(1) of the Qualification Directive, EU Member States grant full access to the education system to all minors who have been granted international protection under the same conditions as their own nationals. By contrast, according to Paragraph 2 of that provision, EU Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third- country nationals legally resident in the country concerned. This is complemented by Article 28 of the Qualification Directive, according to which EU Member States shall ensure equal treatment of beneficiaries of international protection and their own nationals as regards the applicable

procedures for the recognition of foreign diplomas, certificates and other evidence of formal qualifications. The correlation of Articles 27 and 28 of the Qualification Directive may lead to the conclusion that the aliens seeking international protection in the EU include a category of aliens who demonstrate a need for access to education or a need to have access to qualifications recognition procedures. After all, it cannot be ruled out that an alien may at the same time demonstrate the need for access to education and access to qualifications recognition procedures. In accordance with Article 29 of the Qualification Directive, EU Member States shall ensure that beneficiaries of international protection receive, in the EU Member State that granted them such protection, the necessary social assistance, equivalent to that provided to nationals of that EU Member State. Such a legal regulation may also suggest that aliens seeking international protection in the EU include aliens who demonstrate a need for access to social welfare. In accordance with Article 30 of the Qualification Directive, EU Member States shall ensure that beneficiaries of international protection have access to healthcare according to the same eligibility criteria as nationals of the EU Member State that has granted such protection. Thus, this means aliens who demonstrate a need for access to health care. In accordance with Article 32 of the Qualification Directive, Member States shall ensure that beneficiaries of international protection have access to accommodation under the same conditions as other third-country nationals legally residing on their territory. This provision may lead to the conclusion that aliens seeking international protection in the EU include aliens who demonstrate a need for access to accommodation. Finally, in accordance with Article 20(3) of the Qualification Directive, when implementing the provisions of Chapter VII of the Qualification Directive (scope of international protection), EU Member States shall take into account the specific situation of vulnerable persons, such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking in hu-

man beings, persons with mental disorders and victims of torture, rape or other serious forms of psychological, physical or sexual violence. In addition, according to Article 20(4) of the Qualification Directive, Article 20(3) of the Qualification Directive applies only to persons who, following an individual assessment of their situation, have been identified as having special needs, which constitutes another category of aliens seeking international protection in the EU. Some of the categories of aliens seeking international protection in the EU listed in Article 20(3) of the Qualification Directive, such as minors and unaccompanied minors, have already been discussed above. Other of these categories demonstrate even broader context of the title issue.

In addition, it should be noted that sometimes two different categories of aliens seeking international protection in the EU constitute a justification for the regulations contained in a single legal norm. This is because some categories of aliens are synonymous with each other. Examples of such categories are vulnerable aliens within the meaning of Articles 21 and 22 of the Reception Directive and aliens in need of special procedural guarantees within the meaning of Articles 2(d) and 24 and 25 of the Procedural Directive[76].

6. Conclusion

Summing up the above analysis, it should be noted that it resulted in a proposal for the categorisation of aliens seeking international protection in the EU. This categorization was based on selected provisions of the Qualification, Reception and Procedure Directives, which directly or indirectly indicate certain common characteristics of aliens. This fact

76 For example, according to Article 31(7) of the Procedural Directive, Member States may prioritise an examination of an application for international protection in accordance with the basic principles and guarantees of Chapter II of the procedural directive, in particular where the applicant is vulnerable within the meaning of Article 22 of the Reception Directive, or is in need of special procedural guarantees, in particular unaccompanied minors.

is important because it confirms that the concept of international protection adopted in the EU determines certain categories of aliens. In addition, this fact also shows a kind of sensitivity of the EU legislator to the actual different categories of aliens in the EU. It turns out that there are normative grounds in EU law for distinguishing within the general group of aliens seeking international protection in the EU, categories of minors, unaccompanied minors, family members, applicants with special reception needs, aliens with special needs, applicants in need of special procedural guarantees, aliens belonging to a special social group, excluded and not excluded aliens, aliens who are third-country nationals and stateless persons or aliens who are repatriates. These categories of aliens seeking international protection in the EU are accompanied by specific legal provisions aimed at regulating the situation of aliens belonging to certain categories. This leads to the final conclusion that the concept of aliens in the EU should be understood not only from a general point of view, but also in an individualised way. This means the perspective of an individual or a smaller group of individuals. Aliens seeking international protection in the EU is a term for a general group of people as diverse as the societies of modern countries can be. It should therefore come as no surprise that, within that generalised term, it is possible, even on the basis of the applicable law, to identify the common features distinguishing categories that are narrower in scope. These categories indicate the actual diversity of circumstances, situations or conditions within the group of aliens seeking international protection in the EU.

Chapter IV

Substantive conditions for international protection and prohibition of refoulement in European Union asylum law and policy

1. Introduction

International law recognizes the sovereign right of States to control and regulate the entry, stay and expulsion of aliens from their territory. However, this right is limited by restrictions resulting from the guarantees of the international system of human rights protection and immigration and asylum (refugee) policy developed within the European Union[1]. Thus, national legal regulations implemented in connection with the threats that have occurred in recent years – the COVID-19 pandemic, the internal conflict in Belarus and Russia's aggression against Ukraine – must take into account the obligations incurred within the scope of the cooperation between the EU Member States and international legal obligations[2]. However, before discussing the conditions for asylum and the prohibition of expulsion, some terminological issues need to be clarified. The concept of 'asylum' is not an unambiguous concept and may be understood in various ways. This is due to the differences in terminology occurring on the basis of international law (including European law) and national law.

In respect to international law, including European law, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951[3], supplemented and amended by the Protocol relating to the Status of Re-

1 M. Kowalski, *Pomiędzy uznaniowością a zobowiązaniem: podstawy prawnomiędzynarodowej ochrony uchodźców*, 'Politeja' 2006, No. 1 (5), p. 431.

2 E. Karska, *Słowo wstępne / Introduction*, [in:] E. Karska (ed.), *Uchodźcy: Aktualne zagadnienia prawa i praktyki*, Warszawa 2017, pp. 7–10.

3 Convention relating to the Status of Refugees, Geneva, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; entered into force on 22 April 1954. According to the general definition in the 1951 Convention, a refugee is a person who 'As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted (...) is outside the country of his nationality and..' The limitation to 1951 was based on the desire to limit the responsibility of governments to refugee crises known at the time of adoption of the Convention or those which may have arisen as a result of conflicts already known. (*Rules and procedure for determining refugee status. In accordance with the 1951 Convention relating to the Status of Refugees and its Additional Protocol of 1967.*, Office of the United Nations High Commissioner for Refugees, Geneva, January 1992, 2nd edition of the Polish version, Warszawa, November 2007, p. 10).

fugees, concluded in New York on 31 January 1967[4], and secondary legislation of the European Union[5], are of the greatest importance. The title and Recitals of the Convention refer to the 'status of refugees', but sentence 3 of Recitals also refers to asylum. The Convention states that 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'.

A similar situation occurs in the regulations of European Union secondary law, where Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible

4 Protocol relating to the Status of Refugees, concluded at New York on 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267; entered into force on 4 October 1967. As time passed and successive refugee crises occurred, the need to open up the legal possibility of applying the provisions of the 1951 Convention to new developments became more and more evident – this was to be remedied by the Additional Protocol relating to the Status of Refugees. By acceding to the Protocol, a State undertakes to apply the essential provisions of the 1951 Convention to refugees, as understood by the Convention, but without treating 1951 as a cut-off date. The Protocol is related to the Convention but is an independent instrument and may be joined by States not party to the 1951 Convention. (*Rules and procedure for determining refugee status. In accordance with the 1951 Convention relating to the Status of Refugees and its Additional Protocol of 1967.*, Office of the United Nations High Commissioner for Refugees, Geneva, January 1992, 2nd edition of the Polish version, Warszawa, November 2007, p. 10/11).

5 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96; and, to some extent, also Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60.

for subsidiary protection, and for the content of the protection granted (recast) is of key importance (hereinafter: QD(r))[6]. That Directive repealed and replaced Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted[7]. QD(r) uses several different concepts. According to the preamble to the Directive, its main objective is, first, that Member States apply common criteria for identifying persons genuinely in need of international protection and, secondly, that such persons have access to a minimum level of benefits in all Member States (Paragraph 12). These objectives are to be achieved through a common asylum policy including a Common European Asylum System (point 2). In turn, according to Article 2(a), 'international protection' means refugee status or subsidiary protection status as defined in points (e) and (g), i.e. 'refugee status[8]' and 'subsidiary protection status[9]'. This means that the concept of international protection includes refugees, persons with refugee status and persons with subsidiary protection status. The Directive thus equates the concept of international protection with the concepts of 'refugee status' and 'subsidiary protection status', which are forms of granting international protection. In turn, the concept of international protection (which consists of the concepts of 'refu-

6 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9.

7 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12.

8 Means the recognition by a Member State of a third-country national or a stateless person as a refugee.

9 Means the recognition by a Member State of a third-country national or a stateless person as eligible for subsidiary protection.

gee status' and 'subsidiary protection status') is equated with the concept of asylum and the European asylum system.

With regard to procedural issues related to granting and obtaining international protection, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter: PD(r)) is relevant[10]. That Directive repealed and replaced Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status for the Member States bound by it[11].

In Polish law, the regulations of the Constitution of the Republic of Poland[12] and the Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland[13] are of primary importance, followed further by the Act of 12 December 2013 on aliens[14]. Article 56(1) of the Constitution stipulates that aliens may enjoy the right of asylum in the Republic of Poland on the terms laid down in the act. Paragraph 2 provides for the possibility of granting refugee status to an alien seeking protection from persecution, which should take place in accordance with international agreements binding the Republic of Poland (RP). The provisions of the Constitution stipulate already that the concept of 'asylum' is generically different from the concepts of 'refugee' and 'refugee status'. In respect to the regulations of the Act on granting protection to aliens on the territory of the Republic of Poland, it should be pointed

10 On the other hand, as regards procedural issues related to granting and obtaining international protection, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60.

11 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13..

12 Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997 No. 78, item 483, as amended.

13 Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland, consolidated text Dz. U. 2022, item 1264 (hereinafter: 'The Law on granting protection').

14 Act of 12 December 2013 on aliens, Dz. U. 2013, item 1650, as amended.

out to the provisions of Article 3, which provides for four forms of granting protection to aliens[15]. Similar to the provisions of the Constitution, the concept of asylum and form of protection in the act is different from refugee status. In addition, it is worth noting the regulation of Article 2(13) of the Act, which defines the term 'application for international protection'[16]. In turn, the Act on Aliens, in regard to understanding the terms: asylum, temporary protection, subsidiary protection and refugee status, refers to the relevant regulations of the Act on granting protection to aliens on the territory of RP. In addition, the Act on Aliens provides for granting the protection by issuing a residence permit for humanitarian reasons and a permit for tolerated stay (Articles 348 – 359), as well as a permit to stay on the territory of the RP for aliens who are victims of human trafficking (Article 170 *ff.*), which should be classified as national protection[17].

The following conclusions can be drawn from the above provisions. First of all, under Polish law, asylum is a different form of granting protection to aliens. Secondly, the concept of 'international protection' refers only to 'refugee status' and 'subsidiary protection', and does not cover other forms of protection, including asylum.

2. Refugee status

According to the provisions of QD(r) regulations, a third-country national is granted refugee status if, as a result of a well-founded fear of persecution on account of his race, religion, nationality, political opinion or membership

15 By means of: 1) granting refugee status, 2) granting subsidiary protection, 3) granting asylum and (4) granting temporary protection.

16 According to this definition, such an application is an application for a protection by the Republic of Poland of an alien who applies for refugee status or subsidiary protection.

17 See, Ł. D. Dąbrowski, *Pozycja procesowa uchodźcy w postępowaniu administracyjnym i sądowoadministracyjnym - wybrane zagadnienia*, [in:] E. Karska (ed.), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, Warszawa 2020, pp. 205–223.

of a particular social group, he resides outside the country of his nationality and is unable or unwilling to avail himself or herself of the protection of that country for the same reasons, or a stateless person who, for the same reasons as above, is outside the country of his former place of usual residence, cannot or does not want to return to that state because of this fear and to which Article 12 QD(r) does not apply (exclusion)[18].

2.1. Acts and reasons for persecution

Under Article 9(1) of the QD(r), in order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must: (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a). At the same time, the directive indicates examples of the forms in which persecution may manifest itself. Pursuant to Article 9(1) of the QD(r), acts of persecution may take the form of, inter alia: (1) acts of physical or mental violence, including acts of sexual violence, (2) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner, (3) prosecution or punishment which is disproportionate or discriminatory, (4) denial of judicial redress resulting in a disproportionate or discriminatory punishment, 5) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within

18 Incidentally, it should be noted that the statutory conditions for obtaining refugee status contained in Polish Act on granting protection to Aliens, coincide with the conditions set out in the Geneva Convention and in the QD(r), which constitutes the implementation of the requirement to adapt national regulations to international obligations.

the scope of the grounds for exclusion as set out in Article 12(2) of QD(r), 6) acts of a gender-specific or child-specific nature. In addition, there must be a link between the reasons for persecution set out above and acts of persecution (based on race, religion, nationality, political opinion or social affiliation) or the absence of protection against such acts (Article 9 of the Directive).

It is accepted that fears of persecution are not justified by circumstances of a general nature, such as, for example, ongoing hostilities, an undemocratic political system or general insecurity in the country of origin. Such circumstances are often referred to collectively as 'general country of origin conditions'. According to a well-established view, this type of 'circumstances are the background against which the alien's fear grows, and in this sense the decisions in refugee cases often speak of the requirement to individualize the fear"[19]. In addition, the concept of 'persecution' must be read together with the concept of 'well-founded fear' referred to in the legislation. That concept combines a subjective and objective element[20], which means that refugee status is determined by the state of affection of the person concerned, which must be confirmed by an assessment of the objective situation in the procedure for determining the status[21]. At the same time, there is a fear of persecution, meaning that the person concerned has not yet had to suffer specific forms of persecution, but the risk of suffering such actions from the state is significant due to the characteristics of the person concerned and the situation prevailing in that country[22]. It follows from the above that the fear of persecution

19 D. Sowińska, *Geneza wprowadzenia przepisów regulujących formy ochrony cudzoziemców na terytorium RP*, 'Przegląd Bezpieczeństwa Wewnętrznego' 2012, No. 6 (4), pp. 25–26.

20 Judgment of the Provincial Administrative Court in Warsaw of 14 October 2009, file no. V SA/Wa 279/09, Lex No. 562843.

21 Judgment of the Provincial Administrative Court in Warsaw of 24 April 2008, file no. V SA/Wa 239/08, Lex No. 513890.

22 A. Górny, H. Grzymała-Moszczyńska, W. Klaus, S. Łodziński, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, Committee for Migration Research of the Polish Academy of Sciences 2017, p. 11.

should be individualised, that is, that it should concern a specific person. Thus, escape from hostilities, in the case of which the risk to life or health is anonymous and accidental (i.e.it may concern anyone staying in the war area) does not constitute a basis for granting refugee status[23]. This is because persons forced to leave their country of origin as a result of an armed conflict – international or internal – are not normally considered refugees within the meaning of the 1951 Convention or the 1967 New York Protocol. However, they receive protection under other international instruments, such as the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Additional Protocol to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts[24]. However, this does not alter the fact that the invasion of foreign forces and/or the occupation of all or part of a country may give rise to persecution for one or more of the reasons listed in the 1951 Convention. In these cases it is however necessary to demonstrate 'a justified fear of persecution' in the occupied territories. Notwithstanding the above, armed conflict is a circumstance that may determine the qualification for subsidiary protection under the recast Qualification Directive. According to Article 15(c) of the QD(r), 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. The UNHCR recommends that, when applying Article 15(c), the requirement of an 'individual' risk should not be interpreted by States in an excessively narrow manner, but rather as requiring that the risks to which an applicant is exposed are real, and not remote, in his individual circumstances.[25]

23 A. Gajewska, A. Górecka, A. Kacperska, J. Mączyńska, *Definicja uchodźcy. Wybór orzecznictwa międzynarodowego*, Kraków 2005, pp. 6–8.

24 Principles and Procedure for Determining Refugee Status in accordance with the 1951 Convention relating to the Status of Refugees and its Additional Protocol from 1967, Office of the United Nations High Commissioner for Refugees, Geneva, January 1992, Second edition of the Polish version, Warszawa, November 2007, p. 54.

25 UNHCR Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council he minimum Standards for the qualification and status

In this context, the mere fear of being drafted into the army, i.e. not in the case of military service during a conflict in violation of the principles of international law, is not a premise for granting refugee status, because a given country has the right to establish and enforce military service from its citizens. Thus, the need to perform military service is not a premise for granting refugee status[26]. Nor merely the fear of being called up for military service is such a condition.[27]

2.2. Race as a reason for persecution

Pursuant to Article 10(1)(a) of the QD(r), the concept of race covers, inter alia, aspects such as colour, descent, or membership of a particular ethnic group[28]. Legal regulations, indicating examples of the criteria, only determine the direction of searching for premises to be used when defining the term 'race'. Those provisions, m.in, use the phrase belonging to a 'particular ethnic group', meaning that that group must be regarded as distinct from the rest of the society of the country of origin[29]. Increasingly, the case-law takes the view that the concepts of ethnicity and race are related concepts, and discrimination based on ethnic origin is a form of racial discrimination[30]. It can therefore be argued that the concept of 'race'

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of third country nationals or stateless persons ace beneficiaries of International protection and the Content of the protection granted (COM(2009)551, 21 October 2009), p. 17, https://www.unhcr.org/4c5037f99.pdf [accessed on: 1.02.2023].

26 M. Kowalski, *Konflikt na Ukrainie a praktyka udzielania ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej*, [in:] D. Pudzianowska (ed.), *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, Warszawa 2016, pp. 96–115.

27 Judgment of the Provincial Administrative Court of Warsaw of 3 November 2004, file no. V SA/Wa 900/04.

28 Article 10(1)(a) of Directive 2011/95/EU (recast), Article 14(1)(1) of the Act on granting protection to aliens.

29 P. Dąbrowski, *Ocena powodów prześladowania*, [in:] J. Chlebny (ed.), *Prawo o cudzoziemcach. Komentarz*, Warszawa 2020.

30 ECtHR judgment of 22 December 2009 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, ECtHR, judgment of 13 December 2005

is a narrower concept than the concept of 'ethnic group'. This is indicated by the regulations of Polish and EU law, which use the concept of 'ethnic identity' as one of the criteria determining belonging to a given nationality when defining the concept of 'nationality'[31]. In addition, the case-law defines 'ethnic origin' as the concept according to which social groups are characterized, in particular, by a national, religious, linguistic community, a community of culture, traditions and living environment[32].

2.3. The concept of religion

Under Article 10(1)(b) of the QD(r), the concept of religion shall in particular include (a) the holding of theistic, non-theistic and atheistic beliefs, (b) the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, and (c) other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief[33].The prohibition, on pain of capital punishment or imprisonment, of engaging in acts contrary to the State religion of the applicant's country of origin may constitute an 'act of persecution', provided that such prohibition leads in practice to the imposition of such penalties by the authorities of that country[34]. Such penalties may include the sanctions for the public practice of religious rites if, because of these circumstances, the practitioner is exposed to a real danger of prosecution or inhuman and degrading treatment

in the case *Timishev v. Russia*, application No. 55762/00.

31 Article 10(1)(c) of Directive 2011/95/EU, Article 14(1)(3a) of the Act on granting protection to aliens.

32 Judgment of the CJEU of 16 July 2015, C-83/14, *CEZ Razpredelenie Bulgaria AD v. Komisija behind Zashtita lo Diskriminacija*, ECLI:EU:C:2015:480, Paragraph 46; judgment of the CJEU of 6 June 2017, C-668/15, *Jyske Finance A/S v. Ligebehandlingsnævnet*, ECLI:EU:C:2017:278, Paragraph 17.

33 Similarly, Article 14(1)(2) of the Act on granting protection to Aliens.

34 Judgment of the CJEU of 4 October 2018, C-56/17.

or punishment[35]. The threat of religious persecution may result not only from participation in certain religious activities, but also from refraining from them, which results from having atheistic beliefs.

A military service and proselytism may be an issue of contention. In the first case, in special circumstances, a person forced to perform military service against his religious beliefs may be considered to be subject to persecution. In particular, if the punishment for refusal of military service is combined with the inability to perform alternative military service[36]. However, in every case where the punishment for refusal to perform military service may be regarded as an infringement of freedom of religion, it must then be assessed how severe is the punishment and whether, therefore, the nature of a serious breach can be attributed to that violation[37].

Proselytism, on the other hand, is the duty of followers of a given religion to make every effort in the name of spreading and strengthening their beliefs, which may manifest themselves in smaller or stronger interference with the rights of others. The right to religious freedom includes 'teaching' as a recognized form of manifestation of faith. The right to try to convince others of the validity of one's beliefs is explicitly included in the right to religious freedom. However, this right is not absolute and may be limited in cases where it can be demonstrated to be based on grounds of public policy or the protection of persons[38]. The case-law distinguishes between 'proper' and 'improper' proselytism[39], which involves excessive influence or even the use of force (brainwashing, violen-

35 Judgment of 5 September 2012, C-71/11 and C-99/11, *Bundesrepublik Germany v. Y and Z*, ECLI:EU:C:2012:518

36 ECtHR judgment in the case of *Bayatyan v. Armenia*, application no. 23459/03.

37 P. Dąbrowski, o*p. cit.*

38 Ł. D. Dąbrowski, *Migrants' right to religious freedom as a reason for cultural changes in European host countries*, [in:] M. Sitek, S. Studniczeńko (eds.), *The rights of migrants between the needs and capabilities of the state and the international community*, Jozefów 2016, p. 111.

39 J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, Strasbourg 2012, p. 47.

ce and even terrorist acts). In such situations, interference with religious rights appears justified, although it entails the obligation to demonstrate that the interference with those rights was necessary.[40]

2.4. The concept of nationality

Pursuant to Article 10(1)(c) of the QD(r), the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State[41]. Due to the way of defining and referring to such premises as 'ethnic identity' or 'common geographical origins', it means that the ranges of the terms 'race' and 'nationality' may overlap (they have many common elements). One must agree with the view that nationality is determined on the basis of a broader set of characteristics than race. The criteria of racial affiliation are immutable, independent of human choices. The criteria of nationality will, in principle, also be of this nature, except in the circumstances set out in point (c) above. On the other hand, 'when determining nationality, the actual state of affairs should be reconstructed to a greater extent, the connection between the individual and the nation determined on the basis of all the characteristics and circumstances concerning him[42]', as in the case of the regulations of the Act of 7 September 2007 on the Card of the Pole[43]. The presence

40 See, ECtHR judgment of 25 May 1993 in the case of *Kokkinakis v. Greece*, Application no. 14307/88, ECtHR judgment of 24 February 1998 in the case of *Larissis and others v. Greece*, Application nos. 23372/94, 26377/94 and 26378/94.

41 Similarly. Article 14(1)(3) of the Act on granting protection to Aliens.

42 Cf. P. Dąbrowski, o*p. cit.*

43 Dz. U. of 2018, items 1272 and 1669, as amended. Pursuant to Article 1, points (1) and (3), the Pole's Card may be granted to a person who declares belonging to the Polish Nation and meets all of the following conditions: demonstrates his/her relationship with Polishness through at least a basic knowledge of Polish language, which he/she considers to be his/her mother tongue, as well as knowledge and cultivation of Polish traditions and customs; proves

of certain innate traits will speak in favour of a qualification to the concept of race rather than nationality.

2.5. The concept of political opinion

Pursuant to Article 10(1)(e) of the QD(r), the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the person applying for a refugee status[44].

The literature points out the erroneous reference in the wording of the provision of the Polish Act to the concept of 'having thoughts' instead of 'having ideas', as in the Polish translation of the directive[45]. However, the concerns expressed about the literal understanding of the term 'possession of thoughts', leading to 'the conclusion that it refers to thought processes whose declaration is sufficient to conclude that a party holds a particular political belief', does not seem justified. Firstly, the terms 'thought' and 'idea' are synonymous[46], and secondly, legal texts are subject to appropriate legal interpretation. Under a literal interpretation, the words used in the text are understood by assigning to them a generally accepted meaning, but not in isolation from the whole of the analysed regulation, and in the analysed case the division of the individual components of the phrase 'having opinions, thoughts or beliefs' is neither

that he is of Polish nationality or at least one of his parents or grandparents or two great-grandparents were of Polish nationality, or presents a certificate of Polish or Polish diaspora organization confirming active involvement in activities for the benefit of the Polish language and culture or Polish national minority for the period of at least the last three years.'

44 The provisions of Article 14(1)(4) of the Act on granting protection to aliens use the concept of 'political beliefs'.

45 P. Dąbrowski, *op. cit.*

46 Dictionary of foreign words. W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem*, Łodź 2021

possible nor expedient. It is only for reasons of systemic consistency that terminological unification of legal tests in Polish should be postulated.

Views related to social or economic phenomena (e.g. globalization, ecology or COVID-19 vaccination, etc.) will not meet the criterion of political beliefs. They will become political views when they are the basis for criticism of the actions of state institutions and those in power. In addition, critical political views should entail persecution. In 2020, the founder and board member of the Polish Centre for Monitoring Racist and Xenophobic Behaviour was granted political asylum in Norway. In Poland, he was accused of economic crimes. The applicant claimed that the prosecutor's office was taking action on a political order, and the financial problems themselves were related to the withdrawal of the grant previously awarded. The Norwegian authorities resolved that the lack of possibility to conduct a fair and fair trial, due to the failure of the Polish government to maintain the separation of powers and the politicization of the courts, the lack of reaction to the activities of far-right and fascist militias and organizations that use violence against political opponents with impunity, as well as real and documented persecution against the applicant by members of the Polish government and law enforcement agencies, which are reflected in the four actions adopted by the European Court of Human Rights[47], justify granting the protection to the applicant. In the context of the last reason, it should be pointed out that bringing an action before the European Court of Human Rights against one's own country may be treated as a reason for persecution on the basis of 'political opinions'. However, this is reliant on a well-founded fear that the filed complaint would be perceived by the authorities of the country concerned

47 R. Zieliński, *W Polsce walczył z rasizmem i został skazany za oszustwo. W Norwegii dosta azyl polityczny*, tvn24.pl, 8.10. 2020, https://tvn24.pl/polska/rafal-gawel-otrzymal-azyl-polityczny-w-norwegii-4715004 [accessed on: 1.02.2023].

as an act constituting opposition activity, against which they could consider resorting to repression[48].

It is not required to express one's political views publicly, it is sufficient that 'their strength and importance justify the supposition that sooner or later they would be expressed and their holder would come into conflict with the authorities'[49]. On the other hand, circumstances constituting political activity through public involvement in social, civic or party activities such as participation in demonstrations, publication or commentary activities may increase the threat and thus justify the likelihood of persecution.

Persecution on political and religious grounds is one of the most frequently cited reasons for seeking international protection.[50]

2.6. The concept of a particular social group

Under Article 10(1)(d) of the QD(r), a group is considered to be a particular social group if, in particular: (a) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and (b) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. A group is considered to be a particular social group, in particular if it has a distinct identity in the country of origin by perceiving it as distinct from the surrounding society and its members share innate characteristics that cannot be changed or a common background, or share common characteristics or be-

48 CJEU judgment of 4 October 2018 C-652/16, the case of *Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v. Zamestnik-predsedatel on Darzhavna agentsia behind bezhantsite*, ECLI:EU:C:2018:801, Paragraph 90.

49 P. Dąbrowski, *op. cit.*

50 R. Rafalik, *Cudzoziemcy ubiegający się o nadanie statusu uchodźcy w Polsce – teoria a rzeczywistość (praktyka) (legal status as at 31 December 2011)*, 'CMR Working Papers' 2012, No. 55 (113), p. 20.

liefs of such importance to their identity or consciousness that a member of the group cannot be forced to change them.[51]

The concept of 'particular social group' is a vague and at the same time capacious concept. Persecution should concern an existing and specific social group, which at the same time should be a separate group from the rest of society. Social groups are characterized in particular by a national, religious, linguistic community, a community of culture, traditions and living environment[52]. It is assumed that the size of the group has no legal significance, and the members of the group do not have to know each other, let alone remain in some kind of relationship with each other, in addition, not all members of the group have to be equally threatened, and some do not have to be at risk at all[53].

The definition of refugee laid down in the 1951 Geneva Convention defines a refugee as a person who, due to 'the fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Gender is not explicitly mentioned as a reason for persecution. Some academics argue that the Geneva Convention regulations should be supplemented with categories such as gender, sexual orientation or age[54]. Without attempting to address these claims, it should be noted that in 1984 the European Parliament adopted a resolution in which it stated that women who have suffered cruel or inhuman treatment because of alleged transgression of social customs should be considered members of a specific social group

51 Article 14(1)(5) of the Law on granting protection to aliens.

52 Judgment of the CJEU of 16 July 2015, C-83/14, *CEZ Razpredelenie Bulgaria AD v. Komisija behind Zashtita lo Diskriminacija*, ECLI:EU:C:2015:480, Paragraph 46; judgment of the CJEU of 6 April 2017, C-668/15, *Jyske Finance A/S v. Ligebehandlingsnævnet*, ECLI:EU:C:2017:278, Paragraph 17.

53 UNHCR Guidelines no. 1, Paragraph 18, UNHCR Guidelines no. 2, Paragraph 15.

54 E. Feller, *Refugee protection in International Law: UNHCR's Global Consultations on international protection*, Cambridge 2003, p. 20.

for the purposes of refugee procedures[55]. This position was confirmed in 1985 by the UNHCR Executive Committee, thus the cases of gender-based persecution fall within the category of a social group.[56] The provisions of QD(r) explicitly state that gender should be taken into account within the concept of 'a specific social group'. The preamble to the Directive states that 'issues arising from an applicant's gender (...) should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution' (Recital 30 of QD(r)). The second Subparagraph of Article 10(1)(d) of QD(r) states: 'Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.' For this reason, in some cases, women seeking refuge from domestic violence should receive the protection[57]. In addition, the concept of social group includes people who have had to leave their country of origin due to persecution because of their sexual orientation, meaning primarily homosexuality.

A view is expressed in the literature according to which, Polish legislator when defining the concept of 'social group' used the erroneous phrase 'awareness' as a consequence of an error in the translation of QD(r), because, as noted, it is difficult to find meaning in the use of the word 'awareness'. Instead, as in the current Polish version of QD(r), the word

55 European Parliament resolution of 13.10.1984, *On the Application of the Geneva Convention Relating to the status of refugees*, OJ C 127, 14.5.1984, p. 137.

56 M. de Silva, *Problemy prawne w dochodzeniu statusu uchodźcy przez ofiary przemocy domowej*, 'Internetowy Przegląd Prawniczy' 2018, No. 3, p. 106.

57 A. Górny, H. Grzymała-Moszczyńska, W. Klaus, S. Łodziński, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, Committee for Migration Research of the Polish Academy of Sciences 2017, pp. 10–11.

'conscience' should be used[58]. According to Article 10(d) of the Directive *in fine*, 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group'. The Act on Granting Protection to Aliens does not contain such a regulation. Since sexual orientation (heterosexuality, homosexuality and bisexuality) is something separate from gender identification (e.g. transsexualism[59]), the use by the Polish legislator of the term 'awareness', even if not intentionally, better reflects the situation of transgender people and the state of their 'awareness' rather than 'conscience', which may make this provision applicable not only with a limit to sexual orientation (morphological sex) but also gender identification (mental gender)[60].

58 P. Dąbrowski, *op. cit.*

59 E. S. Smith, J. J. Junger, B. Derntla, U. Habel, *The transsexual brain – A review of findings on the neural basis of transsexualism*, 'Neuroscience & Biobehavioral Reviews' 2015, No. 59, pp. 251–266.

60 In this context, it is worth noting the judgment of the Provincial Administrative Court (PAC) in Warsaw of 7 March 2017, in which it was held that determining whether certain means of discrimination against transsexual people may be treated exceptionally as tantamount to persecution depends on the assessment of the whole circumstance. Discrimination, lack of tolerance for transsexual people can be classified as persecution in a given society only in exceptional circumstances, because a certain diversity of behaviour towards the individual is a natural thing in every society. In concerns particularly situations where discriminatory measures lead to genuinely harmful consequences, namely serious restrictions on the right to earn a living, the right to religious practice or the right to education (the judgment of the PAC in Warsaw of 7 March 2017, file no. IV SA/Wa 2813/16). On the other hand, in the judgments of the Supreme Administrative Court of 19 April 2018, it was found that restrictions on the possibility of marrying or the lack of gender change on school diplomas does not indicate that due to such restrictions the applicant's right to life, liberty and personal security is endangered and that this will lead to him being subjected to torture or inhuman or degrading treatment or punishment, will force him to work, deprive him of the right to a fair trial or will be punished without legal basis (Judgment of the Supreme Administrative Court of 19 April 2018, file no. II OSK 2498/17).

2.7. Well-founded fear of persecution

A 'well-founded fear of persecution' is one of the premises of obtaining refugee status. The well-founded fear of persecution may also exist in the country of origin if the alien does not possess characteristics giving rise to persecution on account of his race, religion, nationality, political opinion or membership of a particular social group, if such characteristics are attributed to him by the actors of persecution (Article 10(2) of QD (r))[61]. Thus, the lack of political activity carried out by an alien applying for refugee status does not mean that his activity is not perceived by the authorities as political. It is sufficient to attribute to a person the possession of a certain political viewpoint[62].

In addition, an alien may refer to a well-founded fear of persecution or a real risk of suffering serious harm caused by events that occurred after leaving the country of origin. In such a case, a well-founded fear of being persecuted or a real risk of suffering serious harm may be caused by the alien's actions after leaving the country of origin, in particular where they were the expression and continuation of beliefs or sexual orientation held in the country of origin[63]. This is the so-called *sur place protection*, which has also been approved in the ECtHR case-law[64]. This applies to two types of situations. In the first one, events causing a change in the situation in a given country, e.g. the deterioration of the situation of Belarusian oppositionists (intensification of repression against them) after the elec-

61 Similarly, Article 14(3) of the Law on granting protection to aliens.

62 Judgment of the Provincial Administrative Court in Warsaw of 6 November 2006, file no. V SA/Wa 971/06.

63 Article 5(1) and (2) of Directive 2011/95/EU, Article 17 of the Law on granting protection to aliens.

64 ECtHR judgment of 15 May 2012 in the case of *S.F. et al. v. Sweden*, Application No. 52077/10, ECtHR judgment 23 March 2016 in the case of *F.G. v. Sweden*, Application No. 43611/11, ECtHR judgment of 7 January 2014 in the case of *A.A. v. Switzerland*, application no. 58802/12., judgment of the ECtHR in the case of *N. v. Finland*, application No. 38885/02.

tions[65] or the political activity of an alien manifested inter alia in organising demonstrations of Belarusian opposition[66]. This may also apply to people who leave their country for reasons unrelated to refugees but may develop a well-founded fear of persecution in their own country after leaving. For example, an economic migrant may become *a refugee sur place* when there is an armed conflict or violent regime change in the person's country of origin, or when the government or other actors in that country begin to violate human rights in the community that the migrant is a member of[67]. The second case concerns actions taken by an alien. The situation of the alien will differ depending on whether such actions were taken by the alien in order to deliberately create circumstances causing persecution or not (e.g. religious conversion, sudden manifestation of sexual orientation or gender identity). In such a situation, the assessment should be made on a case-by-case basis and should determine whether the alien's actions are ostensibly created or constitute a real circumstance justifying the granting of the protection. In the case of deliberate creation of such circumstances, the alien may be refused refugee status if subsequent application for international protection is lodged by such alien[68]. This indicates that, in the case of the first application, protection may be granted even though the possible threat was deliberately created by the alien, and that while the granting of refugee status may be refused, this does not preclude the granting of other types of protection, e.g. subsidiary protection. The judgment of the Court of Justice of the European Union of 23 May 2019 is to some extent related to that statement, according to which a Member State should withdraw subsidiary protection status when the state concerned granted that status – although

65 Judgment of the Provincial Administrative Court in Warsaw of 6 November 2006, file no. V SA/Wa 971/06, Legalis.

66 Judgment of the Provincial Administrative Court in Warsaw of 19 August 2010, file no. V SA/Wa 243/10, Legalis.

67 UNHCR Refugee Protection and International Migration, p. 5, https://www.unhcr.org/4a24efoca2.pdf [accessed on: 1.02.2023].

68 Article 19 section 3 of the Act on granting protection to aliens.

the conditions for granting it were not met – on the basis of factual findings which subsequently proved to be incorrect, even though the person concerned cannot be accused of misleading that Member State on that occasion[69].

2.8. Actors of persecution

When defining entities committing persecution or causing serious harm, the Act on granting protection to aliens does not copy the provisions of the Directive. The directive designating these entities in the first point mentions the state, while the Act specifies the public authorities of the country of origin, in the second point the directive indicates parties or organizations controlling the state or a significant part of its territory, while the Act replaces the term 'party' with the term 'groupings'. In the last point, the directive refers to non-state actors when public authorities, including international organisations, cannot or do not want to provide protection against persecution or the risk of suffering serious harm. The Act, in turn, uses the term 'other entities'[70]. However, this does not affect the substantive scope of the statutory provisions. What constitutes a public authority is determined by systemic regulations, which at the same time define the scope of state authority of individual organs. As indicated in the literature on the subject, several conditions must be met jointly in the case of 'another entity': 1) the entity must be non-public, 2) the state or controlling organizations cannot or do not want to provide protection against persecution or serious harm, 3) protection should be effective and durable[71], 4) the applicant has access to such pro-

69 TSEU judgment of 23 May 2019, C-720/17.

70 Article 16 of the Act on granting protection to aliens, Articles 6 and 7 of Directive 2011/95/EU.

71 In accordance with Article 16(2) of the Act on granting protection to aliens 'Protection against persecution or the risk of suffering serious harm shall be deemed to be provided when it is provided in an effective and sustainable manner, and in particular where the actors responsible, including international organisations, are willing and able to prevent persecution or serious harm, in particular by ensuring an effective legal system for the identification, prevention, detection and prosecution of acts constituting persecution or serious harm acts,

tection[72]. By way of example, it can be pointed out that 'non-state actors, committing persecution or acts constituting serious harm, are sometimes considered family members enforcing certain norms of behaviour on women (e.g. resulting from religion), using physical or psychological violence for this purpose in a situation where a woman in her country of origin cannot count on any protection'[73].

3. Subsidiary protection

An alien who does not qualify for refugee status shall be granted subsidiary protection where returning to his or her country of origin is likely to expose him or her to a real risk of suffering serious harm. According to art. 15 of QD(r), serious harm includes: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

In accordance with Article 8 of the QD(r) (Granting subsidiary protection status), Member States shall grant subsidiary protection status to a third country national or stateless person who is eligible for subsidiary protection in accordance with Chapter II (assessment of applications for international protection) and Chapter V (eligibility for subsidiary protection). By contrast, according to Recital 33(2): 'Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention'. Thus, in the first place, it is necessary to analyse whether or not the premises for obtaining refugee status have

and when they ensure that persons who are persecuted or who suffer serious harm have access to such protection.'

72 P. Dąbrowski, *op. cit.*

73 *Ibidem.*

been fulfilled, and if it is not possible to grant such protection, it is necessary to analyse the premises constituting subsidiary protection.

The concept of 'serious harm' should be linked to one of the lists contained in the provisions of Article 15 of QD (r), which means that additional circumstances not mentioned above do not constitute serious harm and, conversely, the occurrence of any of the circumstances indicated indicates the occurrence of serious harm. For example, the fact that an alien is likely to have nowhere to live or meet anyone to help him upon his return to his country of origin does not justify subsidiary protection.[74]

In the first case, the difference between the imposition of the death penalty and carrying out the execution concerns the difference between the imposition of a death penalty and the actual carrying out or the risk of carrying out thereof.

As regards the second case, in the literature on the subject and case-law, the concept of 'torture' is associated with the occurrence of three elements together: intensity - the occurrence of very serious and cruel suffering, premeditation - intentional action, and purposefulness - the use of torture to force a specific behaviour[75]. Similarly, in the case of inhumane treatment, intent is also required[76]. Degrading treatment, on the other hand, does not have to be intentional[77]. However, in the above cases, a certain minimum threshold of distress[78] must be exceeded, which is determined individually in relation to a specific person in a specific factual situation[79]. The case-law

74 PAC in Warsaw, judgment of 27 October 2011, file no. V SA/Wa 824/11.

75 *L. Garlicki,* in: *Garlicki*, Konwencja, Vol. I, Article 3, NB 15–16, Legalis.

76 A. Szklanna, *Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka*, Warszawa 2010, p. 305.

77 ECtHR judgment of 26 October 2000 in the case of *Kudla v. Poland*, application no. 30210/96.

78 ECtHR judgment of 28 February 2008 in the case of *Saadi v. Italy*, application no. 37201/06, Paragraph 135.

79 For example, the judgment of the ECtHR of 11 July 2006 in the case of *Jalloh v. Germany*, application no. 54810/00, Paragraph 67; ECtHR, judgment of 11 January 2007, *Salah Sheekh v. Netherlands*, Application no. 1948/04, Paragraph 137; ECtHR, 28 February 2008, *Saadi v. Italy*, application no. 37201/06, Paragraph 134.

of the ECtHR provides numerous examples of the classification of certain treatment as torture, including: in connection with the manner of forcing confessions (e.g. beating on the soles of the feet, rape, constant personal searches of prisoners, combined with severe violence and humiliation, as well as severe beatings during detention or interrogation[80], as well as examples of the qualification of specific treatment as inhuman, e.g. detention in prison of a person sentenced to serious mental illness[81], imprisoning a person seriously ill with cancer[82], detaining an arrested person who is a drug addict without proper medical care[83].

With regard to the third case, it is assumed that the actions do not have to be taken intentionally and be aimed at a specific alien or group to which he belongs. Thus, these may be actions that threaten an unspecified group of people, such as continuous shelling, explosions or the use of chemical or biological weapons[84]. Although it is required to 'individualize the threat to a specific person, at the same time it is to occur in connection with the widespread use of violence or armed conflict, which means allowing the anonymization of potential victims who will not be attacked in connection with their individual characteristics, but in connection with, for example, staying in a certain area'[85]. An additional issue concerns the concept of 'armed conflict', which in case-law is given an autonomous

80 ECtHR judgment of 27 June 2000 in the case of *Ilhan v. Turkey*, application no. 22277/93, Paragraphs 86–87; ECtHR judgment of 3 June 2004 in the case of *Bati et al. v. Turkey*, applications and nos. 33097/96 and 57834/00, Paragraphs 122 to 123; ECtHR judgment of 9 March 2006 in the case of *Menesheva v. Russia*, application no. 59261/00, Paragraphs 61–62.

81 ECtHR judgment of 11 July 2006 in the case of *Riviere v. France*, application no. 33834/03.

82 ECtHR judgment of 14 November 2002 in the case of *Mouisel v. France*, application no. 67263/01.

83 ECtHR judgment of 29 April 2003 in the case of *McGlinchey et al. v. of Great Britain*, application no. 50390/99.

84 Judgment of 17 February 2009, C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*.

85 A. Górny, H. Grzymała-Moszczyńska, W. Klaus, S. Łodziński, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, Committee for Migration Research of the Polish Academy of Sciences 2017, p. 11.

meaning[86] or by reference to the definition functioning in international criminal law[87]. While the armed aggression of the Russian Federation against Ukraine in February 2014 in the form of a hybrid war, including above all the military intervention in Crimea and its annexation, the war in Donbas and the incident in the Kerch Strait, in the face of many views, due to the military operations taking place on part of the territory of Ukraine, did not justify granting international protection, following the Russian armed attack on February 24, 2022, no one should doubt the possibility of granting international protection.

In the case of the first two conditions for granting subsidiary protection, the alien should be granted refugee status, meaning that the subsidiary protection will not apply to such cases at all, unless the alien is not threatened because of his race, religion, nationality, membership in a specific social group or political opinions. Subsidiary protection is not limited by the risk of suffering serious harm as a result of a characteristic which the person concerned[88] possesses or is attributed to him.

4. Procedural issues

The Procedural Directive (recast) (PD(r) establishes common procedures for granting and withdrawing international protection (protection status and protection granted to non-refugees who otherwise would face serious harm if returned to their country of origin). The aim of the PD(r) is to introduce more effective and faster procedures for international protection. In addition, they are to be more transparent for applicants and, most importantly, in line with EU-wide standards on procedures for granting and withdrawing international protection. The Directive ap-

86 Judgment of 30 January 2014, C-285/12, *Aboubacar Diakite v. Commissaire général aux réfugiés et aux apatrides*.

87 Judgment of Provincial Administrative Court in Warsaw of 27 October 2014, file no. IV SA/Wa 1303/14.

88 A. Górny, H. Grzymała-Moszczyńska, W. Klaus, S. Łodziński, *Op. Cit*., p. 11.

plies to all applications for international protection lodged in EU Member States, including at the border, in territorial waters or in transit zones.

Pursuant to Article 34(1) of the PD(r), before deciding on the admissibility of an application for international protection, EU Member States should allow applicants to present their position with regard to the application in their particular situation of the premises referred to in Article 33 of PD(r). To that end, Member States shall conduct a personal interview on the admissibility of the application[89]. However, in accordance with Article 33 of the PD(r), apart from cases where an application is not examined in accordance with Regulation (EU) no. 604/2013[90], Member States are not required to assess whether an applicant qualifies for international protection in accordance with the PD(r) when the application is considered inadmissible. Conversely, under Article 33(2) of the PD(r), Member States may consider an application for international protection inadmissible only if: (1) another Member State has granted international protection; (2) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35 of PD(r); (3) country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; (4) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or (5) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her

89 Member States may make an exception only in accordance with Article 42 in the event of a subsequent request.

90 Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.6.2013, p. 31.

behalf, and there are no facts relating to the dependant's situation which justify a separate application.

The procedure for examining an application defined in the PD(r) envisages that applicants shall be given the opportunity to appear at a personal interview before the relevant authority takes a decision, at which they should be given the opportunity to fully present the reasons for their application. The person conducting the interview must be competent to take into account the personal and general circumstances surrounding the application. At the same time, the confidentiality of information regarding individual applications should be ensured. According to the PD(r), EU Member States must ensure that applicants' applications are dealt with individually, objectively and impartially, 2) that they are informed of the progress of the procedure, their rights and the decision taken, in a language they understand, if necessary, they must be able to use an interpreter to present their case, 3) have the right to use, at their own expense, the services of a legal adviser, 4) have the right to an effective appeal before a court or tribunal, which involves the provision of free legal assistance. As a rule, the initial application phase (excluding appeals) must be completed within six months. In precisely defined circumstances, when the application is likely to be unfounded or where there are serious national security or public order concerns, special procedures may apply, including speeding up procedures or processing applications at the border.

In addition, the PD(r) provides for certain guarantees for people with specific procedural needs, e.g. due to age, disability, illness, sexual orientation, trauma or other reasons. Such persons shall be given adequate support, including sufficient time, to facilitate their application submission process. Unaccompanied children, on the other hand, are subject to specific requirements, including the obligation to appoint an authorised representative. The application of the Directive aims to protect the best interests of all children.

The PD(r) introduced a new procedure in the event of a repeated application by the same person. People who are not in need of protection can no longer avoid deportation to their country of origin by constantly submitting new applications[91].

In addition, EU Member States cannot detain any person solely on the basis that he or she is seeking asylum. If the applicant is detained, EU rules in line with Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)[92], which repealed Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[93], shall apply. This Directive regulates the living (or reception) conditions of applicants for international protection (asylum seekers or persons applying for subsidiary protection) awaiting examination of their applications. It aims to guarantee standards for the reception of asylum seekers in the EU, sufficient to ensure their dignified standard of living and respect for human rights, thus preventing people from moving to other countries due to differences in living conditions[94].

91 Urząd Publikacji Unii Europejskiej, *Procedury azylowe Unii Europejskiej*, Baza aktów prawnych Unii Europejskiej, 25.05.2020, Https://eur-lex.europa.eu/legal-content/pl/LSU/?uri=CELEX:32013L0032 [accessed on: 1.02.2023].

92 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96.

93 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18.

94 Urząd Publikacji Unii Europejskiej, *Warunki życia osób ubiegających się o azyl – przepisy UE*, Baza aktów prawnych Unii Europejskiej, 25.05.2020 Https://eur-lex.europa.eu/legal-content/PL/LSU/?uri=celex:32013L0033#keyterm_E0001 [accessed on: 1.02.2023].

5. Protection from refoulment

The principle of non-refoulement is often referred to as a cornerstone or central element of the international refugee protection system.[95] Article 21 of the QD(r) contains the principle of non-refoulement and, like the Geneva Convention, also provides for exceptions to this principle. The Directive lays down two conditions under which Member States may return a refugee, regardless of whether his status has been formally recognised or not. Firstly, the occurrence of situations set out in the Directive, i.e. if the refugee constitutes a danger to the security of the Member State where he or she is present, or he or she, having being convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State. Secondly, if refoulment is not prohibited by the international obligations incumbent on the Member States. In respect of such an alien, Member States may revoke, end or refuse to renew or to grant the residence permit. If the circumstances set out in the first condition occur, Member States may also revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body (Article 14(4)). Although the conditions for revoking the status and for refoulement are worded in the same way, these are two different consequences of classifying a refugee as a threat to State security. Revoking the status it is not synonymous with refoulment of a refugee.

An alien with refugee status or beneficiary of subsidiary protection shall not be obliged to leave the territory of the country or be expelled without being deprived of that status or protection. This limitation shall not apply in the circumstances set out in Article 32(1) (expulsion) or Article 33(2) (prohibition of expulsion and return) of the Geneva Convention (GC). Pursuant to Article 32, a refugee may be expelled on grounds of national security or public order, but expulsion is possible only on the basis

95 T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge 2013, p. 44.

of a competent decision. Article 33, on the other hand, sets out the principle of non-refoulement, which is excluded in same cases as those set out in the Directive, i.e. when a refugee justifiably constitutes a threat to the security of the country in which he or she is staying or has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of that country.

