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ARTICLES

THE PRACTICE OF THE HUNGARIAN CONSTITUTIONAL COURT ON ASYLUM

Lilla Berkes[1]

ABSTRACT

The modern-day history of asylum in Hungary ranges from being the country of origin of refugees, through the country of asylum, to the country protecting the external borders of the European Union (EU) and rejecting the refugees. Asylum, which came into focus as a result of the Arab Spring in 2015, has raised numerous issues such as access to territory, pushbacks, procedural guarantees, detention, transit zones, the effectiveness of remedies, and sovereignty and free decision-making on the side of the state. These issues may also have a constitutional dimension. However, a review of the practice of the Hungarian Constitutional Court shows that asylum issues are not grouped along these lines, but rather as per the division of competences between the EU and Hungary. Consequently, some constitutional court procedures have been examined in the context of constitutional interpretation rather than that of constitutional complaint procedures. Furthermore, the constitutional context has changed, influencing the approach of the Constitutional Court. Based on this, the paper first interprets the relationship between asylum and sovereignty and the function of the Constitutional Court in asylum matters, placing the issue in the context of the history of asylum in Hungary. Second, it presents the related practice of the Constitutional Court according to three aspects, namely sovereignty and constitutional identity, the role of human dignity, and interpretation of asylum law by the Constitutional Court.

KEYWORDS

Constitutional Court of Hungary
refugees
asylum
sovereignty
constitutional identity

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1. Introduction

Asylum was for a long time closely linked to the Church and various holy places, originally protecting those who committed crimes and later those fleeing religious persecution. By the 19th century, with the decline of ecclesiastical power and the spread of state sovereignty, the modern institution of diplomatic asylum was established. Theoretically, it was based on the idea of territorial sovereignty: the state does not protect those in need within its own territory, but outside it, within the territory of one of its diplomatic missions. This was a practical expression of the inviolability of diplomatic representation and thus one of the most visible expressions of state sovereignty. By the 20th century, however, the idea of territorial sovereignty had been replaced by the institution of territorial asylum, whereby the state provides protection to those in need on its own territory, thus ending the applicability of diplomatic asylum.[2]

The right to asylum became a point of focus in the 20th century when the two world wars and other armed conflicts resulted in massive population movements, placing an enormous burden on host states in the absence of uniform rules. The desire for uniform regulation arose within the framework of the League of Nations, which contended with the fact that no uniform definition existed of the criteria for recognition as a refugee and the rights and obligations of actors (refugees and states). Thus, the earlier more social-oriented refugee protection became a supranational, legally regulated mechanism and international protection, first through the Convention relating to the International Status of Refugees of 28 October 1933 (although it was ratified by only nine states).[3] The 'turning point' was 1951, when the United Nations High Commission for Refugees (UNHCR) began its work and the Geneva Refugee Convention was adopted, the first to define the concept of a refugee and present its main rights.

Traditionally, the granting of asylum was a right of the state—and thus a sovereign decision of the state to whom and whom not to grant asylum. However, after World War II, this was removed from the absolute discretion of the state and assumed by states as an international legal obligation. Through this, the granting of asylum has become a legally bound decision-making process. Furthermore, territorial asylum is now more a right of the individual and may be constitutionally protected.

In this form, the right to asylum is a set of rights and obligations under international human rights and humanitarian law, which from the state's perspective, includes the following state actions: to admit a person to its territory; allow the person to sojourn there; refrain from expelling the person; refrain from extraditing the person; and refrain from prosecuting, punishing, or otherwise restricting the person's liberty. Although the right of asylum has been viewed as the right of a state and not the right of an individual, it now contains three elements: the

2 | Randelzhofer, 2003, p. 20; Szép, 2012, pp. 149–150.
3 | Jaeger, 2001, pp. 728–730.

authority of a state to grant asylum, right of an individual to seek asylum, and right of an individual to be granted asylum.[4]

This paper deals with an aspect of asylum law issues, namely the practice (or lack thereof) of the Hungarian Constitutional Court. To understand the degree of reluctance of the Hungarian Constitutional Court in the context of the right of asylum, the basic context is needed.

2. A brief history of asylum law in Hungary

The right to asylum is linked to the 1951 Geneva Refugee Convention and its becoming a living right. However, its effects in Hungary have been delayed.

From World War II until 1987, Hungary, like the other Soviet bloc countries, was more a country of origin. In other words, it emitted refugees, rather than receiving and protecting them. Except for the ideological admission of Greek and Chilean communists, the issue of refugees was not a key focus during this period. Refugees from other socialist countries were never granted asylum. Like the other countries of the socialist bloc, Hungary did not ratify the 1951 Geneva Refugee Convention until 1989[5]. Right after that, the wave of refugees caused by the Yugoslav Wars was a major challenge for the Hungarian authorities. First Croats, then Serbs and Bosniaks arrived. Many later returned home, others resettled through immigration programmes in Canada, the US, and Australia, while others stayed behind.[6] While initially only Hungarian nationals arrived, this changed radically later: Hungary became a host country and after the lifting of the territorial barrier[7] to the Geneva Convention[8], there was no longer any barrier to the admission of refugees from outside Europe. One highlight of this was the 'refugee flood' that started in 2015 as a result of the Arab Spring.

During the change of regime, Act XXXI of 1989 on amending the Constitution made the right to asylum part of the Constitution[9], adopting the Geneva concept,

4 | Boed, 1994, pp. 3–8.

5 | See Legislative Decree No. 15 of 1989 on the proclamation of the Convention relating to the Status of Refugees adopted on 28 July 1951, and the Protocol relating to the Status of Refugees adopted on 31 January 1967.

6 | Bokorné Szegő, 2003, p. 250; Tóth, 1994, pp. 69–73.

7 | Hungary exercised its right under the 1951 Geneva Refugee Convention, which allowed ratifying countries to recognise only refugees from Europe.

8 | See Parliamentary Resolution 113/1997 (XII. 17.) on the withdrawal of the Declaration to the Convention relating to the Status of Refugees adopted on 28 July 195 and promulgated by Legislative Decree No. 15 of 1989.

9 | 'Article 65. (1). In accordance with the conditions established by law, the Republic of Hungary shall ensure the right of asylum to foreign citizens or stateless individuals who, in their native country or place of residence, are subject to persecution based on their race, religion, nationality, language, or political convictions.
(2) Individuals granted asylum shall not be extradited to other states.
(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to asylum'.

which was later clarified and harmonised with the Geneva Convention in 1997[10]. The Constitution left it to the legislature to define the content of the right of asylum, and its substantive and procedural rules. However, it itself established what vulnerable status constituted and the criteria relevant to granting fundamental rights, which are constitutional prerequisites for the enjoyment of the right of asylum according to the criteria defined by law.

Subsequently, the first Asylum Act was adopted in 1997.[11] The Act, according to its general justification, provides a guaranteed right to asylum for foreigners seeking it. However, with Hungary's accession to the European Communities (European Union, EU) in 2004, a new law had to be adopted. Within the European Communities, asylum was initially regulated under the third pillar. However, the Treaty of Amsterdam brought significant changes, moving the issue of 'visas, asylum, immigration, and other policies related to free movement of persons' to the first pillar and requiring Member States to develop a common immigration and asylum policy within five years. The ultimate goal was to create a common asylum policy. At an extraordinary meeting of EU Heads of State and Government in Tampere in October 1999, they agreed to work towards establishing a Common European Asylum System. The aim was for the EU to have a common asylum policy by 2010. At the Council meeting in November 2004, it was agreed to launch the second phase, which was elaborated by the interior ministers of Member States at their conference in The Hague. One aim, among others, was to provide a single procedure, single form, single refugee status, and an exchange of information. The European Council called on the Council of Ministers and European Commission to put in place structures covering the asylum systems in Member States by 2005.[12] In this context, Hungary joined the EU and the new Asylum Act[13] was adopted in 2007, harmonising the Constitution, Geneva Convention as an international legal norm, and EU asylum legislation as a supranational system of norms, and meeting the obligations arising from these.[14]

10 | 'Article 65. (1). In accordance with the conditions established by law, the Republic of Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to foreign citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded.
(2) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to asylum'.

11 | Act CXXXIX of 1997 on the Right of Asylum.

12 | Berkes, 2008, p. 89.

13 | Act LXXX of 2007 on the Right of Asylum.

14 | A good example of this is the institution of subsidiary protection, which can be placed between refugee and protected status under the Geneva Convention, by providing protection to persons not persecuted for a Geneva Convention reason but who are unable or unwilling to seek protection in their country of origin because they would be at risk of serious harm if they were to return.

The Fundamental Law, which came into force in 2012, has also maintained the constitutional level of asylum. Furthermore, Article XIV[15] is based on the Geneva Convention, the explanatory memorandum refers to international legal obligations, and it refers to the principle of non-refoulement.

Hungary automatically adopted the international asylum system without much debate. Again, noteworthy is that this period was relatively calm, with few asylum seekers arriving. Therefore, the handling of cases did not cause problems for the asylum authority or courts. However, from 2014, this is no longer the case. As a state response to the 'refugee flood' from 2014 but mostly from 2015, the Fundamental Law was amended in 2018––for the seventh time—introducing significant changes[16]. The amendment was both an opposing reaction to the EU's plans to distribute refugees and a tightening of recognition. Based on Article 31(1) of the Geneva Refugee Convention,[17] it was enshrined in the constitution that asylum seekers should not be able to choose the country of asylum. The Fundamental Law has thus provided a constitutional basis for the safe third country and

15 | 'Article XIV (1). Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited.
(2) 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.
(3) Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum to non-Hungarian citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded'.

16 | 'Article XIV (1). The settlement of foreign populations in Hungary shall not be allowed. Foreign nationals, other than persons with the right of free movement and residence, shall be allowed to reside in the territory of Hungary based on their applications adjudged by the Hungarian authorities on an ad hoc basis. The fundamental rules for the submission and evaluation of such applications shall be laid down in a cardinal law.
(2) Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited.
(3) 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.
(4) Hungary shall, if neither their country of origin nor another country provides protection, extend the right of asylum upon request to non-Hungarian citizens who, in their native country or the country of their usual place of residence, are subject to persecution based on race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to direct persecution is well founded. A non-Hungarian citizen who reached the territory of Hungary through a country where he or she did not face persecution or the immediate risk of persecution shall not have the right to seek asylum.
(5) The fundamental rules for the granting of asylum shall be laid down in a cardinal law'.

17 | 'Article 31 (1). The Contracting States shall not impose penalties, 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 I, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

country of first asylum principles.[18] Asylum seekers who do not fall in this category are no longer constitutionally protected ('not have the right to seek asylum') and are subject to protection under the law. A minor clarification is that the fear of persecution has been supplemented by the addition that it must be based on direct persecution. However, I consider the addition redundant, as the link between persecution and well-founded fear would make it inherently difficult to interpret the reference.

Following the previous lack of interest, the institution of asylum is now the focus of debate, with the Hungarian government consistently opposing it. This was reflected in the legislation, which has also undergone several changes. Both the country of first asylum and safe third country concepts have significantly reduced the number of persons potentially eligible for asylum. In 2015, a special border procedure was introduced and transit zones were established based on Article 43 of Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection. This deals with where persons seeking recognition as refugees or beneficiaries of protection are placed to conduct asylum and alien procedures. The legislation has been modified several times, partly due to the pandemic, EU decisions, and ECHR decisions. Here, I highlight that according to the Asylum Act, an applicant in a transit zone does not have the right to stay in Hungary and is detained within 8 km of the border.[19] The logic of the regulation is that the decision to enter at the border is taken first, and only then can an asylum application be submitted. Those entering the country without following this procedure are escorted back to the other side of the border, and those who arrived via a safe third country are not accepted by the asylum system. However, at the moment, these rules do not apply because of a declared

18 | The principle of non-refoulement, through Article 33 of the Geneva Refugee Convention, significantly limits the sovereignty of individual states in relation to asylum. What remains of state sovereignty in the field of asylum is the possibility to recognise that another country—in practice, the first safe country—is considered more suitable to provide protection to the asylum seeker and therefore either not accept the application in the first place or refuse to grant protection on that ground. Kjaerum, 1992, pp. 514–516.
Exclusion on the basis of transit or the possibility of seeking protection in a third country during a stopover (safe third country) is generally not considered useful from a humanitarian viewpoint in addressing asylum issues, as it means that the entire burden is shifted to the countries that happen to be the first countries of asylum. On the other hand, if there are no universally accepted criteria for determining which state should deal with an asylum seeker's claim, the situation of 'refugees in orbit' arises. However, applying these solutions requires international agreements on responsibility to examine an application and burden-sharing arrangements. Hailbronner, 1993, pp. 59, 63.

19 | Act LXXX of 2007 on Asylum 'Article 71/A (1) Where an alien lodges an application:
a) before admission into the territory of Hungary, or
b) after being apprehended inside the 8 km zone from the external border referred to in Point 2 of Article 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (hereinafter referred to as 'Schengen Borders Code'), or from any frontier sings, and after being escorted through the gate installed for the protection of State borders as defined in the Act on State Borders. In a transit zone, the provisions of this Chapter shall apply with the derogations provided for in this Section'.

state of emergency. Until 31 December 2024, a so-called 'declaration of intent to lodge an asylum application' must be lodged at the designated diplomatic mission or consular post. In case of a positive decision, the applicant will be granted an entry permit and will be able to submit an asylum application after entry.[20] However, in Case C-823/21[21], the Court of Justice of the European Union (CJEU) has ruled that by making the possibility of lodging an application for international protection conditional on the prior submission of a declaration of intent at a Hungarian embassy in a third country, Hungary has failed to fulfil its obligations under EU law.