Since, in accordance with Article 32 of the GC, there is a possibility of expelling a refugee on grounds of national security or public order, and pursuant to Article 21 of the QD(r), Member States may return a refugee if there are reasonable grounds for considering the refugee concerned to be a threat to the security of the Member State in which he or she is staying or the refugee has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of that Member State – It is important to properly understand the concepts of 'national security', 'public order' and 'important/serious reason'. To some extent, the explanation of these concepts can be found in the case-law of the Court of Justice of the European Union. The judgment of 24 June 2015, case C-373/13[96], concerned the scope of Article 21 of Council Directive 2004/83/EC of 29 April 2004[97] as regards the derogation from protection against expulsion and the possibility of withdrawing a residence permit issued to a refugee on the basis of Article 24 of that directive[98]. According to the Court, the concept of 'compelling reasons' has a broader scope than the concept of 'serious reasons'. However, special circumstances which do not show a degree of seriousness and do not allow an expulsion decision

96 Judgment of the Court (First Chamber) of 24 June 2015, *H.T. v. Land Baden-Württemberg*, Case C-373/13.

97 No longer in force Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12.

98 *CJEU - C-373/13, H. T. v Land Baden-Württemberg*, European Database of Asylum Law, Https://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%9137313-h-t-v-land-baden-w%C3%B-CrttemBerg [accessed on: 1.02.2023].

to be taken may allow a residence permit to be refused to the refugee concerned. Therefore, grounds which allow only the withdrawal of a residence permit do not require the existence of a particularly serious crime. The consequences are less drastic for refugees, as this measure must not lead to revoking the refugee status and expulsion. The judgment of 23 November 2010 in case C-145/09[99] concerned the interpretation of Articles 16(4) and 28(3)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC[100]. In its judgment, the Court clarified that the concept of public security covers both the internal and external security of States. As a consequence, public security may be affected by a threat to the functioning of institutions and essential public services and the survival of the population, as well as by the risk of serious disruption to foreign relations or peaceful coexistence of nations, or by a threat to military interests. In addition, the Court held that 'overriding reasons of public security' presuppose not only the existence of a threat to public security, but also that such a threat has a particularly high degree of seriousness, which is reflected in the use of the words 'overriding reasons'. In its judgment of 4 October 2012 in case C-249/11[101], the Court held that the concept of public policy presupposes, in any event, the existence, in addition to the disturbance of the public order entailed by any breach of the law, of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

99 Judgment of the Court (Grand Chamber) of 23 November 2010, *Land Baden-Württemberg v. Panagiotis Tsakouridis,* Case C-145/09.

100 OJ L 158, p. 77, and corrigenda OJ L 229, p. 35. OJ 2005, L 197, p. 34.

101 Judgment of the Court (Second Chamber), 4 October 2012, *Christo Bjankow v. Glawen sekretar na Ministerstwoto na watresznite raboti,* Case C249/11.

At the same time, the above rulings contain guidelines on what elements should be taken into account in the process of assessing the activities of aliens. These factors include, inter alia: the nature and degree of threat to national security or public order of the offence committed, the degree of involvement in criminal activity, possible penalties and penalties imposed, the period of time elapsed since the offence was committed and the behaviour of the person concerned during that period, the risk of reoffending, as well as whether the refugee himself has committed terrorist acts or other serious acts and to what extent he or she has participated in the planning, making decisions or directing others to commit such acts, and whether and to what extent it has financed such acts[102]. In some cases, it may be difficult to define what constitutes a 'serious' crime for exemption purposes. Nevertheless, it must be a very serious punishable offence. Minor crimes punishable by moderate punishment are not grounds for restrictions on refugees, even if they are technically referred to as 'offences' in the criminal law of the country concerned[103]. At the same time, the Court ruled that terrorist activities and drug trafficking within an organised group could be regarded as 'serious considerations in terms of public policy or public security'. However, even in such a situation, automatic action is not possible, and the competent authorities must examine, on a case-by-case basis, whether the specific actions of the refugee are likely to threaten national security or public order. The assessment must be based solely on the individual behaviour of the person concerned. Moreover, even if these conditions are met, the expulsion of the refugee is a last resort and the country concerned may consider less stringent sanctions.

In the judgment of the CJEU of 14 May 2019, in joined cases C391/16, C77/17 and C78/17[104], the Court stated that the term 'refugee' contained

102 L. D. Dąbrowski, *Op. Cit.* pp. 169 – 183.

103 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee, Geneva, January 1992, points 155.

104 Judgment of the Court (Grand Chamber) of 14 May 2019, *M v. Ministerstvo vnitra and X and X v. Commissaire général aux réfugiés Et aux apatrides*, C391/16, C77/17 and C78/17, Paragraphs 84–110.

in the directive repeats the definition given in the Geneva Convention regulations, and the directive specifies in detail the substantive conditions that an alien must meet in order to be considered a refugee within the meaning of the directive. According to Article 13 of the Directive (Granting of Refugee Status), Member States grant refugee status to a third country national or stateless person who qualifies for refugee status in accordance with Chapters II and III, without any discretion in doing so. Formal recognition as a refugee, consisting in the granting of refugee status, makes him a beneficiary of international protection and that he has all the rights and benefits provided for in the Directive, which contains both rights equivalent to those laid down in the Geneva Convention and rights ensuring a higher level of protection which have no equivalent in that Convention, such as a residence permit (Article 24(1)), access to qualifications recognition procedures (Article 28) and access to integration facilities (Article 34). According to the Court, Article 21(2) of the Directive (possibility to refoule a refugee) must be interpreted and applied in compliance with the rights guaranteed by the Charter of Fundamental Rights, in particular Articles 4 and 19(2) thereof, which prohibit in an absolute manner torture and inhuman and degrading treatment or punishment irrespective of the conduct of the person concerned, as well as expulsion to the State, in which there is a serious risk that the person concerned may be subjected to such treatment. Consequently, Member States may not remove, expel or extradite an alien if there are serious and well-established grounds for considering that, in the State of destination, he will be exposed to a real risk of treatment contrary to those rules. Thus, if the return of a refugee entails a risk of infringing the abovementioned fundamental rights, the Member State concerned cannot derogate from the principle of *non-refoulement* under Article 33(2) of the Geneva Convention. Where a Member State decides not to grant or withdraw refugee status, the alien concerned will be deprived of formal recognition as a refugee and deprived of the rights and benefits set out in the Directive, as these are lin-

ked to the formal granting of a refugee status. However, under Article 14(6) of the Directive, they enjoy certain rights provided for in the Geneva Convention, which confirms that they are considered as refugees within the meaning of the Geneva Convention, despite the formal and legal withdrawal of status. Thus, the withdrawal of refugee status does not affect the alien's attribute as a refugee if he/she satisfies the substantive conditions for recognition as a refugee within the meaning of the provisions of the Directive, and therefore within the meaning of the Geneva Convention. This implies that although under the Geneva Convention (Article 33(2)), it is possible to return or expel an alien to his country of origin, even if his life or freedom would be in danger, pursuant to the Directive (Article 21(2)) he cannot be returned if that refoulment would lead to a risk of infringement of his fundamental rights. European Union law therefore provides for a broader international protection for refugees than that provided by the Geneva Convention.

It should also be noted that, in accordance with the above regulations, the prohibition of *non-refoulment* is included or results also from other documents of international law for the protection of human rights. Pursuant to Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984[105], 'No State Party may expel, return or surrender to another State a person if there are serious grounds for believing that he or she may be threatened with torture'. Article 7 of the International Covenant on Civil and Political Rights of 19 December 1966[106] states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimenta-

105 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, United Nations, *Treaty Series*, Vol. 1465, p. 85.

106 The International Covenant on Civil and Political Rights of 19 December 1966; United Nations *Treaty Series*, vol. 999, p. 171 and vol. 1057, p. 407

tion'. A similar prohibition is contained in Article 3 (Prohibition of torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950[107] - 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

It should also be noted that, under Article 31(1) of the 1951 GC, no penalties should be imposed on refugees for illegal entry or stay (without authorisation), arriving directly from a territory where their life or freedom was in danger, provided that they report immediately to the authorities and provide credible reasons for their illegal entry or stay.

6. Conclusion

The protection of fundamental rights is key to Europe's identity, and in 1999 EU Member States committed themselves to creating a Common European Asylum System to address the growing asylum challenges at European level. In the following years, the EU adopted a number of important legislative measures to harmonise the different asylum systems of the Member States. The Dublin Regulation determines which Member State is responsible for examining a given asylum application. The Reception Conditions Directive sets out minimum reception conditions for persons seeking refugee status, including housing, education and health. The Asylum Procedures Directive lays down minimum standards for procedures for granting refugee status, making an important contribution to international law, as this issue was not originally covered by the 1951 Convention relating to the Status of Refugees. QD(r) introduces a form of subsidiary protection, complementing the 1951 Convention, which will be granted to persons at risk of suffering serious harm[108]. The Common

107 The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome on 4 November 1950; ETS no. 005.

108 The UN Refugee Agency, *Polityka azylowa Unii Europejskiej | Azyl na terenie UE*, 20 December 2016; Https://www.unhcr.org/pl/173-plco-robimyzapewnienie-ochrony-prawnejpolityka-azylowa-unii-europejskiej-html.html [accessed on: 1.02.2023].

European Asylum System provides for minimum standards for the treatment of all asylum seekers and minimum standards for examining asylum applications across the EU. However, asylum seekers are currently treated differently across the Union and EU asylum rules need to be reformed. On 6 April 2016, the European Commission launched the process of reforming the Common European Asylum System (CEAS), presenting: options for a fair and balanced system for the distribution of asylum seekers between Member States; further harmonisation of asylum procedures and standards in order to create a level playing field across Europe and thus reduce the incentives to come, in order to limit illegal secondary movements; and strengthening the mandate of the European Asylum Support Office (EASO)[109]. On 23 September 2020, the European Commission proposed a new Pact on Migration and Asylum, as part of a more general reform of EU migration and asylum rules. The Pact forms comprehensive common European framework for migration and asylum management, including several legislative proposals[110]. The new Pact does not affect previous legislative proposals from 2016, where progress has been made[111].

109 Serwis prasowy Komisji Europejskiej, *Komisja przedstawia warianty reformy wspólnego europejskiego systemu azylowego oraz rozwijania bezpiecznych i legalnych sposobów migracji do Europy*, 6 april 2016, Https://ec.europa.eu/commission/presscorner/detail/pl/IP_16_1246 [accessed on: 1.02.2023].

110 Legislative proposals are intended to: 1) replace the Dublin system with a new asylum and migration management system, which better distributes asylum applications among Member States through the new solidarity mechanism and ensures that applications are processed in a timely manner; 2) introduce temporary extraordinary measures in the event of crisis and force majeure in the field of migration and asylum; 3) strengthen Eurodac regulation to improve the EU fingerprint database of asylum seekers; 4) create a full-fledged EU Asylum Agency 5) introduce a new mandatory pre-entry screening (identity, health and security checks and fingerprinting and registration in the Eurodac database); 6) replace Asylum Procedures Directive with the amended regulation; 7) replace Qualification Directive with a regulation to harmonise protection standards and the rights of asylum seekers; 8) reform Directive on reception conditions for asylum seekers; 9) create permanent EU Resettlement Framework.

111 *Reforma polityki azylowej UE*, Https://www.consilium.europa.eu/pl/policies/eu-migration-policy/eu-asylum-reform/ [accessed on: 1.02.2023].

According to the applicable regulations of the GC of 1951, QD(r) and PD(r), a person seeking international protection is granted refugee status if, due to a well-founded fear of persecution in the country of origin because of race, religion, nationality, political opinion or membership of a particular social group, he cannot or does not want to benefit from the protection of that country. In each of the above cases, the method of an open catalogue of criteria for classifying a given person into a specific conceptual group was used to specify individual concepts. At the same time, in the qualification procedure, it is not entirely important to which category a given person will be classified. What matters is the possibility of classifying a person to one of those concepts. In one case, there may be a qualification to several of the above regulations, in another only to one.

When defining the concept of a refugee, circumstances such as family considerations, personal reasons, poor financial situation in the country of origin, lack of medical treatment, lack of work and education, general insecurity in the country of origin, human rights status in the country of origin, cases of antipathy or intolerance on the part of the society are not taken into account[112]. That does not mean that those circumstances are irrelevant when considering the application of protection deriving from institutions other than refugee status. The regulations of international and national law provide for a wide range of protection measures that aliens may apply for. A clear demarcation of the conditions for applying the protection deriving from individual institutions may often not be easy in practice. Nevertheless, it can be argued that the situation of crisscrossing of conditions for obtaining protection may be beneficial for the alien, due to the possibility of alternative application of given institutions (e.g. refugee status or subsidiary protection, subsidiary protection or stay for humanitarian reasons, stay for humanitarian reasons or permission for tolerated stay). Nevertheless, in each case, the alien will

112 B. Kowalczyk, *Polski system azylowy*; Wrocław 2014, Online access: http://www.bibliotekacyfrowa.pl/publication/62929, pp. 111–112.

bear the main burden of proving the fulfilment of the conditions for obtaining protection – because objective situations that do not require any evidentiary action, such as the situation of unjustified unlawful Russian invasion of sovereign and independent Ukraine and bestial rapes, torture, mutilations and mass murders of civilians by 'soldiers of the Russian army' are rather exceptional.

The principle of non-refoulement is a cornerstone of international refugee law. This principle has become a principle of customary international law binding on all States and has developed in a direction that excludes the use of any derogations or exceptions. According to the position of the *European Council on Refugees and Exiles and* the Helsinki Foundation for Human Rights, even if the beneficiary of international protection threatens the security of the State, it may not be possible to return that person without violating his or her fundamental rights. The grounds for depriving a person covered by international protection of his or her status, as provided for in the QD(r), should be applied with the utmost caution, bearing in mind that when refoulement is not possible, the person concerned should not be left in a state of suspension. In cases where the beneficiary of international protection has been deprived of his or her residence permit for important reasons of national security, he or she should retain access to all the rights provided for in the QD(r) which are linked to his or her status and not to the residence permit. Before making any decision in regard to posing a threat to national security, the individual conduct of the person covered international protection should be thoroughly examined[113].

113 Recognition of a person covered by international protection as a threat to the security of the state. Analysis of rights and obligations, ECRE, HFHR, January 2017, p. 9, https://www.ecre.org/wp-content/uploads/2016/12/Danger-to-the-security-of-the-state-which-granted-refugee-status-PL.pdf [accessed on: 1.02.2023].

Chapter V

Common procedural guarantees for granting and withdrawing international protection in the Member States of the European Union at a time of migration crisis

1. Introduction

In 2019, 20.9 million third-country nationals were legally resident in EU Member States, representing around 4.7% of the total population of the European Union (EU). In addition, in 2019 EU Member States issued around 3.0 million first residence permits to third-country nationals, including around 1.8 million for a period of at least 12 months. At the peak of the migration crisis in 2015, 1.82 million irregular border crossings were registered at the EU's external border. By 2019, that number had decreased to 142,000. In 2015, the number of asylum applications had risen sharply to 1.28 million, while in 2019 it amounted to 698 000.

On average, around 370 000 applications for international protection were rejected each year, but only about one third of applicants were returned to their country of origin[1].

Between April and May 2015, the European Commission of the European Union (Commission) focused its activities on the Mediterranean region with the aim of combating smugglers and traffickers on the one

1 At the end of 2019, the number of refugees the EU received on its territory was around 2.6 million, representing 0.6% of the EU population; See, EU EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum*, Brussels, 23.9.2020. COM(2020) 609 Final.

hand, and saving the health and lives of immigrants on the other[2]. This was the so-called '*Central Mediterranean route*'[3].

In the summer of 2015, all attention was focused on the Western Balkans, as the main migration route from the Mediterranean crossings from Libya to Italy shifted eastwards, from Turkey to Greece, then through the Balkans to Central Europe. This is the so-called '*Eastern Mediterranean route*'[4]. It was chosen by refugees seeking refuge in Europe from the Syrian civil war. The change in migration route was due to two main reasons: the new route was considered less dangerous, as the sea crossing is much shorter, and less expensive because smugglers charged much lower fees for travelling this route compared to the 'Central Mediterranean route', i.e. through Libya[5].

2 According to the UN IOM data, 806 people lost their lives on this route in 2015. Therefore the actions taken turned out to be not very effective. See, European Council, *Special meeting of the European Council, - Statement,* Press Release, 23 April 2015, at: https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ [accessed on: 1.02.2023]. For this reason the EU, together with the African Union and the UN, has established in November 2017 a Joint Task Force on Migration (*joint EU-AU-UN Task Force*). Activities of the Task Force as tasks of the African Union, the European Union and the UN IOM, were to be closely coordinated with the Libyan authorities. The aim of this group was to step up efforts to dismantle human traffickers and criminal networks and to create opportunities for development and stability in countries of origin and transit, thereby addressing the root causes of migration. See, European Commission, *Statement, Joint press release of the United Nations, the African Union and the European Union*, 29 November 2017, Abidjan.

3 CE EU, *Central Mediterranean route;* at: https://www.consilium.europa.eu/en/policies/eu-migration-policy/central-mediterranean-route/ [accessed on: 1.02.2023]; See also, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, available at https://www.icmpd.org/news [accessed on: 1.02.2023].

4 CE EU, *Eastern Mediterranean Route*, at: https://www.consilium.europa.eu/en/policies/eu-migration-policy/eastern-mediterranean-route/ [accessed on: 1.02.2023]; The Eastern Mediterranean route led through Turkey to Greece, Cyprus and Bulgaria. The implementation of the EU-Turkey agreement of March 2016 has played a key role in significantly reducing its use: in 2019, the number of people arriving in Greece via this route was 90% lower than in 2015 and a further decrease was recorded in 2020.

5 M. Wagner, *2015 in review: how Europe reacted to the refugee crisis*, ICMPD, 21.12.2015, https://www.icmpd.org/blog/2015/2015-in-review-how-europe-reacted-to-the-refugee-crisis [accessed on: 1.02.2023].

The route to the EU via the Western Balkans was used almost exclusively by the refugees from Syria and Afghanistan. Their share of the total number of people seeking safe haven in Europe was steadily increasing, from over 70% in the first months of 2015 to over 90% in August. Refugees from Iraq had an incomparably smaller but growing share. On the other hand, those arriving by sea in Italy were much more diverse in terms of nationality: they came mainly from Eritrea, Nigeria and Somalia[6].

The EU's response to the unprecedented number of arrivals of refugees and migrants has been inconsistent and has revealed a split in the EU. Up until the end of summer 2015, the EU held heated debates that effectively led to an East-West divide over the admission and relocation of refugees in Europe[7]. Moreover, border fences have been erected at borders inside and outside the Schengen area[8]. Border controls have been reintroduced[9].

6 *Ibidem*.

7 See, European Council meeting (25 and 26 June 2015)– Conclusions, Brussels, 26 June 2015 (OR. en) EUCO 22/15 CO EUR 8 CONCL 3; At that time, EU leaders agreed on a series of measures to be taken in three areas: - relocation and resettlement; - return and readmission; - cooperation with third countries; The EU under the Council's decision has adopted a temporary and exceptional relocation mechanism from Italy and Greece to other Member States. The mechanism was to apply to 120 000 people who were clearly in need of international protection. Brussels, 22 September 2015 (OR. en) 12098/15 ASIM 87.

8 In autumn 2015, Hungary resolved to build fences on the border with Serbia and Croatia; a fence was also erected in 20015 by the Austrian Government on the Austrian-Slovenian border, i.e. within the Schengen area; the border fence was erected by the Slovenian government on the Slovenian-Croatian border; the 11-kilometer barrier was built on the demarcation line between Cyprus and the northern part of the island, in addition a barbed wire fence was erected in the west of the divided capital Nicosia. See, Deutsche Welle (DW), *Fences, barbed wire and soldiers. Fortress Europe separates itself from refugees*, DW 31.08.2021 available at https://p.dw.com/p/3zkGu [accessed on: 1.02.2023].

9 Austria on the Austro-Hungarian land border and the Austrian-Slovenian land border; Germany on the German-Austrian land border; Denmark at Danish ports with ferry connections to Germany and at the Danish-German land border; Sweden: in Swedish ports in the South and West Police Region and on the bridge Öresund; Norway in Norwegian ports with ferry connections to Denmark, Germany and Sweden; See, Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, COM(2016)711; Implementing decision 2016/1989 - Recommendation for prolonging temporary internal border control in exceptio-

Unfortunately, the public debate on migration included the defence of Europe against terrorists, triggered by the bloody terrorist attacks in Paris on 13 November 2015[10].

In the light of the above, it seems legitimate to ask about the practice of the Member States with regard to the legal instruments of the CEAS in force at that time, in particular with regard to procedures for granting or withdrawing international protection. It is therefore a question as to what extent they were adequate to face the situation described above, and to what extent the urgent changes were required.

The above research problems were addressed, firstly, from the point of view of procedural guarantees at the initial stage of examining applications for international protection, followed by a critical discussion of procedural guarantees in the procedure for granting international protection and an analysis of the right to an effective remedy, both under the EU law and in the legal system of the ECHR. The final remarks of the chapter contain information on the attempts to reform the CEAS in response to the deep crisis of confidence amongst Member States as well as to the continual influx of migrants into Europe.

2. Procedural safeguards at the initial stage of examination of applications for international protection

The procedure that should be used when examining applications for international protection, i.e. asylum or subsidiary protection under the CEAS, is now regulated by the 2013 Procedural Directive (recast (PD(r),

nal circumstances putting the overall functioning of the Schengen area at risk; this executive decision was published on 15.11. 2016 and entered into force on 5.12.2016.

10 In the aftermath of these attacks the EU ministers agreed to tighten border security measures around the passport-free Schengen area; see information at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6327 [accessed on: 1.02.2023].

together with Article 4 of 2011 Qualification Directive (recast) (QD (r))[11] and the Dublin III Regulation[12]. The last two regulations are subsidiary in nature and precede the main procedure for granting international protection.

Due to the limited scope of this paper, we can only note here in passing that the issue of granting international protection is directly linked to the issue of effective access to such protection on EU territory, which in turn is related to the nature and territorial scope of compliance with the principle of *non-refoulement* as this determines the legal and factual possibility of submitting an application for international protection. Member States assume that the obligation of *non-refoulement* applies only to persons who meet two criteria:

– that they have reached the border of the country in which they seek protection (or are located within it);
– that there is no country designated as *a safe third country* to which they can be returned.

Both of these criteria are essentially territorial in nature and have led to a practice with dramatic consequences whereby persons applying for international protection have been left to their fate, e.g. in international waters, because no country was willing to take responsibility for examining their application for protection[13]. Subsequently this led to push

11 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast version), OJ L 337, 20.12.2011, p. 9.

12 Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31.

13 PACE *Lives lost in the Mediterranean Sea: who is responsible?*, Report Committee on Migration, Refugees and Displaced Persons Coe (T Strik), 29 Mar 2012.

back to dangerous countries by some Member States in regard to persons applying for international protection[14].

This issue is all the more important as the CEAS and asylum policy as such essentially restrict access to asylum procedures. Thus, while international cooperation on refugees has traditionally focused on protection and assistance, the EU has focused on curbing refugee flows, at least for the last two decades[15].

2.1. Guarantees of fundamental rights within the scope of determining the Member State responsible for examining the application for international protection

The determination of the Member State responsible for examining an application for international protection is carried out under the so-called Dublin system, which is currently based on the Dublin III Regulation. According to its title, it establishes the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person[16].

The Member State responsible for examining an application for international protection *is the one that meets the criteria of jurisdiction set out in Chapter III of the Regulation (Criteria for determining the Member State responsible). It should be noted that the above criteria are not absolute, because*

14 V. Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States. Obligations Accruing at Sea*, 'International Journal of Refugee Law' 2011, Vol. 23, no. 2, pp. 174–220

15 For more information, see: A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford 2009.

16 It should be noted that the purpose of the procedure governed by the Dublin III Regulation is only to determine the competence of the State rather than a substantive examination of the application of a person applying for international protection.

the Member State may, on humanitarian grounds and due to the difficult situation of the applicant, withdraw from them and examine the application[17].

The solutions adopted in the regulation were intended to eliminate the problem of asylum shopping, i.e. multiple submissions of applications for international protection by the same person throughout the EU, and also to solve the issue of refugees in orbit, i.e. persons applying for international protection who cannot find a country that would agree to examine their application on EU territory, i.e. refugees without countries of refuge[18]*. Although these problems are important from the point of view of the Member State, their solution, and in particular 'the rapid determination of the Member State responsible in order to ensure effective access to procedures for granting international protection'*, is undoubtedly also important for the applicant[19]. This is especially so as the regulation obliges a Member State to treat all applicants and beneficiaries of international protection equally[20].

In principle, until the status and type of international protection that the person applying for such protection may obtain is determined, such a person shall remain under the care of the first country reached by that person by crossing the external border of the EU. In exercising such care, a Member State must respect its obligations deriving in particular from the ECHR, including the case-law of the ECtHR[21] and from the Charter of Fundamental Rights of the European Union[22].

In addition, among these commitments, obligations under the 1989 UN Convention on the Rights of the Child are particularly impor-

17 See, in this context, point 17 and Article 17 of the Dublin III Regulation.

18 P. Weis, *Refugees in Orbit*, 'Israel Yearbook on Human Rights' 1980, Vol. 10, pp. 157–166; https://doi.org/10.1163/97890044229l9_007 [accessed on: 1.02.2023]; J. Hathaway, C. James, *Refugees in Orbit – again!*, VerfBlog, 2018/6/11, https://verfassungsblog.de/refugees-in-orbit-again/, DOI: 10.17176/20180612–100311–0 [accessed on: 1.02.2023].

19 See, Recital 5 of Dublin III Regulation.

20 See, Recital 10 of Dublin III Regulation.

21 See, Recital 32 of Dublin III Regulation.

22 See, Recital 14 of Dublin III Regulation.

tant[23], including the commitment to safeguard the best interests of the child[24]. The fulfilment of this obligation requires consideration in particular of the minor's well-being and social development, security considerations and the views of the minor in accordance with his or her age and maturity, taking into account his or her origin[25]. In addition, unaccompanied minors must be given special care and Member States should provide 'special procedural guarantees'[26].

The safeguarding of the best interests of the child also requires that the principle of family unity be fully respected[27], in the spirit of the right to respect for family life enshrined in Article 8 of the ECHR and Article 7 of the EU's CFR[28]. This requires the joint consideration of applications from members of one family[29].

23 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; at https://www.refworld.org/docid/3ae6b38f0.html [accessed on: 1.02.2023].

24 See, Article 6 *Guarantees for minors* Dublin III Regulation; Article 22 of the Convention on the Rights of the Child states that '1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. [..]'.

25 Incidentally, it can be noted that Article 24 of the EU's CFR states the principle that the best interests of the child must be a primary consideration in all actions concerning children and that children have the right to such protection and care as is necessary for their well-being.

26 See, Recital 13 of Dublin III Regulation. See also, UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012, https://www.refworld.org/docid/5135ae842.html [accessed on: 1.02.2023].

27 See, Recital 16 of Dublin III Regulation.

28 See, Recital 14 of Dublin III Regulation; see FRA, *Separated children seeking asylum in the Member States of the European Union*. Synthesis report

29 See, Recital 15 of Dublin III Regulation. See also, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12; Recital 8). Particular attention should be paid to the situation of refugees in terms of the reasons which forced them to leave their country and prevent them from leading a normal family life there.

The use of 'individual interviews with applicants'[30] is a practical measure that best enables a Member State to implement the principle of family unity.

Firstly, they are to take place 'immediately after the lodging of the application for international protection'. Secondly, they provide an opportunity to inform the applicant about the application of this Regulation[31] and specifically to explain that the interview gives him the opportunity to submit information on the whereabouts of family members, relatives or other family members in the Member States in order to facilitate the determination of the Member State responsible[32].

To conclude this part of this chapter, attention should be drawn to the procedure for transferring the applicant to the Member State responsible and, where applicable, to the failure to examine his or her application for international protection. It is the result of the first stage of the asylum procedure.

This decision is of exceptional importance for an applicant. The Regulation therefore takes into account the right to an effective remedy[33] under Article 47 of the EU's CFR and Article 13 of the ECHR and the right to legal aid, including free legal aid[34].

In order to ensure compliance with international law, an effective remedy against such decisions should include examination both of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.

According to the CJEU, an asylum seeker cannot be transferred under the Dublin III Regulation to the Member State responsible for examining

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More favourable conditions should therefore be laid down for the exercise of their right to family reunification.'

30 See, Article 5 of Dublin III Regulation.

31 See also, Article 4 of Dublin III Regulation.

32 See, Article 4(1)(1) of Dublin III Regulation; Article 11 *Family proceedings* of Dublin III Regulation.

33 See, CJEU, case C670/16, *Tsegezab Mengesteab v. Bundesrepublik Deutschland*, GC (Grand Chamber) judgment of 26.07. 2017.

34 See, SECTION IV *Procedural guarantees of* Dublin III Regulation.

his or her application if the living conditions in that country could expose him or her to a situation of extreme material poverty, constituting inhuman or degrading treatment within the meaning of Article 4 of the EU's CFR[35]. The Court resolved that the aforementioned criterion is attained only where such poor living conditions reach a particularly high degree of severity, going beyond a level of uncertainty or the significant deterioration of living conditions. Consequently, the national courts of the Member States are obliged to examine whether there is a real risk of the applicant falling into extreme material poverty on the basis of objective, reliable, specific and properly updated information and taking into account the standard of protection of fundamental rights established by EU law[36].

2.2. Guarantees of fundamental rights within the scope of assessing the credibility of an application for international protection

Another area where procedural guarantees emerge concerns the general criteria for assessing documents or facts submitted by the applicant, contained in Article 4 of the 2011 QD (r). They are crucial *in the second stage of the procedure conducted in the examination of the application for international protection, i.e. the procedure aimed at examining the merits of the application.* It should be made clear that the Qualification Directives, i.e. the Qualification Directive of 2005[37], and the recast Qualification Directive of 2011, do not contain procedural rules applicable to the examination of applications

35 Article 4 of the EU CFR Prohibition of torture and inhuman or degrading treatment or punishment: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

36 CJEU, Case C163/17 *Abubacarr Jawo v. Bundesrepublik Germany*, judgment of 19.03.2019; Joined cases C297/17, C318/17, C319/17 and C438/17 *Bashar Ibrahim et al. v. Bundesrepublik Germany and Bundesrepublik Germany v. Taus Magamadov*, judgment of GC of 19.03.2019.

37 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 26/13 of 13.12.2005.

for international protection and therefore do not establish the procedural guarantees that should be granted to a person applying for international protection[38]. It is the procedural directives (now the recast Procedural Directive (PD(r) of 2011) that have established common standards on the procedures for examining applications and clarified the rights of persons applying for international protection which should be taken into account when examining cases in the main proceedings.

When starting the analysis of the criteria for assessing the credibility of an application for international protection, attention should be drawn at the outset to the issue of persecution on the grounds of sexual orientation of the applicant as a premise for granting refugee status on the grounds of the condition of a 'special social group' from the 1951 GC in the context of Article 4 of the QD(r) of 2011, i.e. the assessment of the credibility of the applicant in terms of his sexual orientation or gender identity when determining refugee status.

This issue has been the subject of several judgments of the CJEU[39]. It therefore follows that the national authorities may ask experts to draw up expert reports to assist in the assessment of facts and circumstances relating to the applicant's declared sexual orientation, provided that the procedures relating to those reports comply with fundamental rights. However, the authority examining the application for international protection, the courts or the tribunal may not base their decision solely on the conclusions of the expert report and shall not be bound by tho-

38 Instead, the Directive provides for a number of rights concerning protection against expulsion, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration structures, as well as special provisions for children and v u l n e r a b l e p e r s o n s .

39 The CJEU first addressed asylum applications related to the issue of persecution on grounds of sexual orientation and gender identity (SOGI) in joined cases C-199/12 - C-201/12, *X, Y and Z v. Minister voor Immigratie, Integratie En Asiel*, judgment of 7.11.2013; Joined Cases C-148/13 to C-150/13, *A, B and C v. Staatssecretaris van Veiligheid En Justitie*, judgment (GC) of 2.12.2014.

se conclusions when assessing the applicant's statements concerning his sexual orientation.

On 25 January 2018, the CJEU issued a judgment in case C-473/16-F. The main proceedings concerned a Nigerian national whose asylum application had been rejected in the first instance by the Hungarian authorities on the basis of a report drawn up by a psychologist indicating that his homosexuality could not be confirmed by the various tests. The Administrative Court and the Labour Court in Szeged, following an appeal, decided to stay the proceedings and ask the CJEU for guidance on the possibility of relying on the expertise of psychologists when assessing the credibility of applications of asylum seekers who fear persecution because of their sexual orientation. The CJEU ruled that expert opinions enabling national authorities to assess an application for international protection more accurately must comply with fundamental rights guaranteed by the Charter of Fundamental Rights of the EU, such as the right to respect for human dignity and the right to respect for private and family life.

Certain forms of expert opinions may, therefore, be useful for assessing the facts and circumstances set out in the application and may be drawn up without prejudice to the fundamental rights of the person applying for international protection. However, the determining authority may not base its decision solely on the conclusions of the expert report and may not be bound by the conclusions contained in that report.

Moreover, according to the Court, even if the preparation of such expert reports is formally dependent on the consent of the person concerned, that consent is not necessarily freely given, since it is compelled by the circumstances of the applicant. In those circumstances, recourse to a psychologist's report in order to establish the person's sexual orientation constitutes an interference with his right to respect for his private life, disproportionate to the objective which it pursues. In that regard, the Court observes that such interference is particularly serious in that it seeks

to provide insight into the most intimate aspects of the life of a person applying for international protection.

The CJEU also concluded that Article 4 of the 2011 QD(r), read in the light of Article 7 of the EU's CFR[40], must be interpreted as precluding the drawing up and use of a psychologist's expert report, aimed at identifying the person's sexual orientation on the basis of projective personality tests, in order to assess the credibility of the claim of a person applying for international protection concerning his sexual orientation[41].

As regards the other issues, it should be noted that in the light of the specific provisions of Article 4(1) of the QD(r) the applicant is required to submit 'as soon as possible' all the elements necessary to substantiate the application for international protection. Those provisions include two criteria for assessing the proper performance by the applicant of a specific obligation, namely the criterion of time, the second substantive criterion of 'all elements'. This obligation on the applicant corresponds, however, to the obligation of the Member State to assess the relevant elements of the application in cooperation with the applicant. The provisions of Article 4 of the 2011 QD(r) cited above mean that it can be concluded that it provides for the principle of joint responsibility of the applicant and the State for the determination and assessment of all the relevant facts. Consequently, if the applicant is unable to provide the necessary elements, then the State 'must use all means at its disposal to provide the necessary evidence in support of the application'[42]. In other words, 'the Member State concerned is under an obligation to cooperate with that applicant in determining the elements relevant to that

40 Article 7 of the EU CFR Respect for private and family life: 'everyone has the right to respect for private and family life, home and communications'.

41 CJEU, case C-473/16, *F. v. Bevándorlási és Állampolgársági HIV*Atal, Judgment of 25.01.2018.

42 See, UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, Para. 196.

application in accordance with Article 4(1) of that directive. These necessary elements for the qualification of the applicant are:

- declarations of the applicant, and
- all documents in his possession relating to:
- her/his age,
- the past, including the past of relatives taken into account,
- her/his identity,
- nationality(s),
- the country(s) and place(s) of previous residence,
- previous asylum applications,
- travel routes,
- travel documents, and
- the reasons for applying for international protection.

These qualifying elements should be assessed in the context of the circumstances in which the applicant has departed from his country of origin or another territory with the understanding that these may be such extremely dangerous circumstances that the applicant may not be in possession of any documents. Past traumatic experiences, feelings of insecurity or language problems, for example, are also relevant here, which may cause delays in properly substantiating the application and submitting it to the relevant authorities.

In addition, the 2011 QD(r) maintains the principle of an individual assessment of each application. In making that assessment the State must focus its attention on the facts, statements, documents and findings referred to in Paragraph 3 of the 2011 QD(r), not only on an individual basis, but also taking into account the individual situation and 'personal circumstances of the applicant, including factors such as origin, sex and age, in order to assess whether, in the light of that situation, the acts

to which he has suffered or could have been exposed to, could constitute persecution or serious harm"[43].

From the point of view of the humanitarian nature of asylum and compliance with the 1951 GC, in particular Article 1 thereof, the most controversial is the obligation of the State examining the application to determine whether 'the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship' (Article 4(3)(e) of the 2011 QD(r)). It is well established by the UNHCR that international law does not impose an obligation on the applicant to seek the protection of another country where he or she could 'establish' his citizenship. This issue was clearly discussed by the founders of the 1951 GC and is governed by Article 1A(2) *in fine*[44], which concerns applicants of dual nationality, and the exclusion clause in Article 1E of the 1951 GC. As the High Commissioner rightly points out, the legislation in question does not provide for a state to exercise discretion in this area. For Article 1E of the 1951 GC[45] to apply, a person who would otherwise fall within the definition of a refugee would have to satisfy the requirement of residence in the country and recognition by the competent authorities of that country 'as having the rights and obligations which are attached to the possession of the citizenship of that country'. Since Article 1E is already reflected in Article 12(1)(b) of the Directive[46], Article 4(3)(e) should not be incorpo-

43 CJEU, joined cases from C148/13 to C150/13, *A, B and C v. Staatssecretaris van Veiligheid En Justitie*, Judgment of 2.12.2014, with UNCHR participation, Paragraph 57.

44 The 1951 GC states that 'a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national '.

45 It provides that the 1951 GC shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

46 Article 12 of QD (r) *Exclusion* 1. A third-country national or a stateless person is excluded from being a refugee if: b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.

rated into national legislation and practice if full compliance with Article 1 of the 1951 GC is to be ensured[47].

In addition, Article 4 of the 2011 QD(r) refers to the criterion of persecution or serious harm or imminent threat thereof. Although these two circumstances were considered to be 'an essential element of the applicant's well-founded fear of being persecuted or of a real risk of suffering serious harm', their guarantee function was significantly weakened as a result of denying them recognition when it had been established that there were compelling reasons to assume that 'acts of persecution or serious harm will not be repeated'. The UNHCR, citing general humanitarian principles, also challenged this regulation, noting that even if 'serious harm does not occur again, compelling reasons resulting from previous persecution may still justify the granting of refugee status'[48]. It is impossible not to share this position of the Commissioner.

The final provisions of Article 4 of 2011 QD(r) regulate the issue of the burden of proof where, under the law, it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence'. Since the limited scope of this paper does not allow for in-depth analysis of these provisions, they are cited *in extenso* in a footnote[49]. However, it is worth quoting a few selected UNHCR comments that

47 UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted*, OJ L 304/12 of 30.9.2004, p. 14.

48 UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*.., p. 15.

49 Article 4(5) of 2011 QD (r): 'Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general informa-

give a specific direction as to their interpretation. The UNHCR notes that in the practical application of the 2011 QD(r) it is important to make the general assumption that there may be situations in which the applicant does not have all the documentary evidence required. In view of that general presumption, it should be assumed that all evidentiary requirements should be applied in a balanced manner, with the necessary flexibility to take account of the specific circumstances of the application for international protection, in particular the fact that applicants are fleeing persecution or serious harm and are often unable to meet normal standards of evidence. Furthermore, Member States should be aware that situations in which applicants can provide the full set of evidence required will be the exception rather than the rule[50].

As the UNHCR rightly concluded, should there be any doubt in determining the overall credibility of the applicant referred to in Article 4(5)(e) of the 2011 QD(r) this should be resolved in favour of the applicant (the principle of resolving the doubts in favor of the applicant).

This principle is of particular importance in relation to children seeking international protection. In their case, the burden of proof should be applied particularly flexibly and freely, so that fact-finding and gathering evidence for international protection should be done in every way possible. On the other hand, when analysing the child's explanations concerning the whole situation, his maturity and competence should be taken into account[51]. It should be borne in mind that state authorities are required to adapt the detailed rules for the assessment of statements and documen-

tion relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established.'

50 See, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, steam. 203–204; UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, https://www.refworld.org/docid/3ae6b3338.html [accessed on: 1.02.2023].

51 UNHCR *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*.., p. 16.

tary or other evidence according to the characteristics of each category of asylum applications, respecting the rights guaranteed by the EU CFR[52].

3. Procedural safeguards in the procedure for granting international protection

3.1. Subject and purpose of the 2013 recast Procedural Directive

According to Article 1 of the 2011 QD(r), the purpose of that directive is 'to establish common procedures for granting and withdrawing international protection under Directive 2011/95/EU'. In this context, however, it is worth quoting the findings of the CJEU that,

> 'As long as a third-country national or a stateless person has a well-founded fear of being persecuted in his country of origin or residence, he or she must be regarded as a refugee within the meaning of the Directive and the Geneva Convention, irrespective of whether refugee status within the meaning of the Directive has been formally granted'[53].

In that regard, the Court has held that refugee status is defined in the Directive as recognition as a refugee by a Member State and that that act of recognition is purely declaratory and not constitutive in nature[54].

52 CJEU, joined cases C148/13 to C150/13, *A, B and C v. Staatssecretaris van Veiligheid En Justitie*, judgment of 2.12.2014, with UNCHR participation, Paragraph 54.

53 CJEU, joined cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra, and X and X. v. Commissaire général aux réfugiés et aux apatrides*, judgment of 14.05.2019.

54 CJEU, joined cases C-391/16, C-77/17 and C-78/17, *M v. Ministerstvo vnitra, and X and X. v. Commissaire général aux réfugiés et aux apatrides*, judgment GC of 14.05. 2019.

The Procedural Directive in its 2013 recast version applies to all applications for international protection lodged in the territory, including at the border, in the territorial waters or in the transit zones of the Member States[55]. It shall not apply to applications for diplomatic or territorial asylum lodged in representations of Member States[56].

Member States may also apply more favourable standards, provided these conform to that Directive[57].

The 2013 PD(r) focuses on the Member State taking into account the needs of vulnerable applicants, special needs[58] and unaccompanied minors[59]. Unfortunately, in practice, unaccompanied minors in migration are currently not fully and effectively protected[60]. Meanwhile, the Stockholm Programme has already established that children's rights must be taken into account systematically and strategically in order to ensure an integrated approach. According to Article 25(1)(a) of the 2013 PD(r) Member States should 'take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him

55 Article 3(1) of 2013 PD(r)

56 Article 3(2) of 2013 PD(r)

57 Article 3(2) of 2013 PD(r) and Article 5 of 2013 PD(r)

58 Recital 29–32 of 2013 PD(r) and Article 24 of 2013 PD(r)

59 Recital 33 of 2013 PD(r) and Article 25 of 2013 PD(r) Guidelines on the legal interpretation of asylum procedures have been published by the UNHCR in a document entitled *Guidelines on International Protection:Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or under The 1967 Protocol relating to the Status of Refugees* (Guidelines on international protection: applications for asylum by children under Article 1A(2) and (1F) of the 1951 Convention or the 1967 Protocol relating to the Status of Refugees), published in December 2009; Article 22 of the Convention on the Rights of the Child is relevant in this regard. *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3). The Convention was accepted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with Article 49.

60 More information in the report entitled. *Separated children seeking asylum in the Member States of the European Union*, report FRA - European Union Agency for Fundamental Rights, This report addresses issues related to children's rights (Article 24) as set out in Chapter III ('Equality') of the Charter of Fundamental Rights of the European Union.

or her to benefit from the rights and comply with the obligations provided for in this Directive'. States may not, therefore, delay the effective handling of the cases of these children.

3.2. The principle of a single procedure for granting international protection: one-stop shop procedure

In order to provide procedural guarantees for the applicant, it is important that the PD(r) of 2013 adopts the principle of a single procedure for examining an application for international protection, the so-called '*one-stop shop*' procedure[61]. It has been proposed by the Commission as a critical option worth considering. Under this procedure, the competent Member State is to assess whether the applicant qualifies for refugee status or subsidiary protection[62].

In the UNHCR's view, this consolidation of the procedure 'can provide the most transparent and fastest means of identifying persons in need of international protection'[63]. In this context, the UNHCR warmly welcomed the clarification of the scope of the 2013 PD(r). This is confirmed, incidentally, by the recast title of the directive in question, which *expressly* refers to international protection and not only to refugee status. This amendment allows the application to be examined by the same authority in terms of compliance with the Convention or subsidiary protection.

61 Communication from the Commission to the Council and the European Parliament - Towards more accessible, equitable and managed asylum systems /* COM/2003/0315 final */ .

62 K. Hailbronner, *Study on the single asylum procedure 'one-stop shop' against the background of the common European asylum system and the goal of a common asylum procedure*, European Communities, 2003.

63 UNHCR Preliminary observations on the Communication from the European Commission, '*Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*', January 2001, https://www.unhcr.org/protection/operations/43662b5e2/communication-european-commission-towards-common-asylum-procedure-uniform.html [accessed on: 1.02.2023].

This solution also contributes to increasing the efficiency of the procedure. As the UNHCR aptly pointed out,

> The circumstances that force people to flee their country are complex and, often, of a composite nature. Many times, those fleeing a country affected by war or conflict can also validly claim to fear persecution on 1951 Convention grounds. The identification of the person's [international] protection needs cannot, therefore, be made in a compartmentalised fashion[64].

Moreover, separate procedures often did not provide identical procedural guarantees, while in separate procedures these guarantees were generally weaker[65]. However, given that both groups of applicants have comparable protection needs, this led to unjustified discrimination. The consolidation of procedures is also supported by guarantees of legal security for the applicant. The authority competent to examine the application within the meaning of the 2013 PD(r) should be best trained in international human rights law and international refugee law and have wider access to information on the situation in their countries of origin[66], while the applicant is not obliged to know the detailed conditions of individual forms of protection. Such a procedure is also more efficient in terms of time, as it has the advantage of being able to resolve quickly the applicant's situation[67].

64 *Ibidem*.

65 Under Article 4(3) of the 2005 PD, as regards substantive issues, Member States could split applications into different procedures, which in some cases were decided by different authorities. Importantly, lower procedural standards may have applied in proceedings conducted outside the main one.

66 Cf. Recital 16 of the 2013 PD(r).

67 Amnesty International's comments on the follow up to the study on the single asylum procedure: « 'one stop shop' against the background of the Common European asylum system and the goal of a common asylum procedure», 10 March 2004; available at:

3.3. Types of procedures in the process of granting international protection

3.3.1. Basic procedure

The basic scheme of the procedure for granting international protection provided for by the 2013 PD(r) is simple. In the first step it provides for the designation of a competent determining authority'[68], whose staff is to be competent and properly trained[69], capable of examining the application 'as soon as possible'[70]. In addition, this authority is to have access to the latest information on the applicant's country of origin[71] from a wide range of sources, as well as expert advice if necessary[72].

The determining authority is required to examine each application 'individually, objectively and impartially'[73], with due regard for the applicable rules of professional conduct[74].

The basic stage of the procedure is the holding of a personal interview[75], which must take place in circumstances conducive to presenting the applicant's case exhaustively[76]. The decision ending this stage of the procedure must be in writing[77] and, if negative, as regards any form of international

https://www.amnesty.eu/wp-content/uploads/2018/10/AI_Consultation_Single_Procedure.doc [accessed on: 1.02.2023], Paragraph 3.

68 Article 2(f) and Article 4 of 2013 PD(r)

69 Article 4(3) and Article 10(3)(c) of 2013 PD(r)

70 See, Recital 18 of 2013 PD(r)

71 Article 10(3)(b) of 2013 PD(r)

72 Article 10(3)(d) of 2013 PD(r)

73 Article 10(3)(a) of 2013 PD(r)

74 See, Recital 17 of 2013 PD(r)

75 Article 14 of 2013 PD(r)

76 Article 15 of 2013 PD(r)

77 Article 11(1) of 2013 PD(r)

protection, should state the reasons in fact and in law together with a written notification of the possibility of appeal[78].

3.3.2. Priority and accelerated procedures

In addition to the basic procedure, there are specific types of procedures, namely priority procedures and accelerated procedures. The 2005 PD had already allowed for the possibility of prioritising or accelerating selected procedures, but did not clearly define the limits on these specific procedures[79]. In addition, it allowed applications to be classified as 'manifestly unfounded' on the basis of a number of conditions, many of which were irrelevant to the substance of the asylum application[80].

The 2013 PD(r) also makes provision for these procedures. However, while the 2005 PD did not make a normative distinction between them, it was decided to include them in the 2013 version[81].

As explained in the preamble to the PD(r), priority procedures imply a reduction in the duration of the procedure and the processing of the application first, without prejudice to the normal procedural deadlines, rules and guarantees[82], while accelerated procedures depart from the normal procedures, in particular by introducing shorter, but reasonable, time limits for certain procedural steps[83].

The 2013 PD(r) on the one hand encourages Member States to give priority to requests from persons with clearly justified needs or in a parti-

78 Article 11(3) of 2013 PD(r)

79 Article 23(3) of PD stated that Member States can prioritize or speed up any examination of the case in accordance with the basic principles and guarantees of chapter II, including where there is a likelihood that the application is well founded or where the applicant is a person with special needs.

80 *Ibidem,* Article 28(2); Article 23(4)(a). – o.) of 2005 PD.

81 Article 31 Paragraphs 7–8 of 2013 PD(r).

82 Cf. Recital 19 of 2013 PD(r)

83 Cf. Recital 20 of 2013 PD(r).

cularly vulnerable situation who deserve special procedural guarantees[84]. On the other hand, Member States may speed up the processing of 'unfounded' or '*manifestly unfounded*' applications under a less protective procedural system, assuming that they are likely to be rejected[85].

With regard to claims considered manifestly unfounded, the 2013 PD(r) retains a certain degree of ambiguity: it does not define the concept itself, but leaves it to the Member States to define it, providing that an application examined under the accelerated procedure under Article 31(8) of the 2013 PD(r) may be considered manifestly unfounded if it is so defined in national legislation.

Article 31(8) of the directive lists ten situations in which an accelerated procedure may be used and thus in which a Member State may reject an application as manifestly unfounded. These are situations in which the applicant:

- listed in the application only issues not relevant to refugee or subsidiary protection status,
- originates in a country recognised as a safe country of origin,
- misled the authorities by presenting false documents or withholding relevant information about his identity and nationality that could have had a negative impact on the decision,
- is probably acting in bad faith, has destroyed or disposed of identity or travel documents
- has made inconsistent, contradictory, improbable or insufficient statements that render its conclusion unconvincing,
- submitted an admissible further application,
- entered or stayed on the territory illegally and, without legitimate reasons, did not report to the authorities in order to submit an application as soon as possible,

84 See, in particular: Article 25 of 2013 PD(r) refers in this case to the obligation to satisfy specific procedural needs. ECRE, *The concept of vulnerability in European asylum procedures*, 2020,

85 On this point, see AIDA *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, September 2015, available at: http://bit.ly/1UGoInU [accessed on: 1.02.2023].

– submits an application to delay or frustrate the enforcement of a return decision,
– poses a threat to national security or has been expelled on grounds of security and public order,
– refuses to allow himself to be fingerprinted.

The concept of the presumption that an application is manifestly unfounded in the circumstances above is not objectionable as such. Criticism may, however, be made of specific circumstances being included in the above list, in particular the circumstances of failure to submit an application as soon as possible or the lack of consent to the taking of fingerprints, since those circumstances do not affect the merits of the application for protection of the person concerned[86].

3.4. Safe country concepts

3.4.1. The safe country of origin concept

In the context of this presumption, particular attention should be paid to the concepts of a safe country, including the concept of safe country of origin, as according to the 2013 PD(r),

> A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he or she presents counter-indication[87].

86 ECRE, *Accelerated, prioritised and fast-track asylum procedures Legal frameworks and practice* in Europe, May 2017, p. 3, https://www.ecre.org [accessed on: 1.02.2023].

87 Recital 40 of 2013 PD(r)

The concept of safe countries of origin has been a controversial element of the CEAS since its establishment as part of the EU *asylum acquis*[88].

From the outset, the UNHCR[89] has been critical of the implementation of this concept, recognising that, together with the practice of extending the use of accelerated procedures to categories far beyond cases of manifest unfounded nature or manifest abuse, it represents a real risk of violation of international law in practice[90].

Currently, the possibility for Member States to apply the safe country of origin concept is provided for in Articles 36 and 37 of 2013 PD(r). As noted by the CJEU,

> Those provisions establish a special examination scheme based on a presumption of adequate protection in the country of origin, which can be rebutted by the applicant where he submits overriding reasons relating to his particular situation[91].

Annex I to that Directive, entitled 'Designation as a safe country of origin for the purposes of Article 37(1)', is worded as follows:

> A country is considered as a safe country of origin where, on the basis of the legal situation, the application

88 ECRE, *Safe countries of origin: A safe concept?* AIDA Legal Briefing no. 3, September 2015, available at: http://bit.ly/2dW2Zql. [accessed on: 1.02.2023].

89 Although in the literature on this subject it is stated that the basis of the Concept of 'the safe third country' and 'country of first asylum' can be found in the Conclusions of UNHCR EXCOM 58(XL) *'Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection'* (1989); See also, M.-T. Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice*, 'Netherlands Quarterly of Human Rights' 2015, Vol. 33, Issue 1.

90 UNHCR *Observations on the European Commission Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step'*, (COM(2004)503 final; Annex SEC(2004)937, 15 July 2004).

91 CJEU, Case C-404/17, *A. v. Migrationsverket*, Judgment of 25.07.2018, Paragraph 25.

> of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.
>
> In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

a) the relevant laws and regulations of the country and the manner in which they are applied;
b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
c) respect for the non-refoulement principle in accordance with the Geneva Convention;
d) provision for a system of effective remedies against violations of those rights and freedoms.

It should be stressed that the 2013 PD(r) is intended to allow Member States to apply this concept but does not oblige them to do so.

The year 2015 is extremely important in the process of implementing the analysed concept at EU level when the Commission presented a proposal for a regulation establishing a common EU list of safe countries of origin[92].

92 Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the Eu-

The aim of the regulation was, firstly, to speed up the processing of asylum applications lodged by persons from countries recognised as safe and, secondly, to strengthen the provisions of 2013 PD(r) regarding safe countries of origin. Member States were to apply specific procedural rules, in particular fast-track asylum and border procedures, when the applicant was a national of a country which has been designated as a safe country of origin. Consequently, the Commission has proposed that Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey should be recognised as such countries[93].

In its assessment of this proposal the European Parliament noted that if such an EU list were to become mandatory for Member States, it could in principle be an important tool to facilitate the asylum process, including returns. It proceeded to deplore the use by Member States of different lists of safe countries, designating different countries as safe, that hinders their uniform application and consistently encouraged secondary movements. The EP also stressed that any list of safe countries of origin should not detract from the principle that each person should be able to have an appropriate individual examination of his or her application for international protection[94]. In the end, however, MEPs agreed that the future common EU list of safe countries of origin, which should help Member States to process certain applications for international protection more quickly and consistently, should replace national lists after a three-year transition period[95].

ropean Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015) 452 final).

93 The proposed EU common list of safe countries of origin includes Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey; See also, Council, *Letter from the Executive Director of EASO containing new country of origin reports on the seven countries listed in the proposal*, 14543/16, 16 November 2016.

94 EP, Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration (2014/2907(RSP)), of 17.12.2014, OJ C 346, 21.9.2016, p. 47.

95 European Parliament, *Committee on Civil Liberties, Justice and Home Affairs draft report on the proposal for a regulation establishing an EU common list of safe countries of origin for the pur-*

In 2016 the Commission also proposed to replace the current PD(r) with a Regulation[96]. Importantly, the proposal detailed a number of issues relating to the safe country of origin concept that were to become mandatory in all Member States. Accordingly, Article 50(1) of the proposal includes a sunset clause that would allow Member States to maintain their national safe-country designations of origin for up to five years after the entry into force of the Asylum Procedures Regulation.

In the explanatory memorandum to the proposal, the Commission stated that 'a common EU list of safe countries of origin should form an integral part of this draft regulation' and for this reason the new text of the procedural regulation includes a proposal for a regulation establishing an EU common list of safe countries of origin, encompassing the same list of countries[97]. Despite the Commission's efforts and the EP support described above, it was not possible to reach an agreement. Consequently, on 12 April 2017 the Council announced the suspension of negotiations and on 21 June 2020 the Commission withdrew its proposal for an EU list of safe countries.

The attempt to establish a common EU list of safe countries of origin has therefore failed. The lists of safe countries of origin decided at the na-

poses of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, 2015/0211(COD), 13 April 2016; European Parliament, *Asylum: EU list of safe countries of origin to replace national lists in 3 years*, Press release, 7 July 2016.

96 Proposal for a Regulation of the European Parliament and of the Council, establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 13.7.2016, COM(2016) 467 final, 2016/0224(COD); the concept of the safe country of was presented in Articles 47 to 50.

97 The Commission envisaged the following further steps. First of all adopting a proposal to establish a common EU list of safe countries of origin; after reaching an agreement by co-legislators; secondly incorporation the text of a new regulation into the asylum procedures regulation at the time of its adoption; thirdly, repeal regulation establishing a common EU list of safe countries of origin.

tional level[98] and the rules in the 2013 PD(r) on procedures based on the safe country of origin concept have remained in force of course[99].

3.4.2. The safe third country concept

The safe country of origin concept is substantively linked to the *safe third country concept*[100]. Some grounds for its introduction into international protection can be found in the conclusions of EXCOM 58(XL) of the UNCHR Executive Committee[101]. It shows that that concept refers to refugees and asylum seekers 'who move illegally from countries where they have already found protection in order to apply for asylum or permanent settlement elsewhere'[102].

Three elements therefore have a constitutive meaning for the issue in question, namely:

- the movement does not take place in the countries of origin, but rather in countries where protection has already been granted;
- the purpose of movement is to seek asylum or to settle permanently in another country; and
- the movement is illegal.

Conclusion 58(XL) therefore allows persons to return to a country where they have already found protection[103], although it does not specify what is meant by this protection. It refers to a phenomenon that is referred to as *secondary movements of refugees and asylum-seekers*. The interpreta-

98 See, Article 37 of 2013 PD(r).

99 CJEU, Case C-404/17, *A. v. Migrationsverket*, judgment of 25 July 2018, Paragraph 31.

100 See, Article 38 of 2013 PD(r).

101 UNHCR EXCOM Conclusion no. 58(XL) *Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection'* (1989), https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html [accessed on: 1.02.2023].

102 *Ibidem*, Paragraph a.

103 *Ibidem*, Paragraph f.

tive declarations and reservations submitted to this conclusion show that the phenomenon of secondary movement and the scope of international cooperation in this area give rise to exceptional tension between states[104]. It must be borne in mind that such secondary or further movement takes place in a manner inconsistent with the rules, that is to say,

> without prior authorisation from the national authorities or without an entry visa, or without documents, or with insufficient documents normally required for travel, or with false or falsified documents[105].

One of the objectives of the CEAS is to reduce this phenomenon, and the concept of a safe third country is one of the important tools for this mitigation[106].

The concept of a safe third country is, like the safe country of origin, extremely problematic[107]. Although the primary responsibility for examining an asylum application, according to the CJEU, lies with the State

104 UN High Commissioner for Refugees (UNHCR), *Summary conclusions on the concept of 'effective protection' in the context of secondary movements of refugees and asylum-seekers (Lisbon Expert Roundtable, 9–10 December 2002), February 2003*, https://www.refworld.org/docid/3fe9981e4.html [accessed on: 1.02.2023]. In regard to interpretative declarations or objections regarding this clause see: Doc A/AC.96/737 part N, p. 23.

105 Executive Committee of the High Commissioner's Programme, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, October 1989*, https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html [accessed on: 1.02.2023].

106 Cf. e.g. Recital 13 of the 2013 PD(r).

107 HFHR, Joint Statement: Pact on Migration and Asylum: To guarantee a new start and avoid past mistakes, difficult issues need to be addressed and positive aspects extended, 6 October 2020; https://www.hfhr.pl/wspolne-oswiadczenie-pakt-o-migracji-i-azylu-by-zagwarantowac-nowy-poczatek-i-uniknac-bledow-z-przeszlosci-nalezy-zajac-sie-trudnymi-kwestiami-i-rozszerzyc-pozytywne-aspekty/ [accessed on: 1.02.2023]; See especially V. Moreno-Lax, *The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties*, [in:] G. S. Goodwin-Gill, P. Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects - The Hague Academy of International Law Centre for Research*, Leiden 2015, pp. 665–721.

in which the application was lodged[108], it was recognised – for example in the preamble of the 1951 GC – that the protection of refugees requires (genuine) international cooperation[109]. The allocation of responsibility should, however, be envisaged only between countries with comparable standards of protection and, moreover, on the basis of voluntary agreements that clearly define their respective obligations. However, the EU concept of 'safe third country' is based on a unilateral decision by a Member State to recognise the responsibility of a third country, which is contrary to the fundamental principles of international law and does not respect the rights of persons applying for international protection[110]. In addition, it should be noted that international law does not allow a state to evade its legal responsibility by delegating its responsibilities to another state or to international organizations[111]. It is therefore rightly emphasized in the literature on the subject that

> The transfer of responsibility from one State to another, even assuming that the latter is a 'safe third country', raises questions of the State's responsibility to fulfil its

108 CJEU, Case C-179/11 *Cimade & GISTI,* judgment of 27.09.2012, Paragraphs 54–55.

109 The relevant passage in the Recital states that 'given that the granting of asylum may be too burdensome for certain States and that a satisfactory solution to a problem the importance and international character of which the United Nations has recognised cannot therefore be achieved without i n t e r n a t i o n a l c o o p e r a t i o n'.

110 UNHCR, *Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (COM(2009)554, 21 October 2009), August 2010, available at: http://www.unhcr.org/refworld/pdfid/4c63ebd32.pdf. [accessed on: 1.02.2023].

111 See, ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), UNGA A/56/10 corrected by A/56/49(Vol.I)/Corr.4.; ILC, Annual Report (2001), *Commentary to the Articles on State Responsibility, Chap. IV, Commentary to Article 47*. Article 47 of ILC on state's responsibility states that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of *each* State may be invoked in relation to that act'. See, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge 2002, p. 272 *ff.*

obligations towards refugees under international refugee and human rights law[112].

The designation of a country as a safe third country implies a rebuttable presumption under Article 38 of 2013 PD(r)[113]. According to it, the applicant has the possibility to challenge the application of the safe third country concept during the examination of the application at first instance. This is an important procedural guarantee but in many countries it is not effective, and this creates a risk of return to the country where the applicant has suffered persecution or serious harm, contrary to the 1951 GC and other relevant instruments[114].

Member States must ensure, both in law and in practice, that the applicant has an effective opportunity to rebut the presumption of safety by informing him sufficiently in advance that his application may not be examined in the Member State due to the concept of a safe third country, which may result in him being sent back to that third country. In such a situation, that person must be given sufficient time to challenge the presumption of safety of that country in his particular situation.

112 M. T. Gil-Bazo, *The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited*, International Journal of Refugee Law 2006, Vol. 18, Issue 3–4, p. 599.

113 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, p. 60.

114 UN High Commissioner for Refugees, UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, available at http://www.unhcr.org/refworld/docid/42492b302.html [accessed on: 1.02.2023].

3.4.3. The concept of a European safe third country

The concept of a European safe third country is the last of the defined concepts of a safe country. It is provided for in Article 39 of 2013 PD(r)[115].

According to the directive, in European countries that can be considered safe, 'particularly high standards of human rights and refugee protection are respected'. This is to be confirmed by:

- ratification of the Geneva Convention and compliance with its provisions without any geographical limitation,
- having asylum procedures established by law, and
- ratification of the ECHR and compliance with its provisions, including the standards relating to effective remedies[116].

As a consequence of the fulfilment of those requirements the entry, including the illegal entry, of applicants from such states gives the possibility for the Member State not to examine or not to examine the application for international protection in its entirety and to assess the applicant's safety in his or her particular situation.[117].

It is clear from the presentation of the concept of safe countries that it strengthens the position of the state of refuge in the procedure for granting international protection. From the perspective of international protection, it raises specific questions, for example:

- Can a country simply transfer asylum seekers to another country without obtaining assurances from that 'safe third country' that they will have access to procedures for determining refugee status?
- Does the State's responsibility end after the asylum seeker's expulsion or is it obliged to cooperate with the destination State?

115 See, A. Kosinska, *Koncepcja europejskiego państwa bezpiecznego i jej wpływ na ochronę praw podstawowych obywateli państw trzecich*, [in:] T. Sieniowa (ed.), *Migracje powrotowe: nauka i praktyka*, Lublin 2015, pp. 165–190.

116 See, Recital 45 and Article 39(2) of the 2013 PD(r).

117 See, Article 39(1) of the 2013 PD(r).

– Does the mere passage through a country mean that it is a 'safe third country' to which an asylum seeker can be returned?
– Can an asylum seeker be sent to a country that is safe in one or two regions but otherwise unstable[118]?

Anticipating further comments, it can be added that, despite their controversial nature, the European Commission maintained them in its legislative proposals of 2016[119], albeit on condition that there are clear procedural safeguards, including the right to an effective remedy.

4. Right to an effective remedy

4.1. Right to an effective remedy in European Union law

The procedure for examining an application for international protection should, as a general rule, provide the applicant with at least:

– the right of residence until a decision is taken by the determining authority;
– access to the services of an interpreter to present one's case in the event of questioning by the authorities;
– the possibility of contacting a representative of UNHCR, and with organisations providing assistance or advice to persons applying for international protection;
– the right to adequate notification of the decision and of the factual and legal justification thereof;
– the possibility of consulting an adviser or legal representative;
– the right to be informed of his/her legal position at decisive moments in the procedure in a language which he/she understands or is reasonably supposed to understand; and

118 See: R. Marx, *The European Union's Plan to Amend the 'First Country of Asylum' and 'Safe Third Country' Concepts*, 'International Journal of Refugee Law' 2019, Vol. 31, no. 4, pp. 580–596.

119 See final remarks.

– the right, in the event of a negative decision, to an effective remedy at a court.

Although the right to an effective remedy is mentioned last in that part of the Directive that in no way demonstrates its least importance among the procedural safeguards mentioned. On the contrary it is of paramount importance, if only because

> The requirement of judicial control (...) reflects a general principle of law which underlies the constitutional traditions common to the member states. That principle is also laid down in articles 6 and 13 of the European convention for the protection of human rights and fundamental freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their joint declaration of 5 April 1977 (Official Journal C 103, p. 1) and as the court has recognized in its decisions, the principles on which that convention is based must be taken into consideration in community law review[120].

In the first place, it is necessary to determine the material scope of that right within the meaning of the 2013 PD(r). It is set out in Paragraph 1 of Article 46 of 2013 PD(r). It thus covers decisions of the competent national authority in four specific situations, namely where an application has been declared unfounded, then where the application has been declared inadmissible, thirdly where the decision was taken under a border procedure and, finally, where the authority has waived the examination of the application because the European safe third country concept applies.

120 CJEU, case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, judgment of 15.05.1986, Paragraph 18.

In addition, two general situations have been covered by the scope of that right, namely the refusal to resume the examination of an application, after discontinuance of the proceedings due to its withdrawal or implicit withdrawal or cessation of support for the application, and the decision to withdraw the status of international protection. Thus, the law at issue covers all final decisions in first instance relating to the granting and withdrawal of international protection.

The key provision on the scope of this right is set out in Article 46(3) as follows:

> In order to comply with Paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to qualification directive (recast)[121], at least in appeals procedures before a court or tribunal of first instance.

Moreover, in the appeal procedure, national courts will also have to take into account the general principles of EU law on access to justice, as referred to in particular Articles 2 and 6 of TEU and Articles 18, 20, 21, 47 and 51–53 of the EU's CFR. At the same time, the concept of court has an autonomous meaning in EU law, regardless of what national law considers a court. In EU law, it is the body that may submit a request for a preliminary ruling to the CJEU on the basis of Article 267 of TFEU. Moreover, according to CJEU case-law, recognition of a body as a court (or tribunal) requires the fulfilment of several criteria, such as establishment by law, permanent nature, mandatory jurisdiction, adversarial

121 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337/9.

nature of the procedure, application of the rule of law, as well as its independence and impartiality[122].

4.2. Right to an effective remedy under European Convention on Human Rights law

The safeguards on the right to an effective remedy are significantly strengthened by the ECHR. As is well known, the normative basis for that reinforcement is Article 13 thereof, according to which,

> Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Translating the above provisions of the ECHR into the specific nature of asylum cases, the ECtHR drew attention to the risk of materialisation of threats to the violation of three human rights and fundamental freedoms, namely threats to the right to life (Article 2 of ECHR), the prohibition of torture, inhuman or degrading treatment or punishment (Article 3 of ECHR) and the prohibition of collective expulsion of aliens (Article 4 of P-4 to the ECHR).

The limited framework of this chapter does not allow for a detailed analysis of the specificity of the human rights or fundamental freedoms in question, but it should be noted that the first two have a special position in the Convention's catalogue. The Court has repeatedly stated that

122 See, CJEU, case *C-506/04 Wilson v. Ordre des advocats du barreau de Luxemburg*, judgment of 19.9.2006, Paragraph 48.

they express the fundamental values of a democratic society, for the protection of which the Council of Europe was established[123].

The States Parties to the ECHR may not, therefore, expel or return persons if this would result in a violation of their rights guaranteed by Articles 2 and 3[124]. Article 15 of the ECHR further states that the obligations of States Parties arising from those rights may not be derogated from, even in the event of an imminent threat to the life of the nation or war. In certain exceptional situations, States may also not expel persons who would be in *flagrant breach* of Article 5 (right to liberty and security) or Article 6 (right to a fair trial) of the ECHR in the country of destination[125].

In view of the subject matter of this chapter, more attention should be paid to Article 4 of P-4 to the ECHR[126].

A review of the case-law of the ECtHR allows several essential elements to be identified. First, the key element for the application of the prohibition on collective expulsion of aliens is the very concept of 'expulsion'. According to the ECtHR,

> The notion of expulsion used in Article 4 of Protocol no. 4 should be interpreted in the generic meaning in current use (that is to say 'to drive away from a place') and should be applied to all measures that may be characterised as constituting a formal act or conduct attributable to a State by which a alien is compelled to leave the territory of that State, even if under dome-

123 ECtHR, case *McCann and Others v. UK,* application number 18984/91, judgment GC of 27.09.1995; As for the meaning of Article 3 of ECHR see e.g. case *Soering v. UK*, application number 14038/88, judgment of 07.07.1989

124 ECtHR, case *Saadi v. Italy*, application number 37201/06, judgment GC of 28.02.2008

125 See, an overview of the forms 'flagrant denial of justice' in ECtHR case-law, case *Harkins v. UK*, application number 71537/14, GC decision of 15.06. 2017, Paragraphs 62–65.

126 The leading case in this regard is case *M.K. and Others v. Poland*, application number 40503/17 42902/17 43643/17, judgment of 23.07.2020.

> stic law such measures are classified differently (for instance as the 'refusal of entry with removal' rather than 'expulsion' or 'deportation')[127].

This interpretation of 'expulsion' (deportation, removal or other similar measure) has been confirmed by the Grand Chamber of the ECtHR inter alia in case *N.D. and N.T. v. Spain* 2020[128]. Thus, the term 'expulsion' must be interpreted autonomously, and is not limited to points of law, but includes acts or omissions of fact on the part of the authorities. This is well illustrated by the findings of the ECtHR in case *M.K. and Others v. Poland* of 2020, in which the ECtHR noted that

> [it] attaches more weight to the applicants' version of the events at the border because it is corroborated by a large number of accounts collected from other witnesses by the national human right institutions (in particular by the Children's Ombudsman). The reports by those bodies indicate the existence of a systemic practice of misrepresenting the statements given by asylum-seekers in the official notes drafted by the officers of the Border Guard serving at the border checkpoints between Poland and Belarus. Moreover, the irregularities in the procedure concerning the questioning of aliens arriving at the Polish-Belarusian border at the relevant time, including the lack of a proper investigation into the reasons for which they sought entry

127 ECtHR, case *M.K. and Others v. Poland*, Paragraph 198.

128 ECtHR, case *N.D. and N.T. v. Spain*, application number 8675/15 8697/15, judgment GC of 13.02.2020, Paragraph 185.

> into Poland, were confirmed by judgments of the Supreme Administrative Court[129].

The second issue, which also remains controversial, is what collective expulsion is. The question then arises, when can a series of individual expulsions be classified as a collective expulsion? In that regard, the European Commission on Human Rights (EComHR) has adopted the relatively simple explanation that 'where a person is expelled along with others without prior individual examination of his or her case, the expulsion will be of a collective nature[130]. The Court upholds the position of the European Commission of Human Rights (EComHR), interpreting the concept of 'collective expulsion' as

> any measure forcing aliens as a group to leave the State, except where such a measure has been adopted on the basis of a reasonable and objective assessment of the specific situation of each of the aliens in the group[131].

It follows that the prohibition in question is not absolute, although even if the authorities make a 'reasonable and objective assessment of the specific situation of each foreign national', the circumstances in which it is implemented are 'an important factor determining whether the authorities' actions comply with Article 4 P-4 of the ECHR'[132].

129 ECtHR, case *M.K. and Others v. Poland*, Paragraph 174.

130 EComHR, case *Becker v. Denmark*, application number 7011/75, decision of 03.10.1975; EComHR, *Alibaks and Others v. Netherlands*, application number 14209/88, decision of 16.12.1988.

131 ECtHR, case *Sultani v. France*no, application number 45223/05, judgment of 20.09.2007, Paragraph 81; ECtHR case *Georgia v. Russia* (I), application number 13255/07, judgment GC of 03.07/2014, Paragraph 167.

132 ECtHR, case *Čonka v. Belgium*, application number 51564/99, judgment of 05.02.2002, Paragraph 59, and *Khlaifia and Others v. Italy*, application number 16483/12, GC judgment of 15.12.2016, Paragraph 237.

The preventive aspect of the prohibition of collective expulsion corresponds to its objective, which is 'to prevent States from returning a certain number of foreign nationals without examining their personal situation and thus without giving them the opportunity to put forward arguments against the measure adopted by the competent authorities'[133]. As a result, it becomes necessary to verify the 'particular situation of the persons concerned'[134], the specific circumstances of the expulsion and the 'general circumstances prevailing at the time'[135]. This, in turn, leads to the conclusion that the obligation of the States Parties to the ECHR resulting from the prohibition of collective expulsion of aliens is not exclusively negative, but that the ECHR has derived from it a series of procedural obligations setting the process to be followed in expulsion cases.

Continuing the theme of obligations, it is also worth emphasising that the entities obliged under Article 4 of Protocol no. 4 to the ECHR (P-4 to the ECHR) are, of course, the public authorities of the State party to the ECHR, while the entitled entities are not only aliens lawfully resident in the territory of the State concerned but also,

> all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality[136].

Moreover, they are persons who have arrived at the border of the defendant State where they were detained and returned to their country

133 ECtHR, case *M.K. and Others v. Poland*, Paragraph 201. See also, ECtHR, case *Sharifi and Others v. Greece and Italy*, application number 16643/09, judgment of 21.10.2014, Paragraph 210; case *Hirsi Jamaa and Others v. Italy,* application number 27765/, GC judgment of 23.02,2012, Paragraph 177.

134 ECtHR, case *Hirsi Jamaa and Others v. Italy,* Paragraph 183.

135 ECtHR case *Georgia v. Russia* (I), Paragraph 171.

136 ECtHR, case *M.K. and Others v. Poland,* Paragraph 199.

of origin[137], regardless of whether their arrival in the defendant State was lawful[138]. It should also be added that the Court applies Article 4 of P-4 to the ECHR also in relation to,

> persons apprehended on the high seas in the course of attempting to enter the territory of the defendant State and then detained and returned to their country of origin[139], as well as persons apprehended in the course of an attempt to cross the border by land and immediately expelled from the territory of the State by the Border Guard[140].

Turning directly to Article 13 of the ECHR and the right to an effective remedy, it should be noted at the outset that, according to the Court, the right in question permeates the entire legal order of the ECHR[141] in order to give it a real and effective dimension[142]. It fulfils its guarantee and protection function in the event of violations, as well as in the absence of actions or ineffective actions of the state[143]. In that sense it is ancillary in nature, enabling a person subject to the jurisdiction of a State party to the ECHR to enforce independently at national level the consequences of a violation

137 ECtHR, case *Čonka v. Belgium*, para 63; ECtHR, case *Sultani v. France*, Paragraphs 81–84.

138 ECtHR, case *Sharifi* and Others, Paragraphs 210–213; ECtHR, case *Georgia v. Russia(I)*, Paragraph 170.

139 ECtHR, case *Hirsi Jamaa and Others,* Paragraph 182.

140 ECtHR, case *M.K. and Others v. Poland*, Paragraph 200.

141 E. Brems, J. Gerards, *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge 2014, p. 304; L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, *t. 1: Komentarz do artykułów 1–18*, Warszawa 2011, p. 724.

142 ECtHR, case *Cocchiarella v. Italy*, application number 64886/01, GC judgment of 29.03.2006, Paragraph 83.

143 E. H. Morawska, *The Principles of Subsidiarity and Effectiveness: Two Pillars of an Effective Remedy for Excessive Length of Proceedings within the Meaning of Article 13 ECHR*, 'Polish Yearbook of International Law' 2019, pp. 159–185; https://doi.org/10.24425/pyil.2020.129604; (publication in 2020).

of the rights and freedoms of conventions. It can therefore be said to be ancillary, since it is applied in connection with those rights or freedoms[144].

In the light of the case-law, Article 13 of the ECHR requires the States Parties to the ECHR to adopt a measure which, first, enables the competent authority of the State to deal substantively with 'a Convention complaint, in accordance with the principles laid down in the case-law of the Court'[145] and, second, enables it to decide on the way to remedy the violation of the Convention which would be most appropriate in the circumstances of the case (*grant an appropriate relief*)[146]. Those two elements constitute the content of the State's obligation under Article 13 of the ECHR[147].

Pursuant to the principle of subsidiarity and the directly related concept of discretion, States have some *discretion* as to the means and manner of fulfilling this obligation[148]. Consequently, the Court declares its respect for the procedural autonomy of the State, although this is not unconditional. In the case of asylum procedures which may lead to a violation of the right to life or the prohibition of ill-treatment by means of expulsion within the meaning of Article 4 of P-4 to the ECHR, the Court has formulated three key requirements: firstly the arguable claim of the person concerned must be subject to strict review by the national authority, secondly the per-

144 ECtHR cases: *Muminov v. Russia*, application number. 42502/06, judgment of 11.12.2008, Paragraph 105; *A. v. Netherlands*, application number 4900/06, judgment of 20.07.2010; *Othman (Abu Qatada v. UK*, application number 8139/09, judgment of 17.01.2012.

145 Case *Kiril Ivanov v. Bulgaria*, application number 17599/07, ECtHR judgment of 11.01.2018, Paragraph 59; other cases, for example, on the grounds of the right to respect for private and family life (case *Voynov v. Russia*, application number 39747/10, judgment of 03.07.2018, Paragraph 42).

146 ECtHR, case *Aksoy v. Turkey*, application number 21987/93, GC judgment of 18.12.1996, Paragraph 95.

147 ECtHR, case *Stanev v. Bulgaria*, application number 36760/06, judgment of 17.01.2012, Paragraph 217.

148 ECtHR, case *Aksoy v. Turkey*, Paragraph 95. For more on this topic, see E. H. Morawska, *Zobowiązania pozytywne państw stron Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2016, p. 201 *ff*. See also, J. Kratochil, *The Inflation of the Margin of Appreciation by the European Court of Human Rights,* 'Netherlands Quarterly of Human Rights' 2011, Vol. 29, pp. 329–335.

son's assertion that there are serious grounds for fearing that there is a real risk of being subjected to treatment incompatible with Article 2 or Article 3 of the ECHR in the place to which he or she will be removed must be subject to independent and rigorous review and, thirdly, the remedy must automatically have an automatic suspensive effect[149]. The first two requirements are of general application and therefore concern all human rights and fundamental freedoms guaranteed by the legal system of the ECHR[150].

At this point, it should be pointed out that 'a remedy having automatic suspensive effect (...) for applications under Article 4 of P-4' cannot be read in isolation from Article 2 and Article 3 of the ECHR. It is therefore an obligation to provide for such a measure where a person claims that collective expulsion would expose him or her to a r e a l risk of ill-treatment in breach of Article 3 of the ECHR or violation of his or her right to life under Article 2 and in view of t h e i r r e p a r a b l e n a t u r e o f t h e h a r m which might occur if the risk of torture or ill-treatment materialised[151].

It is also clear from the case-law that the absence of the measure in question in cases of collective expulsion *per se* determines the violation of Article 2 or Article 3 of the ECHR, for whose determination there is no need to verify the allegations concerning, for example, the lack of adequate information and legal assistance in appeal proceedings, the lack of independence of the Commander-in-Chief of the Border Guard, the potential

149 ECtHR, case *De Souza Ribeiro v. France,* application number 22689/07, GC judgment of 13.12.2012, Paragraph 75.

150 See, ECtHR, case *M. and Others v. Bulgaria*, application number. 41416/08, judgment of 26.07.2011, Paragraphs 122–132; case *Al-Nashif v. Bulgaria*, application number 50963/99, Judgment of 20.06.2002, Paragraph 133, *mutatis mutandis*. Unfortunately, the case-law is not consistent in this area. For example, in relation to the right to respect for family and private life in connection with the separation of families during the proceedings, there has also been talk of an automatic suspensive effect in some cases. (case *Neulinger and Shuruk v. Switzerland*, application number 41615/07, GC judgment of 06.07.2010; case *Nunez v. Norway*, application number 55597/09, judgment of 28.05.2011.)

151 ECtHR, case *Khlaifia and Others v. Italy*, application number 16483/12, GC judgment of 15.12.2016, Paragraph 276.

protracted duration of proceedings before administrative courts or obstacles resulting from the necessity to lodge such a complaint from abroad[152].

Finally, it is worth noting the consequences for asylum proceedings resulting from the preventive dimension of Article 13 of the ECHR. As the Court observes,

> The notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible[153].

In principle, therefore, 'it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention'[154]. In other words, the person concerned has the r i g h t t o r e m a i n on the territory of the Member State until a final decision on the application for protection has been made[155]. It cannot be ruled out that a refusal decision (an expulsion decision) may be regarded as an erroneous decision on appeal[156] and, moreover,

> the requirements of Article 13 and other provisions of the Convention take the form of guarantees and not merely declarations of intent or practical arrangements. This is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all articles of the Convention[157].

152 ECtHR, case *M.K. and Others v. Poland*, Paragraph 147.

153 ECtHR, case *Čonka v. Belgium*, Paragraph 79.

154 *Ibidem*

155 *Ibidem*.

156 *Ibidem*, Paragraph 82.

157 ECtHR, case *Iatridis v. Greece*, application number 31107/96, GC judgment of 25.03.1999, Paragraph 58.

Therefore, the right of asylum seekers to remain pending a final decision on them is of essential significance for Member States in order to fulfil their obligations regarding the principle of *non-refoulement* and the rules of international law relating to the right to *an effective remedy*[158].

To the conclusion of this part of the chapter, it can be added that the UNHCR supports the view that, in order to comply with the principle of *non-refoulement*, remedies should in principle have a suspensive effect and the right of residence should be extended until a final decision on the application is taken. The conclusions of Executive Committee (ExCom) no. 8 (XXVIII) of 1977[159] and no. 30 (XXXIV) of 1983[160] confirm that the automatic suspensive effect may be waived only if it is found that the request is manifestly unfounded or manifestly abusive. In such cases, the court or other independent body should reassess and confirm the refusal to grant suspensive effect based on an analysis of the facts and the likelihood of success of the appeal[161].

5. Conclusion

The 2013 PD(r) has significantly improved procedural guarantees for applicants in many respects. Progress is being made in several areas, namely access to the asylum procedure, guarantees linked to interviews and the right to an effective remedy. However, a few problematic issues re-

158 T. Rodenhäuser, *The principle of non-refoulement in the migration context: 5 key points*, 30.03.2018. https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/ [accessed on: 1.02.2023].

159 General Conclusion on International Protection no. 29 (XXXIV) – 1983 Executive Committee 34th session. Contained in United Nations General Assembly Document no. 12A (A/38/12/Add.1).

160 The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum no. 30 (XXXIV) – 1983, Executive Committee 34th session. Contained in United Nations General Assembly Document no. 12A (A/38/12/Add.1).

161 See, UNHCR Observations on the European Commission Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step' (COM(2004) 503 final; Annex SEC(2004)937, 15 July 2004).

main. The provisions on accelerated procedures, the safe country concept and the general nature of the directives remain particularly worrying[162].

The migration crisis of 2014–2016, however, revealed in practice many other shortcomings of the CEAS system and the EU asylum policy. In view of the alarming death toll in the Mediterranean, on 13 May 2015 the Commission proposed through the European Agenda on Migration a long-term strategy to address the immediate challenges posed by the ongoing crisis, as well as equipping the EU with the tools to better manage migration in the medium and long term, in the areas of irregular migration, borders, asylum and legal migration. A few days later, it submitted the first package of legislative proposals implementing this agenda[163]. The programme was followed by a second set of proposals to address the refugee crisis in September 2015[164], and a third in December 2015[165].

The proposals submitted in 2015 mainly concerned border management issues however, and only the legislative proposals presented by the Commission in May 2016 covered the CEAS[166]. These proposals

162 ECRE, *Accelerated, prioritised and fast-track asylum procedures. Legal frameworks and practice in Europe*, May 2017.

163 These were: a proposal for the emergency relocation of 40,000 persons in need of international protection from Italy and Greece to other Member States; a recommendation calling on Member States to resettle 20,000 people in need of international protection from outside the EU; an EU action plan against migrant smuggling; guidelines on fingerprinting. See, a public consultation on the future of the Blue Card Directive, Press Release, *European Commission makes progress on Agenda on Migration*, 27 May 2015; at: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5039 [accessed on: 1.02.2023].

164 These proposals included: emergency relocation for 120 000 people from bordering countries in clear need of international protection; a permanent relocation mechanism for all Member States; a common European list of safe countries of origin; a more effective return policy; a guide to public procurement rules for refugee support measures; measures to address the external dimension of the refugee crisis. - Trust Fund for Africa.

165 The Commission has proposed the creation of a European Border and Coast Guard (commonly referred to as *Frontex*); The Commission has also proposed to introduce systematic checks on all persons entering or leaving the Schengen area based on relevant databases.

166 Press release, *Towards a sustainable and fair Common European Asylum System,* 4 May 2016; https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1620 [accessed on: 1.02.2023].

first related to the reform of the Dublin system[167], then to the transformation of the existing EASO into a fully-fledged European Union Agency for Asylum, and to the strengthening of the EU's fingerprint database[168], Eurodac, in order to better manage the asylum system and help fight unregulated migration[169]. This package was a first step towards a wide-ranging reform of the CEAS. Further changes were needed to reform the EU's asylum system, as proposed in the second package of legislative proposals. These concerned the reform of the asylum procedure, the Qualification Directive and the Reception Conditions Directive[170].

The proposed changes were aimed at shaping European asylum policy in such a way that it is effective, fair and humane - both in times of peace and crisis. As the CEAS has not been fully implemented in many Member States, the reform also aimed to achieve greater harmonisation and reduce secondary movements. However, the Common European Asylum System reform packages were not adopted. The difficulties in reaching

167 See: Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). COM/2016/0270 final - 2016/0133 (COD); No longer in force, date of end of validity: 23/04/2021.

168 Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) no. 439/2010, COM/2016/0271 final - 2016/0131 (COD). Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 establishing a European Union Agency for Asylum and repealing Regulation (EU) no. 439/2010, .PL Official Journal of the European Union 30.12.2021 L 468/1; Agency for asylum (AUEA) started operating in 2022. see https://euaa.europa.eu/.

169 Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person] , for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM/2016/0272 final - 2016/0132 (COD).

170 Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU Brussels, 13.7.2016 COM (2016) 467 final 2016/0224 (COD).

political agreement on the Reception Conditions Directive, the Qualification Regulation and the protracted negotiations on the Asylum Procedure Regulation and the Dublin IV Regulation have once again shown how contentious asylum and immigration are at EU level[171].

Against this backdrop, the newly elected European Commission[172] presented *a New Pact on Migration and Asylum*' (The New Pact) in September 2020[173]. The New Pact covers multiple issues and addresses migration, asylum, integration and border management. In setting out its objectives, the Commission pointed to more efficient and fairer migration processes, reducing dangerous and irregular migration routes, and promoting sustainable and safe legal pathways for persons in need of international protection. At the heart of this new pact are the principles of solidarity and fair sharing of responsibility, although the approach to them is less binding and more flexible than in previous proposals[174]. The second pillar concerns procedures that are supposed to be more efficient and faster. The new integrated border procedure appears to be a particularly important procedure and all other procedures are to be improved, while being closely monitored and implemented with operational support from EU agencies and EU digital infrastructure[175]. The New Pact therefore provides,

171 See, N. Zaun, S. Gerwens, N. Millet, N. Enria, *Reforming the reform? The future of the Common European Asylum System*, 89 Initiative, Policy Report 2020, https://89initiative.com/wp-content/uploads/2020/02/Reforming-the-Reform.pdf [accessed on: 1.02.2023].

172 The new Commission has put migration at the heart of its mandate. In her State of the Union address of 16 September, the President of the Commission stressed that 'if we are all prepared to compromise - without accepting the slightest damage to our principles - we can find solutions'.

173 European Commission, *Communication on a New Pact on Migration and Asylum*, COM (2020) 609 final, 23 September 2020, https://bit.ly/30FPDkx [accessed on: 1.02.2023].

174 Unlike previous attempts, the New Pact does not provide for fixed relocation quotas, but integrates several forms of cooperation and responsibility-sharing, including a system based on sponsorship principles.

175 It can be added that spending in the area of migration and border management will amount to €22.7 billion over the next seven years. Support for migration and border management has been significantly increased, including by funding up to 10 000 border guards at the disposal of the European Border and Coast Guard Agency by 2027.

- effective and fair management of the external borders, including identity, health and security checks;
- effective and fair asylum rules, streamlining asylum and return procedures;
- a new solidarity mechanism in search and rescue, pressure and crisis situations;
- more effective anticipation, preparedness and response to crises;
- an effective, EU-coordinated approach to return;
- comprehensive governance at EU level for better management and implementation of asylum and migration policies;
- mutually beneficial partnerships with key third countries of origin and transit;
- developing sustainable legal pathways for those in need of protection and to attract talent to the EU; and
- supporting effective integration policies.

At this stage of work, it is difficult to determine whether the above proposals will ultimately be accepted by the Member States. Experience shows that their entry into force is not certain as it requires difficult compromises from countries and a proper balance of many complex issues. There is no doubt that, after the experience of the migration crisis, it is becoming necessary to prepare new instruments open to migration as a dynamic and multifaceted social phenomenon. Bearing in mind the international legal obligations of the Member States, an appropriate balance should be sought between the human dimension of migration and its state dimension: on the one hand, the principle of respect for the right to life, the prohibition of torture, inhuman and degrading treatment of people and the fundamental principle of *non-refoulement* with, on the other hand, the principle of fair sharing of responsibility and solidarity between EU Member States and their obligations regarding the protection of internal security and the maintenance of law and order.

Chapter VI

The right to respect for family life

and the right to found a family

in the context of the asylum procedure

1. Introduction

The right of an alien seeking international protection in regard to respect for his or her family life may be infringed during the asylum procedure. This area of life of aliens is subject to special interference by the state authorities, not only in the context of expulsion, but entry as well[1]. Such interference, depending on the circumstances of the case, may be or may not be legally justified. International law guarantees everyone the right to respect for family life, as well as the right to marry and to found a family: the Universal Declaration of Human Rights (Articles 12 and 16)[2], the International Covenant on Civil and Political Rights (Articles 17 and 23)[3], the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 8 and 12) and the Charter of Fundamental Rights[4] (Article 7)[5]. In this sense, the relevant provisions on refugees are included in Qualification Directive 2011/95/EU of 13 December 2011[6],

1 B. Kowalczyk, *Polski system azylowy*; Wrocław 2014, Online access: http://www.bibliotekacyfrowa.pl/publication/62929, p. 181 [accessed on: 1.02.2023].

2 The Universal Declaration of Human Rights, Resolution of the General Assembly UN 217 A (III) Adopted and proclaimed on December 10, 1948, A. Przyborowska-Klimczak, *Prawo międzynarodowe publiczne. Wybór dokumentów*, Lublin 2008, pp. 134–138.

3 The International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (999 UNTS 171).

4 Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389.

5 On the other hand, the right to marry and the right to found a family in accordance with Article 9 of the CFR are guaranteed in accordance with the national laws governing the exercise of these rights.

6 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9. The Directive recasts and replaces Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12, with a view to ensuring consistency with the case-law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[7] and, to some extent, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents[8]. Refugees, as well as persons seeking international protection, have special rights in the Member States of the European Union regarding the protection of family life. This is due to the impossibility of them returning to their country of origin or previous residence in order to continue their family life.

This chapter discusses the right of persons applying for international protection to respect for family life, as well as the right to marry and found a family in the context of the asylum procedure. In doing so, issues relating to the regulation of family residence and family reunification were examined, as well as guarantees to protect the family unity of applicants for international protection. The subject of the analysis concerns the provisions of secondary European Union law. References are also made to the case-law of the Court of Justice of the European Union and the European Court of Human Rights[9].

2. The concept of family in secondary European Union legislation

The regulations of international law as well as the law of the European Union do not define the concept of family life or the concept of family. However, secondary EU law defines the circle of persons who are included in the family of a person applying for international protection.

7 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12.

8 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44.

9 E. Karska, *Kilka uwag o uchodźstwie jako zagadnieniu prawnym*, [in:] E. Karska (ed.), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, Warszawa 2020, pp. 9–21.

2.1. Family members in the light of the recast Qualification Directive

The concept of family life and, in particular, the proper definition of the circle of persons included in the concept of family members is of great importance for a number of reasons, including, in particular, family members are usually, by virtue of their relationship to the refugee, exposed to acts of persecution in such a way as to give rise to refugee status (Paragraph 36 of the QD (r) Recitals). Secondly, this relevance is of utmost importance in the context of maintaining family unity (Article 23). According to QD (r), the concept of 'family members' must be interpreted broadly, taking into account the different situations of dependency and paying particular attention to the best interests of the child (Paragraph 19 of the Recitals). Under Article 2(j) of the QD (r), 'family members' are to include the spouses, descendants and ascendants of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection. The Directive introduces the condition that a family had to already exist in the country of origin of the applicant for international protection. The applicant's partner with whom he or she is in a stable relationship shall be treated as a spouse, provided, however, that the law or practice of the Member State concerned treats unmarried couples in a manner comparable to married couples in accordance with its law relating to third-country nationals. Descendants are understood as minor children of spouses or couples in a stable relationship, regardless of whether they are legitimate, illegitimate or adopted children, provided, however, that these children are not married. Ascendants include the father, mother or other adult responsible for the applicant if the applicant is a minor and is not married.

2.2. Family members in the light of the Family Reunification Directive

On the other hand, according to the Family Reunification Directive, family reunification should apply in every case to the members of the nuclear family, namely the spouse and minor children (Recital 9). However, discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation is prohibited (Recital 5). Like the earlier directive, the Family Reunification Directive lists three groups of persons included in the concept of family members: spouse, descendants and ascendants (Article 4). According to the Directive, descendants include the minor children of the sponsor and his/her spouse, including adopted children. This also applies to minor children (including adopted children) of the sponsor or spouse, where the sponsor or spouse, as appropriate, has custody and the children are dependent on him/her. The Directive also provides for the possibility of allowing the reunification of children under custody of two persons, provided that the other party having custody consents to it. However, minor children must be below the age of adulthood laid down in the host state legislation and must be unmarried. By way of derogation, where the child is over 12 years of age and arrives independently of the rest of the family, it may be verified before allowing entry and residence whether the child fulfils the integration conditions laid down in the existing legislation of the host State. Unmarried adult children of the sponsor or of his or her spouse should also be included in this category when they are objectively unable to maintain themselves on account of their state of health. On the other hand, according to the Directive, ascendants are defined as being in the direct ascending line of the sponsor (i.e. parents) or his/her spouse (i.e. the spouse's parents), in the case where they are dependent and do not have the support

of their own family in the country of origin. The next group concerns spouses. In addition to the spouse, the directive also refers to an unmarried partner with whom the sponsor is in a duly certified, stable long-term relationship, or is related to the sponsor by virtue of a registered partnership, but also to the unmarried minor child of those persons, including adopted children, and to the adult unmarried child of those persons who is objectively unable to be able to provide for their own needs due to his/her health condition (Article 4(3)). According to the Directive, Member States may decide that partners in a registered partnership shall be treated in the same way as spouses as regards family reunification. In addition, Member States may allow family reunification for other family members if they are dependent on the refugee (Article 10).

However, the Directive does not apply to family members of EU citizens or to non-EU nationals seeking recognition of refugee status whose application has not yet received a final decision and who benefit from a temporary form of protection.

2.3. Family members in the light of the recast Reception Directive

The issue of the right to respect for family life is also present in Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (RD(r))[10]. The Directive contains provisions on the living conditions (or reception conditions) of persons applying for international protection awaiting examination. It is intended to help prevent people from moving to other countries due to differences in living conditions. It thus aims to guarantee standards for the reception of asylum seekers

10 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96.

in the EU that are sufficient to ensure a dignified standard of living and respect for human rights. The Directive defines the term 'family members'. According to its rules, 'family members' means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for international protection: (1) the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, (2) the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, (3) t the father, mother or another adult responsible for the applicant whether by law or by the practice of the Member State concerned, when that applicant is a minor and unmarried (Article 2 of the Directive). Thus, the Directive applies to applicants for international protection and their families, including: 1) spouses and unmarried partners, 2) their children under 18 years of age, 3) other family members (e.g. the mother or father of the applicant, if the applicant is under 18 years of age).

The aim of the directive is to harmonise reception conditions across the EU. These conditions include: access to accommodation, food and clothing, financial benefits, a decent standard of living, medical and psychological care. The applicant should not be detained solely on the grounds of seeking international protection. Detention should be a last resort, the decision to detain should be taken on a case by case basis. In order to prevent arbitrary detentions, an exhaustive list of reasons for detention has been adopted.[11]

11 According to Article 8 of the Directive, an applicant may be detained only: (a) in order to determine or verify his or her identity or nationality; (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applican; (c) in order to decide, in the context of a procedure, on the applicant's right to enter

3. Respect for family life

The need to respect family life is highlighted in a number of EU regulations. According to Recital 18 in the preamble to the RD(r), when implementing that Directive, Member States should prioritise the best interests of a child in accordance with the 1989 UN Convention on the Rights of the Child. When assessing the best interests of the child, Member States should, in particular, take into account the principle of family unity, the minor's well-being and social development, safety considerations and the views of the minor in accordance with his or her age and maturity. Similarly, according to Recital 9 of the RD(r), when applying this Directive, Member States should seek the best interests of the child and the consideration of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively. Next, it is necessary to point to the provisions of Article 7 of the CFR, which refers to respect for private and family life. According to that provision, everyone has the right to respect for his/her private and family life, home and communications. On the other hand, in accordance with Article 52(3) of the CFR, this right has the same meaning and scope as the rights conta-

the territory; (d) when he or she is detained subject to a return procedure under 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 (2) and is intended to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires; (f) in accordance with Article 28 of Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

ined in the relevant article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Therefore, legally permitted restrictions on these rights are the same as those recognised by Article 8[12] of the ECHR[13].