3. Role of the Constitutional Court in the field of asylum

Sovereignty is based on territory, public power, and population. Immigrants from voluntary and forced migration[22] change and can transform a society's cultural fabric. Unlike national minorities, for example, immigrants are less dominated by historical links with the state; however, there is greater scope for manoeuvre under state sovereignty. The state is a shaper of processes in that it has sole control over whom it allows into its territory and whom it allows to settle and become part of society.

Sovereignty is central to national state formation and the possibility of its transformation. Therefore, it has a crucial role in the realisation of human rights. However, the relationship between sovereignty and human rights is two-sided: some hold that human rights and their universalism erode sovereignty in the classical sense of the state acting at its discretion on its own territory. Others contend that because sovereignty is actually socially constructed, historically specific, and mutable, it is better understood as being transformed by human rights.[23]

This dual face of sovereignty is clear in migration issues: there is both the notion of the sovereign as the ultimate decision-maker and as the institutional guarantor of human rights, which may conflict. Immigration control, the traditional sovereign power of the state to control the entry and stay of aliens on their territory, is considered a crucial and fundamental aspect for the democratic functioning of the society.[24] International migration involves several states, and therefore, states must try to regulate these processes jointly at the international level while preserving their autonomous regulatory capacities.[25]

In the midst of these processes, the state can choose to be pro-immigration or to oppose it by (strictly) controlling it. However, state power is limited in terms of elements restricting the scope for action and that represent a degree of inertia.

20 | Act LVIII of 2020 on transitional rules and epidemic preparedness related to the end of the state of emergency 'Article 267-275.
21 | Judgment of the Court (Fourth Chamber) in Case C-823/21, European Commission v Hungary, ECLI:EU:C:2023:504.
22 | Hautzinger, Hegedüs, and Klenner, 2014, pp. 12–13.
23 | Nash, 2009, p. 71.
24 | Slingenberg, 2014, p. 279.
25 | Mohay, 2016, p. 46.

These lead to diversity in society, whether against the will of the state or in excess of it. This could include the impact of illegal border crossing or residence, or the fulfilment of humanitarian obligations. Although states are taking measures to protect themselves against irregular border crossing or illegal residence (irregular migration), they are unable to eliminate the phenomenon completely and their solutions are often only incidental, as they are unable to identify and eliminate all possibilities for abuse in advance. Furthermore, ex-post solutions can lead to status neutralisation.

Regarding the role of the Constitutional Court, two factors are highlighted: traditional constitutional tasks (norm control, constitutional interpretation) and the examination of the constitutionality of individual cases (constitutional complaint procedure). As experience in Hungary shows, the former are more important. In Hungary, in individual cases, access to the Constitutional Court seems difficult. One reason is that the persons concerned seem to prefer going to the ECHR. Another is that for some of the emerging problems, it is questionable whether there is a basis for providing access to the courts at all (see the problem of access to territory, and question of action or inaction by state actors, e.g. a police officer escorts a person illegally entering the country back to the other side of the border). The persons concerned are themselves disinterested. They have no intention of staying in Hungary, and therefore do not wish to avail themselves of the protection the country could theoretically offer when turning to its authorities. Consequently, the latent problems are not brought to the attention of the courts and ultimately, the Constitutional Court. Overall, there is therefore little scope for the Constitutional Court to decide on the content (and limits) of the constitutional protection afforded by the right of asylum through concrete cases.

On the other hand, the role of the Constitutional Court as a bastion of sovereignty is gaining ground. The Constitutional Court, the guardian of the Fundamental Law, protects the framework and basis of the state's functioning, namely its legal system, thereby contributing to protecting the sovereign's functioning. Here, the issue of asylum is presented in a more abstract way. Based on the cases arising in the practice of the Constitutional Court, asylum issues have become a broader issue of competence-sharing and sovereignty between the EU and Hungary. Based on the abovementioned historical background, asylum issues avoided the Constitutional Court before 2016. There was only one case in 1996, under the previous Constitutional Court Act, in which an ex officio procedure was initiated based on Council of Ministers Decree No. 101/1989 (IX. 28.) on the recognition of refugees as a violation of the Geneva Convention as an international treaty. However, the Decree was repealed in 1998 and the new legislation differed significantly from the previous one, so the Constitutional Court terminated its procedure in 1999.[26]

26 | Ruling 866/C/1996.

4. Interpretation of Article XIV of the Fundamental Law and the questions of sovereignty and constitutional identity

The Constitutional Court first had the opportunity to interpret Article XIV of the Fundamental Law in 2015. Only then did the Constitutional Court have the opportunity to examine the substantive significance of the right of asylum to balance the fundamental rights of asylum seekers, constitutionally protected rights of residents on national territory, and main aim of the state such as maintaining public order and safeguarding national security. The opportunity was not harnessed.

The procedure underlying Decision 22/2016 (XII. 5.) (the so-called quota decision)[27] was initiated on the Ombudsman's motion. It concerned the plan for the distribution of refugees in the EU[28], which Hungary did not support. The Ombudsman sought an interpretation of Article XIV(1) and (2)[29] and Article E(2)[30] of the Fundamental Law, partly concerning the prohibition of collective expulsion and possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions.

Two reasons why the Ombudsman initiated this procedure are based on the motion. First, only a narrow group of petitioners can request an interpretation of the Fundamental Law.[31] Second, the Ombudsman, as a control body of the public administration, wanted to explore how Council Decision 1601/2015 could be interpreted to ensure that Hungarian institutions and bodies operate in accordance with the Fundamental Law. In his view, the obligations of these bodies to act in

27 | Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E) (2) of the Fundamental Law [Online]. Available at: https://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf (Accessed: 11 October 2023).

28 | On 22 September 2015, the Council of the European Union adopted Decision 2015/1601, which provides for the transfer of certain categories of asylum seekers residing in Italy and Greece to other Member States including Hungary as a transitional measure.

29 | 'Article XIV (1). Hungarian citizens may not be expelled from the territory of Hungary and may return from abroad at any time. Foreign nationals residing in the territory of Hungary may be expelled only based on a lawful decision. Collective expulsions are prohibited. (2) 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'.

30 | 'Article E (2). In its role as a Member State of the European Union and by virtue of international treaty, Hungary may—to the extent necessary for exercising its rights and discharging its obligations stemming from the founding Treaties—exercise certain competencies deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union'.

31 | 'Act CLI of 2011 on the Constitutional Court Article 38 (1). Where so requested by Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of a provisions of the Fundamental Law regarding a specific constitutional issue, provided that the interpretation can be inferred directly from the Fundamental Law'.

accordance with their tasks and powers may conflict with the content of the fundamental rights guaranteed by the Fundamental Law and may exceed the limits of the powers transferred by Hungary to the EU, creating legal uncertainty regarding additional powers.

In terms of the possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions, the Ombudsman also questioned what legal institutions were entitled to declare this and whether the exercise of powers related to the founding treaties could restrict implementing an act not based on the competence conferred on the EU. The Ombudsman also asked whether the provisions of the Fundamental Law could be interpreted as authorising or restricting the transfer by Hungarian bodies and institutions, as part of cooperation within the legal framework of the EU, of a significant group of foreign nationals legally resident in an EU Member State, following an institutional procedure and without objectively prescribed criteria.

The Constitutional Court thus faced a complex problem, as the Ombudsman's petition, although related to the distribution of refugees, raised fundamental sovereignty issues. Ultimately, the Constitutional Court did not attempt to resolve the problem, as it had separated the motion for interpretation of Article XIV[32] and has not ruled on it since. This also means that the Constitutional Court, although it had the opportunity to examine the substantive significance of the right of asylum, has not taken it yet. As such, the decision pertained more to the limits of powers between the EU and Hungary, with asylum ultimately being only a stepping stone.

Regarding competences, the quota decision stated that the Constitutional Court may examine upon a relevant motion—when exercising its competences—whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary (including the scope of the powers conferred on it), or its identity based on the country's historical constitution. This can happen only in exceptional cases and as a matter of *ultima ratio*, i.e. in compliance with the constitutional dialogue between Member States, within its own jurisdiction.[33]

In terms of the possible future assessment of asylum issues, the quota decision has implied considering two factors, namely sovereignty and constitutional identity. These were not previously considered in the practice of the Constitutional Court. Although not explicitly stated in the decision, its aftermath shows that asylum (in this case, the issue of the mass resettlement of asylum seekers), beyond its humanitarian aspects, has become interlinked with these two concepts. These decisions show a tendency of the Constitutional Court to approach the issue of international migration and the action of supranational institutions in this context from the perspective of the State, State power, and capacity of the State to act, rather than as an expression and guarantee of individuals and their human rights.

32 | '…because it deems it appropriate to examine and decide on the merits of the case separately', Ruling X/3327-31/2015 (new case number: X/1936/2016).
33 | Decision 22/2016 (XII.5.), Reasoning [33], [43]–[46].

For asylum issues, important is the element of sovereignty control that states the presumption of maintained sovereignty. According to this principle, Hungary did not relinquish its sovereignty when it joined the EU, but only made possible the joint exercise of certain competences; accordingly, Hungary's sovereignty must be presumed to be maintained when assessing the joint exercise of additional competences in relation to the rights and obligations laid down in the founding treaties of the EU. However, the Constitutional Court did not offer a more specific conclusion. While it did formulate the presumption of maintained sovereignty, it did not have to and did not derive any conclusions on what this implied for the implementation of the contested EU decisions, as its procedure was purely constitutional interpretation.

The protection and interpretation of sovereignty emerged as a decision-making aspect to examine, and has since become part of the practice of the Constitutional Court. Although the function of the Constitutional Court to protect sovereignty (beyond the manifestation of popular sovereignty) rarely arises, and the external side of sovereignty does not necessarily come within the scope the Constitutional Court, in relation to the people, the nation, and their concept, it has become a task to consider global aspects beyond the specific problem.

Another novelty of the decision was the introduction of the concept of constitutional identity. By this, the decision of the Constitutional Court meant Hungary's constitutional identity, the content of which is defined on a case-by-case basis, consider together the whole of the Fundamental Law and its individual provisions, their purpose, National Avowal (the preamble of the Fundamental Law), and achievements of our historical constitution [by virtue of the National Avowal and Article R(3)[34]]. The resolution also contains an open list of constitutional values within this scope: freedoms, separation of powers, the republican form of government, respect for public autonomy, freedom of religion, legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and protection of the nationalities living with us. These fundamental values are not created by the Fundamental Law, only recognised by it. Therefore, they cannot be renounced by an international treaty, and can only be deprived of Hungary's sovereignty and independent statehood by the permanent loss of its sovereignty. Since sovereignty and constitutional self-identity are intertwined, their two checks must be carried out with regard to each other.[35] The result of the interconnection and defence of these two concepts and phenomena by the Constitutional Court shows that the meeting of European unity and national specificities is seen by the Constitutional Court as a way of ensuring that the constitutional identity of each nation cannot be dissolved in an artificially created common approach. Common values include what is common and national values include what is not. However, non-common values are also values, and European values at that, and therefore

34 | 'Article R (3). The provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, the National Avowal, and with the achievements of our historical Constitution'.
35 | Decision 22/2016 (XII.5.), Reasoning [64]–[65], [67].

also need (judicial) protection. This protection can be provided by the national constitutional courts.[36]

By focusing on constitutional identity, the Constitutional Court started to research the characteristics and values that are partly European but also Hungarian. The court is at the beginning of this journey, and its practice is not consistent or well developed. However, as it is linked to sovereignty issues, the study is suitable as an issue of the relationship of asylum seekers and other migrants, persons, and groups with different cultures with the majority culture. Decision 32/2021 (XII. 20.), presented later, reflected this.

This is also supported by the fact that in Decision 2/2019 (III. 5.),[37] which aimed to interpret the Fundamental Law, the interconnection of sovereignty, constitutional identity, and asylum emerged, but now at the Government's initiative.

The Government's petition raised questions such as whether the Fundamental Law is the source of legitimacy for all sources of law including the right of the EU under Article E of the Fundamental Law, and whether it follows from the Fundamental Law that its interpretation by the Constitutional Court cannot be undermined by the interpretation of another body. The background to the application was that the European Commission had sent a formal notice stating that according to its interpretation, Article XIV of the Fundamental Law on asylum, as amended, infringed certain articles of Directive 2011/95/EU of the European Parliament and 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 for subsidiary protection, and for the content of the protection granted.

The part of the resolution concerning sovereignty control, in addition to was already stated, stipulates that the exercise of powers through the institutions of the EU may not exceed what is necessary under an international treaty, 'may not be directed to more powers than those which Hungary otherwise has under the Fundamental Law', and emphasises the principle of reserved sovereignty.[38] Aligned with its previous decisions, it also stresses that the joint exercise of powers must not restrict Hungary's inalienable right to dispose of its territorial unit, population, form of government, and state structure, and that the joint exercise of powers may be limited to the extent necessary.[39] The resolution does not contain further elements on identity control, does not elaborate on the subject, and does not mention national specificities that need to be protected. It does, however, emphasise our European identity, but does not explain how this identity, which is part of our national identity, relates to other elements of identity that are also treated as part of our constitutional identity. The issue of sovereignty and identity surrounds the interpretation of the granting of asylum in this decision, as discussed later.

36 | Varga, 2018, pp. 22, 26–27.
37 | Constitutional Court Decision 2/2019. (III. 5.) AB [Online]. Available at: https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2019/03/2_2019_en_final.pdf (Accessed: 11 October 2023).
38 | Reasoning [17].
39 | Reasoning [22].

The clash between the strict approach of the Hungarian state on asylum issues and EU processes in the opposite direction has brought the issue of asylum to life in the proceedings of the Constitutional Court. Furthermore, since this is at the heart of the division of competences between the Member State and EU, these issues have become problems related to sovereignty, competence, and national values rather than an asylum issue. Consequently, no new interpretative label has been added to the issue of asylum. However, the decisions did not represent a revolutionary change in the competence issue. Although new interpretative aspects emerged, the Constitutional Court has not taken any steps that would have effectively undermined the validity of EU law or radically changed the relationship between it and national law. By relying on these decisions alone, EU decisions remain enforceable for national institutions, but can provide a reference point for the government in policy debates with the EU.