According to the case-law of the ECtHR under Article 8 of the ECHR, the family creates a legal relationship, e.g. by a marriage certificate, or a de facto relationship, which does not result from such an act, but the type of relationship should not be a discriminatory factor against an informal relationship[14]. While guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family, but Article 8 of the Convention guarantees neither the right to found a family nor the right to adopt[15].

According to the judgment of 13 June 1979, family life within the meaning of Article 8 includes at least links between close relatives, such as grandparents and grandchildren, since such relationships may play an important role in family life. Referring to the resolution of the Committee of Ministers of the Council of Europe, the Court considered a single woman and her child to be one of the forms of family[16]. 'Family life' can undoubtedly persist between parents and adult children, especially

12 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13 Https://fra.europa.eu/pl/eu-charter/article/7-poszanowanie-zycia-prywatnego-i-rodzinnego#charter [accessed on: 1.02.2023].

14 Judgment of 13 June 1979 in the case of *Marckx v. Belgium*, application no. 6833/74, LEX no. 80813 and judgment of 22 June 2004 in the case of *Pini and Bertani and Manera and Atripaldi v. Romania*, Chamber (Section II), Application nos. 78028/01 and 78030/01.

15 K. A. Strzępek, *Zakres ochrony Artykułu 8 Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności – uwagi ogólne na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, 'Prawo i Więź' 2020, no. 3 (33), p. 284.

16 Case of *Marckx v. Belgium*, judgment of 13 June 1979, no. 6833/74.

if they have not yet started a family of their own[17]. The decision of 10 December 1984 states that the relationship between a parent and an adult child may be covered by the right to respect for family life on the basis of evidence showing the existence of additional elements of dependence, thus indicating stronger than normal emotional ties. Without such evidence, the relationship between a parent and his or her adult child will not be protected by Article 8 of the Convention[18]. Relationships between other family members who do not fall within the narrow meaning of this concept may be assessed in the context of family life if additional elements of dependence between other family members are demonstrated.[19]

In its judgment of 26 May 1994 the Court held that Article 8 of the Convention also applies to de facto family ties other than those resulting from marriage. Their assessment depends on the circumstances of the case and, in particular, on the existence of elements such as kinship, cohabitation, the nature of the relationship between the persons concerned, including apparent mutual interest, attachment and dependence[20].

Family members have the right to respect for family life even if the marriage has ceased to exist. After the breakdown of the marriage, the right to respect for family life continues to exist between the child and his or her divorced parents[21], and these ties exist regardless of whether the child was born in or out of wedlock[22].

The protection contained in Article 8 of the Convention also includes the right to cohabitation of spouses and other family members. It forms

17 ECtHR judgment of 23 June 2008 in the case of *Maslov v. Austria*, application no. 1638/03, Paragraph 62.

18 Case of *S and S. v. United Kingdom*, decision of 10 December 1984, application no. 10375/83.

19 ECtHR judgment of 15 May 2012 in the case of *Nacic and others v. Sweden*, Application no. 16567/10, ECtHR, judgment of 3 July 2012 in the case *Samsonnikov v. Estonia*, Application no. 52178/10, ECtHR, judgment of 12 January 2010 in the case of *Khan A. W. v. United Kingdom*, application no. 47486/06, Paragraphs 31–32.

20 The case of *Keegan v. Ireland*, judgment of 26 May 1994, application no. 16969/90.

21 The case of *Keegan v. Ireland*, judgment of 26 May 1994, application no. 16969/90.

22 R. Andrzejczuk, *Ochrona rodziny na płaszczyźnie międzynarodowej*, Warszawa 2018, p. 12.

the basis for building family relationships. Although the Convention does not guarantee aliens the right to enter and reside in another State, as the Court observes, expulsion from the country where close family members reside may infringe the right to respect for family life[23].

In its judgment of 24 January 2017, the Court held that the right to respect for 'family life' does not protect the desire to found a family itself; it presupposes the existence of a family, or at least a potential relationship between, for example, a child born out of wedlock and his natural father, or a union that arises from an authentic marriage, even if family life has not yet been fully established, or a relationship between the father and his legitimate child, even if it turns out, years later, that there is no biological basis[24]. However, as regards an adult child, the decision of 10 December 1984[25] recognised that such a relationship could be covered by the right to respect for family life on the basis of evidence showing the existence of additional elements of dependence. In this case, it concerns stronger than normal emotional ties[26]. On the other hand, in its judgment of 17 April 2018, the Court points out that the applicant's intention to develop a non-existent 'family life' with her nephew by becoming his legal guardian, goes beyond the scope of 'family life' protected by Article 8 of the Convention[27].

In the context of family life, attention should also be paid to the case-law of the European Court of Human Rights in respect to the right to private life. In the case-law of the ECtHR, the right to privacy is broadly understood to include the physical and psychological integrity of the person and 'cannot

23 Judgment of 2 August 2001 in the case of *Boultif v. Switzerland*, Application no. 54273/00, LEX no. 76178.

24 Sentence ECtHR of 24 January 2017 in the case of *Paradiso and Campanelli v. Italy*, Application no. 25358/12.

25 Decision of 10 December 1984 in the case of *S and S. v. United Kingdom*, Application no. 10375/83.

26 R. Andrzejczuk, *Ochrona rodziny na płaszczyźnie międzynarodowej*, Warszawa 2018, p. 14.

27 ECtHR judgment of 17 April 2018 in the case of *Lazoriva v. Ukraine*, application no. 6878/14.

be exhaustively defined"[28]. The right to privacy, the right to personal development and the right to establish and develop relationships with other people and with the outside world[29] are the right to one's own identity, the right to live in a way that is consistent with one's own wishes, both in the family circle and in relationships with other people, including business and professional activities[30]. The notion of private life includes not only the right to live according to one's own wishes, without the control of others, but also the right to establish and maintain relations with other people[31]. In this understanding of private life, family life is a fragment of private life, so even if a given relationship remains outside the scope of 'family life', it is often possible to include it in the sphere of 'private life'[32].

4. One of the elements of the definition of family life: a same-sex relationship

In its judgment of 3 May 1981, the ECtHR held that, irrespective of the modern evolution of attitudes towards homosexuality, a stable relationship between two men does not fall within the boundaries of the right to respect for family life guaranteed by Article 8 of the Convention[33], and the possibility of protecting such relationships is provided for in the scope of the protection of 'private life'.[34] In turn, in the judgment

28 Judgment of the ECtHR of 25 March 1993 in the case of *Costello-Roberts v. United Kingdom,* Series A no. 247-C.

29 ECtHR judgment of 29 April 2002 on *Pretty v. the United Kingdom*, application no. 2346/02, Paragraph 61.

30 ECtHR judgment of 16 December 1992, *Niemietz v. Germany*, application no. 72/1991/324/396.

31 ECtHR judgment of 14 May 2002 in the case of *Zehnalova and Zehnal v. Czech Republic*, application no. 38621/97.

32 ECtHR judgment of 24 January 2017 on *Paradiso and Campanelli v. Italy*, application no. 25358/12, EctHR judgment of 17 April 2018 on *Lazoriva v. Ukraine*, application no. 6878/14.

33 The decision of 3 May 1983 on *X. and Y. v. United Kingdom*, application no. 9369/81.

34 Decision of 14 May 1986 on *S. v. United Kingdom*, https://swarb.co.uk/s-v-united-kingdom--echr-1986/ [2 January 2021].

of 24 June 2010 the ECtHR has held that a union of persons of the same sex falls within the concept of 'family life' on an equal footing with that of two persons of different sex, as regards the need for legal recognition and legal protection of such a union under Article 8 of the Convention. At the same time, it pointed out that Article 12 of the Convention does not impose an obligation on states to grant same-sex couples the possibility of marriage. On the contrary, States enjoy a certain level of discretion as regards the precise status conferred by alternative forms of recognition of same-sex unions by law. A restriction concerning, for example, the possibility of adopting children or access to artificial insemination does not therefore constitute discrimination[35].

In its judgment of 16 July 2014 the Court emphasized that Article 12 of the Convention is a *lex specialis* provision with regard to the right to marry. It protects the fundamental right of a man and a woman to marry and found a family. It expressly provides for the institution of marriage to be regulated in national law. It upholds the traditional notion of marriage as between a man and a woman. Although some Contracting States have extended marriage to same-sex partners, Article 12 cannot be understood as imposing an obligation on Contracting States to grant access to marriage to same-sex couples[36].

In precedent-setting rulings of 21 July 2015 and 14 December 2017, the ECtHR held that the stable cohabitation of two persons of the same sex constitutes 'family life' within the meaning of Article 8 of the Convention[37]. In its judgment of 13 July 2021[38], the ECtHR reminded that persons living in stable same-sex relationships, just like heterosexual people, have

35 ECtHR judgment of 24 June 2010 in the case of *Schalk and Kopf v. Austria*, application no. 30141/04.

36 The case of *Hämäläien v. Finland*, judgment of 16 July 2014, application no. 37359/09.

37 ECtHR judgment of 14 December 2017 in the case of *Orlandi and others v. Italy*, applications nos. 26431/12, 26742/12, 44057/12 and 60088/12.

38 The case of *Fedot and others v. Russia* - ECtHR judgment of 13 July 2021, joined applications no. 40792/10, 30538/14 and 43439/14.

a legitimate need for legal recognition and protection of their relationship. It is the duty of the State Party to the Convention to take this fact into account. The Court finds that there is no legal justification for the impossibility of recognising a same-sex union in national law. The Court stressed that in a democratic society, the rights of minorities cannot depend on the acceptance of the majority. The Court acknowledges that the State 'has a margin of appreciation in choosing the most appropriate form of registration of same-sex unions, taking into account its specific social and cultural context (for example, civil partnership, civil union or Civil Solidarity Act). In the present case, they exceeded that margin, since no legal framework was available under national law capable of protecting the applicants' unions as same-sex couples. Ensuring that the Claimants have access to formal recognition of their couple's status in a form other than marriage will not conflict with the 'traditional understanding of marriage' (..) or with the views of the majority, (..) because these views only oppose same-sex marriage but do not contradict other forms of legal recognition that may exist (..)' (par. 56). That judgment is part of the established case-law of the ECtHR on the protection of the rights of non-heterosexual persons. The Court clearly indicates that States Parties have obligations related to the protection of this minority group. These duties include providing legal protection for same-sex unions and enabling the legal recognition of such unions, and actively prosecuting hate speech and homophobic crimes[39].

5. The right to marry and the right to found a family

The Universal Declaration of Human Rights (Article 16(1) and (2)), the International Covenant on Civil and Political Rights (Article 23(2)),

39 Katarzyna Warecka, *Strasburg: Rosja powinna wprowadzić związki partnerskie*, Prawo.pl, 14 July 2021, Https://www.prawo.pl/prawo/zwiazki-partnerskie-wg-etpc-rosja-powinna-wprowadzic,509442.html [accessed on: 1.02.2023].

the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 12) guarantee the right to marry and the right to found a family. These rights are generically distinct from the right to respect for family life.

The right to marry and found a family is laid down in Article 12 of the ECHR[40]. It has been guaranteed to every man and woman. This right applies to a couple, that is, a man and a woman. Moreover, it does not cover adoption by a single person, as pointed out by the European Court of Human Rights in its judgment of 10 July 1975[41]. At the same time in its judgment of 18 December 1986 the Court pointed out that Article 12 guarantees the right to marry, without mentioning the right to divorce. It is within the competence of the state to allow the dissolution of marriage[42]. However, in its judgment of 18 December 1987, the Court pointed out that, if national law permits divorce, divorced persons cannot be denied the right to remarriage. The exercise of this right should be guaranteed without unjustified restrictions[43].

According to the case-law of the ECtHR, marriage and the needs of the family can be taken into account when the family is bound not only by a formal marriage act, but also by the real (real) bond of marital life. However, insignificant or transient disturbances concerning cohabitation do not call into question the state of de facto marital commonality. In its case-law, the Court has also referred to the age of the spouses. In its decision of 7 July 1986, it stated that the State had competence to determine the appropriate legal age for marriage. The obligation to respect the legal age of capacity for marriage does not constitute a denial of the right

40 Men and women of marriageable age have the right to marry and to found a family in accordance with the national laws governing the exercise of this right.

41 Decision of 10 July 1975 in the case of *X. v. Belgium and the Netherlands*, Application no. 6482/74.

42 The case of *Johnston and others v. Ireland*, judgment of 18 December 1986, application no. 9697/82.

43 The case of *F. v. Switzerland*, judgment of 18 December 1987, application no. 11329/85.

to marry. This obligation also exists if a person's religion allows him or her to marry at a younger age[44]. On the other hand, in the decision of 28 November 2006 the Court has held that the permissible scope of restrictions on the exercise of the right to marry in national law does not include the effective prohibition of any exercise of the right to marry[45].

It is important to note that it is solely up to the eligible individual to decide whether, while exercising the right to marry, he/she also wants to exercise the right to found a family. The capacity or possibility of cohabitation by the future spouses cannot be a precondition for the exercise of the right to marry[46]. On the other hand, in the judgment of 28 May 1985 the Court emphasised that a family formed on the basis of a lawful and genuine marriage is entitled to legal protection even if family life has not yet been fully built, for example through cohabitation. The existence of marriage is sufficient for it to be regarded as having to be respected in the manner required by Article 8 of the Convention[47].

The decision of 21 May 1975 states that the consequence of the right to found a family is the right to have natural children. This is an absolute right. This does not mean, however, that it is necessary to have real possibilities of procreation throughout the marriage[48]. On the other hand, the decision of 15 December 1977 states that, in certain circumstances, the adoption of a child jointly by a man and a woman may be regarded as a basis for founding a family[49].

Provisions of Article 12 of the ECHR do not contain a right to adoption or other means of reuniting the child concerned who is not a natural child

44 The case of *Khan v. United Kingdom*, decision of 7 July 1986, application no. 11589/85.

45 The case of *R. and F. v. United Kingdom*, decision of 28 November 2006, application no. 35748/05.

46 The case of *Hamar v. United Kingdom*, Report of 13 December 1979, Application no. 7114/75.

47 The case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, application no. 9815/82.

48 The case of *X. v. United Kingdom*, decision of 21 May 1975, application no. 6564/74.

49 The case of *X. and Y. v. United Kingdom*, decision of 15 December 1977, application no. 7229/75.

into the family[50]. However, there is an exception to this rule, in the decision of 15 December 1977 it was stressed that the adoption of a child may be a factor constituting the basis for starting a family.

From the point of view of immigration law, the problem concerns the use of the institution of marriage as an instrument to legalize stay in a given country[51]. In this context, attention should be paid to marriages of convenience and forced marriages.

5.1. Marriages of convenience

Council Resolution C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience introduced a restriction on the right to a marriage of convenience as a means of circumventing immigration controls[52]. A marriage of convenience means a marriage between a national of a Member State or a third-country national legally residing in a Member State and a third-country national whose sole purpose is to circumvent the rules on entry and residence of third-country nationals and to obtain for that third-country national a residence permit or authorisation to stay in a Member State.

At the same time, the resolution indicates a list of factors, the occurrence of which may indicate the probability (assumption) that a marriage is a marriage of convenience. These circumstances include: 1) the fact that there is no marital cohabitation, 2) the lack of an adequate contribution to the obligations arising from the marriage, 3) the spouses never met before the marriage, 4) the spouses do not agree on their personal data (name, address, nationality and work), the circumstances of their first meeting or other important personal data, which concern them, 5) the spo-

50 R. Andrzejczuk, *Ochrona rodziny na płaszczyźnie międzynarodowej*, Warszawa 2018, p. 18.

51 W. Klaus, *Zawieranie małżeństw polsko-cudzoziemskich w celu obejścia przepisów legalizacyjnych*, 'Archiwum Kryminologii' 2016, Vol. XXXVIII, p. 272.

52 Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, OJ C 382, 16.12.1997, p. 1.

uses do not speak a language that both understand, 6) a sum of money has been transferred for the marriage (with the exception of money transferred in the form of a dowry in the case of citizens of countries where the transfer of dowries is common), 7) the past of one or both spouses contains evidence of previous marriages of convenience or anomalies regarding the place of residence.

Information concerning the above circumstances may come from various sources of evidence, including: statements by the persons concerned or third parties, written documentation or investigations carried out. The catalogue of the above circumstances is an open catalogue, which means that in practice there may be other determinants proving the convenience of a marriage, which may be taken into account when assessing the actual marriages. In most cases, these will be circumstances demonstrating the absence of any intention of the spouses to live together in order to run a joint household. In addition, deliberately facilitating marriage of convenience is punishable in some countries. In Poland, the marriage of convenience may be associated with civil law consequences rather than criminal law ones.

If there are grounds to suspect that the marriage is a marriage of convenience, the residency card or residence permit may be issued only after the competent national authorities have verified that the marriage is not fictitious and that the other conditions for entry and residence have been fulfilled. Such a check may include a separate conversation with each spouse. If the competent authorities establish that the marriage is a marriage of convenience, the residence permit shall be withdrawn, revoked or not renewed. The person concerned shall have the possibility to challenge the decision before a court or before a competent administrative authority.

5.2. Forced marriages

A situation similar to marriage of convenience may seem to be the situation of entering into a forced marriage. However, a potential similarity should be sought only in the possible legal consequences for persons applying for international protection. In the case of forced marriage, the position of the coerced person cannot be compared with the situation of two persons who arrange a marriage of convenience by mutual consent and in agreement.

According to non-EU regulations, i.e. Resolution 1468 (2005) of the Parliamentary Assembly of the Council of Europe on forced marriages and child marriages[53], a forced marriage is a union of two persons, at least one of whom has not given full and free consent to the marriage. A child marriage, on the other hand, is a union of two people, at least one of whom is under the age of 18. The resolution points out that such marriage is detrimental to their physical and mental well-being and in itself violates their rights. It often forms an obstacle to school attendance and access to education, harms their intellectual and social development, because it limits their horizons to the family circle.

In order to prevent and eliminate forced marriages, including limiting their use in the procedure for seeking international protection, States should introduce certain preventive measures by means of legal regulations. These include: 1) setting the minimum statutory age for marriage for men and women at 18 years, 2) mandatory reporting and registration of every marriage by the competent state authority, 3) conducting an interview

53 Council of Europe: Parliamentary Assembly, *Resolution 1468 (2005) on Forced Marriages and Child Marriages*, 5 October 2005, 1468 (2005), https://www.refworld.org/docid/43f5d5184.html [accessed on: 1.02.2023]. Documents that may be helpful in this area include: UN Human Rights Council Resolution 29/8 of 2 July 2015 on strengthening efforts to prevent and eliminate child, early and forced marriage, UN Human Rights Council Resolution 24/23 of 9 October 2013 on strengthening efforts to prevent and eliminate child, early and forced marriage: challenges, achievements, best practices and implementation gaps, and resolution 35/16 of 22 June 2017 on child, early and forced marriage in humanitarian settings.

with the bride by the registrar before the marriage and allowing the official, in case of doubt as to the free and full consent of one or both parties, for an additional separate interview of one or both spouses, 4) refusal to recognise forced marriages and child marriages contracted abroad, except in cases where recognition would be in the best interests of victims with regard to the effects of the marriage, in particular to safeguard rights that they could not otherwise assert, 5) facilitating the annulment of forced marriages and possibly their automatic annulment, with a simultaneous indication of the maximum time (if possible 1 year) for issuing a decision in such a case. In addition, the resolution also includes certain measures in the area of criminal law regulations, such as the recognition as rape of forced sexual relations to which victims are exposed in forced marriages and child marriages, as well as the recognition of forced marriages as a criminal offence, including aiding and abetting such marriages.

5.3. The institution of marriage of convenience or forced marriages in the case-law of the European Court of Human Rights

The case-law of the ECtHR indicates that a State may define suitably justified and reasonable conditions with regard to the right to marry a third-country national in order to ensure that the proposed marriage is not a marriage of convenience or a forced marriage, so as to prevent, if necessary, such marriages or their use for procedures for obtaining international protection. The decision of 12 July 1976 stated that the right of the State to take measures to eliminate marriages of convenience cannot be denied. An alien alleging that the refusal of a residence permit does not allow him/her to get married must credibly demonstrate the existence of actual marriage plans[54]. In its judgment of 14 December 2010, the Court pointed out that appropriate laws, which must also meet the standards of accessibility

54 The case of *X. v. Germany*, decision of 12 July 1976, application no. 7175/75.

and clarity required by the Convention, may not otherwise deprive a person or a category of persons with full legal capacity of the right to marry partners of their choice (Paragraph 83). According to the case-law of the ECtHR, there is no violation of Article 12 of the ECHR in the case of checks on marriages contracted by or with aliens in order to determine whether they are concluded with the aim of circumventing the law (Paragraph 87). These checks may, for example, include a requirement for aliens to notify the competent authorities of their intention to marry or to provide information relevant to establishing the authenticity of the marriage[55].

Marriages of convenience are very difficult to detect, and therefore certain legal mechanisms seem necessary to try to establish the true facts. On the other hand, the question remains to what extent civil rights can be restricted for this purpose, which in the case of interference in family life and marital relations is a particularly important issue, at the same time ensuring that the actions taken do not bear the hallmarks of discrimination against certain groups (persons)[56].

6. The principle of family unity and reunification

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification lays down the conditions for the exercise of the right to family reunification by third-country nationals residing legally in the territory of the Member States of the European Union. In accordance with Article 2(d) 'family reunification' means the entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry. Family reunification is necessary to enable family life. It helps to create sociocultural

55 ECtHR judgment of 14 December 2010, *O'Donoghue and others v. the United Kingdom*, application no. 34848/07.

56 W. Klaus, *Zawieranie małżeństw polsko-cudzoziemskich w celu obejścia przepisów legalizacyjnych*, 'Archiwum Kryminologii' 2016, Vol. XXXVIII, p. 272.

stability facilitating the integration of third-country nationals in the Member State concerned and promotes economic and social cohesion (Recital 4). Family reunification should respect fundamental rights and observe the principles recognised in particular by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union (Recital 2).

According to Article 1(c) of the Directive, 'sponsor' means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her. The Directive regulates the situation of spouses and minor and unmarried children and eligible sponsors who are third-country nationals.

Pursuant to the Directive, Member States shall authorise the entry and residence of: 1. the sponsor's spouse, 2. the minor children of the sponsor and his/her spouse, including adopted children, 3. minor children, including adopted children of the sponsor, where the sponsor has custody and the children are dependent on him/her, 4. minor children, including adopted children of the spouse, where a spouse has custody and the children are dependent on him/her[57]. In addition, Member States may authorise the entry and residence of: 1. first-degree relatives in the direct ascending line of the sponsor or his/her spouse, where they are dependent and do not have the support of their own family in their country of origin, 2. adult unmarried children of the sponsor or his/her spouse, where they are objectively unable to provide for themselves on account of their state of health, 3. an unmarried partner who is a third-country national with whom the sponsor is in a duly certified, stable long-term relationship, or a third-country national who is related to the sponsor by virtue

57 The minor children referred to in this Article must be below the age of adulthood laid down by the legislation of the Member State concerned and must be unmarried. By way of derogation, in case where the child is over 12 years of age and arrives independently of the rest of the family, a Member State may, before authorising entry and residence, verify that the child fulfils the conditions for integration laid down in the existing legislation of that Member State.

of a registered partnership and the unmarried or unmarried minor child of those persons, including adopted children, as well as the adult unmarried child of these persons, which, objectively, due to its state of health, is not able to provide for itself[58].

At the same time, the Directive provides for certain restrictions. In the case of a polygamous marriage, if the sponsor's spouse already lives with the sponsor in the territory of a Member State, the family reunification of the subsequent spouse shall not be permitted. Member States may also restrict family reunification of minor children of the subsequent spouse and the sponsor (Article 4(4)). In order to ensure better integration and to avoid forced marriages, Member States may require the sponsor and his/her spouse to be of a minimum age, at most 21 years, before making the reunification with the spouse possible (Article 4(5)). By way of derogation, Member States may require that applications for family reunification of minor children be submitted before the age of 15, in accordance with existing legislation. If the application is submitted after the age of 15, Member States which decide to apply this derogation, shall allow the entry and residence of such children on grounds other than family reunification (Article 4(6)).

Under Article 4 of the Directive, spouses and unmarried minor children have the right to join eligible third-country national who is a sponsor, but Member States of the European Union may lay down conditions relating to the resources that the sponsor must have at his or her disposal. The Directive provides that where a child is over the age of 12 and arrives independently of the rest of the family, a Member State may, before authorising entry and residence under the Directive, verify that the child fulfils the integration conditions laid down in its national legislation (Paragraph 12 of Recitals).

58 Member States may decide that partners in a registered partnership shall be treated in the same way as spouses as regards family reunification.

The Court of Justice of the European Union has held that these restrictions do not infringe the fundamental rights of the persons concerned[59].

One of the fundamental exceptions to the principle of family unity and reunification concerns the security and public order of the host State. According to Recital 14 of the Directive, family reunification may be refused on duly justified grounds. In particular, a person who wishes to be granted the right to family reunification should not constitute a threat to public policy and public security. The notion of public policy may include a conviction for committing a serious crime. In this context, it should be noted that the concept of public policy and public security covers all cases in which a third-country national belongs to an association which supports terrorism or supports such a link or has extremist aspirations[60].

With regard to family members of third-country nationals residing in the European Union, the Directive on the right to family reunification clearly states in Article 2(d) that the Directive applies regardless of whether the family was formed before or after entering the country of residence, although the rules in some Member States do not make a clear distinction. Nor is this distinction relevant for the qualification of third-country nationals family members of nationals of countries of the European Economic Area.

European Union law does not differentiate between family ties according to the time of their establishment, i.e. whether they were established before or after the sponsor lived in the European Union[61]. The Court of Justice of the European Union has confirmed that the right qualifying a sponsor under the Directive on the right to family reunification to join

59 CJEU, *European Parliament v. Council*, 27 June 2006, C-540/03, Ecr. 2010, p. I-05769, Paragraphs 62–65.

60 See, Ł. D. Dąbrowski, *Rights and obligations of refugees in the light of the national and international law regulations,* [in:] E. Krzysztofik, E. Tuora-Schwierskott (eds.), *EU Migration Policy and the Internal Security of the Member States*, Berlin 2016, pp. 169–183.

61 CJEU, *Metock and Others v. Minister for Equality, Justice and Law Reform*, 25 July 2008 C-127/08, Ecr. 2008, p. I-06241.

a third-country national family member exists regardless of whether the family ties arose after the sponsor's entry or earlier[62].

Article 5(3) of the Directive requires that applications for family reunification be submitted and examined while the family member is still outside the territory of the Member State where the sponsor is staying. Member States may derogate from this provision and accept an application submitted where family members are already residing on the territory of the Member State concerned[63]. Family reunification should apply in any case to members of the nuclear family, namely the spouse and minor children. Member States shall not discriminate in any way, including on grounds of sexual orientation.

The provisions of Chapter V of the Family Reunification Directive are crucial for family reunification. Chapter V of the Directive refers to a series of derogations (derogations from Articles 4, 5, 7 and 8), creating more favourable conditions for family reunification of refugees in order to take account of the specific situation of this category of persons[64]. Those derogations impose specific obligations on Member States, matched by clearly defined subjective rights, requiring the Member States to authorise the reunification of certain family members of a refugee on more favourable conditions, without the possibility of exercising discretion[65]. At the same time, the Directive allows Member States to restrict the application of these more favourable conditions by limiting them to: 1) family ties which existed before their entry (Article 9(2)); 2) applications submitted

62 CJEU, *Chakroun v. Minister van Buitenlandse Zaken*, 4 March 2010 C-578/08, Ecr. 2010, p. I-01839.

63 CJEU, C-459/99, ECR 2002, p. I-6591, *MRAX*, 25 July 2002; ETS, C-503/03, Ecr. 2006, p. I-1097, *Commission v. Spain*, 31 January 2006

64 Report from the Commission to the Council and the European Parliament on the application of Directive 2003/86/EC on the right to family reunification (COM(2008) 610 final of 8.10.2008), p. 30.

65 Communication from the Commission to the European Parliament and the Council on guidelines for the application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 Final 3.4.2014), p. 21.

within three months of the granting of refugee status (third Subparagraph of Article 12(1)); and 3) families where family reunification is not possible in the third country with which the sponsor or family member has special ties (second Subparagraph of Article 12(1)). However, the Member States may not exercise that discretion in such a way as to undermine the aim and effectiveness of the directive[66].

According to Article 9 of the Directive, the provisions of Chapter V are to apply to family reunification of refugees recognised by the Member States, but Member States may limit the application of the provisions of that Chapter to refugees whose family ties existed before their entry. Under Article 10 of the Directive, its rules with regard to family members authorised to enter and reside (Article 4 'Family members') apply to the definition of family members, with the exception of the third Subparagraph of Article 10(1), which does not apply to refugee children[67]. In addition, Member States may authorise family reunification for other family members not referred to in Article 4 if they are dependent on the refugee (Paragraph 2 of Article 10). Article 10(3) indicates that, where the refugee is an unaccompanied minor, Member States: (a) authorise entry and residence for the purposes of family reunification in the case of first-degree relatives in the direct ascending line, without applying the conditions laid down in Article 4(2)(a), and (b) may authorise entry and residence for the purposes of family reunification in the case of a legal guardian or any other family member; if the refugee does not have any relatives in the direct ascending line or no such ascendants can be found.

According to Article 11(1) of the Directive, the provisions of the Directive on the submission and examination of applications under Chapter V

66 *Ibidem*.

67 Article 4(1), Paragraph 3. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

of the Directive (Family reunification of refugees) apply to the lodging and examination of applications, except that, where a refugee cannot provide documentary evidence relating to family relationships, Member States shall take into account other evidence of the existence of such links, which are subject to assessment in accordance with national law. A decision rejecting an application may not be based solely on the absence of documentary evidence.

As a general rule, an EU state may require the applicant to have accommodation that meets general health and safety standards, sickness insurance and stable resources sufficient to maintain himself and his or her family members. In addition, the applicant may be required to comply with integration measures in accordance with national legislation and to reside in an EU country for a certain period of time (maximum 2 years) before being reunited with family members. However, based on the provisions of Article 12 of the Directive, EU states may not impose requirements on the minimum period of stay on their territory before reunifying the refugees with their family members. In addition, they are exempt from the requirements as regards having accommodation, sickness insurance and means of subsistence if they apply for family reunification within 3 months of being granted refugee status.

7. The principle of family reunification under the Qualification Directive

The Qualification Directive also draws attention to the need to maintain family unity (Article 23(1) of QD(r)). In accordance with Article 23(2) of the QD(r), Member States are obliged to ensure that family members of a beneficiary of international protection who do not personally qualify for such protection are entitled to claim the benefits provided for in the Directive (including: access to education, social welfare, healthcare, access to accommodation). However, this entitlement is excluded

where the family member is or would be excluded from receiving international protection. In addition, Member States may refuse, limit or withdraw the benefits provided for in the Directive on grounds of national security or public order. At the same time, the QD(r) provides for the possibility of extending its rules to other close relatives who lived together as part of the family at the time of leaving the country of origin and who were then entirely or mainly dependent on the beneficiary of international protection. In that regard, according to Recital 38, when deciding on entitlement to benefits provided for in the Directive, Member States should take due account of the best interests of the child and of the specific situations of dependence on the beneficiary of international protection in the case of close relatives already present in the Member State who are not family members of that beneficiary. In specific circumstances, where a close relative of a beneficiary of international protection is a married minor but not accompanied by a spouse, the best interests of the minor may be sought in him/her staying with his or her family of origin.

In accordance with Article 23(2) of the QD(r), Member States shall ensure that the family members of the beneficiary of international protection who do not personally qualify for such protection, are entitled to claim the benefits referred to in Articles 24 to 35 in accordance with national procedures and to the extent appropriate to the personal legal status of the family member concerned. It is clear from the very wording of Article 23(2) of the QD(r) that this provision is intended to ensure that the family unity of the beneficiary of international protection is maintained in the specific case where the members of his family are personally 'not eligible' for such protection. Accordingly, a distinction must be drawn between the situation covered by that provision and that referred to in Recital 36 of that directive, which refers to family members of a refugee who are personally the subject of acts of persecution or are exposed to them in their country of origin by reason of their relationship to the refugee alone and may therefore be granted refugee status. It concerns ensuring a 'minimum level of bene-

fits'. Recitals 41 to 48 and Articles 24 to 35 of the QD(r) indicate that those benefits should enable the family members of the beneficiary of international protection to meet their specific needs and integrate into the host Member State. The benefits thus granted to family members are essentially the same as those granted to the beneficiary of international protection[68]. These benefits include: residence permits (Article 24), travel documents (Article 25), access to employment (Article 26), access to training (Article 27), access to procedures for recognition of qualifications (Article 28), social welfare (Article 29), healthcare (Article 30), care for unaccompanied minors (Article 31), access to accommodation (Article 32), freedom of movement within a Member State (Article 33), access to integration facilities (Article 34) and repatriation (Article 35).

8. Protection against expulsion – preserving family unity

During the procedure for granting international protection and in return cases, cases may arise in which the spouses or parents of a third-country national are at risk of expulsion or are expelled. Such a circumstance may have a serious impact on the functioning of the existing family and, in particular, on the children who are usually directly affected by such circumstances. The authorities of a given country are often obliged to decide whether the family member meets the requirements on the basis of which he was originally granted international (or national) protection and how such a circumstance will affect the existing family of the alien, potentially leading to the breakdown of the relationship and, consequently, the child's right to contact with both parents.

Host States are obliged to respect the right to family life and any interference with these rights must be justified. One of the key issues affecting the host country's decision on the grounds for refusing to grant or extend

68 See, Opinion of Advocate General Jean Richard de la Tour delivered on 12 May 2021, Case C91/20 *LW v. Bundesrepublik Deutschland*, ECLI:EU:C:2021:384, Paragraphs 40, 43, 44.

international protection is therefore whether there are obstacles to family life abroad[69].

When implementing QD(r), Member States are required to take into account the specific situation of vulnerable persons, such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking in human beings, persons with mental disorders and victims of torture, rape or other serious forms of psychological, physical or sexual violence (Article 19). On the other hand, according to the Directive on the right to family reunification, where an application is rejected, a residence permit is refused to be renewed or a decision is taken to order the expulsion of the sponsor or his/her family members, the Member States are required to take due account of the nature and stability of the person's family ties and the duration of his/her stay in the State concerned, and cultural and social ties with the country of origin (Article 17). If the application for family reunification is rejected or the renewal of the residence permit is refused or it is revoked, and when the expulsion has been ordered, the sponsor and/or the family member have the right to appeal (Article 18).

The case-law of the European Court of Human Rights has also expressed the view that, in certain cases, parental contact may be maintained in the form of visits, which does not alter the fact that in certain situations it may be necessary to allow a third-country national to remain in the host country[70]. 'In view of the fact that family members of an alien may also be covered by an application for refugee status and these persons may obtain refugee status or subsidiary protection, a doubt has arisen whether the deprivation of protection covers all these persons or whether their rights to benefit from protection are autonomous and it is necessary

69 Handbook of European law on asylum, borders and immigration, Luxembourg 2014, p. 133.

70 ECtHR judgment of 21 June 1988 in the case of *Berrehab v. Netherlands*, application no. 10730/84, LEX no. 81049, ECtHR, judgment of 2 August 2001 in the case of *Boultif v. Sweden,* Application 54273/00, ECtHR, judgment of 18 October 2006 in the case of *Üner v. Netherlands,* Application no. 46410/99.

to examine the grounds for deprivation of refugee status or subsidiary protection in every individual case? According to the position of the Office of the High Commissioner for Refugees (UNHCR), such persons ('dependent refugees') should have their status guaranteed until the premises to cancel such status apply to them on a case by case basis'[71].

The ECtHR's rulings under Article 5(1)(f) of the ECHR[72], which allows States to control the freedom of aliens in the context of immigration, state that the Court must take into account the specific situation of potential immigrants when assessing how an arrest warrant is executed[73]. According to the judgment of 29 January 2008, while the provision permits the detention of asylum seekers or other immigrants before the State has granted them entry, such deprivation of liberty must be consistent with the general objective of Article 5, namely the protection of the right to liberty and the assurance that no one is arbitrarily deprived of his liberty[74]. *'Non-arbitrary'* means that such deprivation of liberty must be carried out in good faith; it must be closely linked to the objective of preventing illegal entry into the territory of the state; the place and conditions of detention must be appropriate, taking into account the fact that this measure does not apply to persons who have committed criminal offences, but to aliens who, often out of fear for their lives, have left their own country. Furthermore, the length of the period of detention may not exceed the period reasonably required to achieve the objective[75].

71 B. Kowalczyk, *Polski system azylowy*; Wrocław 2014, http://www.bibliotekacyfrowa.pl/publication/62929, p. 327, *The Cessation Clauses: Guidelines on their Application,* UNHCR, 26 April 1999, http://www.refworld.org/docid/3c06138c4.html, p. 7, Paragraph 34.

72 *Article 5(1)(f) 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'*

73 Judgment of 13 December 2011, in the case of *Kanagaratnam v. Belgium*, application no. 15297/09.

74 Judgment of 29 January 2008, the case of *Saadi v. United Kingdom*, Paragraphs 64–66, application no. 13229/03.

75 Judgment of 29 January 2008, the case of *Saadi v. United Kingdom*, Paragraph 76, application no. 13229/03.

In the opinion of the ECtHR, the decision on authorisation of entry belongs to the State and until it is taken, the mere declaration to the migration authorities by an alien does not legalise his stay, regardless of whether it concerns granting international protection or another form of legalisation, and this matter remains dependent on national law. This position has been upheld by the ECtHR in judgments handed down in recent years[76], including in relation to States Parties bound by EU law, which requires to ensure that persons applying for international protection have the right to remain on their territory[77].

9. Conclusion

Private and family life are values protected by international law. At the same time, these values determine the possibilities of family reunification and the development of children, but also constitute grounds for preventing the issuance of a decision on the expulsion of a migrant from the territory of a given country. In the current state of legal regulations and social relations, the protection of family life is not limited only to formal and legal relationships of marriage and family relationships resulting from the formal nature of adoption or guardianship. It also applies to factual (not formal and legal) relationships, i.e. partnerships and cohabitation, including homosexual couples. 'What is important is the real human bond and the reality of family life, rather than the existence of formal ties, although some of them give rise to the presumption of family life (marriage, parent-child relations)'[78].

76 Cf. ECtHR judgment of 23 July 2013 in the case of *Suso Musa v. Malta*, application no. 42337/12; Paragraph 90, the case of *Aboya Boa Jean v. Malta*, par. 53; the case of *Mahamed Jama v. Malta*, application no. 10290/13, ECtHR judgment of 26.11.2015, Paragraph 137.

77 J. Markiewicz-Stanny, *Interpretacja Europejskiej Konwencji Praw Człowieka a międzynarodowe prawo uchodźcze – kilka uwag na tle pozbawienia wolności w związku z migracyjnym statusem*, 'Studia Prawnoustrojowe' 2020, no. 47, p. 144.

78 B. Kowalczyk, *Polski system azylowy*; Wrocław 2014, http://www.bibliotekacyfrowa.pl/publication/62929, p. 181 [accessed on: 1.02.2023].

In the light of the provisions of the European Convention on Human Rights and international refugee law, the detention of refugees or persons seeking international protection is permissible. However, according to the view expressed in the literature on the subject, 'while in the European Convention on Human Rights the very purposes of deprivation of liberty are defined in a narrow manner and boil down to two circumstances, the way in which Article 5(1)(f) of the ECHR is interpreted gives States Parties considerable freedom. In the case of refugee law, the objectives for which detention can be used are broadly formulated, but the basic protective role here is played by the presumption of liberty and the fundamental principle that detention should be avoided. It can therefore be concluded that the interpretation of Article 5(1)(f) of the ECHR is contrary to those principles on the ground that the ECtHR rejects, in principle, the test of necessity as an element of assessing whether the actions of the State Parties were not arbitrary'[79].

79 J. Markiewicz-Stanny, *Op. Cit.* p. 153.

Chapter VII

Admissibility of detention in the context of asylum proceedings in the light of European Union law and practice

1. Introduction

The detention[1] of aliens seeking international protection is one of the key human rights and fundamental freedoms problems observed in the context of asylum policy, not only in Europe but also worldwide[2]. From the placement of such aliens in places of so-called de facto deprivation of liberty which, although they have the characteristics of places of detention in reality, are not so classified by national law, and persons staying there are deprived of the guarantees required for *de jure* detention; through the automatic detention of all applicants for international protection, its unacceptable grounds, excessive length, lack or insufficient procedural guarantees, the lack of coercive measures constituting an alternative to detention, inappropriate detention conditions, ending with use of detention e.g. in regard to children or victims of torture[3] - these are examples of various problems, which, despite the existing and developing legal norms, occur in practice. Frequently, these are not isolated cases, but result from specific normative solutions adopted by the States and the directions and assumptions of asylum policy, taking the form of systemic and structural violations of human rights and fundamental freedoms.

1 In Polish literature see inter alia J. Markiewicz-Stanny, *Wolność i bezpieczeństwo osobiste osób ubiegających się o ochronę międzynarodową – refleksje na tle przekształconej dyrektywy recepcyjnej*, 'Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego' 2015, Vol. 13, pp. 63–64.

2 Among many, see inter alia UNHCR reports adopted under 'Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014–2019', together with the final report (https://www.unhcr.org/protection/detention/57b579d84/unhcr-global-strategy-beyond-detention-baseline-report.html, accessed on: 1.02.2023); Also reports prepared by Global Detention Project, including *Global Detention Project Annual Report – Global Tools, Local Impact*, published in May 2022, https://www.globaldetentionproject.org/global-detention-project-annual-report-global-tools-local-impact [accessed on: 1.02.2023]. Literature: I. Majcher, M. Flynn, M. Grange, *Immigration Detention in the European Union. In the Shadow of the 'Crisis'*, Cham 2020.

3 *Ibidem*

This chapter is devoted to the issue of admissibility of detention under the Common European Asylum System (hereinafter: CEAS), with particular emphasis on the detention of persons seeking international protection. It describes the normative model of protection established in this area in the European Union (hereinafter: EU/Union), at the same time seeking an answer to the question as to what extent the norms of international human rights law concerning the right to liberty and security of person[4] are a factor shaping this model and whether they affect how respective provisions of the CEAS instruments on detention are interpreted and applied by the Court of Justice of the European Union (hereinafter: CJEU/Luxembourg Court).

2. The process of harmonizing the conditions and rules for the detention of aliens within the framework of the Common European Asylum System

Originally, there were no provisions in the EU legal order defining in detail the conditions and rules for the detention of persons seeking international protection[5], with the result that this area was left to Member States to regulate in their national legal systems[6]. Both the detention rates

4 Detention constitutes an interference with the right to liberty and security, which is protected by numerous instruments of international human rights law at the universal and regional level. Including: within the framework of the International Charter of Human Rights - the Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) adopted and proclaimed on 10.12.1948, Article 3; International Covenant on Personal and Political Rights from 16.12.1966 (entered into force on 23.3.1976) Article 9; in European regional instruments – the Convention for the Protection of Human Rights and Fundamental Freedoms of 4.11.1950 (ECHR) (entered into force on 3.9.1953) Article 5; Charter of Fundamental Rights of the European Union proclaimed on 7.12.2000 as amended (OJ. EU C 202/02, of 7.6.2016), Article 6.

5 E.g. *'Judicial analysis. Detention of applicants for international protection in the context of the Common European Asylum System'* EASO Professional Development Series for members of courts and tribunals 2019, Publications Office of the European Union, Luxembourg 2019.

6 G. Cornelisse, *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights*, Global Detention Project Working Paper no. 15, October 2016,

of persons applying for international protection and the maximum duration of detention and detention conditions[7], including access to legal aid for the detainee[8], varied significantly across countries[9]. According to a UNHCR report published in 2000, although the number of applicants seeking international protection in the EU has been stable or even decreasing, the number of detained applicants has increased in most Member States[10].

The first step towards a fundamental change in respect to the issue of detention in the context of asylum and immigration concerned the introduction of specific rules on detention in 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 (hereinafter: the Return Directive)[11]. Its objective was to harmonise Member States' policies on the return of illegally staying aliens to their countries of origin.

In addition, this directive was linked to the implementation of the provisions of the European Pact on Immigration and Asylum of 2008 (hereinafter: the European Pact)[12]. It contained five core EU commitments, which included the commitment to combat illegal immigration, in particular by ensuring the return of illegally staying aliens to their countries

Details. p. 1.

7 See, general information in Reception Standards for Asylum Seekers in the European Union, UNHCR, July 2000, https://www.unhcr.org/4aa763899.pdf [accessed on: 1.02.2023].

8 *Ibidem*, p. 25.

9 See, particularly: Odysseus Academic Network *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States*, October 2006, https://www.refworld.org/docid/484009fc2.html [accessed on: 1.02.2023].

10 *Ibidem*, p. 31.

11 OJ. EU L 348, 24.12.2008

12 Approved by the Council on 25.09.2008 and subsequently adopted by the European Council at its meeting on 15 and 16.10.2008.

of origin or transit13. Developing the subject matter of this obligation, the European Pact provides that

> 'illegal immigrants on Member States' territory must leave that territory. Each Member State undertakes to ensure that this principle is effectively applied with due regard for the law and for the dignity of the persons involved, giving preference to voluntary return, and each Member State shall recognise the return decisions taken by another Member State;"[14]

The commitments contained in the European Pact were to be 'transformed into concrete actions' and consequently lead to new initiatives aimed at 'completing the Common European Asylum System provided for in the 2010 Hague Programme'. This is what happened, and the new document, the Stockholm Programme, adopted by the European Council at its meeting on 10 and 11 December 2009, confirmed the validity of the commitments made in the European Pact[15]. According to the assumptions of the new programme, the main objective of the EU in the field of asylum and immigration policy was to 'establishing a common area of protection and solidarity', based on 'a common asylum procedure and a uniform status of persons granted international protection'.

13 Other commitments are: organising legal immigration, taking into account the priorities, needs and reception capacities identified by each Member State, and fostering integration; increasing the effectiveness of border controls; building a Europe that will be a place of asylum; building a global partnership with countries of origin and transit by fostering synergies between migration and development (European Pact, 2008).

14 European the Pact on Migration and Asylum, 24.9.2008 (unpublished in the Official Journal EU; https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=LEGISSUM:jl0038 [accessed on: 1.02.2023].

15 Stockholm Programme – An open and secure Europe at the service of citizens, OJ C 115/1 of 4.5.2010

To achieve this, the legal instruments in force at the time were recast accordingly. As a result, in January 2012, the recast Qualification Directive[16] entered into force, while in July 2013 the remaining recast CEAS legal acts, i.e. the recast Eurodac Regulation[17], the Dublin III Regulation[18], the Reception Conditions Directive[19] and the recast Asylum Procedures Directive[20], came into force.

From the point of view of the alien's right to liberty and security of person in the asylum and immigration process, the Return Directive of 2008, the recast Procedural Directive of 2013 and the recast Reception Directive of 2013 are of key importance. On the other hand, the issue of detention is also regulated by the Dublin III Regulation though to smaller degree than the directives referred to above.

16 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter: recast Qualification Directive, QD(r)).

17 Regulation (EU) no. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) no. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (EURODAC (r) Regulation).

18 Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter: Dublin III Regulation).

19 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter: recast Reception Directive, RD(r)).

20 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter: recast Procedural Directive, PD(r)).

This legal framework regulates at EU level three main situations in which deprivation of liberty may occur in the context of asylum and immigration, namely:

a) in respect of an alien applying for international protection;
b) in order to prevent illegal entry of an alien into the territory of an EU Member State, and
c) in connection with the return procedure of an alien who is staying illegally on the territory of a Member State (*irregular migrant*)[21].

3. Assurance of fundamental rights in the course of works on detention rules in the recast Common European Asylum System instruments

The course of legislative work on the above-mentioned legal instruments shows that the broadly understood issue of detention was already taken into account at the stage of proposals of the European Commission (hereinafter: EC/Commission). This was due to the requirement to guarantee fundamental rights as general principles of EU law, including the safeguarding of human rights and fundamental freedoms in accordance with the ECHR[22] and the case-law of the Strasbourg Court.

21 Regarding the use of the term 'irregular immigrant', see M. Trojanowska-Strzęboszewska, *Nielegalna czy nieregularna imigracja? Analiza wyzwań definicyjnych ze szczególnym uwzględnieniem polityki imigracyjnej UE*, 'Studies in European Affairs' 2020, 24(3), pp. 145–164.

22 See, Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (presented by Commission) {SEC(2005) 1057} COM(2005) 391 final, 2005/0167 (COD), Brussels, 1.9.2005. As stated in the explanatory memorandum, as a result, in addition to detention and coercive measures, 'particular attention' was paid to issues relating to procedural guarantees and family reunification. See also, Detailed Comments on Proposal for a European Parliament and Council Directive on Common Standards on Procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 Final), 12125/05 ADD 2, Brussels, 10 October 2005, 2005/0167 (COD).

On the basis of this consideration, in Chapter IV of the proposal, the Commission proposed to limit the use of temporary detention by linking its use to the principle of proportionality and limiting it only to situations where it would be necessary to prevent the risk of absconding or where less coercive measures would not be sufficient. In the context of the guarantee function, two requirements deserve particular attention: first, the requirement of *regular review by a judicial authority* of the decision on temporary detention and, secondly, the requirement to define a maximum duration of temporary detention in order to prevent its excessive prolongation[23]. Those procedural safeguards were intended to 'ensure that the Directive is fully compatible' with the right to liberty and security of person under Article 5 of the ECHR[24].

In the explanatory memorandum to the proposal recasting the Reception Directive[25], the Commission first expressed its concern about the extensive use by Member States of 'detention of *asylum* seekers'[26]. In this regard, it saw the need for a 'holistic approach' and for precise rules that would establish detention rules in enumerative manner so that they are not arbitrary and their application is in line with fundamental rights. It was also recognised that the necessary safeguards, such as access to an effective remedy and free legal aid where needed, should be provided. In turn, the reception conditions in a detention facility must comply with the requirement of respect for human dignity. These changes, in the opinion of the Commission, were fully in line with the EU's CFR and the recent case-law of the ECtHR in respect to Article 3 of ECHR.

23 Proposal for the Return Directive (presented by Commission) {SEC(2005)1057, 1.9.2005 COM(2005) 391 final 2005/0167 (COD), Chapter IV.

24 Detailed comments on Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final); ST 12125 2005 Add 2 – Proposal; 10.10.2005

25 See, amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast), Brussels, 1.6.2011 COM(2011) 320 final, point 3.1.2.

26 *Ibidem*

Whereas in the 2003 Reception Directive the detention of an asylum seeker could be used 'when it proves necessary, for example for legal reasons or reasons of public order'[27] (Member States were therefore left with a high degree of discretion in regard to definition of the grounds for detention), the Commission proposed in its proposal, that 'detention may take place only for certain reasons and only if it complies with the principles of proportionality and necessity, following a case-by-case examination'.

The change in the Commission's approach to the detention of asylum seekers was based on the 2003 Recommendation of the Committee of Ministers of the Council of Europe on detention of asylum seekers (hereinafter: the recommendation of the CoE CM of 2003)[28]. CoE CM, in turn, referred to two documents from the UNHCR mechanism.

The first concerned the conclusions of the UNHCR Executive Committee for the Promotion and Protection of Human Rights, i.e. conclusions no. 44 (XXXVII) on the detention of refugees and asylum seekers[29]. International protection is one of the priority issues at every session of the UNHCR Executive Committee. The conclusions on international protection (hereinafter: ExCom Conclusions) express the consensus reached within

27 Directive of the Council 2003/9/EC of on 27 January 2003 laying down minimum standards for the reception of asylum seekers, Article 7(3) 'When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law'.

28 Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers, 16.04.2003, Rec(2003)5. In Preamble of the Recommendation it was expressly stressed that pursuant to Article 5 of the ECHR nobody should be deprived of liberty except for extraordinary cases and in accordance with the procedure provided for by law, and that all guarantees listed in Article 5 shall apply in appropriate cases to asylum seekers. In addition to ECHR (including additional protocols and ECtHR case-law) the recommendation refers to universal documents, including 1951 Convention relating to the Status of Refugees and Protocol concerning the status of refugees, done at New York in 1967, Universal Declaration of Human Rights of 1948, International Pact of Personal and Political Rights of 1966, International Pact of Economic, Social and Cultural Rights of 1966, Convention on the Rights of the Child of 1989

29 *Conclusions adopted by the Executive Committee on the International Protection of Refugees*: Conclusion no. 44 (XXXVII) on the detention of refugees and asylum seekers (1986).

the Committee and are regarded as an important tool for interpreting the international protection mechanism.

The second document concerned the Guidelines of the United Nations High Commissioner for Refugees (UNHCR) on the applicable criteria and standards for the detention of asylum seekers of 26 February 1999 (hereinafter: UNHCR guidelines)[30].

The documents cited by CoE CM define detention and also indicate the rules for its application[31], the premises of detention, the requirement of access to legality checks and complaint mechanisms regarding detention conditions[32]. The CJEU has considered the documents in question to be the basis for the legal system set by the RD(r) and has consistently referred to them when interpreting the RD(r) in the field of detention[33].

The working documents relating to the proposal and the subsequent legislative process also contain direct references to the right to liberty and security of person guaranteed by Article 5 of the ECHR and to the case-law of the ECtHR on that civil human right. For example, thanks to the Strasbourg case-law, the requirement to ensure appropriate conditions of detention has been incorporated into conditions of its legality[34]. In turn,

30 UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), https://www.unhcr.org/protection/globalconsult/3bd036a74/unhcr-revised-guidelines-applicable-criteria-standards-relating-detention.html In 2012 these were replaced by UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, Available at: https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html [accessed on: 1.02.2023] (hereinafter: Detention Guidelines 2012).

31 Including the basic principle that the detention of asylum seekers must not have penal nature.

32 These documents, contrary to the Strasbourg case-law, exhaustively define the permissible grounds for detention of applicants for asylum/international protection.

33 See, *FMS FNZ* (C924/19 PPU) *and SA, SA junior* (C925/19 PPU) *v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, judgment of 14.5.2020 (hereinafter: *FMS* FNZ and SA, SA junior), Paragraph 218.

34 See, Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers. Impact Assessment, 3.12.2008,Add 2, {COM(2008) 815 final} {SEC(2008) 2945}, pp. 10–11.

the duration of detention was linked with the assessment of compatibility with Article 5 of the ECHR[35]. Even at the at the working stage within the Commission it was noted that the length of detention was not regulated at EU level and while the maximum period was usually one month, in many Member States detention could be applied for an indefinite period. This situation was referred, for example, to the judgment of the ECtHR in case of *Saadi v. the United Kingdom*[36], in which the Court ruled that in order for deprivation of liberty within the meaning of Article 5(1)(f) not to be arbitrary, it must be: (1)'carried out in good faith; (2) it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; (3) the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'; (4) and 'the length of the detention should not exceed that reasonably required for the purpose pursued'[37].

The procedural safeguards laid down in Article 5 of the ECHR, and in particular the granting of access to legal aid for asylum seekers in the event of an appeal against a negative decision on freedom of movement within the territory of a Member State, were also introduced into Article 21(2) of the RD(r) under the influence of the ECtHR. It is clear from its case-law that access to legal aid is a 'very important condition' for the legality of detention[38]. In case of *Saadi v. the United Kingdom*, the ECtHR, when assessing whether the conditions of detention were 'ap-

35 *Ibidem*

36 *Saadi v. UK*, judgment of the Grand Chamber of 29.01.2008, application no. 13229/03, Paragraphs 67–74.

37 *Ibidem*, Paragraph 74.

38 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers. Impact Assessment, 3.12.2008, Add. 2 {COM(2008) 815 final} {SEC(2008) 2945}, p. 11.

propriate', took into account not only whether the detention centre provided recreation facilities, medical care, but also legal assistance[39].

4. European Union model of protection of aliens in the event of detention in the context of asylum proceedings

4.1. Normative model

The current EU model of protection of an alien in the event of detention in the asylum process therefore takes into account: the specificity of the grounds for detention, its proportionality and necessity, the obligation to examine each case individually, the provision of guarantees related to detention (including an effective corrective measure, legal aid) and the provision of reception conditions during detention with respect for human dignity, as well as limiting the use of detention for children.

In the event of detention of an alien applying for international protection in one of the EU Member States, Article 26 of PD(r) and Articles 8 and 9 of the RD(r) are of key importance. First, both recast directives categorically state that such a person cannot be detained solely because he or she applies for international protection (Article 26(1) of PD(r) and Recital 15 and 8(1) of the RD(r)).

> Recital 15 in the preamble to the RD(r) states:
> 'The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only

39 *Saadi v. UK*, Paragraph 78.

> under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.'

The RD(r) lists the general conditions for the admissibility of the applicant's detention and the socially justified objectives of the detention. The first condition is therefore necessity, the second individual examination, the third condition concerns lack of possibility to apply more lenient coercive measures effectively[40], and the fourth concerns the application of detention in the cases exhaustively listed in Article 8(3)(a) to (f) of the RD(r) and defined by national law.

Member States are also required to lay down alternative measures to detention in national law, such as the deposit of a financial guarantee, or an obligation to stay at an assigned place (Article 8(4) of RD(r)). According to Recital 20 of the RD(r), the provision of better protection of the physical and psychological integrity of a person applying for international protection requires the detention to be applied as a measure of last resort and only after 'due' consideration of alternative measures which do not entail deprivation of liberty. These measures must also themselves comply with the requirement of respect for 'fundamental human rights'[41].

The detention of an alien applying for international protection should be 'as short as possible'. It may not be longer than is 'reasonably' necessary to complete the administrative proceedings concerning the reasons for detention. In that regard, Member States are required to 'exerci-

40 See, Article 8 (2) of RD(r).

41 Recital 20 of the RD(r).

se due diligence', to take 'concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible' and to have 'a real prospect that such verification can be carried out successfully in the shortest possible time'[42].

Detention is permitted only for the duration of the existence of one of the conditions for deprivation of liberty from the closed list in Article 8(3) of the RD(r). Moreover, the delays in the administrative procedure that 'cannot be attributed to the applicant' may not be the reason for prolonging the detention (Article 9(1) of the RD(r)).

States are also obliged to issue a written detention decision by judicial or administrative authorities. Such a decision must contain the legal and factual justification for the detention (Article 9(2) of RD(r)). Both recast directives – procedural and reception – oblige Member States to ensure 'speedy' judicial review of the lawfulness of detention when it is carried out by administrative authorities (Articles 26(2) of PD(r) and 9(3) of RD(r)). This is both a so-called control at the request of the applicant and an automatic one (ex officio control).

Finally, it is also necessary to emphasise Recital 18 of RD(r), which requires applicants for international protection who have already been detained to be treated 'with full respect' for human dignity and with the satisfaction of their needs. In the case of children, detention must comply with Article 37 of the United Nations Convention on the Rights of the Child.[43]

42 Recital 16 of the RD(r).

43 Can be compared with the legal framework for detention of a third-country national who is staying illegally on the territory of an EU Member State, as laid down in the Return Directive. It requires detention only if 'sufficient but less coercive' measures cannot be applied in the case in question. It states that the purpose of detention can only concern 'preparation of return or carrying out the process of expulsion, further mentioning the two specific situations covered by that objective, namely the existence of a risk of absconding and the avoidance or obstruction of the preparation of return or the removal process. It requires application of detention measure 'for as short a period as possible' and only 'as removal arrangements are in progress 'and its execution must be carried out with due diligence. (Article 15(1)). The return directive also requires issuing a written detention decision stating factual and le-

The fact that the RD(r) regulates the detention of applicants for international protection has been positively assessed by the UNHCR. The introduction at EU level of a ban on detention solely on the grounds of applying for international protection, the requirement of necessity as a condition of detention (which, as underlined by the UNHCR, results from the prohibition of arbitrary deprivation of liberty guaranteed in international human rights law and also reflecting the standard of refugee law), the obligation to establish alternative means of detention in national law and the obligation to consider them before the detention is applied, a requirement for an individual assessment and a closed list of clearly defined grounds for detention, have met with a positive response[44]. At the same time, however, in view of these grounds and the way in which they were formulated, the UNHCR has also made a number of recommendations aimed primarily at preventing possible incorrect application of these grounds by Member States[45]. With regard to the guarantee in the event of detention, the UNHCR noted

gal reasons. By permitting detention on the basis of a decision of an administrative authority, it obliges to carry out immediate ('as soon as possible') judicial review (ex officio or upon request). It orders the 'immediate' release of the alien if the detention is found to be unlawful (Article 15(2)). Another requirement concerns carrying out periodical (which must take place 'at reasonable intervals') inspection (ex officio or on request) of detention in every case, and if the period of detention is 'prolonged ' it must be judicial review (Article 15(3), whereby the extraordinary possibility of extending the time limits for periodic detention checks is regulated in Article 18 and covers unforeseen situations of significant burden on detention centres, administrative or judicial staff, due to the 'exceptionally large number' of aliens covered by the return procedure). An alien who has no 'reasonable prospect of removal' or if it turns out that the conditions of Paragraph 1 are no longer met (Article 15(4)) should be released immediately. Member States must indicate in their national law the maximum duration of detention, which may not exceed 6 months (An extension for further 12 months is permitted if the conditions of Article 15(6) are met).

44 See, UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down Standards for the Reception of applicants for international protection (recast), in particular points 7 to 10. See also, previous comments on the draft directive: UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down Standards for the Reception of asylum-seekers (COM (2011) 320 Final, 1 June 2011), in particular the commentary on Article 8(2) of the RD(r).

45 *Ibidem*, Paragraph 7.

that the national law of the Member States should clearly define the maximum permissible detention periods. On the other hand, the guarantee of 'speedy judicial review' of detention must take place within 24–48 hours of the initial decision on detention. In line with the UNHCR recommendation, regular periodic detention checks should also be introduced by a court or an independent body. It would be a good practice to carry out such an inspection every 7 days until the end of first month, and then every month until the end of maximum period specified in the law. In addition, judicial control or control by an independent body should also cover the alternative measures to detention[46].

4.2. Protection of persons in the event of detention in the context of asylum proceedings in the light of Court of Justice of the European Union case-law

The CJEU has ruled on several occasions on the issue of interpretation and application of provisions of the PD(r) and RD(r) relating to detention. These were cases arising in various factual contexts, including, for example, the placement of an alien who declared his intention to apply for international protection in a detention centre because there was no place for him in the reception centre[47]; detention in order to establish the identity or nationality of the applicant and to obtain the data necessary for the examination of the application, as there was a risk of absconding[48]; where

46 *Ibidem*, point 8.

47 Judgment of the CJEU of 25/06/2020 in the case of *VL*, C36/20 PPU, (further: *VL*). The factual circumstances of the case concerned a Mali citizen who arrived to Spanish coast on a boat together with other 45 men from Sub Saharan Africa and who after being captured by the Spanish Rescue Services was transferred to Gran Canaria. He submitted application for international protection fearing persecution in Mali due to the affiliation in a social group and referring to the ongoing war on this territory.

48 Judgment of the CJEU of 14/09/2017, in the case of *K.*, C18/16, (hereinafter: *K.*).

national security or public order so require (Article 8(3)(e) of the RCD(r))[49]. The group of cases most relevant from the point of view of the research issue covered by this chapter also includes those concerning the situation of aliens staying in transit zones at land borders established by Hungary[50].

49 Judgment of the CJEU (WI), of 15.02.2016, in the case of *J. N. v. Staatssecretaris voor Veiligheid En Justitie*, C601/15 PPU, (hereinafter: *J.N.*).

50 See, judgment in joined cases *FMS FNZ* (C924/19 PPU) and *SA SA junior* (C925/19 PPU) *v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, judgment of 14.5.2020 (hereinafter: *FMS* FNZ and SA, SA junior) and the judgment in the case of *European Commission v. Hungary*, judgment of the Grand Chamber of 17.12.2020., (C 808/18), (hereinafter: EC *v.* Hungary).
In 2015, during the mass influx of aliens into Europe (the so-called migration crisis), Hungary established four transit zones at its land border (Section 15 of Act CXL of 2015 amending certain laws relating to mass migration) ((Egyes törvényeknek a tömeges Bevándorlás kezelésével összefüggő Módosításáról Salt 2015. Évi CXL. TörvényMagyar Közlöny 2015/124), (further: act CXL of 2015). They were forming part of fences built on the border with Serbia and Croatia to close a section of the so-called green border between Hungary and these countries (in Tompa, Röszke, Beremend and Letenye). The conditions in these places can be presented using the example of Röszke zone. It was an area surrounded by a four-meter fence with barbed wire. Sectors inside the zone have also been separated with such wire. Mobile residential containers were erected here. Within its boundaries there was also a narrow square (about 2.5m x 40–50m), to which aliens staying in the zone had free access during the day. Röszke Zone was guarded by police officers and armed security personnel. People staying in it could not contact anyone outside the zone, except their representative. A very limited number of aliens who applied for international protection were admitted daily to the Röszke zone. They could not leave the zone towards Hungary, on the other hand, the Hungarian authorities did not physically prevent them from returning to Serbia. Because persons staying in the zone were subject to a procedure for granting international protection, albeit for a short time, but there were also those aliens for whom a negative decision had already been issued and who had to return to Serbia. Although conditions differed slightly in other zones, the main principles of their functioning remained the same.
Transit zones at the land border are established by legislation adopted by the Hungarian Parliament. (Act CXL of 2015, see T. Hoffmann, *Illegal Legality and the Façade of Good Faith – Migration and Law in Populist Hungary*, 'Review of Central and East European Law' 2022, no. 47, p. 145; K. Kovács, *Hungary*, 'East European Yearbook on Human Rights' 2018, Vol. 1, no. 1, pp. 161–170), which allowed places to be built up within 60 metres of the territory from the border line for the temporary stay of applicants for 'asylum or subsidiary protection' and for carrying out asylum and migration procedures, and which were to be equipped with the necessary facilities for those purposes. According to the legal fiction used, although located in the geographical territory of Hungary, transit zones were not intended to form part of it for the purposes of Hungarian asylum and migration policy. B. Hołyst, R. Hauser

The CJEU also interpreted the rules on detention laid down in Article 15 of the Return Directive[51]. According to the Court, the detention of third-country nationals staying illegally in the Member States, for the purpose of removal is therefore *governed by different legal rules* than the detention of an applicant for international protection, but in the light of the concept of 'detention' or 'detention measure', referred to in the RD(r) and the Return Directive respectively, 'covers one and the same reality'[52]. A detention measure under the Return Directive is of *the same nature* as 'detention' within the meaning of the RD(r) [53]. It should be understood as a coercive measure that 'deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter'[54].

(eds.), *Wielka Encyklopedia Prawa*, Vol. IV: J. Symonides, D. Pyć (eds.), *Międzynarodowe prawo publiczne*, Warszawa 2014, p. 145).

The alien could submit an application for international protection and stay there, *before* in his case, a decision will be taken on whether or not to allow entry into the territory of the country concerned.

Under CEAS, a transit zone in a Member State is treated as its territory. This is confirmed firstly by the Dublin III Regulation, which requires Member States to examine every application for international protection that has been lodged '*on the territory of* one of them, *including*: at the border, or *in transit zones*' (Article 3(1) of the Dublin III Regulation. Moreover, if an alien has lodged an application for international protection 'in the international transit area of an airport of a Member State', that State is responsible for examining the application (Article 15 of the Dublin III Regulation). See also, Article 7(2) and (3) of the Convention designating the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, done at Dublin on 15.06.1990, and Article 14 of the Dublin III Regulation. PD(r) and RD(r) also treat transit zones as a territory of a given state.

51 Judgment of the CJEU of 5.06.2014 in the case of *Bashir Mohamed Ali Mahdi*, C-146/14 PPU, (hereinafter: *Mahdi*).

52 *FMS, FNZ* and *SA, SA junior*, Paragraph 224.

53 *FMS, FNZ* and *SA, SA junior*, Paragraphs 224–5.

54 *Ibidem*, Paragraph 223. For example, the CJEU adopted e.g. that staying in Hungarian transit zones on the land border with Serbia (in Röszke and Tompa) is a detention in the light of the CEAS instruments. This assessment differed from earlier assessment of the ECtHR, whose Grand Chamber ultimately stated that this was not a deprivation of liberty within

In regard to admissible grounds for detention, Luxembourg case-law indicates, firstly, that Article 8 of the RD(r) lists exhaustively the reasons why a person applying for international protection[55] may be detained, and each of them corresponds to a 'specific need' and is 'autonomous'/'independent'[56]. The RD(r) provides for other grounds for deprivation of liberty to be introduced in national law, but only if they do not depend on 'status of a person applying for international protection'[57]. Detention constitutes an interference with the right to liberty, which is protected by Article 6 of the EU's CFR. In the CJEU's opinion, due to the importance of this right and the seriousness of the interference itself, any restrictions on the exercise of the right to liberty may be applied only insofar as it is 'strictly necessary'[58]. Finally, the closed nature of the list of specific grounds for detention laid down in Article 8 of the RD(r) confirms the CJEU's position categorically rejecting the possibility of detention of an alien seeking international protection (and of an alien who is subject to a return procedure) solely on the ground that he is unable to meet his

the meaning of Article 5 of the ECHR (see ECtHR judgment of 21.11.2019 in the case of *Ilias and Ahmed v. Hungary*, application no. 47287/15).

55 *J.N.,* Paragraph 59; *K.*, Paragraph 42.

56 Including *FMS, FNZ* and *SA, SA junior*, Paragraph 250; *EC v. Hungary*, Paragraph 168; *VL*, Paragraph 104.

57 See, Recital 17 of RD(r) and *EC v. Hungary*, Paragraph 169.

58 Including. *J. N.,* Paragraph 56; *K.* Paragraph *40; VL*, Paragraph 105; Cf. also the Court's position regarding detention in the context of the return procedure (*FMS, FNZ* and *SA, SA junior*, Paragraphs 268–9 and Judgment of 28.04.2011 in the case of *El Dridi*, C61/11 PPU, Paragraph 39).
'Detention of a third-country national staying illegally in the territory of a Member State may *in the absence of other sufficient but less repressive measures that could be taken*, be justified *only* in order to prepare for the return of that national or to carry out his removal, in particular where there is a risk of absconding or where the citizen concerned avoids or hinders the preparation of return or the removal process.
Therefore, *only* in the situation where the conduct of the person concerned, in the light of an assessment of each individual case, may negatively affect the enforcement of the return decision in the form of removal, a Member States may deprive him of his liberty through his placement in a detention facility.' [Underlined by KG]

needs due to lack of means of subsistence[59]. In this case, Member States are obliged to ensure that applicants for international protection have access to material benefits within the scope of reception conditions[60]. According to the CJEU's interpretation, the granting of accommodation in kind within the meaning of Article 18 of the RD(r) cannot, in principle, deprive the applicant of his freedom of movement[61].

Similarly, in in the case of *VL*, the Luxembourg Court held that the lack of possibility of accommodating the applicant in a humanitarian centre does not correspond to any of the situations justifying detention under the RD(r) and therefore cannot constitute grounds for detention[62]. It is contrary to Article 8(1) and (3) of the RD(r) in that it 'infringes the essential content of the substantive reception conditions' to which an alien applying for international protection is entitled for the duration of the examination of his application, as well as with the 'principles and objectives' of the recast Reception Directive[63]. Nor can detention be applied 'as a measure involving deprivation of liberty' under Article 18(9)(b) of the RD(r) and therefore treated as another form of material reception conditions in a situation where the normally available housing stock is temporarily exhausted[64].

Interpreting Article 8(3) of the RD(r), which contains a list of legitimate grounds for the detention of a person applying for international protection, the CJEU held that pursuant to points (a) and (b) of that provision, detention is permitted for the purpose of establishing or verifying the identity of a person or nationality or for obtaining information

59 *FMS, FNZ* and *SA, SA junior*, Paragraphs 249–256, 270 and 272.

60 Article 17(3) of RD(r). Also: *FMS, FNZ* and *SA, SA junior*, Paragraph 253.

61 The sanctions laid down in Article 20 of the RD(r) may be the only limitation. See, judgment of the CJEU of 12.11.2019, in the case of *Haqbin*, C233/18, Paragraph 52 and *FMS, FNZ* and *SA, SA junior*, Paragraph 254.

62 *VL*, Paragraph 106.

63 *Ibidem*, Paragraph 107.

64 *Ibidem*, Paragraph 108.

on which an application for international protection is based, and 'which could not be obtained without detention'[65]. However

> 'the proper functioning of the Common European Asylum System requires that the competent national authorities have at their disposal reliable information relating to the identity or nationality of the applicant for international protection and to the elements on which his or her application is based, *that objective cannot, however, justify detention measures being decided without those national authorities having previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued, such a determination requiring them to ensure, in particular, that detention is used only as a last resort* [emphasis added].'[66]

In the case of detention of an applicant for international protection in connection with proceedings to decide on the applicant's right to enter its territory (Article 8(3)(c) of the RD(r)), the CJEU confirmed that border procedures put in place by Member States may be involved. However, as is clear from the judgments in the cases concerning the Hungarian transit zones, these must be border procedures within the meaning of Article 43 of the PD(r) and detention must be aimed at ensuring the effectiveness of those procedures[67].

With this in mind, it should be assumed that detention in the course of border proceedings, i.e. under Article 8(3)(c), cannot be the deprivation of liberty that lasts longer than 4 weeks. According to Article 43(2) of the PD(r), border procedures must be carried out 'within reasonable

65 *EC v. Hungary,* Paragraph 174.

66 *Ibidem*, Paragraph 175 and the case-law cited.

67 *Ibidem*, Paragraph 179.

time'. However, if the Member State does not take a decision rejecting the application for international protection within 4 weeks, it should grant entry to its territory. An application for international protection, on the other hand, should already be examined in accordance with the general procedure[68]. In view of Article 43 of the PD(r) not setting a date from which the four-week period is to run, the CJEU held that the date of submission of an application for international protection, understood as the date on which the examination procedure for such an application begins, should be taken as such[69].

The detention period may not exceed 4 weeks from the date on which the application for international protection was lodged. The border procedure may only take longer if applicants are 'accommodated under normal conditions' in the vicinity of the border or transit zone after the expiry of the four-week period. They can therefore no longer be detained[70]. The CJEU unequivocally ruled that by introducing the obligation to accommodate an alien 'in normal conditions', the PD(r) 'necessarily excluded' an alien from remaining in a detention centre[71]. Importantly, this also applies to the situation of a mass influx of aliens applying for international protection[72]. According to Luxembourg case-law, 'normal accommodation' is to be understood as defined in Articles 17 and 18 of the RD(r), which provide that the applicant is in principle entitled to, first, a cash allowance for accommodation or second, accommodation in kind in a place other than a detention centre[73].

Moreover, border procedures within the meaning of Article 43 of the PD(r) allow detention only to enable examination whether an appli-

68 *FMS, FNZ* and *SA, SA junior*, Paragraph 235.

69 *Ibidem*, Paragraph 240.

70 *Ibidem*, Paragraph 181, also *FMS, FNZ* and *SA, SA junior*, Paragraphs 241–245.

71 *FMS, FNZ* and *SA, SA junior*, Paragraph 245.

72 *Ibidem*, Paragraph 246.

73 *Ibidem*, Paragraph 245.

cation for international protection is inadmissible on the basis of a PD(r) or whether it may be considered unfounded in the light of Article 31(8) of that directive. That condition is therefore not satisfied by the situation in which aliens are staying in a transit zone throughout the examination of their application[74].

Finally, when interpreting Article 8(3)(d) to (f), the CJEU held, first, that the condition set out in Subparagraph (e) of that provision does not apply where the detention occurs 'without prior proof that their [applicants for international protection in the transit zone] individual conduct constitutes a genuine, present and sufficiently serious threat affecting a fundamental public interest or internal or external security' of a Member State[75]. As regards the grounds for detention set out in points (d) and (f), the Court has emphasised that their application is excluded by a situation in which persons must be present in a transit zone without a detention measure being issued in the context of a return procedure under Article 15 of the Return Directive and despite the absence of a decision taken under Article 28 of the Dublin III Regulation[76].

The requirements of necessity and proportionality of detention entail the obligation to issue an administrative or judicial decision indicating the factual and legal grounds on which the detention order is based. That procedural guarantee is intended to ensure that an alien is able, first, to defend his rights 'in the best possible conditions', and secondly, to have full knowledge of the case, including the possibility of assessing the advisability of applying to the competent court. It also serves the court by enabling it to review the legality of the act in question as fully as possible[77]. Admittedly, the CJEU interpreted that guarantee on the basis of Article 15(2) of the Return Directive (in the case of *Mahdi*). It is worth emphasizing,

74 *EC v. Hungary*, Paragraph 185.

75 *Ibidem*, Paragraph 172.

76 *Ibidem*, Paragraph 173.

77 *Mahdi*, Paragraphs 41 and 45, and *FMS, FNZ* and *SA, SA junior*, Paragraph 273.

however, that it was precisely the application of a teleological interpretation that allowed the Court to give a broad (functional) understanding of the term 'decision on application of detention measure' and consequently assume that:

> 'The requirement that a decision be adopted [under Article 15 of the Return Directive] in writing must be understood *as necessarily covering all decisions concerning extension of detention* [emphasis added], given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.
> (..)
> Any other interpretation of Article 15(2) and (6) of Directive 2008/115 would mean that challenging the legality of a decision extending detention would be more difficult for a third-country national than challenging the legality of an initial detention decision, *which would undermine the fundamental right to an effective remedy* [emphasis added].'[78]

The procedural guarantees also include review of the lawfulness of detention ordered by an administrative authority. It should be *speedy and judicial*. This should be an ex *officio* or *on request* review. In the case of detention under the Return Directive, detention must be reviewed at 'reasonable'

78 *Mahdi*, Paragraphs 44 and 46.

intervals. The judicial authority is obliged to carry out the review, even if it was carried out by the detention authority originally[79].

Within the scope of the conducted review, the judicial authority must take into account all the requirements arising from Article 15 of the Return Directive. The review must therefore enable the court to issue an individual decision on the substance of (a) the extension of the detention measure in respect of the person concerned, (b) the possibility of replacing detention measure by a less punitive measure, or (c) the release of such a person, 'that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceeding'[80]

On the basis of a teleological interpretation[81], the CJEU took the view that this requires an appropriate design of the review mechanism so that, first,

> 'It follows that a judicial authority deciding upon an application for the extension of detention *must be able* [emphasis added] to rule on all relevant matters of fact and of law in order to determine, in the light of the requirements set out in Paragraphs 58 to 61 of this judgment [interpretation of premises resulting from Article 15 (6) of the Return Directive], whether an extension of detention is justified, which requires an in-depth examination of the matters of fact specific to each individual case'[82].

79 *Ibidem*, Paragraph 56.

80 *Ibidem*, Paragraph 64.

81 *Ibidem*, Paragraph 63.

82 *Ibidem*, Paragraph 62.

Secondly

> 'Where the detention that was initially ordered is no longer justified in the light of those requirements, the judicial authority having jurisdiction *must be able* [emphasis added] to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national'[83].

Thirdly,

> '*must be able* [emphasis added] to consider any other element that is relevant for its decision should it so deem necessary'[84].

Next, the CJEU concluded that the powers of the judicial authority 'in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned'[85] .

83 *Ibidem*

84 *Ibidem*

85 *Ibidem*

5. Detention of persons applying for international protection in the European Commission's legislative proposal for the reform of the recast Reception Conditions Directive (2016) and in the instruments of the New Pact on Migration and Asylum

In response to the massive influx of refugees and migrants into the EU in 2014–2016 and following years – and the challenges that came with it[86], a structural reform of CEAS has been proposed. The EC's 2016 proposal on the regulation of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereinafter: RD(r) proposal of 2016)[87] clearly indicates that the redesign of CEAS is intended to ensure that the system would work 'in the most difficult situation' while at the same time being 'strict with regard to possible abuses'[88]. With regard to detention, the EC declared that the guarantees introduced under the RD(r) would be maintained.

According to that assumption, in the light of the 2016 RD(r) proposal, detention is therefore permissible only if, firstly, it is necessary, secondly, it is applied on the basis of an individual assessment and, thirdly, if it is not possible to apply a less coercive measure[89]. The Commission also stressed that 'particular care should be taken to ensure that in every case the period of detention is proportionate and that the detention ends when the conditions under the Directive cease to exist'. It then declared that the proposal was compatible with Article 6 of the Charter

86 Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 13.7.2016, COM(2016) 465 final, 2016/0222(COD) (further: explanatory memorandum 2016).

87 Brussels, 13 July 2016 COM(2016) 465 Final 2016/0222 (COD).

88 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM/2016/0465 Final - 2016/0222 (COD).

89 *Ibidem*

of Fundamental Rights of the European Union 'interpreted in the light of Article 5 of the European Convention on Human Rights and relevant case-law' of the CJEU and the ECtHR[90]. The proposal also confirms that 'minors should not be detained in principle', taking into account Article 37 of the United Nations Convention on the Rights of the Child[91].

However, the RD(r) proposal establishes a new, additional basis for detention to 'deal with secondary movements and absconding of applicants'. It provides that

> 'Where a person applying for international protection has been assigned a specific place of residence but has not complied with that obligation and where there is a continuing risk that the applicant may abscond, the applicant may be detained to ensure compliance with the obligation to remain in a specific place'[92].

The new basis is directly linked to the solution introduced in the RD(r) (rev.) allowing for restricting freedom of movement by designating a specific place of residence for the applicant and the need to prevent absconding. As is apparent from Recital 21 in the preamble to the RD(r) proposal, failure to comply with the obligation to stay in a designated place and the risk of absconding are cumulative conditions for detention and that Member States should endeavour to ensure that the length of the detention is proportionate and that it ends as soon as the obligation put on the applicant has been fulfilled or there 'are no longer reasons for believing that he or she will not fulfil this obligation'.

90 *Ibidem*

91 *Ibidem*

92 *Ibidem*

The introduction of this new ground for detention is contrary to the position of the UNHCR[93] and has been negatively assessed by some NGOs and academics[94]. The UNHCR was concerned about its punitive nature and the fact that it was not included in the catalogue of admissible grounds in the UNHCR Guidelines on detention. The Commissioner also pointed out that the RD(r) proposal also does not exclude the imposition by Member States of multiple penalties for a single act[95], which in fact may lead to the combined application of measures such as detention and, for example, the reduction or even withdrawal of *per diems*[96]. Moreover, the RD(r) proposal does not completely eliminate the detention of children, as the UNHCR has been advocating for many years, claiming that detention for asylum and immigration purposes is contrary to the best interests of the child[97].

The assessment of the CEAS reform proposals on the detention of applicants for international protection requires consideration not only of the content of the RD(r) proposal but also of the broader background of the reform, its overall objectives and solutions. From the point of view

93 UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down Standards for the Reception of applicants for International protection (recast) - COM (2016) 465, August 2017, https://www.refworld.org/docid/59a6d6094.html [accessed on: 1.02.2023], pp. 9–11. See, also: G. Cornelisse, *The Pact and Detention: An Empty Promise of 'certainty, Clarity and decent Conditions'*, https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/ [accessed on: 1.02.2023].

94 E.g. International Commission of Jurists, *Detention in the EU Pact proposals Briefing paper*, June 2021, https://icj2.wpenginepowered.com/wp-content/uploads/2021/06/Detention-in-the-EU-Pact-proposals-briefing-2021-ENG.pdf [accessed on: 1.02.2023].

95 Articles 7, 17a and 19 of the RD(r) proposal.

96 See, Article 19(1) and (2) of the RD(r) proposal.

97 UNHCR's position regarding The detention of refugee and migrant children in the migration Context, January 2017, https://www.unhcr.org/58a458eb4 [accessed on: 1.02.2023]; Detention Guidelines 2012; UNHCR Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees (2014–2019), https://www.unhcr.org/53aa929f6 [accessed on: 1.02.2023].

of the right to liberty and security of person, the new screening procedure[98] may be one of the points of concern[99].

6. Conclusion

The EU model of protection of an alien in the event of detention in the context of asylum and immigration procedures under CEAS is the result of changes introduced in the second stage of building the system. At present, the existence of such an EU model of protection can be noticed, which means that the conditions and rules for detention are not left to free regulation in the national systems of the Member States. That model assumes detention in accordance with the requirements of necessity and proportionality, only on well-defined grounds, while limiting the duration of detention and combining the application of that detention with procedural safeguards, including judicial review.

An analysis of the working documents on the recast proposals for the various CEAS instruments and the legislative process leads to the conclusion that these amendments were intended to ensure that EU rules governing detention in the context of asylum and immigration procedures comply with human rights, including the right to liberty and security of person, and Article 5 ECHR and the case-law of the ECtHR, the 2003 recommendation of the CoE CM and the UNHCR guidelines were the source of reference in this area.

98 Proposal for a Regulation of the European Parliament and of the Council introducing screening of third-country nationals at the external borders and amending Regulations (EC) no. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612 Final 2020/0278(COD).

99 See, International Commission of Jurists, *Detention in the EU Migration and Asylum Pact proposals. Briefing paper*, https://www.icj.org/briefing-paper-detention-in-the-eu-migration-and--asylum-pact-proposals/ [accessed on: 1.02.2023].

Chapter VIII

Common procedures in the European Union Member States for granting and withdrawing international protection in the light of the legal and political aspects of the Common European Asylum System

1. Introduction

The question of the role that the European Union (EU) has played and should play in the field of asylum policy is one of the important aspects of the contemporary debate on migration and international protection of refugees in Europe. The extent to which EU Member States have maintained - and should – maintain control over their national asylum and migration policies seems to be at the heart of this debate.

European cooperation in the field of asylum and migration began to develop more or less in the nineteen eighties, first outside the framework of the then European Community and then within the EU, after the Maastricht Treaty (Treaty on European Union, TEU) acquired its first, albeit modest, competences in the field of asylum and migration[1].

A milestone in the development of this cooperation was the announcement by the European Council at a meeting in Tampere in 1999 of a plan to establish a '*Common European Asylum System*' (CEAS)[2]. Interestingly, the European Council did so despite the fact that the Treaty of Amsterdam (TA)[3] only provided for the adoption of only m i n i m u m s t a n d a r d s for certain aspects of asylum systems[4]. The Commission, which became involved in asylum policy after the entry into force of the TA, did not stop with the Tampere Conclusions, but was consistently defining new asylum policy objectives and instruments, stating that

1 Treaty on European Union, Maastricht, 7.02.1992, OJ C 191, 29/07/1992 P. 0001 – 0110.

2 Tampere European Council 15 and 16.10. 1999 Presidency Conclusions, https://www.europarl.europa.eu/summits/tam_en.htm [accessed on: 1.02.2023].

3 The Treaty amending the Treaty on European Union, Treaties establishing the European Communities and certain related acts - Final Act was signed in Amsterdam on 2.10.1997 and entered into force on 1 May 1999, OJ C 340, 10.11.1997, p. 115.

4 The Treaty amending the Treaty on European Union, Treaties establishing the European Communities and certain related acts - Final Act was signed in Amsterdam on 2.10.1997 and entered into force 1.05.1999, OJ C 340, 10.11.1997, p. 1.

> 'At the same time there is a need for an integrated approach involving efficient administrative decision-making procedures on returns, reintegration schemes and entry procedures that deter unfounded requests and combat networks of people traffickers. This approach is all the more important as the victims of abuses of the system are often genuine refugees'[5].

The next stage in the development of asylum policy was set by the Treaty of Lisbon (TL)[6]. With its entry into force in December 2009, the Community's focus on the direction of the asylum policy has been strengthened. Setting minimum asylum standards was definitely becoming a historic idea and will be replaced by the idea of building a common European asylum system with a uniform protection status and procedures. It follows from TL that the scheme in question is to cover:

- a uniform status of asylum;
- a uniform subsidiary protection status;
- a common temporary protection system;
- common procedures for granting and withdrawing uniform asylum or subsidiary protection status;
- the criteria and mechanisms for determining a Member State responsible for examining the application;
- standards concerning reception conditions;
- partnership and cooperation with third countries.

In 2010, the European Council adopted the Stockholm Programme, calling for a '*Europe of responsibility, solidarity and partnership in migra-*

5 EU Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: *Stocktaking of the Tampere Programme and future orientations*, Brussels, 2.6.2004, COM(2004)401 Final, point 2.5.

6 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, OJ C 306, 17.12.2007, p. 1..

tion and asylum matters'[7]. This new programme was to include a 'dynamic and comprehensive migration policy' based on the *Global Approach to Migration* (GAM)[8], the CEAS and an integrated management system for the EU's external borders. Under this programme, the *European Asylum Support Office* (EASO) became operational in June 2011 and was an expert centre dealing with all aspects of the asylum procedure in the EU. The purpose of establishing the Office was to ensure the harmonisation of legislation in the Member States and the correct application of all future legal instruments in this area.

The development of EU asylum measures assumed a growing influence of the EU on Member States' national policies, but this influence became significant as the EU began to move beyond m i n i m u m standards and adopt c o m m o n a s y l u m s t a n d a r d s.

The Commission is now (2021) putting forward further legislative proposals to strengthen agreed common standards in respect to asylum policy. So is the EU on track for supranational asylum policy governance? The migration crisis of 2014–2016 seems to have seriously hampered this[9], although the full transposition and effective implementation of the CEAS is still considered an absolute priority[10].

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7 Notices from European Union Institutions, Bodies, Offices and Agencies European Council, *The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens*, (2010/C 115/01), Paragraph 6.

8 *The Global Approach to Migration* (GAM) was first defined by the European Council in December 2005 (COM(2007) 247); This concept was further developed in 2007 and 2008. It provides a framework for EU cooperation with third countries in the field of migration and asylum. The Stockholm Programme stresses the importance of consolidating, strengthening and implementing GAM. See, https://ec.europa.eu/home-affairs/orphan-pages/glossary/global-approach-migration-and-mobility-gamm_en [accessed on: 1.02.2023].

9 According to FRONTEX data, in 2015 the external borders of the EU member states were illegally crossed by 1,822,337 people. FRONTEX, *Risk Analysis for 2016*, p. 63. https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf [accessed on: 1.02.2023].

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda on Migration*, Brussels, 13.5.2015 COM(2015) 240 Final; See, https://www.europarl.europa.

The question of the impact of this situation on Member States' practices as regards standards for granting international protection, including the guarantee of fair asylum procedures, also arises compellingly.

Such a question appears to be justified in the light of the Tampere Conclusions, in which the European Council 'reaffirms the importance attached by the Union and the Member States to absolute respect for the right to seek asylum' and that the establishment of a *Common Asylum Policy* will be effected

> '[on] the basis of the full and inclusive application of the Geneva Convention, thus ensuring that no person is sent back to the country of persecution, i.e., respecting the principle of *non-refoulement*'[11].

The Treaty of Amsterdam underlined the EU's commitment to developing its asylum policy in line with the 1951 *Convention Relating to the Status of Refugees* (the 1951 CSR)[12] and the *Protocol Relating to the Status of Refugees* (the 1967 PSR)[13] and other relevant treaties[14], stating that

> '[t]he aim is an open and secure European Union which implements the Geneva Convention on Refugees with integrity and applies other relevant human rights

eu/factsheets/pl/sheet/151/polityka-azylowa.47%20Rozporz%C4%85dzenie%20z%202003%20r.%20zezwala%C5%820%20pa%C5%84stwom%20cz%C5%820nkowskim%20na%20detencj%C4%99 [accessed on: 1.02.2023].

11 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, 16/10/1999 - no. 200/1/99.

12 *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

13 *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, Vol. 606, p. 267.

14 It should be noted that 'other relevant treaties' referred to in Article 63 of the TEC (Treaty establishing European Community) are not defined in primary EU law.

> instruments, and is able to respond to humanitarian needs on a solidarity basis."[15]

In anticipation of detailed remarks, it can be added that the legal instruments of the CEAS recognized the 1951 CSR as the foundation of the international legal regime for the protection of refugees. Moreover, their provisions on 'the definition and essence of refugee status should be laid down as guidelines for the competent national authorities of the Member States in the application of the Geneva Convention"[16].

In the light of the above, it must be concluded that it is rightly emphasised in the literature on the subject that EU asylum policy has been and continues to be shaped within the framework of the applicable principles of public international law, in particular the 1951 CSR, the 1967 PSR and the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)[17].

15 See also, Declaration no. 17, annexed to the Final Act of the Treaty of Amsterdam, on Article 63 of the TEC providing for the establishment and holding of consultations with the United Nations High Commissioner for Refugees and other competent international organisations on matters relating to asylum policy.

16 Recital 16 of Council Preamble 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal L 304/12, 30.9.2004.

17 Coe *Convention for the Protection of Human Rights and Fundamental Freedoms,* ETS no. 005, Rome 04/11/1950; Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as The European Convention on Human Rights contains a number of human rights and fundamental freedoms (the right to life, the prohibition of torture, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the prohibition of punishment without law, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy, prohibition of discrimination); additional human rights or freedoms are provided by additional protocols to the ECHR: protocols: 1 (ETS no. 009), number 4 (ETS no. 046), number 6 (ETS no. 114), number 7 (ETS no. 117), number 12 (ETS no. 177), number 13 (ETS no. 187), number 14 (CETS no. 194), number 15 (CETS no. 213) and number 16 (CETS no. 214)). See also, A. Gruszczak, *Elementy otwartej koordynacji w obszarze wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej*, 'Studia Europejskie' 2006, no. 4, Vol. 4, p. 29; E. Borawska-Kędzierska,

The main objective of the analysis in this chapter is to highlight the legal and political issues of the Common European Asylum System, taking into account the principles of asylum procedures, including procedural guarantees for persons seeking international protection under EU law. The results of this analysis will allow us to move on to issues related to the process of harmonising procedural and substantive aspects of international protection, showing its scope, its importance for the CEAS, as well as procedural institutions that *de facto* exclude applicants for international protection from asylum procedures and the practices of EU Member States in its implementation.

2. Foundations of the Common European Asylum System: towards common minimum standards on asylum procedures

2.1. First initiatives: the Dublin Convention and the Schengen Agreement

Starting to present the principles of the CEAS in the context of asylum proceedings, it should be stressed at the outset that the Treaty of Rome of 1957 did not provide for any powers for the European Economic Community (EEC) in the field of asylum and this situation did not change for the next three decades[18]. The assumptions of the future EU asylum policy began to crystallize only in the mid-nineteen-eighties. This occurred

M. Prus, *Polityka imigracyjna i azylowa*, [in:] F. Jasiński, K. Smoter (eds.), *Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy rozwoju*, Warszawa 2005, p. 49; B. Mikołajczyk, *Osoby ubiegające się o status uchodźcy. Ich prawa i standardy traktowania*, Katowice 2004, pp. 21–41.

18 On 25.03.1957, two treaties were signed in Rome – the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom); They entered into force on 1.01.1958. No such provisions were included in the Treaty of Paris, signed in Paris on 18.04.1951 and establishing the European Coal and Steel Community for 50 years.

in two ways, namely within the Schengen process and the Dublin process[19]. The first was based on the Schengen Agreement signed in 1985 and then on the Convention of 1990 implementing the Schengen Agreement[20], while the second was based on the Convention designating the State responsible for examining asylum applications lodged in one of the Member States of the European Communities, drawn up in Dublin on 15 June 1990, commonly referred to as Dublin Convention[21]. At the time of its signing, it did not fall within the scope of the Community law, but all of its signatories

19 Both processes were inspired by the White Paper on the completion of the internal market, which the European Commission submitted to the Council on 14.06.1985, COM/85/0310 Final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A51985DC0310 [accessed on: 1.02.2023]; Although the White Paper concerned the single internal market, it nevertheless provided for measures concerning the right to asylum and the rights of persons granted refugee status (Period 1987 – 1992: *Directive on the Coordination of rules concerning the right of asylum and the status of Refugees*). However, J. Huysmans aptly noticed that 'During this period, migration policy was not an important issue for the European Communities (..). The free movement of persons did not have priority in the development of the internal market. The free movement of workers from third countries, that is not Member States, was even a more marginal issue in the construction of the internal market (..)'. J. Huysmans, *The European Union and the Securitization of Migration*, 'Journal of Common Market Studies' 2000, Vol. 38, p. 754.

20 Agreement on the gradual abolition of checks at common borders (Agreement between The Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual abolition of checks at their Common borders) was signed by France, Germany and the Benelux countries on 14.06.1985, OJ L 239, 22.09.2000, p. 13; Convention implementing the Schengen Agreement of 14.06.1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.09.2000, p. 19.

21 The launch of the Dublin process is linked to the activity of the Member States within the TREVI groups, and the decision taken in October 1986 to create (*Ad hoc Group on Immigration*, AHI); This group started its work in November 1986, splitting into the first two working subgroups: the subgroup on the right to asylum and the subgroup on falsified documents. Until the Maastricht Treaty, this *ad hoc* group and its working groups held more than 100 meetings, eventually forming six working groups: on external borders, expulsions and entry, asylum, forged visa documents and refugees from the former Yugoslavia. For more information see: T. Bunyan, F. Webber, *Intergovernmental co-operation on immigration and asylum*, Churches Commission for Migrants in Europe, Briefing Paper no. 9, https://ccme.eu › *2018/12 › Briefing_Paper_19_UK* [accessed on: 1.02.2023].

were members of the EEC[22]. It established the criteria for determining the State responsible for examining an asylum application, the modalities for the exchange of information between States, the protection of aliens' personal data and the general rules of procedure for transmitting an application to another State. It also contained arrangements concerning the obligations of these states towards refugees or aliens seeking asylum[23].

In the end, the objectives of the two processes proved to be largely convergent, making it possible to incorporate, by the Maastricht Treaty, their acquis into the third pillar of the EU, namely the area of cooperation in the field of justice and home affairs (JHA). This inclusion was carried out with virtually no substantive changes to the findings of these processes[24].

2.2. The Maastricht Treaty: asylum policy in the European Union's justice and home affairs dimension

Under Article K.1 of TEU, asylum policy has become one of the so-called nine *'matters of common interest'* in the area of justice and home affairs. It was also agreed[25] that the actions undertaken within that policy should be taken in accordance with the 1950 ECHR and the 1951 CSR[26].

This meant that asylum policy was to be determined within the framework of the existing rules of public international law, in particular the 1951

22 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention entered into force for the signatory countries on 1.09.1997, while for the countries that joined the EU in 1995 - Sweden and Austria on 01.10.1997 and Finland on 1.01.1998.

23 OJ C 254, 19.8.1997, p. 1.

24 For more information see: S. Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Oxford 1999; S. Lavenex aptly notes 'that the approach [to asylum], which was liberal in the early 50s, has changed significantly towards a more restrictive approach at both national and European level, which was initiated by the economic recession in the mid-70s. (*Ibidem*, p. 2).

25 See, Article K.2 of TEU.

26 The abbreviation CSR 1951 is also referring to PSR 1967.

CSR, the 1967 PSR and the 1950 ECHR. Moreover, the above treaties implied an obligation binding on all Member States to comply with them, hence none of the measures taken in the field of asylum policy could by definition contradict them. This meant that the provisions of the Treaties did not release the Member States from the obligation to comply with international law obligations already binding on the Member States[27].