5. Interpretation of Article XIV of the Fundamental Law and human dignity

Following the abovementioned precedents, the Constitutional Court—surprisingly—instead of emphasising sovereignty, focused on the human dignity concerns of the host state and its population (i.e. not the asylum seekers). This solution also meant that the Constitutional Court did not push the issue of conflict of competences and sovereignty, avoiding a possible conflict with the EU.

The procedure underlying Decision 32/2021 (XII. 20.)[40] was based on the interpretation of the Fundamental Law and initiated by the Government. The Government requested the Constitutional Court to interpret Articles E(2) and XIV(4) of the Fundamental Law. In its application, the Government referred to the judgment of the CJEU in Case C-808/18,[41] according to which a foreign national illegally staying in Hungary cannot be escorted across the border, but must be subject to asylum or expulsion proceedings. The Government argues that given that the effectiveness of the EU rules on expulsion is not guaranteed, the implementation of CJEU judgment could lead to a situation where a non-Hungarian national illegally staying in Hungary, whose identity is sometimes unknown, would remain in Hungary for an indefinite period, thus becoming de facto part of the country's population. Therefore, until such time as effective readmission is achieved by the EU, compliance with the obligation under the judgment will change the population, which will directly affect Hungary's sovereignty as enshrined in the Fundamental Law,

40 | Decision 32/2021. (XII. 20.) AB [Online]. Available at: https://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/$FILE/32_2021_AB_eng.pdf (Accessed: 11 October 2023).

41 | Judgment of the Court (Grand Chamber) of 17 December 2020. European Commission v Hungary. ECLI:EU:C:2020:1029.
The Government's (unhidden) aim was to be exempted from the Court ruling, but the Constitutional Court's decision did not confirm this. Orbán, Szarka, and Szegedi, 2023, p. 14.

its identity based on its historical constitution, and its inalienable right to dispose of its population.

The Seventh Amendment to the Fundamental Law of 29 June 2018 incorporated the abovementioned practice of the Constitutional Court into the EU clause[42] and introduced the obligation to protect constitutional identity.[43] As mentioned, the restriction of the right of asylum was introduced in Article XIV(4). Accordingly, the issue of cultural differences eventually appeared in connection with the earlier framework of sovereignty and constitutional self-identity.

The way to do this was to unfold the content of fundamental rights control. Several options were open to the Constitutional Court. One was to wait and avoid making a decision. Here, it could have requested a preliminary ruling like the German Constitutional Court, but this had never been done before. It could also have excluded the application of the CJEU decision like the Polish example, or tried to find the balance.[44] The latter was achieved.

Fundamental rights control has been linked to sovereignty and identity control since Decision 22/2016 (XII. 5.), but was not the focus of previous decisions. However, for the first time, the Constitutional Court has now conducted an examination of this, meaning it has approached the issue from a fundamental rights perspective. (How does uncontrolled immigration affect culture and can it be protected through human dignity?)

In its review of fundamental rights, it concluded that the failure to exercise joint competences as provided for in Article E(2) of the Fundamental Law could result in the permanent and massive residence of foreign populations in Hungary without democratic authorisation, which could violate the right to identity and self-determination of the Hungarian people derived from their human dignity. The reason for this is that as a result of the lack of enforcement of the exercise of powers, the traditional social environment of persons living on the territory of Hungary may change without democratic authority or influence on the part of the persons concerned without State control mechanisms. This situation may lead to a process beyond the control of the State and to a forced change in the traditional social environment of the person.[45]

Note that the decision focused on the existence or lack of State control, not on the link between settlement and identity, and stressed that the obligation of the State should not, even exceptionally, result in any distinction between the human

42 | 'Article E) (2). In its role as a Member State of the European Union and by virtue of international treaty, Hungary may—to the extent necessary for exercising its rights and fulfilling its obligations stemming from the Founding Treaties—exercise certain competences deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union. The exercise of powers under this Paragraph must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system, and form of governance'.

43 | 'Article R (4). Each and every body of the State shall be obliged to protect the constitutional identity and the Christian culture of Hungary'.

44 | Chronowski, 2022, p. 161.

45 | Reasoning [51]–[52].

dignity of individuals or affect the State's obligation to ensure full protection of the human dignity of all persons present in its territory, including asylum seekers.[46]

Regarding sovereignty control, the decision clarified the previous one by referring to the Treaty on the Functioning of the European Union (TFEU): the presumption of maintained sovereignty is unquestionably applicable to all competences not considered by the TFEU to fall within the exclusive competence of the Union. This is because in these cases, both the Fundamental Law and TFEU provide that Member States are entitled to exercise a certain scope of competences even after the entry into force of the TFEU.[47] This focus on the Fundamental Law has been combined with some consideration of the TFEU. This decision is novel in that based on the presumption of maintained sovereignty, it also stated that the EU and its institutions do not only exercise the powers conferred on them for the purpose of their joint exercise in accordance with the objective of the founding and amending treaties of the EU if they create secondary sources of law, but that the exercise of these powers is also conditional on ensuring the effective implementation of the secondary sources of law created. It cannot be assumed that Hungary has ceded the right to exercise a given power to the institutions of the EU if these institutions disregard their obligation to exercise that power or if the joint exercise of power is carried out only ostensibly so that it manifestly does not ensure the effective application of EU law.[48]

For identity control, the decision stated that constitutional identity and sovereignty are not complementary, but interrelated concepts in several respects: Hungary's preservation of its constitutional identity, also as a Member State of the EU, is made possible by its sovereignty (the preservation of its sovereignty); constitutional identity is manifested primarily through a sovereign—constitution-making—act. Considering Hungary's historical struggles, the aspiration to preserve the country's sovereign decision-making powers is part of it national identity, and through its recognition in the constitution, of its constitutional identity. The main features of state sovereignty recognised in international law have been closely linked to Hungary's constitutional identity due to the historical characteristics of our country.[49]

The resolution reviews those aspects of our historical constitutional achievements that the Constitution has made part of the constitutional interpretation, which are the protection of the values that constitute the country's constitutional identity (including the protection of linguistic, historical, and cultural traditions, and certain steps in the struggle for its sovereignty and freedom).[50] Created during the historical development of the Constitution, these are legal facts that cannot be renounced by an international treaty and amendment to the Fundamental Law, since legal facts cannot be changed by legislation.[51]

The strengthening of fundamental rights control also has a constitutional meaning, in that the state has a constitutional obligation to act to protect human

46 | Reasoning [55].
47 | Reasoning [66].
48 | Reasoning [79].
49 | Reasoning [99].
50 | Reasoning [102]–[107].
51 | This finding Varga Zs. András appeared for the first time in two earlier parallel reasoning, Decision 22/2016 (XII. 5.), Reasoning [112]; Decision 2/2019 (III. 5.), Reasoning [70]–[72].

dignity, even against EU acts that 'threaten' it, albeit in exceptional cases and under specific conditions. This ultimately extends the constitutional mandate under which the state can disregard the implementation of EU law. In places, it sticks to more abstract reasoning (e.g. it does not clarify certain aspects of the lack of exercise of competence) and the criteria set out in the decision are loose.[52] In this case, too, the Constitutional Court has formulated principles and guidelines, but not reached a final conclusion. In cases where the question arises as to the competences of the EU and Hungary as a Member State, or the scope of EU and national law, the Hungarian Constitutional Court strives to maintain a delicate balance. Although it clearly defends the constitution and national sovereignty, it does not question the legitimacy of EU acts and does not resolve potential conflicts itself. However, and this is true for all decisions concerned, it emphasises the importance of constitutional dialogue (although it consistently does not use one of the possible means of this dialogue, namely the preliminary ruling procedure).

6. Article XIV of the Fundamental Law and the constitutional protection of the right to asylum

Based on the foregoing, the Constitutional Court has had the opportunity to interpret the constitutional content of the right of asylum through the Fundamental Law, first at the initiative of the Ombudsman and then at that of the Government. While not yet done in 2016, the 2019 and 2021 decisions have already interpreted Article XIV in substance. In addition, in another case, the Constitutional Court made findings on the right of asylum in the context of the criminal offence of facilitating illegal immigration.[53]

The constitutional interpretations focused on the second sentence of Article XIV(4), according to which a non-Hungarian citizen who entered Hungary through a country where he or she was not subject to persecution or imminent threat of persecution is not entitled to asylum. In (the mentioned) Decision 2/2019 (III. 5.), the initiator—the Government—asked the Constitutional Court to answer the question regarding the authentic interpretation of the phrase 'not have the right to seek asylum'. In its view, it could mean that a non-Hungarian citizen who entered Hungary through a country where he has not been subjected to persecution or the imminent threat of persecution cannot be granted the right of asylum at all. However, it could also be interpreted to mean that the applicant does not have a fundamental right to asylum and that the Hungarian State is not under a constitutional obligation to grant it, although he may be granted the right of asylum in accordance with the substantive and procedural rules laid down by Parliament.

The decision, drawing on the coherent interpretation of the Fundamental Law analogy and of international and EU law, first reviewed whether the constitutional

52 | Blutman, 2022, pp. 7, 10.
53 | See Decision 3/2019. (III. 5.) below.

text contains the same or similar phrase elsewhere. Then, drawing on the interpretation of the established churches by analogy, the Constitutional Court concluded that the phrase 'not have the right to seek asylum' in the second sentence of Article XIV(4) of the Fundamental Law means that the right of asylum cannot be considered a fundamental subjective right in the case of a non-Hungarian citizen who entered the territory of Hungary through a country where he has not been subjected to persecution or an imminent threat of persecution. However, this person has a fundamental right to have his/her application examined by the competent authority based on the cardinal law on the fundamental rules for the granting of the right of asylum under Article XIV(5) of the Fundamental Law. Consequent to this fundamental right, it is the duty of Parliament to set the basic rules for the granting of the right of asylum in a cardinal law.[54]

In so arguing, the decision has blunted the Seventh Amendment's restriction on the right to asylum, even if deducing from the plain meaning of the text ('not have the right to seek asylum') that asylum seekers arriving through a quasi-safe country—or a country designated as such by the legislature—have a 'fundamental right to have their claims examined' under the cardinal law on asylum.[55]

The Constitutional Court further argued that in its view, the second sentence of Article XIV(4) should be interpreted from the internal aspect of sovereignty, since the Hungarian state independently establishes its constitutional organisation and legal system free from the sovereignty of other States, and exercises full and exclusive sovereignty over the persons living in its territory as defined by the Constitution and law.[56] It follows that the right to asylum is not the refugee's own substantive right, but arises from the relevant international treaties entered into by Hungary as a limit to its external sovereignty, and that the basic rules of the international treaties are determined by the Hungarian State independently in the framework of its internal sovereignty.[57]

The decision then invoked the role of international and EU law in strengthening interpretation. Under the Universal Declaration of Human Rights and Geneva Refugee Convention, the principle of non-refoulement is a minimum international obligation explicitly undertaken by Hungary.[58] The principle is also enshrined in Article XIV (3) of the Fundamental Law, so the resolution does not contain anything new in this respect. What does, however, nuance the issue is the emphasis on the fact that the detailed establishment of the prohibition of refoulement, the rules that apply to refugees not subject to the prohibition of refoulement, in addition to those in the Fundamental Law, is not set in national law in the Fundamental Law, but referred to statutory regulation.[59]

54 | Reasoning [44].
55 | Chronowski, 2019, p. 73.
56 | This approach already appeared in Decision 9/2018 (VII. 9.) (Reasoning [50]).
57 | Reasoning [45].
58 | Reasoning [46].
59 | Reasoning [47] The argument also included a citation of Article 39 of Directive 2013/32/EU of the European Parliament and the Council on common procedures for granting and withdrawing international protection.

In contrast, (previously mentioned) Decision 32/2021 (XII. 20.) again avoided the actual interpretation of Article XIV(4). Although the Government has asked the Constitutional Court to interpret Article E(2) and Article XIV(4) of the Fundamental Law to determine whether it can be interpreted as meaning that Hungary can implement an EU obligation, which in the absence of effective enforcement of European legislation, could lead to a situation where an alien illegally residing in Hungary becomes de facto part of the country's population. However, the decision focused on the content of constitutional identity and exercise of powers as detailed above. On one hand, the last sentence of Article XIV (4) of the Fundamental Law is instrumental to the specific constitutional problem in that it defines the scope of persons not entitled to asylum. Therefore, there is no need for an independent interpretation.[60] On the other hand, it only stated that it is also a consequence of Article XIV and of the mutual solidarity between states that Hungary must actively and effectively contribute to the reassuring settlement of the situation of asylum seekers in its territory. This obligation is unquestionably incumbent on the institutions and bodies of the EU.[61]

A 'cuckoo bird' is Decision 3/2019 (III. 7.),[62] where the decision did not interpret the Fundamental Law, but examined a provision of the Criminal Code that sanctions the promotion and support of illegal immigration.[63] As such, the decision used the guarantee system of constitutional criminal law. However, this decision interpreted Article XIV(4) not in itself, but in accordance with the Asylum Act. According to this decision, Article XIV(4) of the Fundamental Law lays down the substantive—positive and negative—legal conditions for the granting of the right of asylum, which are detailed in Act LXXX of 2007 on the Right of Asylum and supplemented by procedural conditions and rules. Related with this status, the applicant for recognition as a refugee is entitled, inter alia, to reside in the territory of Hungary under the conditions laid down in the Asylum Act and to a permit for residing in the territory of Hungary, which is provided for in a separate act. This legislation provides the framework for a close link with Article XIV of the Fundamental Law and other provisions, i.e. fundamental rights protection is granted to persons who have been granted recognition (or subsidiary protection) as refugees, and to a limited extent, to those who are participants in the recognition procedure. However, fundamental rights protection does not extend to activities not covered by or not closely linked to the right of asylum, such as illegal immigration or

60 | Reasoning [22].