The solutions introduced by the Maastricht Treaty meant that in practice the Member States remained dominant actors at that early stage in the development of asylum policy[28].

It should also be emphasised that[29], under the Maastricht Treaty, the Court of Justice of the European Union (CJ EU) could have jurisdiction to interpret or settle disputes concerning the application of only Pillar III Conventions, and this meant that it had *de facto* no jurisdiction over legal instruments in the area of asylum[30]. In the legal literature's view, this meant that measures adopted on the basis of intergovernmental arrangements were usually restrictive, in accordance with the views and preferences of the dominant entities - the Ministers of Justice and the Ministers

27 E. Borawska-Kędzierska, M. Prus, *Polityka imigracyjna i azylowa*, [in:] F. Jasiński, K. Smoter (eds.), *Obszar wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej. Geneza, stan i perspektywy rozwoju*, Warszawa 2005, p. 49.

28 Consequently, the Council has only been required to fully a*ssociate* the Commission to work in the field of asylum, as well as to inform the European Parliament of its initiatives in the field of asylum. See, Article K.4.2. and Article 6 of the Maastricht Treaty.

29 The above emphasis results from the CJ EU's currently active 'participation' in the interpretation and disputes of Member States' obligations in the area of asylum policy.

30 See note 108. It should be noted, without going into details, that Pillar III provides for specific legal instruments that were intended to facilitate the continuation by Member States of their existing international cooperation inter alia in the field of asylum. These included: joint actions, common positions and conventions; these were intergovernmental instruments and required the consent of all Member States. They could not concern matters reserved to the exclusive competence of the States; Common positions were not binding and conventions, being instruments of international law that the Council recommended to Member States to adopt, often did not become binding because they did not obtain the required number of ratifications. See A. Potyra, *Wymiar sprawiedliwości i sprawy wewnętrzne Unii Europejskiej – od Traktatu z Maastricht do Traktatu Lizbońskiego*, 'Rocznik Integracji Europejskiej' 2007, no. 1, p. 127.

of the Interior of the Member States - whose preferences were not balanced by the preferences of other entities[31].

The above findings, although limited by the extent of this paper, allow us to conclude that the initial achievements in the field of asylum at Community level were rather modest. Nevertheless, in October 1999, at the Tampere Summit, the European Council decided to start work on the CEAS[32].

2.3. The Tampere Agenda: establishing a common European asylum policy

In the conclusions of its meeting in Tampere, known as the Tampere Agenda[33], the European Council stated that the above-mentioned CEAS will constitute one of the elements of the Common European Asylum Policy[34]. In the short term, CEAS was to include common standards for a fair and efficient asylum procedure for the submission and proces-

31 J. Huysmans, *The European Union* .., p. 751; V. Guiraudon, *European Integration and Migration Policy: Vertical Policymaking as Venue Shopping*, 'Journal of Common Market Studies' 2000, Vol. 38, no. 2., p. 265; R. Lohrmann, *Migrants, Refugees and Insecurity. Current threats to Peace?*, 'International Migration' 2000, Vol. 38, no. 4, pp. 3–22; See also, Ch. Kaunert, S. Léonard, *The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?*, 'Refugee Survey Quarterly' 2012, Vol. 31, no. 4, p. 8, https://academic.oup.com/rsq/article [accessed on: 1.02.2023]. It should be added that the main body in the field of Pillar III was the JHA Council composed of Justice and Interior Ministers. In addition, Article K.4 of TEU established a Coordination Committee responsible for preparing the Council's work and delivering opinions (Committee K.4). It was composed of senior representatives of the Ministries of Justice and Home Affairs and an observer from the European Commission. In addition to the JHA Council and the K.4 Committee, the Permanent Representatives Committee also functioned within the III Pillar.

32 Denmark (the United Kingdom) and Ireland have not joined the common asylum policy, engaging only in selected elements of it.

33 See, A. Gruszczak, *Elementy otwartej koordynacji w obszarze wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej*, 'Studia Europejskie' 2006, no. 4, vol. 4, pp. 11–39.

34 European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15–16 October 1999*, 16 October 1999, available at https://www.europarl.europa.eu/summits/tam_en.htm [accessed on: 1.02.2023].

sing of asylum applications. In the long term, however, it was supposed to lead to establishment of a common asylum procedure and a uniform status for people granted asylum, applicable throughout the Union, together with additional forms of international protection for refugees[35].

Importantly, the European Council reiterated its emphasis on the future EU asylum system to be in line with the 1951 CSR and other relevant human rights instruments[36]. The Member States have therefore undertaken to ensure the protection of asylum seekers in accordance with the international standards set by the 1951 CSR and the 1967 PSR. The reference to the 1951CSR and the 1967 PSR should be read as a significant strengthening of the position of these treaties in the system of international refugee protection[37]. The EU did not undermine the position of the CSR when it started to build legal regime within the framework of CEAS, and moreover it shows a noticeable stability of its position in this respect[38].

35 Presidency Conclusions, Tampere European Council, Paragraph II(A)(13)–(14).

36 European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999, 16 October 1999, Towards A Union of Freedom, Security and Justice: the Tampere Milestones, point 4. 'The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union'.

37 In this context, it should be noted that originally the scope of the 1951 CSR was subject to both geographical and temporal limitations. It applied only to events occurring before 01.01.1951 and the Contracting States had the option of limiting such events to those occurring in Europe. It was not until the adoption of the PSR in 1967 that the standards of the CSR were widely used by abolishing the time limit. The geographical restriction was to be maintained only for those Contracting States of the CSR which decided to apply it at the time of the initial binding of the CSR, provided that they would also be able to notify the cessation on the application of the restriction at any time.

38 This was subsequently confirmed in Directive of the Council 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (QD of 2004) and its recast of 2011. This is also regularly reiterated by the Court of Justice of the European Union (CJEU). See, CJEU, joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla and Others v. Federal Re-*

Going back to the Tampere Agenda, it is worth noting that several criteria have been added that are important for the analysed issue.

In its conclusions, the European Council 'reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum ' and that the establishment of a common asylum policy will be carried out 'based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e., maintaining the principle of *non-refoulement*'[39]. With regard to the above findings, the Commission stated that '(..) the development of a common procedure and a uniform status requires (..)

– the setting of strategic guidelines,
– the definition of landmarks,
– the setting of objectives and
– the agreement on an assessment procedure for progress reporting,

without prejudice to the exercise of the Community legislative powers, following as closely as possible the policy objectives set'[40].

Summarising its assessment of the Tampere Agenda, the Commission also noted that

> 'in asylum matters, short-term measures must always be set in the context of a stable, foreseeable policy that is guided by long-term objectives. The framework designed at Tampere, for both the first and the second stages, provides the possibility of doing so. This process must also be guided by a concern for transparency so

public of Germany, GC judgment of 2.03.2010; Case C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, GC judgment of 17.06.2010.

39 European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999, 16 October 1999, Towards A Union of Freedom, Security and Justice: the Tampere Milestones, point II.13

40 Communication of the Commission to the Council and European Parliament, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755 Final Brussels, 22.11.2000, p. 19.

> that there can be a wide-ranging public debate involving the European Parliament and civil society, which will reinforce support for the measures adopted"[41].

It can therefore be concluded that the Commission, in the increasingly dynamic process of European integration, has recognised a democratic deficit consisting in the lack of active participation of European citizens in the Union's decision-making process. So it began the process of reaching for the idea of civil society, which was very cautious.

2.4. The Treaty of Amsterdam: communitarisation of asylum policy

Nevertheless, the Tampere Agenda should be seen primarily from the perspective of the provisions of the TA[42]. As is already known, it introduced asylum policy principles into the Treaty establishing the European Community (TEC) and, under a special protocol[43], incorporated the Schengen *acquis* into the EU's legal and institutional framework[44]. Consequently, it built a Community *'Area of freedom, security and justice* (AFSJ)"[45] on the basis of the EU dimension of JHA[46].

41 *Ibidem*.

42 For more on this topic, see A. Szahoń-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne Unii Europejskiej*, Poznań 2011.

43 This concerns Protocol (No. 2) integrating the Schengen *acquis* into the framework of the European Union (1997), OJ C 321E , 29.12.2006, pp. 191–195.

44 The Schengen *acquis* consisted of the Schengen Agreement and the agreements on the accession of further States to it, as well as all the acts issued by the Schengen Executive Committee and other bodies authorised by it.

45 Apart from the principles governing asylum policy, the EU's 'third pillar' also included immigration, visa and customs policy, as well as police and judicial cooperation.

46 The provisions on cooperation in the field of justice and home affairs were contained in Title VI of the TEU; Subject *of common interest* included the following issues: asylum policy, rules governing the crossing of external borders, immigration policy, rules on entry into and movement within the Union, rules for the residence of third-country nationals in the territories

This transposition was made on the basis of the so-called '*footbridge procedure*' (*passarelle)*[47]. It was provided for in Article 42 of TEU, according to which it was possible to amend primary law without the need to follow the Treaty procedure required for treaty amendment and ratification by all the Member States, in accordance with their constitutional provisions[48]. Nevertheless, the effective application of this special procedure required the unanimous consent of the Council, after consulting the EP, and the principles of judicial cooperation in criminal matters, customs cooperation and police cooperation were excluded from this procedure[49].

A. Gruszczak rightly underlines that the cooperation of states within the JHA framework suffered from the lack of appropriate legal and technical measures to achieve the objectives of cooperation[50]. In the light of that assessment, it becomes clear why the TA obliged the Council to adopt 'within a period of five years the asylum measures, namely the criteria and mecha-

of the Member States, the fight against illegal immigration, residence and work of third--country nationals, the fight against drug addiction, the fight against fraud and judicial cooperation in civil and commercial matters.

47 Various terms are used to describe it: 'footbridge clause', 'transitional procedure', 'dynamization procedure' or *passerelle* clause'. It was comprised of a set of norms defining the possibilities of transferring certain areas of cooperation from the third intergovernmental pillar to the first Community pillar. See, W. Czapliński, *III filar*.., pp. 125–126.

48 Article 42 of TEU provided that the Council, acting unanimously on the initiative of the Commission or of a Member State after consulting the European Parliament, may decide that actions in the areas referred to in Article K.1 are to be subject to the title IIIa of the Treaty establishing the European Community and may, at the same time, lay down the voting arrangements which are attached thereto. It recommends that the Member States adopt this Decision in accordance with their respective constitutional requirements. See also, J. Barcz, *Procedura tzw. kładki na podstawie art. 42 TUE – aspekty prawne*, [in:] *Możliwość wykorzystania tzw. procedury kładki (art. 42 TUE) dla reformy ustrojowej Unii Europejskiej*, Warszawa 2007, p. 7. It should be added that the *footbridge procedure* was already included in the Treaty of Maastricht.

49 See, Article K.9 of TEU, Article 100c of TEC in the TA version.

50 A. Gruszczak, *III filar Unii Europejskiej po Tampere: wnioski i perspektywy*, 'Studia Europejskie' 2000, no. 3, p. 87; In this context, it is important to point out that cooperation within the JHA dimension was based on intergovernmental cooperation, without its communitarisation. It was based on international law. Thus, the Member States played a key role in deciding on the pace and directions of cooperation, and the role of the Community institutions was significantly limited, if not excluded.

nisms for determining the Member State responsible for examining an asylum application, as well as minimum standards for the reception of refugees, the definition of 'refugee' and the procedures governing the asylum process'[51]. In addition, the TA called for the adoption of minimum standards for granting temporary protection to displaced persons and those who otherwise need international protection, and for promoting balancing efforts between Member States (*burden-sharing measures*)[52]. It should be clarified here that the concept of minimum standards assumes that Member States may introduce and apply provisions that are more favourable to persons applying for international protection.

Comparing these TA provisions with the Tampere Agenda, it can be seen that a step forward was taken in Tampere: for the first time the intention to pursue a 'common policy' in the field of asylum was declared there, whereas TA only provided for the establishment of 'minimum standards'37. The Tampere Conclusions clearly indicate that the aim of establishing common minimum standards in the short term is to pave the way for 'a common procedure and a uniform status for persons granted asylum valid throughout the Union' in the long term[53]. In this respect, it is striking that the arrangements on asylum and immigration in the conclusions of the Tampere Summit were brought together and titled 'Common *EU asylum and migration policy*' and included a subsection on CEAS.

It can therefore be acknowledged that in Tampere, EU Heads of State and Government made *de facto* use of the new TA provisions to give

51 Article 73K of TA. In the consolidated version of the EC Treaty, this article was renumbered 63, OJ C 321E, 29.12.2006, p. 37.

52 As for *burden-sharing* in the area of asylum policy, see m.in. G. Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, 'Journal of Refugee Studies' 2003, Vol. 6, no. 3, pp. 236–252; See also, A. Niemann, N. Zaun, *EU Refugee Policies and Politics in Times of Crisis*, 'Journal of Common Market Studies', Vol. 56, no. 1, https://onlinelibrary.wiley.com/toc/14685965/2018/56/1 [accessed on: 1.02.2023].

53 See, European Council, Presidency Conclusions of the Tampere European Council, 15–16 October 1999.

a significant boost to several aspects of the Area of Freedom, Security and Justice, including asylum.

As far as the *Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts* (Treaty of Nice, TN) is concerned, the issue of asylum was not the leading issue[54]. However, it is worth quoting Article 63(1)(d) of TEC, which states that 'the Council (..) within five years of the entry into force of the Treaty of Amsterdam, [shall] adopt inter alia measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, as regards minimum standards on procedures in Member States for granting or withdrawing refugee status[55].

3. Common minimum standards on asylum procedures

3.1. Scope of harmonisation of procedural and substantive aspects of international protection

In accordance with Article 63 of TEC[56] and following the Tampere Conclusions, the first steps in the construction of the CEAS were taken in 2000–2005, and it was already assumed that the common minimum standards developed under this system would cover both procedural

54 As we know, the works on TN focused on three issues 'leftover' from Amsterdam: the size and composition of the Commission, the weighting of votes in the Council and the possible extension of qualified majority voting (QMV). These were commonly called 'Amsterdam leftovers'.

55 Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002, p. 33. (Treaty establishing the European Community (Nice consolidated version). It may also be noted that Article 63 of TA and TN provided for 'refugee status', while Article 63 of the TL version (thus Article 78 of TFEU) on the 'status of asylum' and subsidiary protection.

56 Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU, 2007). OJ 2010/C 83/01, 20.03.2010; Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC,).

and substantive aspects of international protection: from the moment of entry into a Member State until the final decision on international protection is made.

Thus, at the level of secondary law, common minimum standards have been developed by means of directives in the field of admission (the so-called reception directive), qualification for international protection (the so-called qualification directive) and procedures for granting and withdrawing refugee status (the so-called procedural directive). In addition, minimum standards for the provision of temporary protection in the event of a mass influx of displaced persons have been developed with a view of establishing specific procedures for offering temporary immediate protection, while the protection in question should be in line with the Member States' international obligations with regard to refugees[57].

However, it should be borne in mind that although specific issues have been regulated in separate directives, they were (and still are) internally interrelated and thus should not be treated as substantively isolated instruments of the CEAS[58]. Subsequently, pursuant to Council Regulation of 11 December 2000 the establishment of Eurodac for the storage and comparison of fingerprint data was decided[59], while Council Regulation Dublin II of 18 February 2003 established the criteria and mechanisms for determining the Member State responsible for examining an asylum application[60]. This way, the fundamental legal instrument of asylum poli-

57 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 07.08.2001, p. 12.

58 More on this issue by: H. Battjes, *European Asylum Law and International Law*, Leiden-Boston 2006, p. 196 *ff.*

59 Council Regulation no. 2725/2000 of 11.12.2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15.12.2000, p. 1. It has been operational since January 2003.

60 Council Regulation no. 343/2003 of 18.2.2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 050 , 25.02.2003, pp. 0001–0010;

cy, which for a long time was the Dublin Convention of 1990, was embedded in Community law.

3.2. The importance of the harmonisation of asylum procedures for the Common European Asylum System

The provisions on asylum procedure and procedural safeguards that are of interest are contained in Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, commonly referred to as the Procedural Directive (2005 PD)[61].

The 2005 PD was addressed to all EU Member States except Denmark[62].

The Directive set 1 December 2007 as the date on which the EU Member States bound by that Directive should fulfil their obligation to bring into force the laws, regulations and administrative provisions necessary for the application of this Directive[63], subject to the provisions regarding the right to legal assistance and representation (Article 15 of 2005 PD), which were to be transposed by 1 December 2008 at the latest. Consequently, its provisions were to apply to applications for international protection lodged and procedures for the withdrawal of refugee status after 1 December 2007[64]. Moreover, the 2005 PD applied only to persons who were third-country nationals and stateless persons.

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see also Commission Regulation No.1560/2003 of 2.9.2003 laying down detailed rules for the application of Council Regulation no. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222, 05.09.2003, p. 3.

61 Council Directive 2005/85/EC of 1 December 2005 establishing minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13.

62 See, Paragraph 34 of the Preamble to the 2005 PD.

63 Article 43 of the 2005 PD.

64 Article 44 of the 2005 PD.

Stressing the importance of the 2005 PD for the CEAS, the effects of the Dublin Regulation should be taken into account in particular. For asylum seekers who were deprived of the freedom to choose the Member State in which they could lodge an asylum application, the guarantee function of the asylum procedure was important, since the harmonisation of asylum procedures provided a guarantee that their application was examined in every Member State in a fair manner subject to the equality principle. For the Member States, on the other hand, its preventive function was important, as it prevented secondary movements of asylum seekers[65].

It must be agreed that, from the point of view of the CEAS, the harmonisation of asylum procedures (together with the Reception Directive on reception conditions) was crucial for its creation and development.

3.3. Procedural institutions de facto excluding asylum seekers from asylum procedures

However, the scope of this harmonisation was only established in 2005 and a number of its solutions were controversial and even objectionable. In particular, it concerned solutions linked to procedural institutions such as 'first country of asylum'[66], 'safe country of origin'[67] and 'safe third country'[68]. The definitions of these institutions, expressing their specific concepts, were the subject of far-reaching disputes during the drafting

65 K. Hailbronner, *Asylum Law in the Context of a European Migration Policy*, [in:] N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford 2004, p. 70.

66 Article 26 of the 2005 PD; in the context of this concept, see Article 31 of the 1951 CSR.

67 Article 31 of the 2005 PD; on the EU lists there are/were countries such as: Albania, Bosnia and Herzegovina, Macedonia, Kosovo, Montenegro, Serbia and Turkey. According to the CEAS, a citizen of an EU Member State cannot apply for asylum in another Member State.

68 Article 36 of the 2005 PD. See, CJEU, case *Parliament v. the Council*, C133/06, GC judgment of 6.05.2008, according to which Articles 29(1) and (2) and 36(3) of the 2005 PD are invalid; following the judgment, Member States shall establish their own lists of safe third countries and submit them to the Commission.

works, which significantly delayed their finalization[69]. Although they were proposed as institutions to speed up asylum procedures[70], the UNHCR[71], NGOs and European civil society organisations[72] considered that their compliance with the international obligations of the Member States, in particular as regards *non-refoulement*, as guaranteed by the 1951 CSR, raised serious concerns[73].

Incidentally, European countries have resorted more broadly to the above-mentioned institutions in their asylum policies since the nineteen-eighties. Their aim was to deter or prevent migrants and refugees from arriving on their territory and consequently restrict access to their asylum systems. In other words, it 'simply was about 'excluding asylum seekers from the pro-

69 The first draft of the EC directive was submitted by the EC in September 2000. See, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Brussels, 20.09.2000, COM (2000) 578 final. Description of the drafting works along with a description of the above-mentioned controversy see: Statewatch EU divided over list of 'safe countries of origin' – Statewatch calls for the list to be scrapped, available at www.statewatch.org [accessed on: 1.02.2023].

70 About institutions intended to accelerate asylum procedures see: J. van Selm, *Access to Procedures, 'Safe Third Countries,' 'Safe Countries of Origin' and 'Time Limits*, 'Global Consultations on International Protection', Geneva 2001, 2001; M.-T. Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited*, 'International Journal of Refugee Law' 2006, Vol. 18, pp. 571–600; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford 2009.

71 See, UNHCR, Observations on the European Commission Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step, (COM(2004)503 final; Annex SEC (2004)937, 15 July 2004).

72 Critical comments were raised inter alia by European Council for Refugees and Exiles (ECRE), Amnesty International, Human Rights Watch. At this point, it can be added that the PD is one of the most criticized CEAS directives. This issue is discussed more by C. Costello, *The Asylum Procedures Directive and the proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection*, 'European Journal of Migration and Law' 2005, Vol. 7, no. 1, pp. 35–69.

73 See also, D. Ackers, *The Negotiations on the Asylum Procedures Directive*, 'European Journal of Migration and Law' 2005, Vol. 7, no. 1., p. 1–33; M. Fullerton, *Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal*, 'International Journal of Refugee Law' 2005, Vol. 17, no. 4, pp. 659–687.

cedural door[74], even retroactively, and therefore also those persons who have already arrived on their territory[75]. In reality, therefore, these were institutions of migrant deterrence policies and, as such pose a challenge to the fundamental principles of international refugee law and human rights[76]. It would be enough to point out that in the case of *TI v. the UK,* the ECtHR held that the application of the concept of a safe third country does not relieve the Contracting State of the ECHR of its obligations under Article 3 of the ECHR as regards freedom from torture, inhuman or degrading treatment or punishment, even under the Dublin Convention[77].

3.4. European Union Member States' practice in regard to harmonization of asylum procedures

Criticism of the provisions of the 2005 PD is combined with criticism of its application by EU Member States, or even its absence. The analyses carried out clearly showed that its provisions proved to be ineffective in practice[78] and did not sufficiently guarantee a fair and equal practice of EU Member States in the assessment of applications of persons applying for international protection[79]. On the other hand, by leaving Member States a wide margin of discretion, it has been difficult to eliminate

74 S. G. Goodwin-Gill, *The Refugee in International Law*, Oxford 1996, p. 333.

75 These policies are described inter alia by: J. Vedsted-Hansen, *Non-admission Policies and the Right to Protection: Refugees' Choice vs. States' Exclusion?*, [in:] F. Nicholson, P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge1999, pp. 269–288.

76 More on this in: T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge 2013.

77 ECtHR, case *TI v. the UK*, application no. 43844/98, judgment of 07.03.2000.

78 The level of effectiveness is understood in this case as the degree of achievement of the objective for which the 2005 PD was adopted.

79 B. Kowalczyk writes that this state of affairs has led to a situation in which international protection in the EU has become an illusion; B. Kowalczyk, *Kompetencje dyskrecjonalne państw w podstawach prawnych systemu dublińskiego*, Wrocław 2015. p. 92; see also C. Teitgen-Colly, *The European Union and asylum: An Illusion of protection*, 'Common Market Law Review' 2006, no. 43, p. 1512–1513.

significant differences between Member States as regards the reception of applicants, procedures and assessment of eligibility for international protection[80]. As B. Kowalczyk rightly observes, leaving the Member States a wide discretion contributed to the 'renationalisation' of asylum matters[81]', which was combined with the incorrect implementation of the 2005 PD into the national legal systems of the Member States, in terms of time and manner. As further rightly observed by B. Kowalczyk, 'these factors and political, social and economic changes in Europe and in the countries of origin of refugees consequently led to the collapse of the system and the search for ways to reconstruct it on the basis of limiting the discretionary powers of states'[82]. Based on the Commission's findings, the main divergences between Member States' national rules on asylum procedures occurred 'in particular as regards the provisions on accelerated procedures, 'safe country of origin', 'safe third country', interviews, legal assistance and access to an effective remedy'[83].

These divergences led the Commission to conclude that the objective set for the 2005 PD, namely to create equal opportunities for persons applying for international protection in terms of 'transparent and effective asylum procedures', had not been fully achieved[84].

80 The lack of harmonisation was not unique to the 2005 DP, but was characteristic of the entire CEAS. B. Kowalczyk points this out in: *Kompetencje dyskrecjonalne państw* ... p. 91 *ff*. See also, the literature cited there, inter alia W. Czapliński, *Układy z Schengen (czy pierwszy bastion 'Twierdzy Europa'?)*, 'Przegląd Zachodni' 1992, no. 1, p. 101; see also: B. Wierzbicki, *Europejska polityka wobec uchodźców*, 'Sprawy Międzynarodowe' 1991, no. 4, p. 71–86; M. Zdanowicz, *Zewnętrzne implikacje porozumień z Schengen*, 'Przegląd Prawa Europejskiego' 1996, no. 1, p. 18; K. Hailbronner, C. Thiery, *Schengen II and Dublin: Responsibility for asylum Applications in Europe*, 'Common Market Law Review' 1997, no. 4, p. 961.

81 B. Kowalczyk, *Kompetencje dyskrecjonalne państw w podstawach prawnych systemu dublińskiego*, Wrocław 2015, p. 92

82 *Ibidem*.

83 Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2010/0465 final version, point 6.

84 *Ibidem*.

4. The process of recasting the 2005 Procedural Directive

4.1. The Hague Programme: assumptions for the recast of the 2005 Procedural Directive

In relation to the above assessment, the European Commission, unaware of the upcoming migration crisis at the end of the second decade of the twenty-first century, has started a significant reconstruction of CEAS instruments. That decision was based on a negative assessment of Member States' practice with regard to the 2005 PD and was based on the general observation that the minimum standards contained in the 2005 PD were indeed not capable of ensuring the desired degree of harmonisation of asylum procedures between Member States[85]. It was therefore considered necessary to amend it in order to bring about greater harmony and improvement of standards regarding the 'common procedure for international protection in the Union'[86]. It was also recognised that actual and effective cooperation between national asylum authorities in regard to asylum decision-making processes in the Member States can contribute to greater harmonisation of Member States' national rules[87]. Finally, the need for measures to increase solidarity and responsibility between EU Member States and between the EU and non-EU countries (third countries) was recognised[88].

85 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *An Asylum Policy Plan: An integrated strategy for protection across the EU* {SEC(2008) 2029} {SEC(2008) 2030} /COM/2008/0360 final version, p. 3.

86 European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection within the Union and repealing Directive 2013/32/EU*, Brussels, 13.07.2016, COM(2016) 467 Final, 2016/0224(COD).

87 *Ibidem*, p. 4 and p. 6.

88 *Ibidem*, p. 4 and pp. 7–11.

These statements were strongly echoed in the Hague Programme, adopted in 2005 by the European Council[89]. It was intended to be a 'follow-up to the Tampere Programme (1999–2004)' and as such contained strategic objectives 'with a view to strengthening the area of freedom, security and justice (AFSJ)' for the period 2004–2009[90].

Guided by these objectives, the Commission formulated ten priorities to guide joint efforts to strengthen freedom, security and justice[91]. Among them, the Commission pointed to 'the creation of a common area of asylum through an effective, harmonised procedure in line with the Union's values and humanitarian traditions'[92].

As a result of all these activities, the 2005 PD was transformed into a Directive of the EP and of the Council 'on common procedures for gran-

89 European Council *The Hague Programme: strengthening freedom, security and justice in the European Union*, OJ 2005/C 53/01. It was endorsed by the European Council at its meeting on 04–05.11.2004; See also, *Council and Commission Action Plan implementing The Hague Programme on strengthening freedom, security and justice in the European Union* adopted by the Council at its meeting on 2 and 3 June 2005, OJ 2005/C 198/01.

90 Communication from the Commission to the Council and the European Parliament, *The Hague Programme: ten priorities for the next five years of the Partnership for European renewal in the area of freedom, security and justice*, Brussels, 10.05.2005, COM(2005) 184 final version.

91 Communication from the Commission to the Council and the European Parliament, The Hague Programme: *Ten priorities for the next five years of the Partnership for European renewal in the area of freedom, security and justice*, Brussels, 10.05. 2005, COM(2005) 184 final version.

92 This was the third priority. In its elaboration, the Commission stated that '.. Establishment of a Common European Asylum System is another priority. Over the next few years, work will be carried out to complete the evaluation of the first phase instruments by 2007 and to present the instruments and actions of the second phase related to the establishment of a common asylum policy aimed at establishing a common procedure and a uniform status for persons with refugee status or beneficiaries of subsidiary protection status by the end of 2010. Administrative cooperation between the national services of the Member States should be strengthened and funds should be allocated to assist Member States in examining applications and receiving third-country nationals. The Hague Programme also pointed to the need to consider the possibility of examining asylum applications jointly. The Commission has started the creation of EU regional protection and resettlement programmes.' See also, the Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament: *The Hague Programme: Ten priorities for the next five years. Partnership for European renewal in the area of freedom, security and justice*, COM(2005) 184 final, (2006/C 65/22), point 2.5.

ting and withdrawing international protection (recast)' (PD(r) of 2013)[93]. July 2015 was supposed to be the final deadline for its transposition into the national legislation of the EU Member States[94].

4.2. Instruments for the recast of the 2005 Procedural Directive

4.2.1. 2008 European Pact on Immigration and Asylum

The process of transforming the 2005 PD should also be viewed from the perspective of several instruments. They include the *European Pact on Immigration and Asylum*, which was adopted in 2008[95].

It formulated the obligation to create a European legal framework on asylum, in accordance with the norms of international law, in particular those relating to human rights, human dignity and refugees[96]. At the outset, it imposed certain 'requirements' on the EU, which in fact were setting the direction for strategic actions. They were:

- organisation of legal immigration, taking into account the priorities, needs and reception options identified by the Member States, and the promotion of the integration of immigrants;
- controlling irregular immigration and supporting voluntary returns to countries of origin or transport of immigrants;
- improving the effectiveness of border controls,
- creation of a European legal framework for asylum;

93 Although its title refers to recast, in reality this 'Recast' resulted in repealing the previous directive.

94 With the exception of Article 31(3)(4) and (5) of the PD(r), for which the deadline for transposition was 20.07.2018: Article 51(2) of PD(r) of 2013.

95 European Council *European Pact on Immigration and Asylum*, 24.09.2008, EU Doc 13440/08; The text of the Pact has not been published in the Official Journal of the EU; https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=LEGISSUM:jl0038&from=EN [accessed on: 1.02.2023].

96 European Council, *European Pact on Immigration and Asylum*, 24.09.2008, EU Doc 13440/08.

– establishing comprehensive partnerships with third countries to promote synergies between migration and development[97].

Nevertheless, the second stage of the construction of the CEAS, and thus the process of transforming asylum procedures, should be viewed primarily from the perspective of the Treaty on the Functioning of the European Union (TFEU)[98] and the provisions of the Charter of Fundamental Rights of the European Union (Charter, CFR)[99], which on 1 December 2009 became an act of primary EU law, binding the EU institutions and its Member States in the application of the EU law[100].

4.2.2. Treaty of Lisbon

The Treaty of Lisbon has changed and transformed the existing Treaties into two separate treaties, namely into the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[101].

Article 3(2) of TEU elevated the 'area of freedom, security and justice' to the status of the EU objectives[102]. In addition, the EU's legal competences in the area of AFSJ has been clarified by Article 4(2)(j) of TFEU, which classifies this policy area, including asylum policy, as one of the shared com-

97 *Ibidem*.

98 TL came into force on 1.12.2009.

99 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

100 See, Declaration on the Charter of Fundamental Rights of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13.12.2007, consolidated version, OJ 2016/C 202/01.

101 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, OJ C 306, 17.12.2007, p. 1. The Treaty of Lisbon was signed in Lisbon (Portugal), on 13.12.2007 and entered into force on 01.12.2009.

102 It states that the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

petences. Subsequently, significant institutional changes were made, strengthening the role of the European institutions in the field of asylum policy.

In the first place, this concerned the European Parliament (EP), which, thanks to the adoption of the ordinary legislative procedure as a standard procedure throughout the AFSJ, including in asylum matters, was given the power to co-shape the EU's asylum policy (Article 78(2) of TFEU in conjunction with Article 294 of TFEU (former Article 251 of TEC). Subsequently, the restrictions on judicial review were lifted by applying the normal rules on the jurisdiction of the Court of Justice of the European Union to all cases related to the AFSJ in all EU Member States, including asylum[103].

Furthermore, Article 78(2)(d) of TFEU (former Articles 63(1) and (2) and 64(2) of TEC) required the adoption of a '*common procedure* for granting and withdrawing uniform asylum or subsidiary protection status'. In doing so, the EU has moved away from the previous concept of a minimum standard approach in favour of procedures for a higher level of coherence in asylum procedures so that they form a single and consistent whole.

Article 78 also required the measures adopted within the asylum policy to be in accordance with the 1951 CSR and the 1967 PSR, as well as with the other relevant treaties. Moreover, Paragraph 1 contains an ob-

103 The TA acknowledged the important, albeit limited, competence of the CJEU in the field of asylum policy. First, the TA accepted the jurisdiction of the CJEU in the third pillar, but at the same time established that it had jurisdiction only in those cases and only insofar as it results from specific provisions of the Treaty. This was a departure from the theory of universal jurisdiction of the Court binding in the Communities. Secondly, the Court's jurisdiction in Pillar III was characterised by its optionality as it depended on its recognition by the Member States. This solution was completely different from the principle of compulsory jurisdiction of the Court in the Communities. See, new Article 35 of TEU. However, although limited, it was very important for a national court to be able to refer a question to the Court for a preliminary ruling (Article 35(1) to (3)(a) and (b) of TUE). The Court had jurisdiction to give preliminary rulings on the validity and interpretation of decisions and framework decisions, on the interpretation of conventions created on the basis of Title VI of the TEU and on the interpretation and validity of measures implementing those conventions. Another limitation of the Court's jurisdiction concerned the lack of competence regarding the legality of the actions of the police and other services, as well as the proportionality of the measures taken (Article 35 of TEU, Paragraph 5).

ligation to respect the principle of non-refoulement, thereby giving it the character of a Treaty obligation, which covers all forms of international protection provided for in the EU law rather than only refugee status as regulated by the 1951 CSR[104].

4.2.3. Charter of Fundamental Rights of the European Union

The second major change in the EU legal order related to TL, which significantly affected the asylum procedure - also by reducing its restrictiveness - was the incorporation of the EU CFR into the EU legal order[105].

Article 6(1) of TEU is of particular importance in this regard, as it refers to the EU CFR, according to which it becomes directly binding on the European institutions, bodies, offices and agencies of the Union, as well as on the Member States when they adopt and implement legal acts of Union law, including in the field of asylum[106]. That reference is all the more important given the inclusion of the right to asylum in the catalogue of fundamental rights[107]. Article 18 provides for this, stating that

> 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community (..)'[108].

104 B. Kowalczyk, *Polski system azylowy*; Wrocław 2014, p. 193.

105 OJ C 326, 26.10.2012, p. 391.

106 See, Declaration on the Charter of Fundamental Rights of the European Union, contained in the Final Act of the Conference of the Representatives of the Member States, Brussels 03.12.2007, CIG document 15/07.

107 OJ C 202, 07.06.2016, p. 390.

108 For more on this topic, see: M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's Law*, 'Refugee Survey Quarterly' 2008, Vol. 27, no. 3, pp. 33–52.

In addition, Article 19 of the EU CFR also guarantees the prohibition of expulsions and provides that

> 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'[109].

This prohibition applies to both individual and collective expulsion[110].

4.2.4. Stockholm Programme

The implementation - from 1 December 2009 - of TL provisions coincided with the implementation of the third strategic programme, namely the Stockholm Programme, in which the European Council set out actions for the construction of an open and secure Europe for the benefit and protection of citizens for the period 2010–2014[111].

First of all, it should be noted that 2012 was set as the deadline for the implementation of the CEAS instruments, which was to be institutionally strengthened by the European Asylum Support Office (EASO)[112].

109 Charter of Fundamental Rights of the EU, see footnote 110.

110 A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, Warszawa 2013, p. 675.

111 European Council *The Stockholm Programme – an open and secure Europe serving and protecting citizens. Towards a citizens' Europe in an area of freedom, security and justice*, OJ C 115, 4.05.2010, p. 1. It defined the main priorities for the development of the EU in the years 2010–2014: 1) propagation of citizenship and fundamental rights (Europe of rights); 2) building European justice area (Europe of law and justice); 3) development of internal security strategy (Europe that protects); 4) access to Europe in a globalised world and the creation of a responsible migration policy (Europe of responsibility, solidarity and partnership in the field of migration and asylum); 5) strengthening actions within the external dimension of the area of freedom, security and justice (Europe's role in a globalised world).

112 The European Commission proposed the creation of an office on 18.02.2009. Regulation (EU) no. 439/2010 of the European Parliament and of the Council of 19.05.2010 establishing a European Asylum Support Office. EASO started as an EU agency on 01.02.2011.

From the point of view of the very process of recasting the asylum procedure, it was important to abandon the concept of minimum procedural standards in favour of 'achieving a greater degree of harmonisation of procedures"[113]. However, the common procedural rules were again determined by the need to prevent or restrict secondary movements within the Union and to enhance mutual trust between Member States'. Moreover, these principles were also recognised, together with the uniform status of persons granted international protection, as the basis for the 'common area of protection and solidarity' to be created in the context of asylum (*Asylum: a common space of protection and solidarity*)[114]. In the European Council's view, high standards of protection were to apply in this common area with regard to reception conditions, procedural guarantees and status determination, so that persons seeking international protection had equal access, regardless of the Member State, to fair, equal and swift decisions on granting the international protection (asylum or subsidiary protection).

In this context, the idea of increasing the number of refugees resettled from third countries and greater involvement of EU countries in the implementation of the 'European resettlement programme', launched in autumn 2009 as a humanitarian measure, emerged[115]. It was targeted at people who

113 See also, *Program Sztokholmski – uwagi wstępne*, [in:] *Program Sztokholmski – implikacje i wyzwania dla Unii Europejskiej i Polski*, Warsaw 2010, Materiały Robocze – Forum Wymiar Sprawiedliwości i Sprawy Wewnętrzne UE, Warszawa 2010, Vol. 2, no. 16.

114 European Council, *Stockholm Programme - An open and secure Europe serving and protecting citizens*, OJ C 115, 2010 p. 32, point 6.2. ('Asylum: A Common Space of Protection and Solidarity').

115 Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme, C/2015/3560, OJ L 148, 13.6.2015, p. 32; see also Communication on the Resettlement Programme (2009). *Communication from the Commission to the Council and the European Parliament on establishing a joint EU resettlement scheme*, Brussels, 02.09.2009, COM(2009) 447 final; for more information see: H. Wyligała, *Strategiczny rozwój narzędzi polityki migracyjnej UE w obliczu kryzysu migracyjnego*, 'Rocznik Bezpieczeństwa Międzynarodowego' 2016, Vol. 10, no. 2, pp. 176–177; When launching this programme, the European Commission stressed at the time that it was 'striving to provide real, safe and legal solutions to people whose lives are in danger from smuggling groups'.

experienced violence, lawlessness and civil wars and therefore required international protection[116].

On the other hand, the European Council expressed in the Stockholm Programme the importance of real, non-systemic threats to the effectiveness and fairness of asylum procedures, and therefore stated the need to give due consideration to 'fair and effective procedures' that can 'prevent abuse'[117]. In this way, as J. Gąciarz aptly observes, the creation of preventive mechanisms which would allow to block activities dangerous to public order and the security of citizens has become important for migration policy[118].

5. Conclusion

The attempts to create a Common European Asylum System described above have not eliminated the significant differences between Member States, both in terms of refugee protection and reception conditions. These differences were most often caused by the different levels of economic development of the Member States, but also by the different degree of openness and readiness to receive migrants.

On the eve of the so-called European migration crisis in the summer of 2015, there was no coherent asylum system in Europe, although the need for its creation had been reported for a long time. It was then that the ineffectiveness and inadequacy of the existing EU solutions became blatantly obvious. The crisis in question was characterised by a sharp increase

116 It was not intended to be an obligatory programme, but a voluntary one. Under this programme, at least 50,000 refugees were to be sent to the EU in 2017–2019.

117 Although the programme does not indicate e*xplicitly* what kind of abuse is involved, Part 4 of the programme, entitled 'A Europe that protects', allows to assume that these are abuses in the asylum procedure linked inter alia to 'serious crime and organised crime', in particular trafficking in and smuggling of human beings, sexual exploitation of children and child pornography, cybercrime, corruption, drugs and terrorism.

118 J. Gąciarz, *Program Sztokholmski: pomiędzy ambicjami a realiami bezpieczeństwa*, [in:] A. Gruszczak (ed.), *Program Sztokholmski – implikacje i wyzwania dla Unii Europejskiej i Polski*, Warszawa 2010, pp. 19–20.

in the number of people migrating to Europe via the Mediterranean - usually in small boats or dinghies managed by smugglers - to seek asylum. Suffice it to say that 1.2 million asylum applications were submitted in 2015[119].

The crisis has also shown that individual Member States have not been willing to deliver on previous declarations of readiness to respect human rights in the migration process. Moreover, even the implementation of the 1951 CSR has been repeatedly criticized by countries opposing the 'open door' policy towards refugees[120].

Given how the crisis has been handled, it is not surprising that in its January 2016 report, the independent international humanitarian medical commission Médecins Sans Frontières (MSF) identified the European Union as the main party responsible for the migration crisis[121].

119 The UNHCR reported that those who reached Europe in 2015 were mainly Syrians (49%), Afghans (21%) and Iraqis (8%). Asylum applications were lodged mainly in Germany, Sweden, Austria and Hungary. Only during the first two months of 2016 another 123,000 people arrived on the shores of Greece. For comparison, in the same period of 2015 there were only 4.6 thousand of them. See, report at http://uchodzcy.info/infos/obecny-kryzys-migracyjny/ [accessed on: 1.02.2023].

120 R. Ulatovsky, *Niemcy-dają radę (?)*, 'Rocznik Strategiczny' 2016/2017, Vol. 22, pp. 183–193; A. Krzemiński, *Niemiecka polityka otwartych drzwi w ogniu krytyki*, 'Polityka', 27.12.2015. https://www.polityka.pl/tygodnikpolityka/swiat/1644964,1,niemiecka-polityka-otwartych-drzwi-w-ogniu-krytyki.read [accessed on: 1.02.2023].

121 MSF International Activity Report 2016. A year in review, available at https://www.msf.org/international-activity-report-2016/year-review [accessed on: 1.02.2023].

Chapter IX

Use of economic and social rights by aliens applying for international protection in the European Union based on the example of the access to the labour market

1. Introduction

Access to the labour market is one of the elements contributing to the provision of a *durable solution*[1] for the refugees. As defined by the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) such solution includes any means which can make the situation of the refugees 'satisfactorily and permanently resolved' in a manner enabling them to lead 'a normal life'[2], which in turn is associated with permanent settlement in the host country, third country or a country of origin[3]. The possibility of taking up gainful employment allows the refugees to get back on their feet more quickly, to get out of the difficult situation they find themselves in and contributes to achieving self-sufficiency. As emphasized by UNHCR, this actually benefits not only themselves but also the economies and societies of host countries[4]. The access to decent work has fundamental significance for the protection and well-being of refugees. It contributes to 'survival of the refugee and his family as well as to their development, engagement and recognition in the society'. Finally as indicated by UNHCR the access to decent work is "integral to the restoration of human dignity and freedom, strengthe-

1 'The permanent solution' or '*durable solution*' in the UNHCR mandate, see: Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14.12.1950, Article 1. In respect to decent work for refugees in the context of the provision of permanent solution, see inter alia: UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees, July 2021, Paragraph 1 (hereinafter: UNHCR Guidelines on Decent Work) and General Conclusion on International Protection, ExCom 50 (XXXIX) (1988), A/43/12/Add.

2 UNHCR Master Glossary of Terms, Rev.1, June 2006, quoted after: M. Ineli-Ciger, *Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework*, 'European Journal of Migration and Law' 2022, no. 24, p. 37.

3 M. Ineli-Ciger, *Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework*, 'European Journal of Migration and Law' 2022, no. 24, p. 37.

4 For general information see: UNHCR Guidelines on Decent Work.

ning resilience, enabling the fulfilment of the right to private and family life and attaining durable solutions'[5].

Regulations related to wage-earning employment were included in the 1951 Convention on the Status of Refugees (hereinafter referred to as CSR or Geneva Convention)[6] in art. 17–19 respectively. Originally the special role of art. 17 referring to wage-earning employment was emphasised and was regarded by some as one of the most important provisions of the Geneva Convention[7]. Its roots go back to earlier regulations from nineteen-twenties which encouraged the states to mitigate the restrictive measures taken in regard to refugees to protect national labour markets[8]. Although the CSR does not regulate in detail the situation of persons seeking international protection, nevertheless (as UNHCR consistently emphasizes[9]) firstly, a person seeking such protection may be a refugee within the meaning of the CSR, and secondly, some guarantees envisaged in the Geneva Convention are applied before the status of a refugee is recognised[10]. Finally, the Geneva Convention differentiates the scope of application of some provisions, inter alia depending on whether an alien has a right

5 UNHCR Guidelines on Decent Work, Paragraph 2.

6 Article 17–19 of CSR sets out respectively: wage-earning employment, self-employment and practicing liberal professions.

7 Comments to Article 17, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*; https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html [accessed on: 1.02.2023]. L. Henkin (USA delegate for the development of CSR) pointed'Without the right to work, all other rights are meaningless.' (as cited in C. Costello, C. O'Cinnéide, *The Right to Work of Asylum Seekers and Refugees*, ASILE, May 2021, https://www.asileproject.eu/wp-content/uploads/2021/07/CostelloOCinneide_RightToWorkASILE_10May2021.pdf [accessed on: 1.02.2023].

8 *Ibidem* See, inter alia: Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees League of Nations Treaty Series, Vol. LXXXIX, no. 2005, rez. 6 ('It is recommended that restrictive regulations concerning foreign labour shall not be rigorously applied to Russian and Armenian refugees in their country of residence'.)

9 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, para. 28.

10 E.g. Article 33 and 31. Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems; EC/GC/01/17 04.09.2001.

to legal stay in a given country (e.g. En. *lawfully staying in the territory/Fr. résidant régulièrement sur le territoire*) or is just present lawfully in the territory of that state (En. *lawfully in the territory (Fr. se trouvant régulièrement sur le territoire)*[11]. According to UNHCR the second group of aliens may also include individuals seeking international protection[12].

On the other hand, the access to the labour market should be also discussed from the perspective of the international human rights law. It is a component of *the right to work* which was expressly guaranteed in numerous universal and regional international instruments. The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR)[13] is one of such instruments. It mentions the right to work in art. 6 opening part III of ICESCR. This provision confirms the obligation of States Parties to ensure for individuals the right to have the possibility of supporting themselves through freely selected or accepted job and the obligation to undertake appropriate steps in order to ensure this right. This obligation does not mean the assurance of work for every individual, but it entails the requirement to guarantee that every individual will have a real, open opportunity for employment (taking up employment)[14].

The first of the aims of state policy collected in Part I of the Charter which should be pursued by the states with the support of all available measures as defined in the 1961 European Social Charter (hereinafter: ESC)[15] stipulates that 'everyone shall have the opportunity to earn his living

11 UNHCR Guidelines on Decent Work, Paragraph 7. In Polish language version it was translated the same as a person 'lawfully staying in the territory'). Dz. U. 1991 no. 119 item 515.

12 E.g. UNHCR Guidelines on Decent Work, Paragraph 7.

13 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

14 See, general comments of the Committee on Economic, Social and Cultural Rights (hereinafter: CESCR): General comment no. 18, E/C.12/GC/18, Paragraph 1.

15 European Social Charter, ETS no. 035, open for signing on 18 October 1961, came into force on 26 February 1965.

in an occupation freely entered upon"[16]. Pursuant to art. 1 of ESC whose aim is to ensure the effective execution of the right to work[17], the States Parties have 'to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment'[18]. The right of every individual resulting from the concerned provision is associated by the European Committee of Social Rights (hereinafter: ECSR) inter alia with the requirement for the States-Parties to conduct 'a policy of full employment' and activities promoting 'equal and effective access to employment' and removal of obstacles in hiring employees for wage earning employment in other States Parties[19].

Moreover, the issue of *real access to employment* could be one of the factors relevant for the execution of human rights and fundamental freedoms of personal nature. As a result of the process of interpretation and application of human rights treaties they give rise to social and economic implications, also in the area of employment. This was confirmed in the case-law of the European Court of Human Rights (hereinafter: ECtHR or Strasbourg Court)[20].

With the above in mind, the chapter analyses the normative model of access to the labour market for aliens applying for international protection[21] in the Member States, in reference to international refugee

16 Similarly in the European Social Charter (revised), ETS no. 163, adopted on 3 May 1996, came into force on 1 July 1999 (hereinafter: ESC(rev.)).

17 Article 1 of ESC belongs to the core of the Charter. Pursuant to Article 20 of ESC it is one of seven articles, out of which a state – by being bound by this chapter - needs to select at least five (in ESC(rev.) this concerns 9 articles and the states need to be bound by at least six of them – part III Article A).

18 Article 1 (1) of ESC.

19 *Digest of the Case-law of the European Committee of Social Rights*, June 2022., p. 10, https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd [accessed on: 1.02.2023].

20 Particularly the judgment of ECtHR in the case of *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 21.01.2011 (hereinafter: *M.S.S. v. Belgium and Greece)* discussed in further part of the paper.

21 In the chapter, with regard to the documents of the first stage of building the CEAS, efforts were made to use the use of the term 'asylum'. The term 'international protection', introduced

law and UNHCR recommendations and international human rights law. The chapter is divided into three parts. The first of them is devoted to the presentation of standards in the field of access to the labour market resulting from international refugee law and the activities of UNHCR. The second part presents access to the labour market in the light of international human rights law, while the third describes access to the labour market as one of the reception conditions in the EU.