61 | Reasoning [49].

62 | Decision 3/2019 (III. 7.) AB [Online]. Available at: https://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/3_2019_AB_eng.pdf (Accessed: 11 October 2023).

63 | The statute classifies as a misdemeanour the activity of organising illegal immigration, and defines by way of example the content of the organising activity, which may include: organising border surveillance; preparing, distributing, or commissioning information material; and building or operating a network. The indirect political background to the decision is the infringement procedure launched by the European Commission against Hungary in 2018, which found the Stop Soros law to be contrary to EU law. Békés, 2020, p. 942.

residence. Furthermore, there is no fundamental rights protection in cases where a person abuses the asylum procedure to regularise his/her stay in Hungary. Following the amendment of the Fundamental Law, protection is not extended to those who entered Hungary through a country where they have not been subject to persecution or an imminent threat of persecution.[64]

7. Right of appeal in constitutional complaint procedures

Regarding constitutional complaint procedures, the related cases have not reached the substantive stage, as the Constitutional Court considers that no problems or arguments have been put forward that would have raised the question of the unconstitutionality of the challenged judicial decision or issues of constitutional importance that would have required a substantive examination of the cases.[65]

There are almost no classic asylum cases under the Fundamental Law. One of these cases concerned the non-refoulement of a Syrian national, who claimed that the withdrawal of his residence card would only allow him to return to Syria, where he would be at risk of torture and inhuman treatment. The Constitutional Court, however, stated laconically that the petition only raised factual issues relating to the revocation of the residence card, but that the Constitutional Court did not have jurisdiction to assess and weigh the evidence.[66]

Oddly, there have also been cases where the asylum authority has lodged a constitutional complaint[67] against a court decision annulling its decision. In its constitutional complaint, the applicant primarily requested the Constitutional Court to rule in principle that under Article XIV(4) of the Fundamental Law, if the court annuls a decision of an asylum authority rejecting an asylum application, it may give guidance establishing the existence of conditions for the applicant's eligibility for international protection if it ascertains that the applicant arrived in Hungary directly from a country where he/she was subject to persecution or an imminent threat of persecution. It also requested a declaration that the necessary condition for granting asylum was the applicant's presence in Hungary and that the constitutional condition for the granting thereof was not fulfilled in the

64 | Reasoning [52].

65 | Act CLI of 2011 of the Constitutional Court 'Section 29. The Constitutional Court shall accept constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises paramount constitutional issues'.

66 | Order 3440/2021 (X. 25.) AB, Reasoning [25]–[26]. The residence card was revoked, because the petitioner had provided false information regarding his place of residence, and based on the information provided, posed a real, direct, and serious threat to public security in Hungary, and according to the expert opinion contained in the classified document, to national security.

67 | The right of petition of organisations exercising public authority was explicitly included in the Constitutional Court Act of 20 December 2019, but is explicitly excluded from that of 1 June 2023. Act on CC Section 27.

case of an applicant who did not cooperate with the authorities during the asylum procedure and left for an unknown destination without leaving his/her contact details behind.[68] In its rejection, the Constitutional Court referred to the fact that the Asylum Act contains rules on inadmissible applications, but the authority had not invoked them in its own proceedings or in those of the court. Therefore, there was no constitutional requirement to be met in that regard.[69]

8. Summary

Hungary, as the external border of the EU, has faced a significant wave of migration since 2015, which has led to several amendments to laws and the Fundamental Law. Furthermore, the EU and the ECHR have taken action in response. However, it is an interesting contrast that despite this, asylum cases in the strict sense are almost non-existent in the practice of the Constitutional Court.

Because of the historical background, asylum issues had avoided the Constitutional Court before 2016. From 1989, Hungary adopted the international asylum system automatically without much debate. This system worked for a long time without major difficulties or controversy.

However, as a state response to the 'refugee flood' from 2014, but mostly from 2015, significant changes were introduced. Despite this, the constitutional review of the legislative amendments has not been initiated before the Constitutional Court and no constitutional complaints have been lodged in individual cases. The decisions in which the institution of asylum has been raised have been taken in constitutional interpretation proceedings. The clash between the strict approach of the Hungarian state on asylum issues and the EU processes in the opposite direction has brought the issue of asylum to life in the proceedings of the Constitutional Court. Furthermore, since this is really at the heart of the division of competences between the Member State and EU, these challenges have grown into problems pertaining to sovereignty, competence, and national values, rather than an asylum issue. Because it has arisen unilaterally as a matter of sovereignty, identity, national culture, and, most importantly, the powers of the EU, no new interpretative label has been added to the issue of asylum and the decisions did not answer everyday questions that affect the asylum scene, such as access to the territory, pushback phenomenon, provision of procedural guarantees, effectiveness of legal remedies, and conflict of all these with state sovereignty. In addition, although the Constitutional Court has raised questions pertaining to competences, sovereignty, and constitutional identity, these decisions did not represent a revolutionary change in the competence issue. Although new interpretative aspects have emerged, the Constitutional Court has not taken steps to undermine the validity of EU law or radically change the relationship between EU and national law.

68 | Ruling 3394/2022 (X. 12.), Reasoning [18]–[19].
69 | Reasoning [31].

For the future, the question of the substance of asylum as a constitutional right remains an option for the Constitutional Court. On one hand, it has an ongoing procedure in which this would be possible. On the other, it cannot be ruled out that as the EU constantly pressures Hungary to adjudicate applications from those entering its territory, such an individual case could be brought before the Constitutional Court. It already stated that fundamental rights protection does not extend to activities not covered by or not closely linked to the right of asylum, such as illegal immigration or residence, and by analogy, there is no fundamental rights protection in cases where a person abuses the asylum procedure to regularise his/her stay in Hungary. Following the amendment of the Fundamental Law, protection is not extended to those who entered Hungary through a country where they have not been subject to persecution or an imminent threat of persecution. However, these issues may change as the legality of entry and residence changes. Similarly, the scope of the safe third country definition may change. As such, it cannot be said that there is no room for manoeuvre left for the Constitutional Court.

Bibliography

Berkes, L. (2008) 'Fél lábbal a Paradicsomban. Menekültügyi igazgatás nemzetközi jogi és európai jogi kitekintéssel', *Iustum Aequum Salutare,* IV(1), pp. 77–95.

Békés, Á. (2021) '3/2019. (III. 7.) AB határozat – jogellenes bevándorlás elősegítése' in Gárdos-Orosz, F., Zakariás, K. (eds.) *Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990-2020*. Budapest: HVG-ORAC, TK-JTI, pp. 941–954.

Blutman, L. (2022) 'Az Alkotmánybíróság határozata arról, hogy egyes uniós jogi aktusok végrehajtása mellőzhető-e az Alaptörvényre tekintettel. Az uniós jog elsőbbsége és az Alaptörvény', *Jogesetek Magyarázata*, 2022/1, pp. 5–12.

Boed, R. (1994) 'The state of the right of asylum in international law', *Duke Journal of Comparative & International Law,* 5(1), pp. 1–33.

Bokorné Szegő, H. (2003) *Nemzetközi jog*. Budapest: Aula Kiadó.

Chronowski, N. (2019) 'Alaptörvény-értelmezés az európai alkotmányos párbeszéd jegyében – a 2/2019. (III. 5.) AB határozat', *Közjogi Szemle,* 12(3), pp. 72–73.

Chronowski, N. (2022) *Alkotmányosság három dimenzióban*. Budapest: TK Jogtudományi Intézet [Online]. Available at: https://jog.tk.hu/uploads/files/ChronowskiNora_Alkotmanyossag_harom_dimenzioban.pdf (Accessed: 11 October 2023).

Hailbronner, K. (1993) 'The Concept of Safe Country and Expeditious Asylum Procedures: A Western European Perspective', *International Journal of Refugee Law*, 5(1), pp. 31–65; https://doi.org/10.1093/ijrl/5.1.31.

Hautzinger, Z, Hegedüs, J., Klenner, Z. (2014) *A migráció elmélete.* Budapest: Nemzeti Közszolgálati Egyetem Rendészettudományi Kar [Online]. Available at: http://real.mtak.hu/16634/1/w207.bat_session%3D1164013711%26infile%3D%26sobj%3D8961%26cgimime%3Dapplication%252Fpdf (Accessed: 11 October 2023).

Jaeger, G. (2001) 'On the history of the international protection of refugees', *International Review of the Red Cross*, 83(843), pp. 727–738; https://doi.org/10.1017/S1560775500119285.

Kjaerum, M. (1992) 'The Concept of Country of First Asylum', *International Journal of Refugee Law*, 4(4), pp. 514–530; https://doi.org/10.1093/ijrl/4.4.514.

Mohay, Á. (2016) 'A nemzetközi migráció jogi aspektusai, különös tekintettel a legális migráció szabályozására az Európai Unióban' in Tarrósy, I., Glied, V., Vörös, Z. (eds.) *Migráció a 21. században*. Pécs: Oblikon Kiadó, pp. 45–65.

Nash, K. (2009) *The Cultural Politics of Human Rights*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511576676.

Orbán, E., Szarka, V., Szegedi, L. (2023) *Az EU intézményi és döntési folyamatai és a nemzeti közigazgatás kapcsolata*. Budapest: Nemzeti Közszolgálati Egyetem [Online]. Available at: https://tudasportal.uni-nke.hu/xmlui/bitstream/handle/20.500.12944/20592/Az%20EU%20intezmenyi%20%C3%A9s%20dontesi%20folyamatai%20es%20a%20nemzeti%20kozigazgatas%20kapcsolata%202023.pdf?sequence=1 (Accessed: 11 October 2023).

Randelzhofer, A. (2003) 'Die Völker- und verfassungsrechtlichen Grundlagen des deutschen Asylrechts' in Stern, K. (ed.) *Zeitgemäßes Zuwanderungs- und Asylrecht – ein Problem der Industriestaaten*. Berlin: Duncker & Humblot, pp. 19–32.

Slingenberg, L. (2014) *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality.* Hart Publishing.

Szép, Á. (2012) 'A védett beléptetési eljárás kudarca. A diplomáciai menedékjog vége?', *Iustum Aequum Salutare,* VIII(1), pp. 147–161.

Tóth, J. (1994) *Menedékjog – kérdőjelekkel.* Budapest: Közgazdasági és Jogi Könyvkiadó.

Varga, Zs. A. (2018) 'Az alkotmánybíróságok szerepe a nemzeti/alkotmányos önazonosság védelmezésében', *Iustum Aequum Salutare,* XIV(2), pp. 21–28.

MIGRATION IN MODERN SERBIA – MANAGING AND MEDIATING REFUGEE FLOWS

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ABSTRACT

This study outlines the socio-historical context of the movement of populations in a geographical area that roughly corresponds to contemporary Serbia, examining the migration flows in this area since the 19th century. It examines data on the migration management that Serbia undertook during the migrant and refugee crisis of 2015 and the events that followed. This analysis revealed an amalgam of the continuity and discontinuity of migration flows in Serbian society. Serbia has a relatively long history of external migration driven by economic and political circumstances, during which these two groups of drivers trade places based on their dominance. However, a new phenomenon has transformed the entire Serbian territory into a transit zone for migrants and refugees from the Middle East, Africa, and Central Asia attempting to reach the EU. Further, the study demonstrates how Serbian institutions manage these processes by providing various statistical data and commentary on these data.

KEYWORDS

migration
migrants
refugees
asylum
readmission
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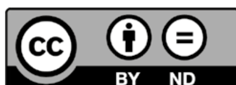

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1. Introduction

Over the previous two centuries, there were two crucial and equally important drivers of migration on the territory of modern Serbia,[3] as elsewhere worldwide and particularly in Eastern and Central Europe: economic (seeking better employment and a better life) and political (intrastate/civil and interstate wars). Economic migration primarily occurred as the migration of individuals and later entire families into more economically advanced parts of Europe and the United States (US) (the West), whereas political migration occurred as a collective and permanent movement because of political circumstances, strife, and changes in state borders. In both cases, those 'moving' were ethnically diverse local populations, who shared similar historical experiences (economic struggle, the way of life, moral codes); however, they also had markedly different perceptions of their collective identities and political inclinations. Regardless of whether these ethnic groups lived in empires on the eastern borders of the European West at the end of the 19th century (Austria-Hungary, Russia, and the Ottoman Empire) or in their own transnational or nation states after the First World War, Serbs and other groups constantly faced emigration (driven by poverty: regional and economic disparities and pronounced social divides) or forced migration (driven by politics: internal ideological conflicts or interstate war).

These drivers of migration partly lost momentum after the Second World War, when intra-European migration came to a particular halt known as the Cold War. At the time, the strict ideological and military division of Europe into 'capitalist' and 'communist' blocs (NATO and the Warsaw Pact) made the borders non-porous and impermeable to anything resembling mass migration.[4] Political dissidents from the East, who were occasionally allowed to emigrate legally or illegally to the West, were the only exceptions. However, after nearly five decades of stagnant borders and migration, when the Eastern Bloc collapsed and the Iron Curtain that divided the European political East and West fell (1989–1990), the collapse of the USSR (1991) led to a new and record wave of economic migration

3 | Historically, the modern concept of 'Serbia', unlike medieval 'Serbian lands', is dynamic in character and signifies a political, cultural and geographical space that has transformed – broadened and narrowed – over time: 'Serbians have come and gone, and they have moved.' (Pavlovich, 2002).

4 | Communist Yugoslavia was a notable exception as it was able to enter into favourable political and economic arrangements with Western European countries. The basis and main impetus for these agreements was the Declaration on the Relations between Socialist Federal Republic of Yugoslavia and the European Economic Community (EEC), signed in late 1967, and particularly the 1968 agreement on economic cooperation between Yugoslavia and West Germany, which set the precedent that the citizens of a communist country could be granted the status of 'temporary workers' in the capitalist West. In addition, West Germany signed its first contracts on inviting foreign labour with Italy (1955), Spain and Greece (1960), Morocco and South Korea (1963), Portugal (1964), and Tunisia (1965). All these agreements were reached 'behind closed doors', without public debate, both in Germany and the other signatories (Hofbauer, 2018).

to the West.[5] Simultaneously, political refugees continued to emigrate, mostly driven by the civil war in former Yugoslavia.[6] Mass migration from the former communist bloc to the West intensified in the early 21st century owing to the significant enlargement of the European Union (EU).[7] This simultaneously led to mass labour migrations into developed Western countries – millions of people from Eastern Europe were now in a position to seek better-paid and more secure employment. This revived and reinforced prominent long-standing migration routes in 19th-century Europe.

However, the second decade of the 21st century saw a historical first in terms of migration – unexpected mass migration from former European colonies and Third World countries into wealthy Western nations via the Balkans and Central Europe. Unlike the early postcolonial period (1960–1990), when there was a steady and more-or-less legal inflow of mostly individuals or small (family) groups from decolonised areas (from Pakistan and India, Central and East Asia, Algeria, and Morocco to Jamaica and other countries in the Caribbean), this time there was a mass, one-off migration of hundreds of thousands of people, mostly young men, from war-torn areas in the Middle East, Africa, Central Asia, and so forth, into developed countries in the European West (the EU, Switzerland, and the UK). To reach their countries of destination by land, these migrants had to pass through countries in South and Central Europe, which were faced for the very first time in their modern history with a different – and socially and politically shocking – side of 'globalisation', whose economic impact has been felt,[8] however, remains conceptually elusive.[9] In this context, Serbia's experiences of producing, managing, and mediating migration flows can be understood as a paradigm of a country which has always found itself on the borders of significant civilisations and margins of modernisation, as well as on the transit routes of global migration flows, which inevitably affect the social order and political systems of (almost all) countries today.

5 | According to official records, 2.72 million Eastern Europeans, that is, 'temporary workers', entered Germany alone between 1989 and 2000.
6 | Cvetković, 1999.
7 | The most significant enlargement of the EU occurred in 2004 with the admission of the Baltic states (Lithuania, Latvia and Estonia), Poland, the Czech Republic, Slovakia, Hungary, Cyprus and Malta, followed by Romania and Bulgaria (2007), and Croatia (2013).
8 | During the 19th century, economic disparity between countries and global regions was relatively small and the primary form of inequality was internal inequality. The differences in income between countries accounted for 20% of global inequality, whereas 80% of inequality was generated within individual countries. During the mid-twentieth century, the process was reversed: the position of a country in the global market had a much more significant impact on the proportions of global inequality than relations within countries. This trend has continued to the present day, when a new struggle for the division of global wealth is occurring, in which countries' internal conflicts are being partially suppressed while global 'civilisational' rivalries in the struggle for the concentration of capital are becoming more intense (Milanović, 2006).
9 | Conrad, 2017.

2. Modern Serbia – ethnic, labour and war-driven migration

During the wars of independence and territorial integrity that occurred in the 19th century and in the first few decades of the 20th century, there was limited emigration of local populations (Serbs and other ethnic groups) from Serbia to developed Western nations. This was the case for a number of reasons, however, primarily because the borders of the Ottoman Empire were not open to migration from the West and because the struggle for freedom is more important than economic security and ambition. Although substantial migrations from poor to rich nations occurred in Europe in the early 19th century for various reasons (wars, political persecution, poverty, and overpopulation), Serbia did not experience large-scale migrations to the West. This was simply because although Serbia was gradually acquiring independence, it was simultaneously freeing itself from both the Ottoman and feudal shackles, becoming a society of independent, free peasants who were striving for the self-sustainability of their small pieces of land that required to be worked on by several people organised into family *zadrugas*. In a country with no major cities or industries and modest but fulfilled economic needs, whose peasants were emancipated but not yet full citizens (they would not acquire the political status of citizens until the sovereignty of the Principality of Serbia and later the Kingdom of Serbia were recognised in 1878 and 1882, respectively), there was minimal motivation to emigrate. However, there was a constant influx of Serbs from the border regions of neighbouring empires (Austria and the Ottoman Empire); a significant number of educated foreigners and entrepreneurs also arrived in Serbia. In the second half of the 19th century, favourable social circumstances, which were enshrined in law with the 1865 Law on the Settlement of Foreigners (which enabled foreigners to easily acquire Serbian citizenship, pay low taxes, and receive investment incentives), led to the arrival of several experts from various profiles – from engineers to professional soldiers (mostly Aromanians, Czechs, and Germans) – in the Principality and later the Kingdom of Serbia.[10]

Simultaneously, the mass migration of populations occurred from Eastern Europe to the West, particularly to the United States. For example, 3.5 million people emigrated to the United States from Poland in the late 19th and early 20th centuries. The same has occurred in other Western European countries, particularly in Italy and Ireland. However, between the two world wars there was a

10 | However, the more independent Serbia became, the more local Muslims emigrated from it – the first to leave were soldiers from fortified towns, followed by other populations that had converted to Islam (by mid-nineteenth century, around 8,000 refugees had fled to 'Turkey', that is, to southern parts of Serbia still under the Ottoman rule). After the Congress of Berlin in 1878, which enabled the Principality of Serbia to obtain independence and Austria-Hungary to occupy and then annex Bosnia and Herzegovina, Muslim populations continued to leave Serbia and Bosnia for Kosovo, Macedonia and Asia Minor (according to different sources, there were between 50,000 and 70,000 refugees). There was a similar number of Serbian refugees from Kosovo.

period of 'restrained mobility' because of the consequences of war, when around eight million Germans and five million Russian, Serbs and other prisoners of war in Germany were left roaming Europe.[11] After 1918, the US passed protectionist measures to safeguard its economy and imposed an immigration quota that stopped immigration. The global crisis of 1929 and high unemployment rates in the US reversed migration flows.[12]

Serbia permanently lost almost one-third of its pre-war population during the wars that occurred in the Balkans and Europe in the second decade of the 20th century (1911–1918).[13] The newly founded union, the Kingdom of Serbs, Croats, and Slovenes (the Kingdom of Yugoslavia as of 1929), experienced migration driven first and foremost by economic reasons, and only partly by political, that is, ethnic, and/or national drivers (primarily in the south, in Kosovo and Metohija).[14]

During the Second World War, when the territory of the Kingdom of Yugoslavia was divided between the occupying forces of Germany, Italy, Hungary, Bulgaria, and the newly founded state-like union called the Independent State of Croatia (NDH),[15] there was mass persecution and, ultimately, the genocide of Jews, Serbs, and Roma (particularly in the NDH). The exact number of killed, exiled, and displaced persons, including those killed in the Ustaša and German concentration camps, has never been determined; however, assessments range from 1.02 to 1.7 million people. In each of these events, 60–75% of the total number of victims were Serbian.

A few decades after the Second World War ended, Serbia as a part of communist Yugoslavia experienced its first mass external migrations that were driven purely by economic reasons.[16] They occurred because of internal economic

11 | Baden, 2000, cited in Hofbauer, 2018, p. 56.

12 | Brunnbauer, 2016, p. 91.

13 | In the wake of the First World War (1914–1918), Serbia had approximately 4.5 million inhabitants, 1.2 million of whom died or disappeared during the war. Official demographic records indicate that there were over half a million people fewer in Serbia in 1921 compared with the number recorded in the population survey conducted in 1911.

14 | After the First World War, populations from undeveloped parts of the newly-founded kingdom, particularly Bosnia, Dalmatia and Montenegro, were resettled. The majority of migrants came to Belgrade, which quadrupled in size in the span of a few decades (to 400,000 inhabitants in 1938).

15 | It is no coincidence that this is when the Commissariat for Refugees and Displaced Persons was established in Belgrade. It was tasked with organising the intake of Serbian and other refugees from the occupied parts of the former Kingdom. In the autumn of 1941, there were already over 300,000 refugees in the areas controlled by German occupiers (the only occupied part of Yugoslavia that did not have a politically defined status). This is why even they were forced to appoint a 'commissioner for migrations' to the Headquarters of the Military Commander in Serbia (Borković, 1979).

16 | In the 1950s, Yugoslavia experienced politically motivated migration as well: most of it occurred in the aftermath of the war (around 100,000 'Yugoslav political emigrants' moved to Western countries, 40,000 of whom were Serbs). There were minor migration flows to Israel (7,500 Jews), Czechoslovakia (around 10,000 Czechs and Slovaks), Turkey (6,400 Turks) and the USSR (around 4,000 refugees). At that time, the first 'non-governmental' centres, that is, expatriate foundations under the indirect control of the federal government were founded with the aim of monitoring the work of the diaspora and later the flow of economic migration from Yugoslavia (Brunnbauer, 2017).

struggle and unemployment, which increased owing to 'temporary employment' contracts that the non-aligned government in communist Yugoslavia made with capitalist Western governments. Through individual and temporary worker emigration and thereafter, through the emigration of their families, 203,000 people left the Socialist Federal Republic of Yugoslavia to go to Western Europe in the first decade, since it became possible to legally travel abroad according to (un)official data. The global oil crisis of the 1970s, which was particularly severe in Western Europe, did not reduce worker migration from Serbia to Western countries. This trend continued for most of the 1980s.[17]

The violent dissolution of Yugoslavia (1991–1995) renewed the purely political drivers of migration of its populations: owing to the ethnic conflict in Yugoslav republics, Serbia had an inflow of as many as 400,000 refugees from Bosnia and Herzegovina alone between 1991 and 1995. At the very beginning of the conflict, several Serbian refugees from Slovenia and Croatia (the former Yugoslav republics that first seceded from Yugoslavia) led Serbia to re-establish its Commissariat for Refugees (1992), tasked with organising the intake and return of refugees from former Yugoslavia. The Law on Refugees, setting the conditions for

> [...] meeting [the refugees'] basic subsistence needs and providing them social security [...] pending the creation of conditions for their return to the places of origin, i.e. pending the creation of conditions for their durable social security[18]

(which likely meant until they became Serbian citizens), was also passed and amended several times. Research confirms what has been observed over time: the vast majority of refugees in Serbia could not return to their former homes, and they established permanent residences in Serbia or emigrated to Western countries. Later, during the armed conflict in Kosovo and NATO's subsequent attack on Serbia and Montenegro (1999), a further 250,000 Serbs and other non-Albanian ethnic groups from Kosovo emigrated to Central Serbia and Serbia's northern province Vojvodina and were granted the vague status of 'exiled persons'.[19]

Finally, after the 'lifting of sanctions' (2001) imposed on Serbia ten years earlier (at the outbreak of the civil war in Yugoslavia), the drivers of migration flow were 'purely economic', however, this time those emigrating were mostly young and educated workers who were leaving for the EU, particularly Austria and Germany and, to an extent, France and Italy.[20] According to the Organisation for Economic Co-operation and Development (OECD), 645,000 people left Serbia between 2000 and 2018 (primarily for Germany, Austria and Switzerland). In this way, Serbia joined the well-established migration flows, that is, economic migration from Eastern and Central Europe (Slovenia and Czechoslovakia were somewhat of an

17 | According to the 1981 population survey, 296,000 people from Serbia were working as 'temporary workers' abroad. This number was probably higher, considering most Gastarbeiters were working illegally, and therefore, could not be included in the survey.
18 | Preambula Zakona o izbeglicama, Službeni glasnik RS, No. 18/92.
19 | 'Kosovo' is today a political entity not recognised internationally by the majority of UN nations. This is why the legal status of Kosovo refugees in Serbia remains unclear.
20 | Dragišić, 2013.

exception). Unsurprisingly, this exacerbated the lack of a domestic workforce, particularly high-skill workers such as engineers and doctors, and middle-skill labour (nurses, construction specialists, hospitality workers), which caused additional issues for the Serbian economy and public services. According to the (current) liberal narrative on 'mobility' as a defining characteristic of contemporary society, which serves to legitimise global migrations, this means that those from economically more disadvantaged areas should now immigrate to Serbia and other countries whose populations have emigrated for better (-paid) jobs.

3. Contemporary Serbia – migrant worker outflow and war-driven migrant inflow

In the early 21st century, migration in Serbia occurred without surprise – refugees from Kosovo were being taken in while the domestic workforce was quietly emigrating abroad – until 2015, when a truly new phenomenon emerged – large columns of refugees from an entirely unexpected direction that had been reserved for conquerors and occupiers alone. This time, it was refugees, not soldiers; that is, migrants arriving from remote parts of the Middle and Far East (Syria, Iraq, Afghanistan, Bangladesh), North Africa (Somalia), and other war-affected areas. Modern regional conflicts have global consequences, and this is more or less common knowledge, however, now all citizens of Balkan countries, from which people traditionally emigrate, must face this for the first time.

The existing institutional framework for monitoring and managing migration and refugee flows in Serbia was almost exclusively engaged in and dedicated to domestic issues: the Law on Refugees dealt with the problems of Serbian refugees and other refugees from former Yugoslav republics and had last been amended in early 2002. It was the legal reflection of the historical circumstances which saw former Yugoslav republics become independent and the Serbian province of Kosovo placed under the protectorate of the UN (and later the EU). However, the foreign policy context changed with the official policy of 'EU integrations', which created an obligation for Serbia to coordinate with EU policy regarding asylum seekers, that is, political refugees from Third World countries who were seeking work in EU countries. Therefore, the new legal framework included the Law on the Confirmation of the Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing without Authorisation (2007),[21] the

21 | Apart from the EU, Serbia has readmission agreements with the following countries: Bulgaria (since May 2001), Croatia (since May 2009), Denmark (since December 2002), France (since April 2006), Germany (since September 2003), Hungary (since December 2002), Italy (since November 2009), Norway (Since November 2009), Slovakia (since January 2002), Slovenia (since September 2001), Switzerland (since Jun 2009) and Sweden (since January 2003). Komesarijat za izbeglice i migracije Republika Srbija: Sporazumi [Online]. Available at: https://kirs.gov.rs/lat/readmisija/sporazumi (Accessed: 8 August 2023).