This framework allowed to assess firstly, the evolutionary and progressive character of the EU model of the access to the labour market for persons applying for international protection and secondly, the impact of the international refugee law and UNHCR recommendations and international human rights law on that model. The assessment takes into account the development of the Common European Asylum System (hereinafter referred to as CEAS) and the transition from minimum reception conditions implemented under Council Directive 2003/9/EC of 27.01.2003[22] (hereinafter referred to as the Reception Directive or RD) to deeper harmonisation under Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection[23] (hereinafter referred to as RD(r) or recast reception directive). At the same time, it takes into account the case-law the Court of Justice of the EU (hereinafter: the CJEU or the Luxembourg Court) in regard to interpretation and application of the provisions of the reception directives. In order to identify possible future directions of changes in the access to the labour market of persons applying for international protection, the analysis also includes EC's proposal from 2016 regarding the Directive of the European Parliament and of the Council laying down standards for the reception of ap-

in the second phase of building the CEAS, covers both asylum and subsidiary protection.

22 Council Directive 2003/9/EC of 27.01.2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.02.2003, p. 18.

23 Directive of the European Parliament and of the Council 2013/33/EU of 26.6.2013, OJ L 180, 29.06.2013 , pp. 96–116.

plicants for international protection (recast) (hereinafter proposed RD(r) (rev.) of 2016)[24]. It is a part of the second package of proposals regarding the reform of CEAS in accordance with the priorities of the structural reform defined in Commission's communication of 2016 entitled 'Towards a reform of the common European asylum system and enhancing legal avenues to Europe'[25].

2. Access to the labour market by persons seeking international protection in the international refugee law and United Nations High Commissioner for Refugees recommendations

As already indicated in the introduction, the fact itself that no detailed regulations concerning persons applying for international protection have been introduced into the Geneva Convention does not mean that its provisions are irrelevant to such aliens.

CSR sets the standard of treatment in regard to access to the labour market for refugees in respect to three forms, namely wage-earning employment, self-employment and liberal professions[26]. This standard varies. In case of wage-earning employment it means 'the most favourable tre-

24 Brussels. 13 July 2016 COM(2016) 465 final 2016/0222 (COD).

25 Communication from the Commission to the European Parliament and the Council of 6 April 2016 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', COM(2016) 197 final. The first legislative conclusions were presented on 4 May 2016. They enabled to execute three of priorities defined in the communication: 1) establishment of sustainable and fair Dublin system for identification of a Member State responsible for examination of asylum application; 2) strengthening the Eurodac system to better monitor secondary movements and combat illegal immigration; 3) create a genuine European Union Asylum Agency to ensure proper functioning of the European asylum system. See, proposed RD(r)(rev.) of 2016.

26 Article 17, 18 and 19 of CSR. In the literature see e.g. A. Edwards, *Article 19 1951 Convention*, [in:] A. Zimmermann, F. Machts, J. Dörschner (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary,* Oxford 2011, p. 979. In addition, CSR also regulates the right to benefit from labour laws and social insurance (Article 24 of CSR).

atment' *granted* by a given state to *citizens of another country* 'in the same circumstances'. In respect to self-employment, CSR requires from the states a standard of 'treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances' and in respect to practicing liberal professions – 'as treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'. In other words in respect to wage-earning employment the CSR sets the standard of most preferential treatment with the following provisos:

- as favourable treatment as possible accorded under the same circumstances to citizens of a foreign country (wage-earning employment)
- not less favourable treatment accorded generally to aliens under the same circumstances (self-employment and liberal professions).

However, in respect to wage-earning employment CSR postulates for adoption of a standard of national treatment of refugees and persons applying for international protection as it encourages the States Parties to give ' 'sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals', and in particular in regard to two groups of refugees: who have entered the territory of a given state under the labour recruitment programmes or under immigration schemes (art. 17 §3 of CSR).

Additionally, no national labour market protection measures (exclusively) shall apply to the refugees who at the time of entry into force of the Geneva Convention for a host country were exempted from the restrictions and refugees who have completed three years residence in a given state or are married to a person possessing the nationality of the country of residence or have at least one child possessing the nationality of the country of residence (art. 17 §2 of CSR).

In addition to the previously discussed differences regarding the standard of treatment defined in art. 17–19 of CSR, these provisions also deal with a non-uniformly indicated eligible person. While in the case of wage-e-

arning employment (art. of 17 of CSR) and liberal professions (art. 19 of CSR) the Geneva Convention establishes the standard of treatment of a refugee lawfully staying in territory, in regard to self-employment (art. 18 of CSR) it defines as being lawfully in the territory *(Fr. se trouvant régulièrement sur le territoire)*. This is expression of one of the assumptions of Geneva Convention under which the acquisition of the rights stipulated therein shall occur gradually along 'with deepening relationship of the refugee with the host State'27. According to UNHCR's interpretation, the lawful presence 'is an intermediate stage' between a physical presence of the refugee in the territory of the given state and a lawful stay[28]. In the case of an asylum-seeker admitted by the given state at the border to asylum procedures it means therefore 'a legal presence' as the person concerned was granted the right of entry, at least for a certain period[29]. Consequently the level of treatment set by CSR in art. 18 in respect to self-employment shall cover the persons applying for international protection[30].

Notwithstanding the fact that CSR indicates that the access to the labour market for asylum-seekers (in the case of 'lawful presence' in the territory of the host country) should be ensured in regard to self-employment only, UNHCR is of the opinion that these persons should be able to have the access to the labour market in every aspect of a wage-earning employment and as soon as possible, but no later than 6 months after submitting their application[31].

27 See, UN High Commissioner for Refugees (UNHCR), *UNHCR intervention before the European Court of Human Rights in the case of Saadi v. United Kingdom*, 30 March 2007, Application no. 13229/03, https://www.refworld.org/docid/47c520722.html [accessed on: 1.02.2023], Paragraph 12.

28 *Ibidem* also UNHCR Guidelines on Decent Work, Paragraph 7.

29 *Ibidem*.

30 UNHCR Guidelines on Decent Work, Paragraphs 7, 19.

31 Ibid, Paragraph 46. 'UNHCR has consistently advocated for *refugees and asylum-seekers* [emphasis added] to be given access to the labour market no later than six months from the date of applying for international protection, or sooner if refugee status (or another form of international protection or right to stay) is granted within the six month period'. See, documents

UNHCR places strong emphasis on the mutual nature of the benefits that result from the fastest possible access to the labour market for both a refugee and the host country[32]. This approach is consistent with the position of the Executive Committee of UNHCR (hereinafter: ExCom) and with the findings adopted as part of the Global Consultations on International Protection (hereinafter: Global Consultations)[33].

According to UNHCR, early access to the labour market reduces the likelihood of illegal employment, increases the alien's independence, promotes integration with the host community It also allows to develop vocational qualifications and gain experience which in turn means also a benefit for these aliens whose residency permit will be ultimately denied by the state[34]. In addition, early access to the labour market for persons applying for international protection results in the reduced demand for financial and social assistance from the host country for a person applying for international protection thus strengthening his sense of dignity and self-respect[35]. In response to the concerns of states that opening access to the labour market to persons applying for international protection may adversely affect the time in which return will be enforced in the event of a possible negative decision on granting international protection, UNHCR refers to the findings of the Global Consultations. These findings indicate that the optimal solution is to grant a temporary work permit to persons seeking international protection who

referred to in further part of the chapter containing the position of UNHCR regarding EC proposals on RD, RD(r) and RD(r)(rev.).

32 See, UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, https://www.unhcr.org/protection/operations/46e53de52/response-european-commissions-green-paper-future-common-european-asylum.html [accessed on: 1.02.2023], and UNHCR Guidelines on Decent Work.

33 *Global Consultations on International Protection*, 4.09.2001 EC/GC/01/17, Paragraph 13.

34 See, UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, p. 21, https://www.unhcr.org/protection/operations/46e53de52/response-european-commissions-green-paper-future-common-european-asylum.html [accessed on: 1.02.2023].

35 *Ibidem*, Paragraphs 48–49.

have already been staying in the territory of a given host country for a predetermined period of time[36]. This solution allows to balance the interests of states in the form of ensuring a quick return with the interest of a refugee who, even if the application is rejected, would benefit in the form of acquiring financial resources and certain skills that facilitate his reintegration in the country of origin[37].

3. Access to the labour market in international human rights law

3.1. The access to the labour market in the normative structure of the right to work

The catalogue of human rights and fundamental freedoms constituting 'common highest aspiration for all peoples and nations' proclaimed in the Universal Declaration of Human Rights[38] (hereinafter referred to as UDHR) includes a right of every person to work and free choice of employment (art. 23). It was also included in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in some specialised human rights treaties within the UN system[39] and in regional treaties[40].

Under ICESCR the right to work is stipulated in art. 6. As interpreted by the ICESCR, it 'is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity'.[41]

36 Global Consultations on International Protection, 4.09.2001 EC/GC/01/17, Paragraph 13.

37 *Ibidem*

38 Resolution of the UN General Assembly 217 A (III) adopted and proclaimed 10.12.1948.

39 ICERD, Article 5 Paragraphs (e) and (i), CEDAW Article 11, Paragraph 1 (a), CRC Article 32, Convention on the rights of migrant workers, Articles 11, 25, 26, 40, 52 and 54.

40 The European Social Charter and Revised European Social Charter mentioned in the introduction.

41 General comment no. 18, E/C.12/GC/18, Paragraph 1 (hereinafter: Gen. Com. 18).

The structure of the right *to work* in art. 6 of ICESCR is complex and combines many dimensions[42]. Its normative content comprises a right of every person to freedom of decision on acceptance or refusal of employment. Consequently, it implies – in negative (freedom) approach – the prohibition on forcing anyone in any way to accept and select a given employment, while in the positive approach – leads to recognition of the right to use the protection system guaranteeing access to employment for every employee. This right also assumes the prohibition of arbitrary termination of employment. It does not however impose obligation on the state to guarantee employment for every person[43]. The essence of legal guarantees of the right to work concerns the right to be able to work (Fr. *le droit* de pouvoir *travailler*)[44], which in turn is supposed to enable a dignified life[45]. Access to the labour market, including the possibility to legally seek a wage-earning employment, is an essential component of the right to work defined in this manner[46].

Finally, it should be stressed that ICESCR stipulates the right to 'decent work' (Fr. *travail décent)*, which is understood as employment respecting the fundamental rights of a human being and employee rights in regard to safe working conditions and remuneration[47]. *Decent* work means a work

42 On the right to work of persons applying for international protection see first the publications of C. Costello. Inter alia: C. Costello, C. O'Cinnéide, *The Right to Work of Asylum Seekers and Refugees*, ASILE, May 2021, https://www.asileproject.eu/wp-content/uploads/2021/07/CostelloOCinneide_RightToWorkASILE_10May2021.pdf [accessed on: 1.02.2023].

43 Gen. Com. 18, Paragraph 6.

44 *Ibidem*

45 'Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community'. *Ibidem* Paragraph 1.

46 UNHCR Guidelines on Decent Work, Paragraph 9.

47 Gen. Com. 18, Paragraph 7.

from which the income allows the employee to support himself and his family and which is performed with respect for physical and mental integrity[48].

The prohibition of discrimination[49] introduced in art. 2 (2) of ICESCR, also covers the right to work, therefore according to the CESCR, the prohibition of discrimination also applies to the *employment opportunities* of migrant workers and their family members[50].

As mentioned in the introduction, the obligations of states in the area of access to employment also result from the ESC and ESC(rev.). At the same time, it should be noted that the entities protected by the Charters include, as a rule, only those aliens who are citizens of another ESC or ESC(rev.) State-Party 'legally residing or working' in the territory of a given State-Party[51]. In respect to refugees within the meaning of the CSR and - in the case of ESC(rev.) also stateless persons within the meaning of the 1954 Convention Relating to the Status of Stateless Persons of 1954 (hereinafter: CSS)[52] - the Annex establishes the standard of 'the most favourable treatment possible, in any case not less favourable' than resulting respectively from CSR and CSS and any other existing international agreements applicable to refugees and stateless persons[53]. However, this applies *only* to those refugees (and stateless persons from ESC(rev.) perspective) who are 'lawfully staying' in the territory of an ESC or ESC(rev.) State Party.

States parties to these treaties must strive by all appropriate means to ensure that everyone has the opportunity to earn a living by work freely chosen (item 1 in the catalogue of policy objectives declared in Part I of the ESC and ESC(rev.)). All states that are a party to a first or second

48 *Ibidem*

49 See also, Article 7 of the Convention on the rights of migrant workers.

50 Gen. Com. 18, Paragraph 18.

51 Paragraph 1, Annex to ESC and Annex to ESC(rev.), which form an integral part of the charters.

52 Convention relating to the Status of Stateless Persons, New York 28 September 1954, UNTS vol. 360, p. 117.

53 Paragraph 2 of Annex to ESC and ESC(rev.) and Paragraph 3 of Annex to ESC(rev.).

charter are bound by Article 1 of ESC and ESC(rev.), which establish specific obligations related to the right to work[54]. Pursuant to para. 1, they are obliged to accept 'as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment'. Para. 2, in turn, requires effective protection of the employee's right to earn a living by freely chosen work. The ESCR links Paragraph 1 not only with the requirements to pursue a 'full employment policy' and to take measures to promote 'equal and effective access to employment' and to remove obstacles to the employment of workers for gainful employment in other States Parties. The Committee also emphasizes the provision of support by States Parties to migrants, refugees and internally displaced persons entering the labour market[55].

On the other hand, according to the interpretation of the ESCR, effective protection of the right to work, referred to in art. 1 (2) of ESC and ESC(rev.), requires inter alia the elimination of all forms of discrimination in employment, including discrimination based on nationality[56]. Therefore, in the opinion of ESCR, persons who are citizens of countries outside the EU or the European Economic Area (hereinafter: EEA) should enjoy the same rights as EU citizens in the field of work that is not related to exercising state prerogatives[57]. States may, however, make aliens' access to employment on their territory conditional on having a work permit. However, they cannot generally prohibit nationals of other States Parties from taking up employment. Any restrictions in this regard must conform to the limiting

54 See, Table of provisions accepted by States Parties to the European Social Charter, https://rm.coe.int/country-by-country-table-of-accepted-provisions/1680630742 [accessed on: 1.02.2023]. the states essentially bound themselves by all provisions of Article 10(f) ESC and ESC (rev.), except for the Czech Republic which was bound just by the first three Paragraphs of that article (without Paragraph 4).

55 *Digest of the Case-law of the European Committee of Social Rights*, June 2022, p. 46, https://rm.coe.int/digest-ecsr-prems-106522-web-en/1680a95dbd [accessed on: 1.02.2023].

56 *Ibidem*, pp. 47–48.

57 *Ibidem*, p. 48.

clause of Art. 31 of ESC and Art. G of ESC (rev.), namely to meet the criteria of legality, expediency and necessity collectively. In the ECSR's view, this leads to the conclusion that aliens can only be prohibited from work 'which is inherently related to the protection of the public interest or national security and is related to exercising public authority'[58].

Finally, the right to engage in a gainful occupation in the territory of any other Party defined in art. 18 of ESC and ESC(rev.) should be mentioned. It is connected with the obligations of states to apply the existing legal regulations 'in a liberal spirit'; to simplify existing formalities and reduce or abolish administrative and other charges levied on foreign workers or their employers; and liberalise, individually or collectively, the laws governing the employment of foreign workers[59].

3.2. Access to the labour market as a factor affecting the exercise of civil human rights and fundamental freedoms in European Court of Human Rights case-law

In the light of ECtHR case-law the *real access to* employment could be one of the factors relevant for the exercise of the human rights and fundamental freedoms of civil nature, to be precise – freedom from torture, inhuman or degrading treatment or punishment[60]. As held by the Strasbourg Court in 1979 in case *Airey v. Ireland*[61], the human rights and fundamental freedoms guaranteed in the ECHR can give rise to social and economic

58 Conclusions 2006 – Albania, *Article 1–2*. Also *Ibidem*

59 See also, Paragraph 18 in part I of ESC and ESC (rev.), under which the citizens of the States Parties have the right to engage in any gainful occupation in the territory of any State Party 'on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons'.

60 *M.S.S. v. Belgium and Greece.*

61 ECtHR, *Airey v. Ireland*, app. no. 6289/73, 9.10.1979, Paragraph 26.

implications and consequently an interpretation of ECHR cannot be excluded which would encroach the social and economic domain[62].

The case of *M.S.S. v. Belgium and Greece*[63] is of key significance for the issue of the access to employment for asylum-seekers. In the judgment in that case, the ECtHR concluded that the applicant, as an asylum seeker, belonged to a vulnerable group[64], which the national authorities should have 'given due consideration'. Consequently the national authorities should be held accountable for their inaction when the applicant had lived for several months "on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs"[65].

In the ECtHR's opinion, a situation where an asylum seeker lives in extreme poverty, without the possibility of satisfying 'his most basic needs: food, hygiene and housing', accompanied by 'ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving',

62 Cf. *Ibidem* In later years this approach allowed the Strasbourg Court e.g. to determine that the subjective scope of the right to respect to 'private life' based on Article 8 of ECHR includes 'to some extent' the right to 'establish and develop relations with other human beings'. The possibility of developing relations with outside world is significant, if not key 'during the professional life' (e.g. ECtHR, *Niemietz v. Germany*, app. no. 13710/88, 16.12.1992, Paragraph 29).

63 ECtHR, *M.S.S. v. Belgium and Greece*, app. no. 30696/09, 21.01.2011 (hereinafter referred to as: *M.S.S. v. Belgium and Greece).* In this case, the applicant was an Afghan national who, after fleeing Kabul via Iran and Turkey, made his way to Greece, where he was first detained and then released after being ordered to leave the territory. M.S.S. fled to Belgium, where he applied for international protection. Belgium, having received confirmation that the applicant would be able to apply for asylum in Greece, deported M.S.S. In Greece, after issuing a document certifying the status of an asylum seeker, the applicant was released from detention. He had no means of subsistence or a place to live and use sanitary facilities. He lived in one of the Athens parks where other Afghans seeking asylum in Greece gathered. On two more occasions he tried to leave Greek territory using false documents and was arrested as a result. At the time of the ECtHR's examination of the case, the proceedings concerning his asylum application were still pending and the applicant's living conditions had not improved in any way.

64 For information on this case see: K. Gałka, *Cudzoziemcy poszukujący azylu jako grupa ludności szczególnie podatna na zagrożenia w orzecznictwie Europejskiego Trybunału Praw Człowieka*, [in:] E. Karska (ed.), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, Warszawa 2020, pp. 69–92.

65 *M.S.S. v. Belgium and Greece*, Paragraph 263.

may constitute a violation of Art. 3 of ECHR[66]. The issue of *effective* access to employment was one of the factors that the ECtHR took into account in this case. The Court noted that, under Greek law, asylum seekers with so-called pink cards had ensured access to the labour market 'which would have enabled the applicant to try to solve his problems and provide for his basic needs', but in fact access to the labour market was

> 'so riddled with administrative obstacles that this cannot be considered a realistic alternative (...). In addition, the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate'[67].

4. Access to labour market as one of the reception conditions in the European Union

4.1. Access to the labour market in the minimum standards regarding reception of asylum-seekers (2003)

The Reception Directive was adopted during the first stage of building the CEAS as a response to the need to establish 'minimum'[68] re-

66 *M.S.S. v. Belgium and Greece*, Paragraph 254.

67 *M.S.S. v. Belgium and Greece*, Paragraph 261.

68 The need to properly interpret the 'minimum standards' of reception was pointed out, among others, by UNHCR, who recognized that they allowed European standards to be introduced into diverse national legal orders or to maintain or raise standards on which it would be possible to reach a consensus among Member States. However, they cannot be the 'lowest common denominator' or the lowest possible standard of protection. As underlined by UNHCR, they should 'reflect the standards necessary to ensure effective protection across the Union and keep differences in legislation and practices within an acceptable margin.'. See, UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, https://www.unhcr.org/protection/

ception standards that would be 'sufficient' to ensure 'a decent standard of living and comparable living conditions in all Member States' for aliens seeking asylum[69]. The implementation of minimum reception standards at the same level in all Member States was intended to limit secondary movements of aliens within the EU[70]. These movements occur when an asylum-seeker submits multiple applications simultaneously or successively in different Member States or in a situation of so-called '*asylum shopping*', i.e. when a person already enjoying asylum in one Member State re-applies in another country[71].

Recognizing that 'a certain degree[72]' of harmonization in the EU is desirable in this matter, standards on access to the labour market for aliens seeking asylum in one of the Member States have been envisaged in the catalogue of minimum reception conditions in the RD[73]. According to the explanatory report accompanying the application regarding the reception directive[74], the above-mentioned standards were formulated in such a way as to enable aliens to 'lead a normal life' as soon as possible, while not imposing on Member States 'an obligation to grant the right to work', leaving them 'full control' of the national labour market. Opening access to the labour market was intended as a measure providing asylum-seekers with the opportunity to become financially independent,

operations/46e53de52/response-european-commissions-green-paper-future-common-european-asylum.html [accessed on: 1.02.2023].

69 Recital 7 of RD of 2003.

70 Recital 8 of RD.

71 For the issue of secondary movements see conclusions of ExCom 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection', no. 58 (XL), 13.10.1989.

72 Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, COM/2001/0181 final - CNS 2001/0091, Explanatory Memorandum https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52001PC0181&from=EN (hereinafter: Ex. Mem. to RD).

73 Article 11 of RD.

74 Ex. Mem. to RD.

thereby giving Member States the possibility to limit their obligation to grant material reception conditions[75].

At the same time, it should be emphasized that initially, the solution within the scope of 'minimum standards' proposed by the Commission assumed that Member States would not refuse either applicants or their family members access to the labour market for a period longer than 6 months from the date of submission of the asylum application and for this purpose they would establish, under what conditions access to the labour market will be possible after the expiry of the defined deadline[76].

Ultimately, the RD left it to each Member State to decide how long an asylum seeker would not have access to the labour market, noting, however, that if a first instance decision had not been taken against the applicant within a year (unless it was caused by the applicant himself), that state is obliged to determine the conditions of access to the labour market for that person[77]. A rule was also introduced according to which access to the labour market could not be withdrawn for the duration of the appeal proceedings concerning a negative decision on granting asylum[78]. At the same time, by opening access to the labour market for asylum seekers, Member States could give priority to EU and EEA nationals, as well as those third-country nationals who were legally residing in the territory[79].

Member States were required to implement the RD by 6 February 2005, i.e. within two years from the date of publishing its text in the Official Journal of EU[80]. The analyses of the European Council on Refugees

75 See, Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, COM/2001/0181 final - CNS 2001/0091, Article 15 para. 4.

76 Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States, COM/2001/0181 final - CNS 2001/0091, Article 13 para. 1.

77 Article 11 (1) of RD.

78 *Ibidem*, Article 11 para. 3.

79 *Ibidem*, Article 11 para. 4

80 Article 26 para. 1 of RD.

and Exiles (ECRE)[81], and the monitoring carried out by the EC show that some countries have not transposed the RD in respect to labour market access fully and on time[82]. The states that successfully transposed the RD included both those that provided access to the labour market for aliens seeking asylum after a year, as well as countries that immediately introduced more favourable solutions than those resulting from the RD, shortening this time to 6 or even 3 months[83].

Nevertheless, when deciding to grant access to the labour market to persons applying for asylum, some Member States introduced additional requirements or procedures for aliens, which in practice significantly hindered this access[84]. These measures varied in individual Member States and consisted, for example, in the obligation to obtain a work permit, which the future employer had to apply for, or to obtain additional documents[85].

81 The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation? AD3/11/2005/EXT/SH https://ecre.org/wp-content/uploads/2016/07/The-EC-Directive-on--Reception-of-Asylum-Seekers-Are-asylum-seekers-in-Europe-receiving-material-support--and-access-to-employment-in-accordance-with-European-legislation-November-2005.pdf [accessed on: 1.02.2023], (hereinafter referred to as ECRE report).

82 For details, *Ibidem* Upon the expiry of the deadline to implement the directive, the EC initiated the violation proceedings against the Member States which have not communicated at all or fully to the EC as to what measures were taken by them in order to implement the RD. the court proceedings were initiated against 6 states at the CJEU and in respect of Austria and Greece the CJEU finally declared the default on obligations (judgment dated 26.10.2006, *the Commission v. Austria* (case C102/06); judgment dated 19.04.2007 – *the Commission v. Greece* (case C72/06)).

83 *Ibidem* also: Odysseus - Academic Network for Legal Studies on Immigration, Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States, 2007, https://www.refworld.org/docid/484009fc2.html, p. 70 [accessed on: 1.02.2023](hereinafter referred to as Odysseus report).

84 Inter alia Odysseus report.

85 EC, Green Paper on the future Common European Asylum System, 6.2007 COM(2007) 301 final, p. 5 (hereinafter referred to as: the Green Paper of 2007), ECRE report. Also see Odysseus report, pp. 70–71.

It is also worth noting that a significant number of states applied the reception conditions to persons applying for subsidiary protection in the EU.

4.2. Access to the labour market in the standards regarding the reception of persons applying for international protection (2013)

Although the Reception Directive generally contributed to enhancing access to the labour market for asylum-seekers[86], the variety of solutions adopted by the Member States as part of its transposition - regarding the time after which an alien applying for asylum could work, additional requirements, extending the application of the conditions provided in the directive on persons granted subsidiary protection - resulted in failure to achieve one of the fundamental objectives of the harmonization of reception conditions. This objective concerned ensuring an equal level of protection for aliens in all Member States, which was to prevent the secondary movement of aliens within the EU. In practice, there has been some approximation rather than harmonization of the national legal systems of the Member States[87]. While monitoring the application of the RD in the field of access to the labour market, the Commission found that the margin of discretion of assessment left to the Member States was too wide to implement the original assumptions of the CEAS[88]. Anyway, this assessment applied to the rest of the Reception Directive.

In the second phase of the development of the CEAS, the Commission therefore sought to achieve a higher common standard and equality of pro-

86 Odysseus report, ibid, pp. 72–73. Also see: UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, https://www.unhcr.org/protection/operations/46e53de52/response-european-commissions--green-paper-future-common-european-asylum.html [accessed on: 1.02.2023].

87 Odysseus report, p. 11.

88 Green Paper, p. 2.2. See, UNHCR, Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum--seekers (final) of 3.12.2008, p. 2.

tection as well as a higher level of solidarity between Member States[89], where this principle is mentioned in art. 80 of the Treaty on the Functioning of the European Union (hereinafter TFUE)[90]. This provision states that the policies regarding border control, asylum and migration and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility between the Member States. The Recitals of the recast Reception Directive (RD(r)) emphasize that access to the labour market is intended to 'promote self-sufficiency' of applicants, and the whole catalogue of reception conditions - indicates that these standards must be sufficient to ensure 'a decent standard of living' and 'comparable living conditions in all Member States' for applicants. In addition, RD(r) makes it clear that it applies 'to all stages and types of procedures' involving applicants 'in all locations and places where applicants reside[91], though greater harmonisation of reception conditions was again perceived as key to reducing the secondary migration movements[92]. However, in UNHCR's opinion the Member States should interpret RD(r) '*in a positive and generous spirit*', in accordance with the Charter of Funda-

89 Green Paper, p. 1.

90 The Treaty on the Functioning of the European Union (consolidated version), OJ C 202/1, 7.6.2016,. The change implemented under the Treaty of Lisbon amending the Treaty establishing the European Union and the Treaty establishing the European Community, OJ 306/1, 17.12.2007.

91 Recital 8 of RD(r). UNHCR, Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers (COM (2011) 320 final, 1.06.2011), pp. 2–3.

92 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum. An Integrated Approach to Protection Across the EU, {SEC(2008) 2029}{SEC(2008) 2030}, 17.6.2008, COM(2008) 360 final, p. 4

mental Rights of the EU[93], ECHR and CRS and the Protocol, Convention on the Rights of the Child, ICESCR, ICCPR[94].

However, the Recitals of the recast Reception Directive do not clearly emphasize the importance of access to the labour market as a key factor facilitating the social integration of persons applying for or persons already granted international protection despite this issue being strongly emphasised by the EC in the justification of its proposal[95]. The Commission stated inter alia that:

'Entitlements to work (and limits thereon) are important in this respect as employment is accepted as a major element which facilitates integration. In this context, ways need to be found to raise the awareness of the labour market actors on the value and potential contribution that beneficiaries of international protection can bring to their organisations and companies. Particular attention should also be devoted to the identification of their working experience, skills and potential and to the recognition of their qualifications, since beneficiaries of international protection are often unable to provide the documentary evidence, such as diplomas and other relevant certificates, from their countries of origin that Member States' legislation may normally require as a precondition to lawful employment in certain fields. The acquisition of necessary inter-cultural skills and competences should also be promoted, not only regarding the beneficiaries of international protection, but also regarding the professionals working with them. Diversity management should also be supported. With a view to taking a comprehensive approach, it might also be necessary to consider providing asylum seekers access to specific selected integration me-

93 The Charter of Fundamental Rights of the European Union of 7.12.2000 as amended, OJ C 202, 07.06.2016, p. 389.

94 UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

95 Green Paper, Paragraph 2(4)(2).

asures and facilities, inter alia to facilitate a speedy integration of those individuals ultimately granted international protection'.[96]

At the same time, without prejudice to the competences of the Member States, the EC wanted the provisions of the RD(r) to ensure simplified and harmonized access in such a way that it would not be hindered by the imposition of additional restrictions by the states[97].

Ultimately, the limit of 9 months has been introduced, within which the Member States are required to ensure access to the labour market for a person applying for international protection from the date of submission of the application for international protection[98]. This period starts on the date of lodging the application and shall run if the competent authority does not make a decision in the first instance and the applicant is not responsible for that delay. It should be stressed that the EC requested in this respect a shorter - six-month – period, which was supported by, among others, UNHCR and NGOs[99]. In the course of appeal proceedings the access to the labour market cannot be revoked until a negative decision is issued, 'where an appeal against a negative decision in a regular procedure has suspensive effect'[100]. In response to restrictions imposed by individual Member States, the RD(r)) underlined the need to ensure actual access to the labour market[101].

As under the 2003 RD, by opening access to the labour market for applicants for international protection, Member States may give priority

96 *Ibidem*

97 *Ibidem*, specifically p. 2.2.

98 Article 15 (1) of RD(r).

99 UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)., *Ibidem*, pp. 37–38.

100 Article 15 (3) of RD(r)

101 Article 15 (2) of RD(r).

to EU and EEA nationals, as well as third-country nationals legally residing in the territory[102].

The current case-law of the Luxembourg Court shows that teleological interpretation plays a special role in the process of interpretation and application of Art. 15 of RD(r)[103]. According to CJEU this provision cannot be interpreted in isolation from its objectives. Firstly, the CJEU underlined in this respect the objective of the entire RD(r) indicated in its Recital 11, i.e. to establish reception standards sufficient to provide aliens applying for international protection with 'decent living conditions' and comparable reception conditions in all Member States. The obligation to respect human dignity applies to all aliens applying for international protection, both those who are waiting for a decision on international protection and those for whom a decision on the state responsible for examining the application has yet to be made. Referring to the position of the Advocate General[104], the CJEU held that 'work clearly contributes to the preservation of the applicant's dignity'. This is due to the fact that the income obtained with its help allows 1) him to meet his own needs, but also 2) to obtain a place of residence outside the reception centre, where, if necessary, the family can live with him.

On the other hand, the aim of RD(r) is also to promote self-sufficiency of aliens applying for international protection (Recital 23). The Luxembourg Court referred to the EC's proposal regarding the RD(r)[105] and emphasized that

102 Article 11 (4) of RD(r).

103 The Luxembourg Court has used the teleological interpretation in the judgment of 14.01.2021 in joined cases C322/19 and C385/19, specifically Paragraphs 69–71.

104 Opinion of the Advocate General, Jean Richard De La Tour presented on 3 September 2020 in joined cases C322/19 and C385/19.

105 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), Brussels, 3.12.2008 COM(2008) 815 final).

> 'access to the labour market is beneficial both to applicants for international protection and to the host Member State. Simplification of access to the labour market for those applicants is likely to prevent a significant risk of isolation and social exclusion given the insecurity of their situation."[106].

In the opinion of the CJEU, closing access to the labour market for persons applying for international protection causes the state to incur costs related to increased social benefits and contradicts the self-sufficiency of aliens[107].

4.3. Access to the labour market in European Commission's legislative proposal regarding the reform of the recast reception conditions directive (2016)

In response to massive influx of refugees and immigrants to the EU during years 2014–2016 and following years – and the challenges accompanying this new situation[108], the structural reform of the CEAS was proposed[109]. It should be remembered that the works on the first reform of CEAS during the years 2008–2013 were started under completely different conditions, namely 'historically low levels of asylum applications' in 'most Member States' (with the exception of 'some border states'), a time when

106 CJEU, ruling dated 14.01.2021 in joined cases C322/19 and C385/19, Paragraph 70.

107 *Ibidem,* Paragraph 71.

108 Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 13.7.2016, COM(2016) 465 final, 2016/0222(COD) (hereinafter: Ex. Mem RD(r)(rev.)).

109 In relation to the migration pressure that has been in place since 2014, the EC published in May 2015 the E European Agenda on Migration - *Managing migration better in all aspects: A European Agenda on Migration,* Brussels, European Commission, Press release 13 May 2015 .

asylum systems were generally 'under less pressure' than in earlier years[110]. Faced with the influx of refugees and migrants, it became necessary to create *a stable and effective* system of *sustainable* migration management based on the principles of responsibility and solidarity[111].

The regulations regarding access to the labour market have been changed in the RD(r) (rec.) in such a way as to effectively implement the objectives of the directive, which, apart from further harmonization of reception conditions in the Member States to ensure dignified treatment of aliens applying for international protection throughout the EU, 'in accordance with fundamental rights and the rights of the child' (1)[112] and the reduction of secondary movements (2), it is also necessary to increase the independence of applicants for international protection and *increase their prospects for integration into the society of the Member State* (3)[113]. The proposed changes are based on the assumption that persons applying for international protection should be provided with the opportunity to work and earn money as soon as possible, also during the time of processing their applications[114].

The changes impose an obligation on Member States to ensure access to the labour market no later than 6 months from the date of submission of the application for international protection, if an administrative decision has not yet been taken and the alien himself is not responsible for the delay in the procedure[115]. This deadline is therefore aligned

110 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum on Integrated Approach to Protection Across the EU, {SEC(2008) 2029}{SEC(2008) 2030}, 17.6.2008, COM(2008) 360 final, Paragraph 1(2).

111 Communication from the Commission to the European Parliament and the Council of 6 April 2016 'Towards a reform of the common European asylum system and enhancing legal avenues to Europe', COM(2016) 197 final. See also, Ex.Mem. RD(r)(rev.) (context and justification of the proposal).

112 RD(r)(rev.) proposal.

113 *Ibidem*

114 *Ibidem*

115 *Ibidem* (see Article 15 (1))

with the duration of the examination of the merits of applications under the proposed Asylum Procedures Regulation[116]. Member States have been given the option of granting access to employment even earlier, and RD(r)(rev) encourages to grant access to employment no later than 3 months from the date of application if the application appears to be well founded, including where its consideration has therefore been prioritized[117].

RD(r)(rev.) then provides for 'effective'[118] access to the labour market. Therefore, the factual conditions must not hinder the access to employment for a person applying for international protection[119]. The RD(r)(rev.) does not directly provide for the possibility of giving priority to EU citizens, citizens of EEA countries, and aliens legally residing in their territories, but it allows 'checking whether such a person can be employed on a given position[120]'. It follows from previous comments that the change in the deadline reflects the EC's current aspirations in this regard and is in line with UNHCR's recommendations, presented for many years, that access to the labour market for persons applying for international protection should occur as soon as possible, but not later than 6 months from the date of submitting the application.

It should also be noted that the EC proposal excludes from access to the labour market those persons applying for international protection, for whom the Member States decided to accelerate the examination of the application by applying the so-called border procedure[121]. This concerns people who are not expected to be recognised as persons benefitting from international protection due to the fact that their applications do not seem to be well founded (art. 15 (1) and (2)) e.g. in a situation of submitting evidently false

116 *Ibidem*

117 *Ibidem*

118 *Ibidem*, (see Article 15 (2)).

119 *Ibidem*

120 *Ibidem* (see Article 15 (2)).

121 *Ibidem* (see Article 15)

testimony, information or documents[122]. This change was negatively assessed by, among others, UNHCR, according to which the access to the labour market is access to substantive law and as such should not be determined on the basis of choice of case processing modality[123].

A new solution in the proposal concerns art. 15 (3) of RD(r)(rev.) requiring a Member State to ensure equal treatment of applicants for international protection and its own nationals in the following explicitly listed areas: 1) working conditions, including pay and dismissal, working time and holidays, as well as health and safety conditions in the workplace; 2) freedom of association and freedom of coalitions; 3) vocational education and training; 4) recognition of diplomas, certificates and other evidence confirming formal qualifications; 5) branches of social security as defined in Regulation (EC) no. 883/2004, including, for example, sickness benefits, disability benefits, maternity benefits and equivalent paternity benefits. At the same time, only expressly stipulated restrictions to the right to equal treatment in the above-mentioned areas were allowed[124].

Finally, the RD(r)(rev.) proposal of 2016 defines also the conditions of work available for persons applying for international protection. These conditions include 'at least'): remuneration and dismissal conditions, workplace health and safety conditions; working time and holidays taking into account collective labour agreements.

122 *Ibidem*

123 UNHCR, Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM (2016) 465, August 2017, p. 14.

124 Member States may restrict the equal treatment of persons applying for international protection:
(i) pursuant to letter b) of this Paragraph by excluding them from participating in the management of public order authorities and from performing public functions;
(ii) pursuant to letter c) of this Paragraph – by excluding them from vocational education and training directly associated with a determined professional activity;
(iii) pursuant to letter e) of this Paragraph by excluding family benefits and unemployment benefits without violating the provisions of Regulation (EU) no. 1231/2010.

5. Conclusion

Following conclusions can be drawn based on the conducted analysis.

Firstly, access to the labour market for aliens applying for international protection is one of the reception conditions in the EU, and Member States are obliged to ensure such access in the form and scope currently provided for by RD(r). The obligation to ensure access to the labour market for persons applying for international protection also arises from international refugee law and UNHCR standards, as well as from international human rights law. This means that the status of an applicant for international protection in terms of access to the labour market is determined not only by EU law, but also by the above branches of law.

Secondly, the EU normative model of access to the labour market for applicants for international protection is evolutionary. Increasingly, its framework takes into account the standards resulting from the aforementioned branches of law, including those regarding the obligation for actual access to the labour market and those regarding the speed of opening such access. However, for the time being (while the RD(r) is in force), this model is not fully compliant with UNHCR recommendations. Despite the six-month deadline for opening access to the labour market proposed by the European Commission, a nine-month deadline was finally introduced. Time will tell whether the six-month period recommended by UNHCR will be applied in the reformed CEAS as a common standard in all Member States.

Thirdly, the CJEU's interpretation and application of Art. 15 of RD(r) guaranteeing access to the labour market for persons applying for international protection is in line with the objectives of the recast Reception Directive. These objectives include ensuring decent living conditions and promoting self-sufficiency, understood by the Luxembourg Court also as preventing isolation and social exclusion[125]. This is consistent with the meaning given to access to the labour market in international

125 CJEU, ruling dated 14.01.2021 in joined cases C322/19 and C385/19, Paragraph 71.

refugee law and UNHCR standards and in international human rights law as a guarantee inherently associated with human dignity and essential to ensuring a lasting solution for refugees[126].

126 See, ExCom Conclusion no. 50 (XXXIX) (1988), Paragraph (j).

Chapter X

Status and protection of applicants for international protection in the European Union with special needs as regards reception conditions

1. Introduction

Legal instruments adopted in the first phase of building the Common European Asylum System (hereinafter: CEAS) under a common asylum and migration policy aimed at leading to an 'open and secure' European Union (hereinafter: EU/Union), 'fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'[1], implemented the requirement to consider the special needs of certain categories of persons as regards reception conditions[2], the fulfilment of obligations constituting the content of international protection within the meaning of the Qualification Directive[3] and partly within the scope of the procedures for granting and withdrawing refugee status in the Member States[4]. In the latter case, special procedural guarantees are provided for unaccompanied minors, while leaving it to the Member States to give priority to the case of an applicant who is a person with special needs[5].

1 Conclusions of the European Council adopted at a special meeting in Tampere on 15 and 16 October 1999, Tampere milestones, point 4 (hereinafter: the Tampere programme).

2 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ UE L 31/18, 6.2.2003, (hereinafter: RD), Recital 9 and Chapter IV

3 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.9.2004, (hereinafter: the Qualification Directive), in particular Article 20, also Articles 29 and 30.

4 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005, Recital 14 (unaccompanied minors), Article 17 (unaccompanied minors), Article 23.

5 However, cf. the EC proposals for this directive (Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2000/0578 Final - CNS 2000/0238 and Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM/2002/0326 Final - CNS 2000/0238), as well as the amendments proposed by the European Parliament (hereinafter: EP) (European Parliament legislative resolution on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee Status (14203/2004 – C6–0200/2004

Thus, the '*perspective of vulnerability*'[6] was incorporated into the CEAS legal order. Vulnerability can be described as an increased susceptibility of a person to threats, which also results in increased susceptibility to violations of his/her rights, including human rights[7]. This meaning refers to the fact that vulnerability refers to an actually existing threat, but in essence it also implies increased sensitivity of the person to threats, in other words it concerns actual or potential exposure to harm[8]. In a *vulnerability*-based perspective it is important that such characteristics are linked to the specific needs of a person, which in turn require a specific – appropriate – response from national authorities. In the context of reception conditions, these may be, for example, needs related to broader access to medical care or adequate accommodation.

It is not intended to present in this chapter all detailed arrangements that have been envisaged for applicants for international protection in the Union with special needs in terms of reception conditions. The chapter regards the approach based on the specific needs of applicants as one of the essential elements of the EU paradigm of the protection of aliens and seeks to establish the main assumptions comprising this approach based on an analysis of the relevant RD provisions and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying

– 2000/0238(CNS)). These documents took greater account of persons with special needs other than unaccompanied minors. In the first proposal, the EC indicated that one of its objectives concerns 'laying down specific safeguards for fair procedures for persons with special needs' (see the objectives of the proposal) .

6 Unlike in the national languages of many EU Member States (e.g. French, Italian, Spanish), there is no simple equivalent of this term in Polish

7 Due to the above-mentioned lack of equivalents of terms in Polish language of such expressions as '*vulnerable*' or '*vulnerability*', the Chapter deliberately left these terms in original English form.

8 See inter alia I. Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law*, London 2017, p. 4. Also K. Gałka, *Cudzoziemcy poszukujący azylu jako grupa ludności szczególnie podatna na zagrożenia w orzecznictwie Europejskiego Trybunału Praw Człowieka*, [in:] E. Karska (ed.), *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, Warszawa 2020, p. 69).

down standards for the reception of applicants for international protection (recast), (hereinafter: the recast Reception Directive, RD(r))[9], as well as the working documents and legislative process documents of the Directives in question. In order to identify possible future directions of changes in the status and protection of applicants with special needs, the 2016 EC proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereinafter: the proposed RD(r)) was also taken into account in the research[10].

The *vulnerability*-based approach is increasingly taken into account in the interpretation and application of the provisions of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR or the European Convention) by the European Court of Human Rights (hereinafter: ECtHR or the Strasbourg Court), and is also present in international refugee law and UNHCR recommendations. Therefore, the analysis of the CEAS legal order will be preceded by explanatory notes explaining the most important assumptions regarding *vulnerability* in Strasbourg case-law and refugee law.

2. Vulnerability in the light of the case-law of the European Court of Human Rights[11]

From the beginning of the twenty-first century, the case-law of the ECtHR has observed a steady increase in the number of cases in which the Court

9 OJ L 180/96, 29.06.2013

10 Brussels, 13 July 2016 COM(2016) 465 Final 2016/0222 (COD). The proposal is part of the second package of proposals for the reform of CEAS in line with the structural reform priorities set out in the Communication from the Commission to the European Parliament and the Council of 6 April 2016, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe', COM(2016) 197 Final.

11 Regarding *vulnerability* in international human rights law, including the case-law of the ECtHR, see: D. Xenos, *The human rights of vulnerable*, 'The International Journal of Human Rights' 2009, Vol. 13, no. 4, pp. 591–614; L. Peroni, A. Timmer, *Vulnerable groups: The Promise of an emer-*

attaches importance to *the vulnerability* of the applicant[12]. The ECtHR links the requirement of 'special protection' to this characteristic, which translates into a broadening of the scope of the positive obligations[13] of the States Parties to the ECHR or a narrowing of the margin of assessment accorded to States in connection with restrictions imposed by them on the exercise of the rights or freedoms protected in the ECHR[14]. *Vulnerability* is thus a normative category (producing legal effects) in the legal order of the ECHR, although the Court has not formulated a definition of it in the abstractive manner, nor is it applied in a clear and consistent way[15].

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ging Concept in European Human Rights Convention law, 'International Journal of Constitutional Law' 2013, Vol. 11, no. 4, pp. 1056–1085 (text available on-line at: https://academic.oup.com/icon/article/11/4/1056/698712, page last checked: 15.02.2019); A. Timmer, *A Quiet Revolution: Vulnerability in the European Court of Human Rights*, [in:] M. Fineman, A. Grear (eds.), *Vulnerability: Reflections on a new ethical Foundation for law and politics*, Ashgate, Farnham 2013, pp. 147–170; C. Ruet, *La vulnérabilité dans la jurisprudence de la Cour européenne des droits de l'homme*, 'Revue trimestrielle des droits de l'homme' 2015, no. 102, pp. 317–340; Y. Y. Al Tamimi, *The protection of vulnerable groups and individuals by the European Court of Human Rights,* 'Journal européen des droits de l'homme / European Journal of Human Rights' 2016, no. 5.; F. Ippolito, S. Iglesias Sánchez (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Oxford-Portland 2017; I. Nifosi-Sutton, *op. cit.*, *Women, children and (other) vulnerable groups: standards of protection and challenges for international law, eds.* M. Półtorak, I. Topa, Peter Lang Publishing Group 2021. See, also, M. Mustaniemi-Laakso, M. Heikkilä, E. Del Gaudio, S. Konstantis, M. Nagore Casas, D. Morondo, A. G. Hegde, G. Finlay, *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, Fostering Human Rights among European Policies, Work Package no. 11 – Deliverable no. 3, 31.05.2016, https://www.fp7-frame.eu/wp-content/uploads/2016/08/Deliverable-11.3.pdf [accessed on: 1.02.2023].

12 K.Gałka, *op. cit.* p. 69 together with the literature given.

13 For example, for detainees, see the judgment of the ECtHR of 17.10.2013 in the case of *Keller v. Russia*, application no. 26824/04, in particular point 81; for persons belonging to the Roma population, see ECtHR judgment of 29.01.2013 in the case of *Horváth and Kiss v. Hungary*, application no. 11146/11, in particular Paragraph 116.

14 For the assessment of the alleged breach of the prohibition of discrimination (Article 14 of ECHR), see, for example, judgment of the Grand Chamber of 10.03.2011 in the case of *Kiyutin against Russia*, application no. 2700/10, in particular Paragraph 63.

15 L. Peroni, A. Timmer, *Vulnerable groups: The Promise of an emerging Concept in European Human Rights Convention law*, 'International Journal of Constitutional Law' 2013, Vol. 11, no. 4. The authors observed that the Court reference to *vulnerability* does not have rhetorical character, but '[*t]he term does something: it allows the Court to address different aspects of inequality in a more substantive manner*'. Also: E. H. Morawska, *The European Court of Human Rights To-*

The Court referred for the first time to *vulnerability* in 1981 in the case of *Dudgeon v. the United Kingdom*[16]. It concerned a complaint alleging infringement of Articles 8 and 14 of the ECHR by criminal law provisions relating to offences related to homosexual behaviour by men, as well as a police investigation. At that time, the Strasbourg Court pointed out that people who are 'young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence' are *'especially vulnerable'*[17]. The Court did not define what it meant by *vulnerability*, but it did indicate the factors determining it (age, physical condition, mental abilities, experience and physical, moral and social dependence)[18].

The lack of a general definition of *vulnerability* also characterizes contemporary Strasbourg case-law, as demonstrated e.g. by the judgment in the case of *Centre For Legal Resources on Behalf of Valentin Vâmpeanu v. Romania*[19]. In his concurring opinion to the judgment Judge Pinto de Albuquerque observed that 'extreme *vulnerability*'

> Is a broad concept which should include young people or elderly people, seriously ill or disabled people, persons belonging to minorities or groups discriminated against on grounds of race, ethnic origin, gender, sexual orientation or any other ground.

wards Group Vulnerability: An Open-Ended Approach, [in:] M. Półtorak, I. Topa (eds.), *Women, children and (other) vulnerable groups: standards of protection and challenges for international law*, Berlin 2021, pp. 41–76.

16 *Dudgeon v. the UK* (App. no. 7525/76), of 22/10/1981.

17 *Ibidem*, Paragraph 49.

18 See, E. H. Morawska, *The European Court of Human Rights Towards Group Vulnerability: An Open-Ended Approach*, [in:] M. Półtorak, I. Topa (eds.), *Women, children and (other) vulnerable groups: standards of protection and challenges for international law*, Berlin 2021

19 ECtHR, *Centre For Legal Resources on behalf of Valentin Vâmpeanu v. Romania* (App. no. 47848/08), of 17/07/2014 , Paragraph 11.

Increasingly, the ECtHR refers to vulnerability on a group basis, in which the entire specific category of individuals is considered to be particularly vulnerable, and therefore the applicant's vulnerability is determined by belonging to this category (regardless of its internal diversity), and not by his individual characteristics or circumstances in which he finds himself (*vulnerability* on an individual basis)[20]. The ECtHR identified inter alia people with mental disorders[21], people living with HIV[22]or asylum seekers[23] as vulnerable groups, but this is not a closed and homogeneous catalogue[24].