Law on Foreigners (2008),[22] and the Law on Migration Management (2012),[23] which transformed the Commissariat for Refugees into the Commissariat for Refugees and Migration. To an extent, all of these legal changes in the management of migration flows in Serbia were preparations for what would follow in 2015.

This year marked a watershed because of the increased influx of migrants and refugees to Serbia and the beginning of the refugee and migrant crises.[24] As usual, the interplay of causes that led to the crisis at that exact moment and at such a scale is rather complex,[25] however, for the purposes of this study, it will suffice to underline the civil war in Syria and the international military intervention against the Islamic State as key factors. According to UNICEF, more than 1.5 million migrants and refugees have crossed Serbia since 2015; between one-third and one-quarter of them were children.[26] The uniqueness of which became clear when the number of expressed intentions to seek asylum in 2015 and the previous year was compared. In 2014,[27] 16,500 people expressed the intention to seek

22 | 'This law regulates the conditions for the entry, movement, stay and return of foreigners, as well as the jurisdiction and tasks of the state administrative bodies of the Republic of Serbia, in connection with the entry, movement, stay of foreigners on the territory of the Republic of Serbia and their return from the Republic of Serbia' (Zakon o strancima, Sl. Glasnik RS, No. 97/2008, Article 1, Section 1).
23 | 'This law regulates migration management, principles, administrative body responsible for migration management and unified data collection and exchange system in the field of migration management.' (Zakon o upravljanju migracijama, Sl. Glasnik RS, No. 107/2012, Article 1, Section 1).
24 | Scholars and officials in Europe did not register the fact that several months before the large wave of migrants from the Middle East into Europe – or more precisely, in January 2015 – the same phenomenon occurred in Kosovo (Priština), where tens of thousands of Albanians (suddenly, but in a well-organized way) took 'charter buses' to go to Western countries because they heard that 'Germany, Austria and Switzerland were granting asylum to anyone who applies to live there'. It is not clear who organised this wave of migration and with what results (the number of those who were deported or granted asylum). The German authorities called the entire situation 'an organised abuse of the right to an asylum'. Not long before these 'charter buses' were stopped, a much larger wave of migrants began from the Middle East, created by the invitation of the same government in Germany. DW: Organizovana zloupotreba prava na azil [Online]. Available at: https://www.dw.com/sr/organizovana-zloupotreba-prava-na-azil/a-18249174 (Accessed: 8 July 2023).
25 | Zaragoza-Cristiani, 2015, pp. 6–17.
26 | UNICEF: Izbeglička i migrantska kriza [Online]. Available at: https://www.unicef.org/serbia/izbeglicka-i-migrantska-kriza (Accessed: 11 May 2023).
27 | The primary sources of data in this part of the study are the Migration Profiles of the Republic of Serbia. The definition of a migration profile can be found in the Introduction of this document for each year and it remains unchanged in every profile. The 2014 Profile, for example, states: 'The Migration Profile is a document which compiles data on all categories of migrants in the country, classified in accordance with the Regulation 862/2007 of the European Parliament and of the Council of 11 July 2007, on Community statistics on migration and international protection, and provides a description and analysis of the overall situation relating to migration in the Republic of Serbia. The development of the Migration Profile and its regular updating was the obligation of the Republic of Serbia in accordance with the Visa Liberalization Roadmap, as well as the specific goal set by the Migration Management Strategy (Official Gazette RS, No. 59/09).' The website of the Commissariat for Refugees and Migration of the Republic of Serbia also states that Serbia has been compiling

asylum[28] and in 2015, 579,518 expressed intentions to seek asylum.[29] In March 2016, the Western Balkans route was closed[30] and the number of expressed intentions decreased significantly to 12,811.[31] This statistic has been declining ever since, and only 2,306 foreigners have expressed the intention to seek asylum in Serbia in 2021.[32] Considering that Serbia was not a destination country for these migrants and refugees, the number of asylum seekers has continued to decline significantly each year. In 2015, when 579,518 persons expressed the intention to seek asylum, only 586 (just over 0.1 %) finally initiated the process of seeking asylum.[33] This number declined further when the process was suspended[34] to 546 cases; only 16 persons were granted refuge in Serbia, whereas an additional 14 people were granted asylum and subsidiary[35] protection.[36] Between 2016 and 2021, the percentage of persons who initiated the process of seeking asylum ranged between 1.9% in 2019[37] and 7.45% in 2021[38] out of the total number of people who expressed the intention to seek asylum.

Before proceeding to an overview of readmission statistics, it is vital to note that all the data presented here should be interpreted as a means of constructing an overall picture of migratory movement across the Serbian territory between 2014 and 2021 and not as an indicator of the actual situation in the field. It is impossible to determine the exact number of people who crossed Serbia during this period. Apart from those registered by Serbian institutions, a certain number of people slipped below the radar through the services of smugglers. Each year, the Migration Profile registers dozens of people charged with human trafficking, mostly Serbian citizens. In 2016, 15 foreign and stateless citizens were deported

this document independently since 2010. This information, as well as all the Migration Profiles published between 2010 and 2021 can be found at Komesarijat za izbeglice i migracije Republika Srbija: Migracioni profil Republike Srbije [Online]. Available at: https://kirs.gov.rs/cir/migracije/migracioni-profil-republike-srbije (Accessed: 11 May 2023).

28 | Migracioni profil Republike Srbije, 2014, p. 46.

29 | Migracioni profil Republike Srbije, 2015, p. 41.

30 | On 9 March 2016, Macedonia joined Slovenia, Croatia and Serbia in closing its borders to refugees and other migrants. This officially closed the migrant route across the Balkans. This information can be found at DW: Godišnjica zatvaranje „Balkanske rute“ [Online]. Available at: https://www.dw.com/bs/godi%C5%A1njica-zatvaranje-balkanske-rute/a-37808594 (Accessed: 11 May 2023).

31 | Migracioni profil Republike Srbije, 2016, p. 42.

32 | Migracioni profil Republike Srbije, 2021, p. 37.

33 | Migracioni profil Republike Srbije, 2015, p. 42.

34 | In most cases applicants failed to appear for the appointed interviews because they had already left Serbia.

35 | The Law on Asylum and Temporary Protection of the Republic of Serbia defines subsidiary protection as: ‘Subsidiary protection shall be understood to mean a form of protection granted by the Republic of Serbia to a foreigner who would be, if returned to the country of his/her origin or habitual residence, subjected to serious harm, and who is unable or unwilling to avail himself/herself of the protection of that country’ (Zakon o azilu i privremenoj zaštiti, Sl. Glasnik RS, br. 24/2018, Article 2, Section 8).

36 | Migracioni profil Republike Srbije, 2015, p. 43.

37 | Migracioni profil Republike Srbije, 2019, p. 29.

38 | Migracioni profil Republike Srbije, 2021, p. 38.

from Serbia for illegal entry or smuggling;[39] the Migration Profiles from the remainder of this period did not explicitly provide this information.

The other unknown in this equation is the result of Serbia's visa policy and the fact that it was not coordinated with the EU policy. In late 2022, this element of Serbia's foreign policy came under heavy criticism from European officials[40] because of an increase in the number of illegal entry attempts into the EU. According to Frontex,[41] by December 2022, there had been 308,000 registered attempts to illegally enter the EU over the course of that year, 139,535 of which were registered on the Western Balkans route.[42] How exactly did this occur? As part of its foreign policy, Serbia has been using a visa-free regime to express gratitude to countries that have not recognised the independence of Kosovo. In circumstances where there was a migrant and refugee crisis, this meant that citizens of third countries were able to reach Serbia by airplane without a visa and later attempted, mostly illegally, to enter the territory of an EU country. If the list of countries[43] that have not recognised Kosovo is compared with the list of countries whose citizens need a visa to enter EU territory,[44] there is a considerable overlap between them. Currently, Serbia's visa policy is much more coordinated with EU policy, however, this is the result of gradual change and, as a rule, stems from political pressure. It is difficult to assess how many people crossed Serbia in this way, because they were not included in the statistics presented in this study unless they violated Serbian law. Consider Tunisia as an example. This country has not recognised the unilaterally proclaimed independence of Kosovo, and Serbia introduced a visa requirement for Tunisian citizens in 2022 as a result of criticism from European officials. According to Frontex, Tunisian citizens accounted for a large portion of the people who attempted to illegally enter the EU in 2022, along with Syrian, Turkish, and Afghani citizens.[45] The 2021 Migration Profile of the Republic of Serbia registered 851 persons from Tunisia who were not allowed to enter Serbia,

39 | Migracioni profil Republike Srbije, 2016, p. 37.

40 | The text on this topic can be found at Radio Slobodna Evropa: EU zahtijeva da države Zapadnog Balkana uvedu vize za građane trećih zemalja [Online]. Available at: https://www.slobodnaevropa.org/a/migracione-politike-eu-zapadni-balkan/32162236.html (Accessed: 5 July 2023).

41 | The EU agency in charge of controlling outside EU borders. More on the core purpose of the agency can be found at FRONTEX: Who we are? [Online]. Available at: https://frontex.europa.eu/about-frontex/who-we-are/tasks-mission/ (Accessed: 19 November 2023).

42 | FRONTEX: EU external borders in November: Western Balkans route most active [Online]. Available at: https://frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-november-western-balkans-route-most-active-ULSsa7 (Accessed: 6 July 2023).

43 | Kancelarija za Kosovo i Metohiju Vlada Republike Srbije: Koje države nisu priznale jednostrano proglašenu nezavisnost Kosova? [Online]. Available at: https://www.kim.gov.rs/lat/np101.php (Accessed: 5 July 2023).

44 | Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1806#d1e32-54-1 (Accessed: 6 July 2023).

45 | FRONTEX: EU external borders in November: Western Balkans route most active [Online]. Available at: https://frontex.europa.eu/media-centre/news/news-release/eu-external-borders-in-november-western-balkans-route-most-active-ULSsa7 (Accessed: 6 July 2023).

mostly because the purpose for their stay was unclear.[46] Other statistics in this profile exclude Tunisian citizens and report extremely small numbers for this group.

As for the readmission of foreign and stateless citizens, only the 2021 Migration Profile contains such data, which is somewhat surprising. The 2020 profile contains records on the number of revocations of stay, and the profiles for 2018 and 2019 contain data on foreigners' refusal of entry, in parts that concern the prevention of illegal entry and stay in Serbia. The current Law on Foreigners[47] defines return as the 'procedure of returning a foreigner, whether voluntarily or forcibly, to his country of origin, country of transit in accordance with bilateral agreements or readmission agreements, or to a country to which the foreigner is returning voluntarily and in which he will be accepted'.[48]

Certainly, the return procedure includes readmission, however, it is impossible to distinguish between readmission and other cases defined in this section of the Law on Foreigners. Therefore, the statistics from the Migration Profiles were supplemented with official records of Serbia's Ministry of the Interior on readmission, which were obtained by submitting a written request to this branch of the Serbian government. These data were not included in the Migration Profiles essentially because states compile statistics for themselves and not for conducting research. Without examining the important methodological issues concerning the reliability of official statistics, these data are presented at the end of this section. This study focuses on this aspect of migration flow management because Hungary, Austria, and Serbia signed a Memorandum of Understanding on 16 November 2022 which concerns, among other matters, the return of people from Serbia based on the Readmission Agreement, which constitutes an important part of managing and mediating migration flows, as the title of this paper suggests.

Three similar categories, in which all Migration Profiles between 2010 and 2021 contain data on the revocation of stay, protective measures of removal, and security measures of expulsion are also highlighted.[49]

46 | Migracioni profil Republike Srbije, 2021, p. 28.

47 | 'This law regulates the conditions for the entry, movement, stay and return of foreigners, as well as the jurisdiction and tasks of the state administrative bodies of the Republic of Serbia, in connection with the entry, movement, stay of foreigners on the territory of the Republic of Serbia and their return from the Republic of Serbia' (Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019, Article 1, Section 1).

48 | Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019, Article 3, Section 26.

49 | Moreover, there is an unofficial practice of pushback. This means that migrants are gathered in the areas near the border with one of the neighboring states along the migratory route, then driven to the closest border crossing and then released and told in which direction to go. This is usually done by the police and threats are also part of the process. Described practice is not characteristic only for Serbia and pushback is common practice among the states along the migratory route, as NGOs are claiming (Štambuk and Tasovac, 2022; Đurović, 2021). However, Serbia is among the small number of countries actually acknowledging pushback happening. Serbia's Constitutional Court ruled in favour of 17 Afghani citizens on December 29, 2020 who were pushed back to Bulgaria in February 2017. Court compensated each Afghani citizen with, symbolic, 1000e and more importantly, acknowledged wrongdoing of the members of border police in Gradina, where the incident occurred (Bilten Ustavnog suda za 2020. Godinu, 2021, pp. 1261–1295; Đurović, 2021).

The Law on Foreigners from 2018 defines forcible removal as 'the enforcement of the obligation to return, including the use of police powers'.[50] The revocation of stay and the security measure of expulsion were not specifically defined in the current Law from 2018 or the previous Law from 2008.[51] The Migration Profiles, published between 2010 and 2021, state that the security measure of expulsion is used for foreigners who have committed crimes during their stay in Serbia. Moreover, Article 81 of the current Law on Foreigners states that 'A foreigner may be forcibly removed from the Republic of Serbia if: 1) He does not leave the Republic of Serbia within the time allowed for voluntary return; 2) The time allowed for voluntary return has not been issued; 3) A security measure of expulsion or protection measure of removal of foreigner from the country has been ordered by the court'.[52]

Having navigated the labyrinth of legal acts in Serbia, data on readmission, revocation of stay, and return of persons between 2018 and 2021 is presented below. This timeframe was selected because the current Law on Foreigners was enacted in 2018.