In view of the research problem outlined in the chapter, it is worth taking a broader look at the use of *the vulnerability* approach by the ECtHR in cases involving asylum seekers.

In 2011, the Grand Chamber, in its judgment in the case of *M.S.S. v. Belgium and Greece*[25], recognised for the first time foreign asylum seekers as a *vul-*

20 See for example. E.H.Morawska, *op. cit.* , U. Brandl, Ph. Czech, *General and Specific Vulnerability of Protection-Seekers*.., pp. 249–251. Distinction between *vulnerable* persons and *vulnerable* groups was firmly stressed by judge Sajo in its partly consistent and partly contradictory individual opinion annexed to the Judgment of the Grand Chamber of 21.1.2011 in the case of *M.S.S. v. Belgium and Greece*, application no. 30696/09 (hereinafter: judgment in the case of *M.S.S. v. Belgium and Greece*), in which he criticised the position of the majority of the judge panel, stressing, inter alia that asylum seekers do not constitute a social group or, if so, that group is not homogeneous (see point II of the Opinion). The importance of such a distinction is also underlined in: *The Concept of vulnerability in European asylum Procedures*, published in 2017 by *European Council on Refugees and Exiles* (ECRE) under *Asylum Information Database* (AIDA), p. 10.

21 ECtHR, *Alaios Kiss v. Hungary*, (App. no. 38832/06), of 20/05/2010.

22 ECtHR, *Kiyutin v. Russia* (App. no. 2700/10), of 10/03/2011, Paragraphs 63–64. *Novruk and Others v. Russia* of 2016.

23 *M.S.S. v. Belgium and Greece.*

24 L. Peroni and A. Timmer underline: '(..) what exactly ties all these groups together is still not entirely clear, as the Court has not (yet) fully developed a coherent set of indicators to determine what renders a group vulnerable.' See, L. Peroni, A. Timmer, *Vulnerable groups: The Promise of an emerging Concept in European Human Rights Convention law*, 'International Journal of Constitutional Law' 2013, Vol. 11, no. 4, 1056–1085, p. 1064.

25 Literally, the ECHR recognized asylum seekers as members of '*a particularly underprivileged and vulnerable population group*' (*Ibidem*, Paragraph 251). Commentary on the above judgment in various aspects, inter alia in: G. Clayton, *Asylum Seekers in Europe: M.S.S. v. Belgium and Greece*, 'Human Rights Law Review' 2011, Vol. 11, no. 4, pp. 758–772. The author points out that the recognition of asylum seekers as *vulnerable* is 'another interesting and poten-

nerable population group. With this judgment, the Court 'initiated a change in its case-law'[26] regarding the applicants for international protection.

In the present case, the applicant's exceptional situation as *a vulnerable* person was relevant in two main respects. First, when assessing the conformity with the requirements of Article 3 of the ECHR of the conditions of detention of the applicant during the applicant's two periods of detention by the Greek authorities in an airport detention centre. Secondly, in assessing the conformity with the requirements of Article 3 of the ECHR of the conditions of extreme poverty in which the applicant had to live while awaiting examination of his application for international protection.

When assessing the conditions of detention, the Court concluded that it must take into account that:

> 'the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through

tially important aspect of the judgment' (see page 769). Precedent nature of the judgment in the case of *M.S.S. v. Belgium and Greece* for the issues covered by this chapter is also indicated in: U. Brandl, Ph. Czech, *General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?*, [in:] F. Ippolito, S. Iglesias Sánchez (eds.), *Protecting Vulnerable Groups. The European Human Rights Framework*, Oxford-Portland 2017, p. 248. On the significance of the judgment in the case of *M.S.S. v. Belgium and Greece* for the system based on the so-called Dublin II Regulation, see also: V. Moreno-Lax, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece,* 'European Journal of Migration and Law' 2012, pp. 1–31, text also available on-line on the SSRN platform at: https://ssrn.com/abstract=1962881; B. Mikołajczyk, *Europejski Trybunał Praw Człowieka a 'system dubliński': uwagi w związku z wyrokiem ETPCz w sprawie M.S.S. przeciwko Belgii i Grecji*, [in:] L. Brodowska, D. Kuźniar-Kwiatek (eds.), *Unia Europejska a prawo międzynarodowe: księga jubileuszowa dedykowana Prof. Elżbiecie Dyni*, Rzeszów 2015, pp. 267–276; A. Fermus-Bobowiec, E. Lis, *Udzielanie ochrony międzynarodowej cudzoziemcom na terytorium Rzeczypospolitej Polskiej*, 'Studia Iuridica Lublinensia' 2016, Vol. 25, no. 4, pp. 25–59.

26 ECtHR judgment of 07.07.2015 in the case of *V.M. and Others v. Belgium*, application no. 60125/11, Paragraph 136. Judgment delivered by chamber of 7 Judges, which was later replaced by judgment of the Grand Chamber inconclusive *as to the merits of the allegation*, removing the application from the list of cases (see judgment of the Grand Chamber of 17.11.2016 in the same case).

> during his migration and the traumatic experiences he was likely to have endured previously'[27],

adding later that the 'applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'[28].

In the context of extreme poverty, the Court found that

> 'the Court attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive'[29].

The ECtHR assessed as 'known' the state of 'particular uncertainty and *vulnerability*' accompanying asylum seekers in Greece. It accused the Greek authorities that they

> 'have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs'[30].

27 *M.S.S. v. Belgium and Greece*, Paragraph 232.

28 *Ibidem*, Paragraph 233

29 *Ibidem*, Paragraph 251.

30 *Ibidem*, Paragraph 263.

Importantly, for the Court, the applicant was *a vulnerable* person 'because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously' and vulnerability was intrinsically linked to his status as a foreign asylum seeker. However:

> 'the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum-seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.'[31]

This means that the ECtHR associates the vulnerability of aliens seeking asylum with two elements, i.e. the so-called ex ante and *ex post vulnerability*[32]. The first one concerns the difficult experiences which led such persons to flee their homeland, while the second one concerns the situation while awaiting a decision on granting international protection, where the *vulnerability* results from acts and omissions of the State Party to ECHR which leads to violations of human rights.

It is also worth mentioning the so-called '*compounded vulnerability*'[33], i.e. situations in which there is more than one basis determining the vulnerability of the applicant, which makes his vulnerability unique

31 *Ibidem*, Paragraph 262.

32 The term '*vulnerability ex post*' was taken from: A. Timmer, *A Quiet Revolution: Vulnerability..,* p. 155). U. Brandl and Ph. Czech rightly noted that aliens seeking asylum 'don't just come to the host state in the state of *vulnerability*, but it is the state that makes them *vulnerable*' (U. Brandl, Ph. Czech, *General and Specific Vulnerability of Protection-Seekers..,* p. 250).

33 Term proposed by A. Timmer (*eadem, A Quiet Revolution: Vulnerability..,* p. 161*) used inter alia in:* U. Brandl, Ph. Czech *General and Specific Vulnerability of Protection-Seekers...*, p. 250.

and multiplied[34]. Strasbourg case-law recognises that sometimes *vulnerability* is not only linked to the status of applicants for international protection, but also results from belonging to another category of persons in need of special protection, such as children[35] or single mothers with young children[36].

The impact of the *vulnerability* approach on the threats faced by applicants for international protection is particularly evident with regard to the findings made in the case of M.S.S. *v. Belgium and Greece* regarding the obligations of the States Parties to the ECHR in relation to living conditions in extreme poverty. Admittedly, it is not possible to infer from the European Convention an obligation to provide home for all persons under the jurisdiction of the State, or an obligation to provide financial assistance to refugees enabling them to maintain a certain standard of living[37]. However, in the case of *M.S.S.*, relying on two conditions, namely the *vulnerability* of the applicant as an asylum seeker and the fact that the obligation to provide decent material conditions to asylum seekers results directly from the provisions of Greek national law implemen-

34 In such cases, the ECtHR speaks of 'extreme vulnerability' or that the vulnerability is '*accentuated*' – *see e.g.* ECtHR judgment of 19.01.2012 in the case of *Popov v. France*, applications nos 39472/07 and 39474/07, Paragraph 91, and ECtHR judgment of 7.7.2015 in the case of *V.M. and Others v. Belgium*, application no. 60125/11, Paragraph 138.

35 The well-established case-law of the ECtHR treats children as the most vulnerable persons, with the consequence that States parties to the ECHR have an obligation to provide them with effective protection (ECtHR judgment of 12.10.2006 in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03, Paragraph 52). A child staying illegally in the territory of a country, on the other hand, belongs to a 'class of highly vulnerable members of society' (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* Paragraph 55), requiring protection from the state. The ECtHR sees *vulnerability* of children as extreme because of their special needs, in particular as regards their age and lack of independence, but also the status of asylum seekers (ECtHR judgment of 19.01.2012 in the case of *Popov v. France*, applications no. 39472/07 and 39474/07, Paragraph 91; Judgment of the Grand Chamber of 04.11.2014 in the case of *Tarakhel v. Switzerland*, application no. 29217/12, Paragraph 99).

36 See, ECtHR decision of 13.09.2016 in the case of *F.M. and Others v. Denmark*, application 20159/16, Paragraph 23.

37 Judgment in the case of *M.S.S. v. Belgium and Greece*, Paragraph 249 and the judgments cited.

ting EU law, the ECtHR held that Greece was required under Article 3 of the ECHR to provide the applicant with living conditions which would enable him to satisfy his basic needs[38].

In subsequent judgments, applying those criteria, the ECtHR placed even greater emphasis on the codification of the obligation to ensure adequate living conditions in Greek law, which is binding on the Greek authorities. In doing so, the ECtHR first drew attention to the fact that, in the case of *M.S.S.*, the conditions of extreme poverty in which the applicant lived were the result of the negligence of Greece, a State party to the ECHR, which had a positive obligation under national and European law to ensure adequate reception conditions for asylum seekers[39].

Finally, it is worth noting that the vulnerability of asylum seekers is linked by the Court to the requirement to act primarily in the social domain, which, according to the well-developed case-law, may be covered by the interpretation of the guarantees enshrined in the ECHR made by the Court[40]. In cases involving asylum seekers, it can be observed that the Court links social implications with guarantees which are 'typical' guarantees belonging to the sphere of civil rights which are inherently 'of freedom' nature. By way of example, it may be pointed out that degrading conditions of detention of persons characterised by the ECtHR as *vulnerable* may not only lead to a violation of Article 3 of the ECHR, but

38 In an article published immediately in 2011 commenting on the decision of the Grand Chamber in the case *M.S.S. v. Belgium and Greece*, Ms Clayton stated that there are possible different interpretations of the position on the responsibility of the States Parties to the ECHR for the extreme poverty in which asylum seekers live. According to the first, the ECtHR's reference to provisions of national law implementing an EU directive has an impact, but is not conclusive, in order to conclude a positive obligation in that regard. In the light of the second interpretation, this constitutes a constitutive condition of an obligation (see Clayton, G., *Asylum Seekers in Europe*..p. 767). Subsequent case-law of the ECtHR has shown that the second interpretation applies.

39 Judgment of the ECtHR of 29.01.2013 in the case of *S.H.H. v. United Kingdom*, application no. 60367/10, Paragraph 90.

40 Judgment of the ECtHR of 09.10.1979 in the case of *Airey v. Ireland*, application No. 6289/73, Paragraph 26.

also have consequences for the assessment of the compatibility of the deprivation of liberty of those persons with the requirements stemming from the guarantee of the right to liberty and security (Article 5(1)(f) of ECHR). According to the case-law of the ECtHR, in order for a person's deprivation of liberty to comply with the requirements of that provision of the Convention, it must not only be applied for the purpose of carrying out the deportation, but there must also be 'some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention'[41]. The fact that detention conditions have not been adapted to, for example, the 'extreme vulnerability' of children is a factor that may determine the State's responsibility for violating Article 5(1)(f) of the ECHR.

3. Vulnerability and special needs of persons in international refugee law and United Nations High Commissioner for Refugees' recommendations

The 1951 Geneva Convention relating to the Status of Refugees (hereinafter: CRS/Geneva Convention) does not distinguish between categories of persons with special needs or *vulnerable*[42]. Though Article 1(A)(3) of the CRS refers to 'membership of a particular social group', an expression which must be interpreted in accordance with the directive of evolutionary interpretation, open to 'the diverse and changing nature of groups in various societies' and 'evolving international human rights norms'[43].

41 ECtHR judgment of 19.01.2012 in the case of *Popov v. France*, applications nos. 39472/07 and 39474/07, Paragraph 118 and the case-law cited.

42 Inter alia report: *The concept of vulnerability in European asylum procedures,* ECRE, p. 10, https://asylumineurope.org/wp-content/uploads/2020/11/aida_vulnerability_in_asylum_procedures.pdf [accessed on: 1.02.2023] (further: ECRE report on vulnerability).

43 UNHCR Guidelines on International Protection: 'Membership of a particular social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 7 May 2002, https://www.unhcr.org/3d58de2da.pdf [accessed on: 1.02.2023], for details see Point 3.

Moreover, in the light of the current practice of application of CRS, such a social group may concern, for example, women or homosexual people[44]. However, under Article 1(A)(3), membership of a particular social group may be one of the grounds for persecution which *determines having the convention status of a refugee*. It does not however constitute a criterion on the basis of which the rights comprising that status and the content of international protection in the light of the CRS are differentiated.

> Notwithstanding the above, the issue of *vulnerability* and special needs of certain categories of refugees has been reflected in the activities of the UNHCR and the UNHCR Executive Committee (hereinafter: ExCom). Over the decades, various ExCom conclusions and UNHCR guidelines have been adopted on the situation and protection of specific groups of people distinguished on the basis of criteria such as age, gender, disability, sexual orientation, experience of violence and sexual abuse, and torture[45].

One of the many examples concerns ExCom conclusions 93 (LIII) of 2002, which recommended that reception arrangements for asylum seekers should reflect gender and age considerations. They should take particular account of the educational, psychological, recreational and other special needs of children, especially unaccompanied and separated children. In addition, the special needs of victims of sexual abuse and exploitation, trauma and torture, as well as 'other *vulnerable* groups'[46] should

44 *Ibidem*

45 See, ECRE report on vulnerability, p. 10.

46 ExCom Conclusions no. 93 (LIII) – 2002, Unless indicated otherwise, all texts of ExCom conclusions issued until 2014 quoted in this chapter come from UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th Edition, June 2014, https://www.unhcr.org/53b26db69.pdf [accessed on: 1.02.2023].

also be taken into account. Another example concerns Conclusions 107 (LVIII) of 2007 entitled 'Children at Risk', which affirmed that children due to 'their age, social status and physical and mental development are often more *vulnerable* than adults in situations of forced displacement' and recognising that forced circumstances and factors such as displacement, post-conflict situations, integration into new societies, prolonged displacement and statelessness 'may generally increase the *vulnerability*'[47] of children, or ExCom Conclusions 89 (LI) of 2000 reaffirming the importance of appropriate priority for the protection needs of women, children, young people and the elderly in the planning and implementation of UNHCR programmes and state policies. Documents dedicated to specific groups of people include inter alia the UNHCR Guidelines on Refugee Children of 1988[48], the 1991 Guidelines on the Protection of Refugee Women[49], and the 1997 Guidelines on Rules and Procedures for Dealing with Unaccompanied Children Seeking Asylum[50].

The *vulnerability* and special needs of both *refugees* and *migrants* are widely referred to in the New York Declaration for Refugees and Migrants (hereinafter: the New York Declaration)[51], adopted in 2016 by the UN General Assembly (hereinafter: UNGA) in a unanimous vote of all Member

47 ExCom Conclusions no. 93 (LIII) – 2002.

48 UNHCR *Guidelines on Refugee Children,* August 1988, https://www.refworld.org/publisher,UNHCR,THEMGUIDE,5a65bb9d4,0.html [accessed on: 1.02.2023].

49 Guidelines on the Protection of Refugee Women prepared by the Office of the United Nations High Commissioner for Refugees, July 1991, https://www.refworld.org/publisher,UNHCR,THEMGUIDE,3ae6b3310,0.html [accessed on: 1.02.2023].

50 UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, https://www.refworld.org/publisher,UNHCR,THEMGUIDE,3ae6b3360,0.html [accessed on: 1.02.2023].

51 New York Declaration for Refugees and Migrants, Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1. The declaration was adopted at the UN Summit for Refugees and Migrants convened to deal with large flows of refugees and migrants.

States. In the section regarding both refugees and migrants[52] the countries confirmed that they recognise and will satisfy:

> 'in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants'[53].

In addition, obligations are highlighted, firstly, towards women and children when travelling, who are exposed to discrimination and exploitation, sexual, physical and psychological exploitation, violence, trafficking in human beings and modern forms of slavery[54]. Secondly, attention was also drawn to the situation of people living with HIV, 'encouraging' the States to take up the fight against stigma, discrimination and violence affecting this group of people, and to review policies related to restrictions on entry or return based on serological status and, finally, to promote access to HIV prevention, treatment, care and support[55]. The declaration firmly

52 In the New York Declaration, some commitments apply equally to refugees and migrants, stating that 'though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms' and that 'they also face many common challenges and have similar vulnerabilities, including in the context of large movements'; point 6 of the New York Declaration), while some of them were formulated separately for refugees and migrants (inter alia para. 21 of New York Declaration).

53 New York Declaration, Paragraph 23.

54 *Ibidem*, Paragraph 29.

55 *Ibidem*, Paragraph 30.

declared the protection of 'the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child'[56].

The New York Declaration refers to *vulnerability* in two aspects, which the UNHCR described as 'situational' and 'individual'[57]. In the first aspect, *vulnerability* is the result of the movement conditions or conditions prevailing in the host country. It is associated inter alia with hazards during travel, which may result, for example, from dangerous means of transport[58]. In the latter case, *vulnerability* is associated with individual characteristics or circumstances of a particular person. This group includes inter alia children, people with disabilities and victims of human trafficking[59].

Two instruments were created in 2018 as a consequence of the New York Declaration. The first of these is the Global Compact on Refugees (hereinafter also referred to as GCR) developed by UNHCR, which was later approved by the UNGA[60]. 'The Comprehensive refugee response framework' (hereinafter: CRRF) constituting Annex I of the New York Declaration forms an in-

56 *Ibidem*, Paragraph 32. Literal: 'We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant authorities. We will comply with our obligations under the Convention on the Rights of the Child. We will work to provide for basic health, education and psychosocial development and for the registration of all births on our territories. We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including support for host countries as required. We will strive to provide refugee and migrant children with a nurturing environment for the full realization of their rights and capabilities'.

57 'Migrants in vulnerable situations' UNHCR's perspective, https://www.refworld.org/pdfid/596787174.pdf [accessed on: 1.02.2023], point 1.

58 *Ibidem*

59 *Ibidem*

60 Presented by UNHCR in Part II of the Annual Report (Report of the United Nations High Commissioner for Refugees Part II - Global compact on refugees, A/73/12), subsequently confirmed by the UN General Assembly by resolution of 17 December 2018, A/RES/73/151, (point 23).

tegral part thereof. The second instrument is the Global Compact for Safe, Orderly and Regular Migration (GCM) adopted at the *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration* in Marrakech, subsequently approved by the UNGA[61].

In the case of the GCR, according to its Action Programme, all measures taken in the areas identified as areas of support to reduce the burden on host countries and benefit refugees and host communities must 'include', 'substantially engage' and 'seek *input*' of people *'with diverse needs and potential vulnerabilities'*. The following persons were identified as such in an open list: girls and women; children; adolescents[62]; persons belonging to minorities; victims of sexual and gender-based violence, sexual exploitation and abuse or trafficking in human beings; elderly; people with disabilities[63].

Even more references to *vulnerability* were introduced into the GCM[64], and on of its objectives, according to Annex II of the New York Declaration, was to ensure effective protection of human rights and fundamental freedoms regardless of migration status 'and the special needs of vulnerable migrants'[65]. One of the 23 objectives of the GCM cooperation framework concerns addressing and eliminating vulnerabilities in migration[66]. As a consequence, States committed to:

> 'to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstan-

61 Adopted on 10 December 2018, endorsed by the UNGA on 19 December 2018 (A/RES/73/195). See, Annex II of the New York Declaration.

62 According to the adopted UN definitions, 'youth' is defined as between the ages of 15 and 24, and 'adolescents': 10–19 years.

63 Paragraph 51 of the GCR.

64 See inter alia point 12. Also: 'Migrants in vulnerable situations' UNHCR's perspective, https://www.refworld.org/pdfid/596787174.pdf [accessed on: 1.02.2023] with a distinction between what UNHCR describes as 'situational' and 'individual' vulnerability.

65 Annex II of the New York Declaration, point 8(i).

66 GCM, Paragraph 16, objective 7.

> ces in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender--responsive approach in addressing vulnerabilities, including in responses to mixed movements."[67]

4. Applicants for international protection with special needs and reception conditions in the European Union

4.1. Persons with special needs in minimum standards for the reception of asylum seekers (2003)

Among the six main objectives declared by the EC in its proposal for Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter: RD/ Reception Directive) was to define the different reception conditions available to asylum seekers at different stages of the asylum procedure or depending on its type, 'and for groups with special needs, such as minors', as well as cases where these conditions are excluded, restricted or amended[68]. The proposal stresses that when asylum seekers belong to *groups*

67 GCM, Paragraph 23. The implementation of the obligation is to be served by the activities listed in point 23 in letters (a)-(l).

68 Proposal for a Council Directive laying down minimum Standards on the Reception of applicants for asylum in Member States (presented by the Commission), Explanatory Memorandum, COM (2001) 181, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=-COM%3A2001%3A0181%3AFIN [accessed on: 1.02.2023].

with special needs, or when they are in detention, reception conditions 'should be specifically designed to meet those needs'[69].

Consequently, a separate chapter (IV) entitled 'Provisions for persons with special needs' was introduced into the Reception Directive, requiring Member States to take into account the specific situation of 'vulnerable'[70] persons belonging to specific groups[71], in the national legislation implementing the provisions of the Reception Directive relating to material reception conditions and health care. Their list, which is not exhaustive[72], includes: (1) minors, (2) unaccompanied minors, (3) disabled people, (4) elderly people, (5) pregnant women, (6) single parents with minor children, (7) persons subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

As the EC pointed out, the aim was to take account of those groups which, first, in the *practice of the Member States* and, secondly, *in the relevant studies* were recognised as having special needs with regard to accommodation, psychological and health care.[73]

Next, the RD expressly stipulated that the requirement that Member States take account of the specific situation of persons applies only to those 'found to have special needs after an individual evaluation of their situation'[74].

The monitoring carried out by the EC in the transposition of the RD into the national systems of the Member States revealed serious deficiencies in taking into account the needs of applicants for international

69 *Ibidem* See also, Recital 9 of the Reception Directive.

70 The Polish language version of the reception directive uses the term 'sensitive'.

71 Article 17(1) of the Reception Directive.

72 *Ibidem* Also Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States (presented by the Commission), , COM (2001) 181, commentary on Chapter IV, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=-COM%3A2001%3A0181%3AFIN [accessed on: 1.02.2023].

73 Explanatory Memorandum, *Ibidem*.

74 Article 17(2) of RD.

protection with special needs[75]. Weaknesses in two areas were identified as key to this state of affairs. The first was the problem with the proper identification by Member States of persons with special needs applying for international protection, both in terms of the definitions adopted in the national systems and the established procedures[76]. Although a significant number of Member States have introduced into their national legislation the same catalogue of persons with special needs as contained in Article 17(1) of the RD or have left the formula open, several Member States have not recognised all the groups listed by the RD or have not established rules at all to take account of persons with special needs[77]. The biggest problem concerned however the lack of any procedures to identify persons with special needs[78]. The lack of EU-level identification rules was identified as the most important shortcoming of Article 17 of RD[79] combined with the lack of definition of special needs and the lack of definition of what their individual assessment should consist of, resulted in Article 17 being ineffective in many Member States[80].

75 Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) COM(2008) 815 final, 3.12.2008, (hereinafter: RD(r) 2008).

76 Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Brussels, 26.11.2007, COM(2007) 745 final, hereinafter: EC report on RD; also: Odysseus - Academic Network for Legal Studies on Immigration, Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States, 2007, https://www.refworld.org/docid/484009fc2.html, p. 70 [accessed on: 1.02.2023] (hereinafter; Odysseus Report).

77 EC report on RD.

78 EC report on RD.

79 Odysseus Report.

80 ECRE Report on *vulnerability*.

The second identified weakness was linked to a lack of the necessary resources, capacities and expertise to enable Member States to respond adequately to such special needs of applicants[81].

Striving for further harmonisation of national regulations on reception conditions, which would limit secondary movements of persons between Member States, and which was the main objective of the recast of the Reception Directive[82], the EC also decided on the need to implement such solutions at the EU level that would ensure in the Member States the measures enabling immediate identification of the existence of special reception needs in applicants, as well as the need to improve reception conditions in specific areas, including, for example, accommodation[83].

4.2. Persons with special needs in the standards for the reception of applicants for international protection (2013)

Taking into account the situation described above, the EC ultimately proposed a number of changes relating to people with special needs in the reception directive recast in connection with the reform of CEAS carried out in 2008–2013[84].

According to Recital 14 of the RD(r), 'the reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs'.

81 RD(r) 2008

82 *Ibidem*, Paragraph 3.

83 Paragraph 5. Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers, Brussels, 3.12.2008 COM(2008) 815 final.

84 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter: recast Reception Directive, RD(r)).

A legal definition of the term 'applicant with special reception needs' has been introduced (Article 2(k) of the RD(r)), recognising that it means:

- a *vulnerable* person
- in accordance with Article 21,
- who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in RD(r).

Compared to RD, the illustrative catalogue of persons considered to have special needs has been extended to include victims of trafficking in human beings, persons suffering from serious illnesses and persons with mental disorders, as well as victims of female genital mutilation (Article 21 of the RD(r)). On the basis of the available working documents and the legal process, however, it is not possible to determine precisely on what basis this catalogue was established.

It was also decided to harmonise the assessment of special reception needs for vulnerable persons. The introduction of the assessment obligation is twofold, firstly to determine whether the applicant is a person with special needs and the nature of these needs. The assessment must be carried out 'within a reasonable period of time' and need not take the form of an administrative procedure[85].

Only *vulnerable* persons under Article 21 of the RD(r) may be recognised as having special needs and, consequently, only they may benefit from the specific assistance established by the Directive[86].

As in the case of RD, in the recast reception directive, detailed provisions were devoted to minors, unaccompanied minors and victims of torture and violence, and for each of these groups they were enhanced in relation to RD. Attention should also be drawn to the separate provision of the RD(r) providing for the detention of '*vulnerable* persons and applicants with special reception needs' (Article 11 of RD(r)). According to that provision, 'the health, including mental health, of applicants in detention

85 Article 22 of RD(r).

86 *Ibidem*, Paragraph 3.

who are vulnerable persons shall be of primary concern to national authorities', and in the event of detention of such persons, Member States must ensure, first, regular monitoring and, secondly, appropriate assistance taking into account the particular situation of such persons, including their state of health, (Article 11(1) of RD(r)). A separate provision has also been included for minors and unaccompanied minors.

Given the findings above, several issues need to be highlighted. First of all, it is necessary to pay attention to terminological issues. The RD(r) uses the expression 'applicant with special reception needs' recognising that it is a '*vulnerable* person' under Article 21 who 'needs special guarantees in order to exercise the rights and comply with the obligations' provided for in the recast Reception Directive. On the one hand, RD(r) provides that only vulnerable persons may be regarded as persons with special needs benefiting consequently from RD(r)'s specific guarantees[87]. On the other hand, however, in the provision on detention (Article 11 of the RD(r)) it refers to 'vulnerable persons and applicants with special needs', suggesting that these concepts are not necessarily identical/mutually conditional.

4.3. People with special needs in the European Commission's legislative proposal on the reform of the recast Reception Conditions Directive (2016)

Proposed RD(r) envisages several changes to the provisions of the current recast reception directive concerning persons with special needs. It removes terminological confusion present in RD(r). The legal definition of the term 'applicant for international protection with special reception needs' is no longer combined with the term '*vulnerable person*', merely stating that it should be understood in this case as 'person who is in need of special guarantees in order to benefit from the rights and comply with the obligations' provided for in the Reception Conditions Direc-

87 See, ECRE report on vulnerability, p. 15.

tive[88], as indicated in the proposal – 'regardless whether they are *vulnerable*[89].' Similarly, the provision that 'only persons seeking international protection with special needs may benefit from special assistance' provided for in the RD(r) now seems clearer.

On the other hand, the catalogue of persons hitherto regarded as *vulnerable* within the meaning of Article 21 of the RD(r) has been included in the legal definition of the term 'applicant with special reception needs', while retaining its open nature[90].

The proposal also lays down more detailed arrangements for assessing specific reception needs as well as for the identification, documentation and fulfilment of those needs[91].

5. Conclusion

The analysis confirmed the initial hypothesis that an approach based on the specific needs of persons applying for international protection is an essential element of the EU paradigm of the protection of aliens. This is evidenced by the inclusion of the issue of the specific needs of applicants as one of the priorities in all stages of the construction and reform of the CEAS, the evident clear desire to ensure the full effectiveness of the EU protection of applicants with special needs, as well as the increasingly clear treatment of this issue as a cross-cutting issue, permeating the various arrangements establishing reception conditions. Not only in terms of material reception conditions and access to health care, but also, for example, in relation to detention (Article 11 of RD(r)) or other measures restricting the freedom of movement of a person applying for international protection (Recital 18 of the RD(r) proposal). Also the following conclusion may be drawn based on the analysis

88 See, provisions of Article 2(13) of the proposed RD(r).

89 Proposed RD(r) (optional elements of the proposal).

90 *Ibidem*

91 *Ibidem*

of the EC's proposal on the reform of the recast Reception Conditions Directive (2016). The Union's approach to the matter is based on the specific needs of persons, rather than their particular characteristics (which is different than in the case of vulnerability). However, it seems that the reason why vulnerability has become a normative category in e.g. international human rights law is similar and is linked to the need of special protection. It seems that, bearing in mind that in general vulnerability itself is rather an approach or perspective but not a coherent *legal* concept, the proposal to abandon referrals to this term in the new RD(r) does not change the scope or the level of existing protection, while implementing more clarity to the CEAS terminology.

Final remarks

Human rights protection standards
as the main factor determining the directions
and pace of changes in the European paradigm
of the protection of aliens: collective de lege lata
and de lege ferenda findings

As already mentioned, the protection of aliens' rights should be approached in a broad sense. The problem addressed in this research covers the broadly defined 'European paradigm of protection of aliens'. This paradigm is not limited to only one legal system or legal regime of a given international organization, such as the EU (European Union), CoE (Council of Europe) or UN (United Nations). Nor is it based solely on the national law systems of European countries. Rather, it should be seen as a kind of synthesis of converging and coherent guarantees that complement each other. These guarantees may result from both national law and standards of public international law in force in the legal systems of the European Union, the Council of Europe and the United Nations.

The presented research refers to all the cited systems and legal regulations in force in the territory of the Republic of Poland. Only such an approach guarantees a broader and full perspective of the protection of aliens within the 'European paradigm'. Regulations concerning the discussed issues, which exist in different systems, should be regarded as complementary to each other. Even when they reflect the same guarantee, such a phenomenon should be treated as consolidation and confirmation of the applicable standard. An example of such a situation concerns the emphasis on the need for special protection of children, refugees or other particularly vulnerable groups.

As already mentioned, it is clear that within one legal system the mechanisms and procedures for protecting aliens complement each other. The consistency of the standards formulated by the Commissioner for Human Rights of the CoE with the guarantees resulting from the ECHR (European Convention on Human Rights), ESC (the European Social Charter) and other human rights treaties in the CoE system is an example of such a situation in the Council of Europe system. The protection of aliens' rights in this area should be perceived as an ecosystem of coherent guarantees found in treaties in the field of human rights of the CoE, case-law, soft-law of the Council of Europe and documents of the Com-

missioner for Human Rights of the CoE[1]. A similar phenomenon can be found in the UN and EU systems.

Although it is difficult to consider the formulation of uniform and complementary standards within one international organization as surprising, complementary and mutually referring standards within the legal regimes of several international organizations are not so obvious. In this regard, it should be noted that the system of the CoE is not a closed and exclusively self-centered ecosystem. It is common for bodies operating within the Council of Europe system to refer to 'external' standards, such as the European Union system[2] or the universal system[3].

The complementarity of the analyzed standards of protection of aliens' rights is extensively noticeable within the framework of this research[4]. In the context of the EU legal system, it was agreed already at the stage of the Maastricht Treaty that actions taken within the scope of the asylum policy should be taken in accordance with the ECHR and the 1951 Refugee Convention. Such a provision means that the EU asylum policy in the light of Art. K.1 of the TEU was to be established within the existing norms of public international law, in particular the 1951 GC, 1967 NYP and the ECHR[5].

The asylum regulations are of particular importance within the EU legal system. It should be noted that the right to asylum has been added to the catalog of fundamental rights[6]. Article 18 of the CFR guarantees this right 'with respect to the principles of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refuge-

1 See more in Chapter 1.

2 'The Dublin cases' examined by the ECtHR can be an example of this phenomenon – see more in: J. Czepek, *Problemy dotyczące rozpatrywania wniosków o azyl w systemie Unii europejskiej na gruncie orzecznictwa Europejskiego Trybunału Praw człowieka. Analiza 'spraw dublińskich'*, [in:] M. Golda-Sobczak, W. Sobczak (eds.), *Dylematy Unii Europejskiej. Studia i Szkice,* Poznań 2016, p. 89–103.

3 Commissioner for Human Rights, The human rights of irregular migrants in Europe, p. 15.

4 For example see Chapter 1, 2, 3.

5 See more in Chapter 5.

6 OJ C 202/390 7.6.2016.

es and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (..)'[7]. This guarantee was supplemented by art. 19, which prohibits removal, expulsion or extradition to a country 'where there is a grave risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'[8].

The examples above testify to the coherence of the 'European paradigm' and mutual reference to guarantees expressed in a different system of protection of individual rights. As already mentioned earlier, even when there are regulations reflecting the same guarantee, they should be seen not as competing with each other, but as convergent and complementary.

The human rights protection standards are the key factor determining the directions and potential evolution of the European paradigm of aliens' protection. This research pays particular emphasis on the potential state interference with the right to freedom and personal security and freedom in the context of the movement of migrants[9]; the scope of guaranteeing the exercise of economic and social rights by aliens residing in EU Member States[10] and the issue of the status and protection of persons requiring special treatment[11]. Separate chapters are devoted to these issues.

Naturally, human rights protection standards operating within a coherent 'European paradigm' cannot be seen as limited exclusively to the above issues.

The protection of refugee rights starts actually from the moment of entry and stay of a refugee in good faith in the territory of the host country. In this regard, in accordance with the applicable standards of public international law, each sovereign state has exclusive control over its territory, and thus over persons residing on its territory[12]. Therefore, in the absence

7 See, EU Charter of Fundamental Rights, Article 18.

8 *Ibidem*, Article19.

9 See more in Chapter 8.

10 See more in Chapter 9.

11 See more in Chapter 10.

12 F. Morgenstern, *The Right of Asylum*, 'British Yearbook of International Law' 1949, Vol. 26, p. 327.

of treaty obligations to the contrary, a state has the right to grant or refuse asylum to persons residing within its borders[13]. This guarantee is confirmed, for example, in the UN Declaration on Territorial Asylum[14], ECtHR (European Court of Human Rights) case-law[15] or the 1951 Geneva Convention[16].

Currently, very significant problems related to receiving the refugees result from difficulties with access to the territory of the host country and with access to procedures for granting international protection in the host country[17]. Therefore, on the one hand, it is crucial to create provisions of national law that will be clear and consistent with the international standards applicable within the framework of the 'European paradigm'. On the other hand, problems arise due to difficulties in accessing international protection procedures in the host country. In this context, it is crucial to establish whether the asylum seeker is indeed entitled to protection. In this context, the provision of asylum stems from the need to protect the individual from danger to his or her life or from torture, inhuman or degrading treatment in the country of origin. Such an obligation results from the ECHR. The Court stipulates that the prohibition on returning an asylum seeker who has been refused entry to the territory of a given country when it is established that there are serious indications in the country of destination that, if he or she were to be deported, that person would be at real risk of being treated in breach of Article 3 of ECHR[18]. It is up to the state to determine whether such indications

13 A. Grahl-Madsen, *Territorial Asylum*, Stockholm-London-Rome-New York 1980, p. 50; K. Hailbronner, *Molding a New Human Rights Agenda: Refugees and Asylum: The West German Case*, 'The Washington Quarterly 1989', Vol. 8, no. 4, pp. 183–184; F. Morgenstern, *The Right of Asylum*, 'British Yearbook of International Law' 1949, Vol. 26, p. 327.

14 UN General Assembly, 14 December 1967, A/RES/2312(XXII), Article 1 *Declaration on Territorial Asylum*,

15 ECtHR in case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*, application nos 9214/80, 9473/81, 9474/81, judgment of 28.05.1985, Paragraph 67.

16 The 1951 Geneva Convention, Article 31.

17 See more in Chapter 2.

18 ECtHR judgment in case of *M.K. and Others v. Poland of 2020*, Paragraph 183.

exist. In addition, the State party is obliged to ensure that a person threatened with deportation can benefit from 'effective safeguards that would protect him or her from being exposed to a real risk of being subjected to inhuman or degrading treatment, as well as torture"[19].

Refugee protection within the system of international human rights protection focuses primarily on the issues arising from the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the right to respect for private and family life, and the right to freedom and personal security. The issues above should be supplemented by the issue of guaranteeing the exercise of economic and social rights by aliens and the protection of persons requiring special treatment.

In this respect the ECHR system does not differ from other first-generation human rights protection standards and puts highest emphasis on protection of the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the right to respect for private and family life, the right to freedom and personal security and prohibition of collective expulsion of aliens. The ECtHR has most extensively developed its case-law regarding the protection of refugee rights in the area of these guarantees.

These issues have already been extensively analysed in this research but it is worth emphasizing the fundamental role played by the right to life and the prohibition of torture in the area of the protection of refugee rights. In fact, these two guarantees, expressed respectively in Art. 2 and 3 of the Convention, express the most fundamental values of human civilization: the right to life and the absolute protection of the physical and mental integrity of the individual[20]. This is also how their role should be perceived in the context of protecting individuals against expulsion or deportation to a country where they could be exposed to treatment contrary to Art. 2 or 3.

19 *Ibidem*, Paragraph 184.

20 J. P. Costa, The European Court of Human Rights: Consistency of its case-law and positive obligations, Speech at Leiden University, 30.05.2008, [in:] NQHR, Vol. 26/3, 2008, pp. 452–453.

A special role of both guarantees in the context of the protection of refugee rights results also from the nature of both these rights and their non-derogable character. The Court stipulated very clearly the scope of the individual's protection against deportation to a country where he or she might be exposed to a violation of Article 8. 2 or 3[21]. The ECtHR also quite clearly formulated the guarantee regarding the sphere of Art. 8[22]. Despite the rather expressive nature of the guarantees arising from Art. 3 in the studied area, they may raise some doubts. M-B.Dembour notices a problem in this area. The author uses the relatively little-known case of *Bonger v. the Netherlands*[23] as an example and argues that it embodies the shortcomings of the ECtHR's approach to migrant issues[24]. In the case in question, the applicant had been living in the Netherlands for almost 10 years without a residency permit. Therefore, he could not legally work or take advantage of social benefits. The issue of the impossibility of his return to his country of origin was not questioned. The applicant argued that the situation of suspension in which he found himself, without being able to change it, constituted a violation of Article 3 of the Convention. The ECtHR concluded that in this case the analyzed issue regarded a refusal to obtain a residency permit, therefore it found the complaint inadmissible[25].

M-B.Dembour considers the applicant's situation to be Kafkaesque[26], although he recognizes that to some extent it is a continuation of the earlier

21 See, ECtHR judgment in case of *Soering v. United Kingdom* of 7.07.1989, application no. 14038/88.

22 ECtHR judgment in case of *Abdulaziz, Cabales and Balkandali v. United Kingdom* of 28.05.1985, application nos 9214/80, 9473/81, 9474/81.

23 ECtHR judgment in case of *Teshome Goraga Bonger v. the Netherlands* of 15.09.2005, application no. 10154/04.

24 M-B. Dembour, *The migrant Case-Law of the European Court of Human Rights: Critique and Way Forward*, B. Çalı, L. Bianku, I. Motoc (eds.), *Migration and the European Convention on Human Rights*, Oxford 2021, p. 23.

25 *Teshome Goraga Bonger v. Netherlands.*

26 M-B.Dembour, *op. cit.*, p. 24.

case-law of the ECtHR[27]. The author states that in the context of protecting the rights of refugees, the ECtHR has resolved to support the treatment of the individual by states, which is contrary to what the respect for the dignity of a human being would require[28]. M-B.Dembour argues that dormant resources found in the ECHR provisions, including but not limited to Art. 3, 6 and 14, can be used to resolve this issue. The Strasbourg retreat can be remedied. It is entirely possible, within the limits of the ECHR, to grant migrants the comprehensive protection they deserve[29].

The above position should be noted in the context of considerations about potential changes in the European paradigm of protection of aliens. It is evident that even in the context of fairly well-established guarantees regarding the protection of the rights of refugees, there is potential under the ECHR for development and broader consideration of the protection of individual rights in a specific situation. It is also difficult not to notice the potential for a wider application within the discussed scope of the right to a fair trial or the prohibition of discrimination, applied jointly with other rights or freedoms regarding specific violations, as advocated by the author. Such an evolution of the interpretation of rights and freedoms envisaged in the Convention in relation to refugees naturally depends on the circumstances of the individual cases and on the position of the Court.

In a broad sense, the development and any changes within the European paradigm of protection of aliens are significantly affected by the political situation and political decisions of the rulers taken within this situation. The evolution of CEAS (Common European Asylum System) represents the evidence of the changes dictated by current migration events and responses. Its original assumptions were expressed in 1999 in Tampere[30]. Sin-

27 *Ibidem*, p. 29 and next

28 *Ibidem*, p. 39.

29 *Ibidem*.

30 The European Council, the Conclusions of Finnish Presidency, Tampere, 15–16 October 1999.

ce then, at the initiative of the Commission, these assumptions have been constantly evolving[31]. These regulations also cover the problems arising from the migration crisis affecting Europe in 2015. It was as a result of this crisis that the European Commission decided to undertake a wide-ranging reform of the Common European Asylum System and to develop safe and legal ways to migrate to Europe[32].

Social unrest and armed conflicts also have a significant impact on the migration situation in Europe, as evidenced by the events related to Russia's aggression against Ukraine in 2022. Due to the unpredictability of such events and their outcome, it would be difficult to anticipate the scale and effects of a migration resulting from a given armed conflict. However, the standards of international protection of human rights in the context of refugees must be the common denominator of events of this kind.

The scope of second-generation human rights is an important direction of change. Within the European paradigm, the development of guarantees for the exercise of economic and social rights by aliens residing in EU Member States should be emphasized in particular. This process can be noticed in different phases of CEAS development. And so, access to the labor market is intended to 'promote self-sufficiency' of applicants, and the whole package of reception conditions indicates that these standards must be sufficient to provide applicants with 'a decent standard of living' and 'comparable living conditions in all Member States'. The Reception Conditions Directive established common reception standards that Member States should interpret 'in a positive and generous spirit' in line with the EU Charter of Fundamental Rights[33], the ECHR, and the CSR and Protocol, the Convention on the Rights of the Child, ICESCR (the International Covenant

31 See, P. Sadowski, *Wspólny Europejski System Azylowy – historia, stan obecny i perspektywy rozwoju*, Toruń 2019.

32 See more in Chapter 1.

33 The Charter of Fundamental Rights of the European Union of 7.12.2000 as amended OJ C 202, 07.06.2016, p. 389.

on Economic, Social and Cultural Rights), ICCPR (the International Covenant on Civil and Political Rights)[34].

As part of the undertaken studies on aliens and the phenomenon of migration, it would be difficult not to include issues related to the exercise of economic and social rights by aliens. According to the UNHCR, such a solution includes any measures which would allow the situation of refugees to be 'satisfactorily and permanently resolved' in a way that enables them to 'live a normal life'[35].

The EC Green Paper emphasizes the role of right to work, stating that employment is recognized as the main factor facilitating integration[36]. The CJEU (the Court of Justice of the European Union) concluded similarly stating that 'work obviously' contributes to the dignity of the applicant' because the income obtained with its help allows him to meet his own needs and allows him to obtain a place of residence outside the reception center, where, if necessary, family can live with him[37].

The evolution of the CEAS system is continuous. In recent years, especially after 2015, work is underway to introduce changes to the CEAS model. These changes result mainly from the factual situation caused by the massive influx of refugees and migrants to the EU in 2015–2016 and the challenges that have arisen with it[38].

34 UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

35 UNHCR Master Glossary of Terms, Rev.1, June 2006, quoted in: M. Ineli-Ciger, *Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework*, 'European Journal of Migration and Law' 2022, no. 24, p. 37.

36 EC, Green Paper on the future Common European Asylum System, 6.2007 COM(2007) 301, Paragraph 2(4)(2); see more in Chapter 9.

37 CJEU, judgment of 14.01.2021, in joined cases C322/19 and C385/19, Paragraph 70.

38 Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 13.7.2016, COM(2016) 465 final, 2016/0222(COD) (hereinafter referred to as: explanatory memorandum 2016).

In the context of changes in the European paradigm of protection of aliens and their potential directions, attention should also be paid to the issue of the status and protection of persons requiring special treatment. This problem is becoming more and more noticeable due to the increasing number of migrants in recent years as a consequence of the migration crisis. The group of people requiring special treatment includes people with disabilities, people requiring specialist medical care, as well as women and children. Children require special protection when they are deprived of adult supervision.

The studies also address the problem of vulnerable persons, taking into account the specificity of the 'European paradigm'. This means an analysis of both the CoE system, with particular emphasis on the case-law of the ECtHR in this regard. It mainly concerns the possibility of violating Art. 3.

Although the Geneva Convention on the Status of Refugees of 1951[39] does not distinguish the category of persons with special needs, this category of individuals and their needs have been taken into account, for example, in the activities of UNHCR and the UNHCR Executive Committee (hereinafter: ExCom). Over the decades, multiple ExCom conclusions and UNHCR guidelines have been adopted regarding the situation and protection of specific groups of people distinguished on the basis of criteria such as age, gender, disability, sexual orientation, experience of violence and sexual abuse or torture.

The EU legal order also takes into account the perspective of vulnerable people. This is noticeable, for example, in the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. The document mentions 'groups with special needs, such as minors'[40] and notes that when asylum seekers belong to groups with special

39 *Footnote at the beginning of the monograph

40 Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States (presented by the Commission), Explanatory Memorandum, COM (2001) 181, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=-COM%3A2001%3A0181%3AFIN [accessed on: 1.02.2023].

needs, the reception conditions 'should be specifically designed to meet those needs'[41]. It should also be mentioned that the EC proposed a number of changes relating to persons with special needs in the recast Reception Directive in connection with the CEAS reform carried out in 2008–2013[42].

In the face of vast migrations, the phenomenon of detention of aliens seeking international protection becomes an increasingly noticeable problem. In this context, there is a risk of violation of human rights and fundamental freedoms. This may concern automatic detention of all applicants for international protection, excessive duration of such detention, lack of or insufficient procedural guarantees, lack of coercive measures alternative to detention, inadequate conditions of detention. The issue is particularly serious when it concerns children, vulnerable people or victims of torture. In the EU legal system, there is a clear model of alien protection developed within CEAS in the context of asylum and immigration proceedings.

Due to the large number of people migrating to European countries and the lengthy procedure of reviewing asylum applications, these people are forced to stay in various types of centers for migrants, operating under different names. Since any type of centers for migrants or asylum seekers are detention centers, the States are responsible for ensuring decent conditions in such facilities for all persons who are placed there. Failure to provide such conditions may constitute a violation of Art. 3 of ECHR or Art. 1 of CAT[43].

In recent years, the issue of the conditions provided in such facilities has been repeatedly analyzed in the judicial decisions of the European Court of Human Rights[44]. These conditions are also examined by the Europe-

41 *Ibidem*. See also, Recital 9 of the Reception Directive.

42 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), (hereinafter recast Reception Directive, RD(r)).

43 The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10.12.1984, Article 1.

44 E.g. ECtHR judgment in case of *Ilias and Ahmed v. Hungary* of 21.11.2019, application no. 47287/15, Paragraphs 180–194; ECtHR judgment in case of *A.A. v. Grece* of 22.07.2010,

an Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[45] and the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[46]. States should definitely pay attention to and constantly improve the conditions provided in such facilities.

It should be stressed that it would be difficult to consider the European paradigm of protection of aliens as fully formed. There is a noticeable potential for further development and possible changes in its area. In the face of recent events taking place in Europe in connection with Russia's aggression against Ukraine and the returning waves of illegal migrants, it should be presumed that further evolution in the area of the 'European paradigm' and legal solutions in this area will be observed in the near future.

application no. 12186/08, Paragraphs 49–65; ECtHR judgment in case of of 21.01.2011, application no. 30696/09, Paragraphs 216–234, 249–264.

45 See, the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from a visit to Greece on 13–17.03.2020, CPT/Inf (2020) 35, point 26 and next.

46 See, Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report for a State-Party from a visit to Bulgaria on 24–30.10.2021, 28.10.2022, point 91–113.

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From the editorial review of Maciej Perkowski, Ph.D., Dr. Hab. Iur., Full Professor of Law
Head of the Department of Public International Law and European Law
Faculty of Law of the University of Białystok

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From the editorial review of Tomasz Kamiński, Ph.D., Dr. Hab. Iur., Associate Professor of Law
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