In 2021, revocation of stay was issued to 1,313 persons, 167 of whom were forcibly removed from the border of a neighbouring country based on the Readmission Agreement.[53]

Table 1. The foreigners who were removed based on the Readmission Agreement are categorized according to their citizenship[54]

Citizenship	Number of Persons	Percentage
Afghanistan	116	69.46
Bangladesh	20	11.97
Syria	14	8.38
Iraq	4	2.39
Algeria	3	1.79
Egypt	3	1.79
Libya	3	1.79
Philippines	1	0.59
Lebanon	1	0.59
Russian Federation	1	0.59
Montenegro	1	0.59
Total	167	100

50 | Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019, Article 3, Section 27.
51 | Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019; Zakon o strancima, Sl. Glasnik RS, No. 97/2008.
52 | Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019, Article 81.
53 | Migracioni profil Republike Srbije, 2021, p. 31.
54 | Migracioni profil Republike Srbije, 2021, p. 31.

As for the data for 2020, there are data on the revocation of stays, however, no data on the return of foreigners. This is surprising, considering that both the current and previous Law on Foreigners stipulate that the revocation of stay can be applied to foreign citizens who have previously entered Serbian territory illegally.[55] In 2020, revocation of stay was issued in 720 cases, and 152 persons were forcibly removed. In the same year, 294 people were expelled from Serbia, however, the Migration Profile did not provide citizenship to these people.[56]

The Migration Profiles for 2018 and 2019 contain data on the returns of foreigners; however, for unclear reasons, the profiles for 2020 and 2021 do not. This is particularly surprising, considering that the 2018 Migration Profile states:

> Pursuant to the new Law on Foreigners, which has been in force since 03 October 2018, decisions on return are issued to foreign citizens who have entered and/or are staying in the Republic of Serbia illegally.[57]

As it may be, 2018 saw the revocation of stay issued for 2,142 persons, most of whom (1,136 persons) were citizens of Afghanistan. However, decisions on return were issued to 1,579 people, and the removal of foreigners was issued to 164 people, most of whom were Pakistani (22%), Iraqi (12,8%), and Iranian (10,4%).[58] Finally, a security measure of expulsion was issued for 209 people, however, the profile did not provide their citizenship structure.

In 2019, revocation of stay was issued 849 times, and the Ministry of the Interior issued 7,513 decisions on the return of foreigners.[59] Security measures of expulsion were issued to 109 people, most of whom were citizens of Afghanistan (33%), Iraq (19%), and Romania (11%).[60] There were 258 expelled persons and these data were not categorised according to citizenship.[61] This part of the profile only contains information on the age and gender of these persons, which is the case with every issue in the profile between 2010 and 2020.

What remains to be examined are the readmission statistics based on the official records of the Ministry of the Interior, which were not published in any of the Migration Profiles. These data refer to the period from 2015, when the migrant and refugee crises reached their nadir, and 2022. Four categories of data have been focused upon: the number of requests made by foreign countries to Serbia's Ministry of the Interior to readmit third-country nationals based on the Readmission Agreement,[62]

55 | Zakon o strancima, Sl. Glasnik RS, No. 97/2008, Article 35; Zakon o strancima, Sl. Glasnik RS, No. 24/2018 and 31/2019, Article 39.
56 | Migracioni profil Republike Srbije, 2020, pp. 31–33.
57 | Migracioni profil Republike Srbije, 2018, p. 39.
58 | Migracioni profil Republike Srbije, 2018, pp. 38–39.
59 | Migracioni profil Republike Srbije, 2019, pp. 23–24.
60 | Migracioni profil Republike Srbije, 2019, p. 24.
61 | Migracioni profil Republike Srbije, 2019, p. 25.
62 | The Agreement was signed on 18 September 2007 in Brussels and ratified in the Law on the Confirmation of the Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing without Authorisation (Zakon o potvrđivanju Sporazuma između republike Srbije i Evropske zajednice o readmisiji lica koja nezakonito borave, Službeni glasnik RS – Međunarodni ugovori, No. 103/2007, Article 1).

the number of requests made by the Ministry of the Interior for foreign countries to admit third-country nationals based on the Readmission Agreement, the number of citizens returning to Serbia based on the Readmission Agreement, and the number of citizens returning from Serbia based on the Readmission Agreement. Based on the previous discussion, it is clear why these categories have been selected. For the sake of clarity, these data are presented in tables. Even a cursory glance would be sufficient to conclude that far more people were returned to Serbia than removed.

Table 2. The number of requests made by foreign countries to Serbia's Ministry of the Interior to readmit third country nationals based on the Readmission Agreement

Year	Number of requests
2015	9637
2016	7990
2017	1988
2018	1793
2019	1204
2020	2632
2021	4683
2022	3268
Total	33213

Source: Ministry of the Interior of the Republic of Serbia

Table 3. The number of requests made by the Ministry of the Interior for foreign countries to admit third country nationals based on the Readmission Agreement

Year	Number of requests
2015	249
2016	461
2017	287
2018	992
2019	287
2020	1213
2021	750
2022	1657
Total	5896

Source: Ministry of the Interior of the Republic of Serbia.

Table 4. The number of citizens returned to Serbia based on the Readmission Agreement

Year	Number of requests
2015	5442
2016	105
2017	178
2018	486
2019	414
2020	806
2021	890
2022	679
Total	9000

Source: Ministry of the Interior of the Republic of Serbia

Table 5. The number of citizens returned from Serbia based on the Readmission Agreement

Year	Number of requests
2015	116
2016	176
2017	33
2018	17
2019	59
2020	97
2021	166
2022	191
Total	855

Source: Ministry of the Interior of the Republic of Serbia

4. Closing remarks

Focusing on the data presented in this study, the major discrepancy between the number of people who expressed an intention to seek asylum and the number of people who actually initiated this process, stands out. However, this is not surprising, considering that this process was suspended for nearly 90% of the

applicants. What best illustrates how migrants and refugees view Serbia is that almost 580,000 expressed an intention to seek asylum in 2015, resulting in only a few dozen approvals. For the vast majority of people from Asia and Africa who enter its territory, Serbia is a country of transit that directly bears several readmissions. The total number of nationals from the third countries who were returned to Serbia between 2015 and 2022 based on the Readmission Agreement is approximately ten times higher than the number of people who were returned from Serbia on the same basis (to be exact, the numbers are 9000 and 855, respectively).

Furthermore, the Law on Foreigners was amended in 2018, partly because of the experiences in 2015. The fact that return is the default measure for foreigners who illegally enter Serbia or stay in its territory according to the Law from 2018 testifies to the fact that Serbia is aware that the control of migration flows can be exceedingly demanding in terms of resources, and that it is necessary to speed up this process as much as possible. This, in turn, leads to another matter that could easily stay ‘below the radar’. Serbia signed the Memorandum of Understanding with Hungary and Austria simply because any help with readmission is welcome. However, if the focus shifts slightly towards Serbia’s visa policy, the European Union places Serbia under political pressure. In this way, the responsibility for protecting EU borders appears to have shifted from members of the external borders of the EU to those countries that aspire to join the Union. Frontex’s website certainly displays that EU policy is moving in this direction. It does not take much imagination to conclude who will be a casualty if something goes awry in migration flow management.

Bibliography

Bade, K. J., Emmer, P. C., Lucassen, L., Oltmer, J. (eds.) (2007) *The Encyclopedia of European Migration and Minorities: From the Seventeenth Century to the Present*. Cambridge: Cambridge University Press.

Bade, K. J., Münz, R. (eds.) (2000) *Migrationsreport 2000 – Fakten, Analysen, Prognosen*. Frankfurt/New York: Campus.

Borković, M. (1979) *Kontrarevolucija u Srbiji. Kvinsliška uprava 1941-1944*, I. Belgrade: Sloboda.

Brunnbauer, U. (2016) *Globalizing Southeastern Europe: Emigrants, America, and State since the Late Nineteenth Century*. Lanham: Lexington Books.

Conrad, S. (2017) *What is Global History?* Princeton: Princeton University Press.

Cvetković, V. N. (1998) *Fear and Humiliation (Yugoslav War and Refugees in Serbia; 1991-1997).* Belgrade: Institute for European Studies.

Dragišić, P. (2013) 'Emigriranje iz Srbije od šezdesetih godina XX veka do danas. Kvantitativni pregled', *Tokovi istorije*, 21(3), pp. 233–249; https://doi.org/10.31212/tokovi.2013.3.dra.233-249.

Đurović, J. (2021) 'Odluka Ustavnog suda potvrda da se migranti proteruju iz Srbije', *Voice of America*, 22 January [Online]. Available at: https://www.glasamerike.net/a/pushback-migranata-iz-srbije/5747949.html (Accessed: 9 August 2023).

Hofbauer, H. (2018) *Kritik der Migration: Wer profitiert und wer verliert*. Vienna: Promedia.

Milanović, B. (2016) *Global Inequality: A New Approach for the Age of Globalization*. Harvard: Harvard University Press, Belknap Press; https://doi.org/10.4159/9780674969797.

Pavlowitch, K. S. (2002) *Serbia: The History Behind the Name.* London: C. Hurst & Co. Publishers.

Štambuk, M., Tasovac, M. (2022) 'Dogovor sa retroaktivnim dejstvom', *Pravda za sve*, 12 March [Online]. Available at: https://www.otvorenavratapravosudja.rs/teme/ostalo/dogovor-sa-retroaktivnim-dejstvom (Accessed: 9 August 2023).

Zaragoza-Cristiani, J. (2015) 'Analysing the Causes of the Refugee Crisis and the Key Role of Turkey: Why Now and Why so Many?', *Robert Schuman Centre for Advanced Studies Research Paper,* No. RSCAS 2015/95, pp. 1–26; https://dx.doi.org/10.2139/ssrn.2704901.

Migracioni profil Republike Srbije za 2014. godinu. Beograd: Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/migracioni%20profil%202014.pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2015. godinu. Beograd: Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/migracioni%20profil%202015.pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2016. godinu. Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/migracioni%20profil%202016.pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2018. godinu. Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/Migracioni_profil_2018.pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2019. godinu. Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/Migracioni_profil_Republike_Srbi.%20godinu.pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2020. godinu. Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracioni%20profil%20Republike%20Srbije%202020%20FINAL%20(1).pdf (Accessed: 11 May 2023).

Migracioni profil Republike Srbije za 2021. godinu. Beograd: Vlada Republike Srbije [Online]. Available at: https://kirs.gov.rs/media/uploads/Migracije/Publikacije/Migracioni%20profil%20Republike%20Srbije%20za%202021-%20godinu.pdf (Accessed: 11 May 2023).

Republika Srbija Ustavni sud (2021) *Bilten ustavnog suda za 2020. godinu*. Beograd: Ustavni sud i Službeni glasnik [Online]. Available at: http://www.ustavni.sud.rs/Storage/Global/Documents/Sudska_Praksa/%D0%91%D0%B8%D0%BB%D1%82%D0%B5%D0%BD_2020.pdf (Accessed: 9 August 2023).

ASYLUM AND REFUGEE ISSUES IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

Lana Cvikl[1] – Benjamin Flander[2]

ABSTRACT

This study examines the role of the Constitutional Court of the Republic of Slovenia in addressing asylum and refugee issues. It examines the constitutional and statutory regulations surrounding international protection, the procedure for the recognition of and statistical data on international protection, and the legal remedies available in asylum and refugee cases, with a particular focus on petitions for reviewing the constitutionality of laws and constitutional complaints. Further, it presents a comprehensive analysis of the relevant Constitutional Court's case law, specifically concerning refugees, asylum seekers and individuals seeking subsidiary international protection. The findings reveal that the relevant case law can be categorised into two segments: those that deal with the successful challenges of statutory provisions, and those that pertain to the constitutional complaints of asylum seekers. Additionally, the Court frequently cites decisions from the European Court of Human Rights, however, less frequently the case law of the Court of Justice of the European Union. However, mentioning the case law of other countries is extremely rare. None of the Constitutional Court's decisions concerning Slovenian constitutional identity are directly linked to refugee, asylum, or international protection issues. Nonetheless, it is plausible that the Court may change its approach to these areas in the near future.

KEYWORDS

asylum
refugees
international protection
constitutional court
case law
Slovenia

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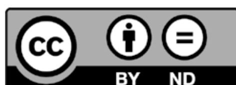

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1. Introduction

The 1963 constitution introduced the Constitutional Court of the Republic of Slovenia. The new Constitution of the Republic of Slovenia[3] (hereinafter: Constitution), adopted in 1991, acquired new important competences and a stronger position as the highest body of the judicial branch of power for the protection of constitutionality, legality, and human rights.[4] The Constitutional Court is regulated by the Constitution in an independent chapter (Articles 160–167), separate from the chapter on state regulation and the chapter on the judiciary. The Constitutional Court comprises nine judges who are elected on the proposal of the president of the Republic by secret ballot through a majority vote of all members of the National Assembly. They are elected for nine years and may not be re-elected. Although listed in the Constitution, the Constitutional Court's powers are determined in detail by the Constitutional Court Act[5] (hereinafter: CCA) adopted in 1994. The most important powers of the Slovenian Constitutional Court are reviewing the constitutionality of laws and the constitutionality and legality of other general acts (e.g. sub-statutory acts) and deciding constitutional complaints regarding violations of fundamental rights.[6] As a guardian of human rights and fundamental freedoms, the Constitutional Court plays an important role in protecting the rights of those seeking international protection and in shaping asylum and refugee policies within the country.

Article 48 of the Constitution stipulates the right to asylum. Within the limits of the (statutory) law, this right shall be recognised for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms.[7] The fundamental/constitutional right of asylum includes the right to ask for and obtain asylum, provided that the applicant meets

3 | The Constitution of the Republic of Slovenia (Ustava Republike Slovenije [Constitution]), Official Gazette of the Republic of Slovenia No. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16.

4 | The judiciary of the Republic of Slovenia comprises general and specialised courts. General courts operate at four levels: local and district courts (first-instance courts), higher courts, which allow appeals against first-instance courts, and the Supreme Court, which is the highest court in the country. Specialised courts are divided into labour courts, which are competent to reach decisions on labour-law disputes and disputes arising from social security, and the Administrative Court, which provides judicial protection in administrative matters and has the status of a higher court. Owing to the special powers of the Constitutional Court, this court has a unique position in the judicial system of the Republic of Slovenia.

5 | The Constitutional Court Act (Zakon o ustavnem sodišču [CCA]), Official Gazette of the Republic of Slovenia No. 64/07 – official consolidated text, 109/12, 23/20.

6 | The competences of the Constitutional Court also include deciding on (a) the constitutionality of the international treaties prior to their ratification, (b) disputes regarding the admissibility of a legislative referendum, (c) jurisdictional disputes, (d) the impeachment of the president of the Republic, the president of the government, and individual ministers, (e) the unconstitutionality of the acts and activities of political parties, (f) disputes on the confirmation of the election of deputes of the National Assembly, and (g) the constitutionality of the dissolution of a municipal council or the dismissal of a major. It also decides on several other matters vested in it by the CCA and other laws.

7 | Constitution, Article 48.

the constitutional criteria, the criteria under the Geneva Convention[8] and the Protocol Relating to the Status of Refugees,[9] and all legal criteria in accordance with established national judicial practice.[10] The Constitution explicitly stipulates that competent state authorities, including courts, must decide the right to asylum within the limits set by statutory law. The latter has been amended several times since the creation of the new legal system for independent Slovenia. The current valid law is the International Protection Act[11] (hereinafter: ZMZ-1), which formulates the right of asylum as the right to international protection. It encompasses two types of international protection for asylum seekers: refugee status and subsidiary protection (see the section on the legal and material background).

As the right to international protection is a fundamental (constitutional) right, when deciding on legal remedies against competent authorities, the competent court must also consider the standards of fair trial from Article 23 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR),[12] and focus on possible connections with other international conventions that regulate the enforceable rights of individuals. During the procedure, if the criteria for recognising the right to asylum are not met, certain other human rights may be relevant in the decision-making process on international protection from the Constitution, the ECHR, the International Covenant on Civil and Political Rights,[13] the UN Convention on the Rights of the Child,[14] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[15] and the European Convention on the Exercise of Children's Rights.[16,17]

The competent state authority and court must focus on the protection of absolute and non-absolute rights, should a party in the proceedings assert this,

8 | The *Convention* relating to the Status of *Refugees* (189 U.N.T.S. 150, entered into force 22 April 1954). United Nations, 1951.

9 | The Protocol Relating to the Status of Refugees (A/RES/2198, entered into force 31 January 1967). United Nations, 1960 [Online]. Available at: https://www.refworld.org/docid/3ae6b3ae4.html (Accessed: 8 August 2023).

10 | Decision of the Constitutional Court of the Republic of Slovenia No. Up-78/00, dated 10 March 2000.

11 | The International Protection Act (Zakon o mednarodni zaščiti [ZMZ-1-UPB1]), Official Gazette of the Republic of Slovenia, Nos. 16/17 – officially consolidated text, 54/21.

12 | Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

13 | UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

14 | UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

15 | UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

16 | Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160.

17 | Šturm et al., 2010. The competent state authority and the court must focus on the protection of absolute and non-absolute rights, should a party in the proceedings assert this, or if there is a real risk of their violation when returning or handing over a person to another country, clearly evident from data available.

or if there is a real risk of violation when returning or handing over a person to another country, clearly evident from data available. If the competent authority or court rejects the request and orders the person to leave Slovenia within a certain period, this decision must contain an assessment that, owing to the rejection of the request, his or her absolute rights from the aforementioned international conventions are not at any real risk of being violated in that other country.[18]

As non-absolute rights, provisions of the ECHR on the right to personal security and liberty, Article 5; the right to respect for family life, Article 8; the right to equality (prohibition of discrimination), Article 14; and the right to an effective legal remedy, Article 13; and provisions of Article 1 of Protocol No. 1 to the ECHR,[19] Article 4 of Protocol No. 4 to the ECHR,[20] and Articles 2, 3, and 4 of Protocol No. 7 to the ECHR may be considered in the asylum procedure.[21] In such cases, when a competent authority or court checks the (in)admissibility of a violation of a non-absolute right, it must apply the constitutional principle of proportionality (Article 2 in relation to Article 15, Paragraph 3 of the Constitution).[22]

After exhausting all legal remedies, the asylum seeker has the opportunity to file a constitutional complaint regarding the violation of a constitutional right. The nature of the right to international protection also imposes positive obligations on the state in relation to ensuring the possibility of effective enforcement of this right and the legal basis for obtaining certain social and economic rights.[23]

This article provides an overview of the legal framework governing asylum and refugee matters in Slovenia and examines the jurisprudence of the Constitutional Court on international protection issues. The primary thrust of the relevant decisions is summarised and a developmental arc of the case law is provided, which reveals that the majority of the Constitutional Court's decisions concern either the abrogation of challenged statutory legal provisions or constitutional complaints of asylum seekers. With its decisions, the Court prompted legislative changes, clarified legal standards, and addressed gaps in the protection of fundamental rights. Considering that Slovenia, as other countries, faces challenges in balancing national security interests with the protection of human rights in the context of asylum and refugee matters, the authors examined the Court's approach to strike this delicate balance. Regarding this particular issue, they explore whether the Constitutional Court has linked asylum and refugee issues with constitutional

18 | Ibid.
According to the Constitutional Courts' case law, in such disputes, state authorities and courts must focus on Article 3 of the ECHR (see *Soering v. the United Kingdom*, *Vilvarajah and others v. the United Kingdom* and *Chahal v. United Kingdom*).

19 | Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

20 | Council of Europe, Protocol 4 to the European 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, 16 September 1963, ETS 46.

21 | Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117.

22 | Šturm et al., 2010. See also Avbelj et al., 2019.

23 | Ibid.

identity. Finally, the authors explore whether the Constitutional Court considers the Constitutional Courts' case law of other countries, in particular EU Member States, or the documents and decisions of international organisations when developing relevant case law.

The issue of boundaries of competences between the European Union (EU) and Slovenia as a Member State, regarding asylum and other migration issues is prescribed in Paragraph 3 of Article 3a of the Slovenian Constitution: 'Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations'. This implies that the Constitutional Court has the competence to decide on the conformity of 'implementation provisions' of Slovenian legislation with the Constitution. These are legal provisions that transform EU laws (Directives or Regulations) into Slovenian national laws. However, as the Court ruled in a landmark case, in instances when implementation provisions simply copy *verbatim* the wording of a Directive, this competence belongs solely to the Court of Justice of the European Union (CJEU), considering that the claimant alleged the non-conformity of a Directive with higher EU documents (e.g. Treaty on the Functioning of the European Union,[24] Charter of Fundamental Rights of the European Union[25]).[26] In other landmark cases, the Court further clarified that implementation provisions cannot be simply any provision; the goal which a Directive prescribes can only be reached by legal means which conform to the Slovenian Constitution.[27] (None of these landmark cases was related to issues of migration or asylum.) However, this is only relevant in petitions for constitutionality reviews which challenge certain legal provisions by alleging their unconstitutionality. However, the situation is entirely different in the case of constitutional complaints. As explained below, all relevant EU Directives and Regulations were implemented within the Slovenian national law. According to an explanation published on the Constitutional Court website, a constitutional complaint can only claim violation of human rights and fundamental freedoms. A constitutional complaint cannot be lodged owing to the erroneous application of substantive or procedural law or an erroneously established state of facts in proceedings before courts.[28] Since EU law is either substantive or procedural, the Constitutional Court cannot decide on it in cases of constitutional complaints. It can only decide whether a provision of national law violates the Constitution or if a human right is violated during asylum proceedings.

24 | European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.
25 | European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
26 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-113/04, dated 4 July 2004.
27 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-37/10, dated 18 April 2013.
28 | The Constitutional Court of the Republic of Slovenia, 2020.

2. An outline of the legal and material background

Slovenia is party to the 1951 Geneva Convention regarding the status of refugees[29] and the 1967 New York Protocol supplementing the Geneva Convention, succeeded by the notification of succession with respect to United Nations Conventions. The asylum system in Slovenia was originally governed by the Asylum Act adopted by the National Assembly on 8 July 1999.[30] This was replaced by the ZMZ-1, which came into force on 4 January 2008.[31] The relevant domestic legal basis is currently the ZMZ-1, in force since 24 April 2016 which implements the following EU rules: Regulation (EC) No. 1030/2002, Regulation (EC) No. 2252/2004, Regulation (EC) No. 767/2008, Directive 2011/95/EU, Directive 2013/32/EU, Directive 2013/33/EU, and Regulation (EU) No. 603/2013.

According to ZMZ-1, refugee status is granted to a person who provides justifiable and authentic proof that he/she is endangered in his/her home country owing to race or ethnicity, religion, nationality, political opinion, or membership of a particular social group.[32] Subsidiary protection status shall be granted to a third-country national or stateless person who does not qualify for refugee status, but with respect to whom substantial grounds have been indicated to believe that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to the country of his or her former habitual residence, would face a real risk of suffering serious harm. The latter entails the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[33] Refugee status is granted for an indefinite period and can only be revoked for specific reasons, as stipulated in Paragraph 1 of Article 67.[34] However, subsidiary protection is temporary.

29 | *Convention* relating to the Status of *Refugees* (189 U.N.T.S. 150, entered into force 22 April 1954). United Nations, 1951.
30 | The Asylum Act (Zakon o azilu [ZAzil]), Official Gazette of the Republic of Slovenia, No. 51/06 – officially consolidated text.
31 | International Protection Act (Zakon o mednarodni zaščiti [ZMZ]), Official Gazette of the Republic of Slovenia, No. 11/11 – officially consolidated text.
32 | ZMZ-1, Article 20, Paragraph 2.
33 | ZMZ-1, Article 20, Paragraph 3.
34 | As stipulated in ZMZ-1, Article 63, Paragraph 1, a refugee's status shall cease if:
- they voluntarily accept the protection of the country of which they are a national;
- they voluntarily regain their citizenship after losing it;
- they acquire a new citizenship and enjoy the protection of the country that granted it;
- they voluntarily resettle in the country that they left and did not return to for fear of persecution;
- the circumstances owing to which they have been granted refugee status cease to exist and they can no longer refuse the protection of the country of which they are a national;
- as a stateless person, they are able to return to their former country of habitual residence, because the circumstances owing to which they were granted refugee status have ceased to exist.

The competent body deciding on applications for international protection is the International Protection Procedures Division[35] (*Sektor za postopke mednarodne zaščite*) of the Migration Directorate (*Direktorat za migracije*), at the Ministry of the Interior (*Ministrstvo za notranje zadeve*, hereinafter: MI).[36]

Foreigners in the Republic of Slovenia or at a border crossing point may express the intent to file an application for international protection with any state body (in practice, intent is usually communicated to a border control police officer). The intent should be expressed without undue delay, 'in the shortest time possible after entering the Republic of Slovenia'. He (or she) is then processed by the police, who establish his identity and the route of entry into the Republic of Slovenia, before transferring him to the competent authorities at the Asylum Home (*Azilni dom*) where he files an application for international protection in the presence of a state-appointed translator.[37]

Administrative laws govern the first stage of the asylum process. The deciding authority performs a personal interview with the applicant to establish the identity, grounds on which the application is based, and all other facts or relevant circumstances.[38] If the application is rejected, the applicant has the right to judicial protection. A lawsuit in an administrative dispute (*upravni spor*) decided before the Administrative Court must be filed within 15 days of the service of the administrative decision. If this decision is made by using an expedited procedure (*pospešeni postopek*), a lawsuit must be filed before the Administrative Court within three days.[39] An appeal to the Supreme Court (*Vrhovno sodišče*) is allowed against judgements issued by the Administrative Court.[40] A petition for constitutionality review or a constitutional complaint, decided by the Constitutional Court, is also allowed to every person in Slovenia, including asylum seekers. The deadline for filing a constitutional complaint is only 15 days, which is much shorter than the general deadline of 60 days.[41]

Few applicants in Slovenia have been awarded international protection. The duration of this process is one of the most significant shortcomings of the Slovenian asylum system.[42] More detailed data is presented in Table 1 and Graph 1.

35 | The translations are in the Slovene language.
36 | Ministry of Interior, Republic of Slovenia, 2023a.
37 | Prior to filing this application, the foreigner must be duly informed of the procedure and his rights in a language he understands. Such cases shall not be regarded as an illegal crossing of the state border (Government, Republic of Slovenia, 2023b).
38 | ZMZ-1, Article 45. See also Pravno informacijski center (hereiafter referred to as 'PIC'), 2023.
39 | ZMZ-1. Article 70, Paragraph 1.
40 | ZMZ-1, Article 70, Paragraph 4.
41 | ZMZ-1, Article 72.
42 | PIC, 2023. It is often said, that Slovenia is not really the applicants' 'desired destination'. Many applicants for international protection leave the Asylum Home, abscond, before a final decision is reached, which causes the procedure to be stopped. In 2023, the trend of arbitrarily leaving Slovenia continued, 89% of applicants for international protection leave the country on average in 15-16 days. Moreover, as the MI notes, in 2022, 31.447 people declared to the police their intent to file an application for international protection. Of these almost half 'arbitrarily left the Asylum Home' before even actually applying for international protection (Government, Republic of Slovenia, 2023a).

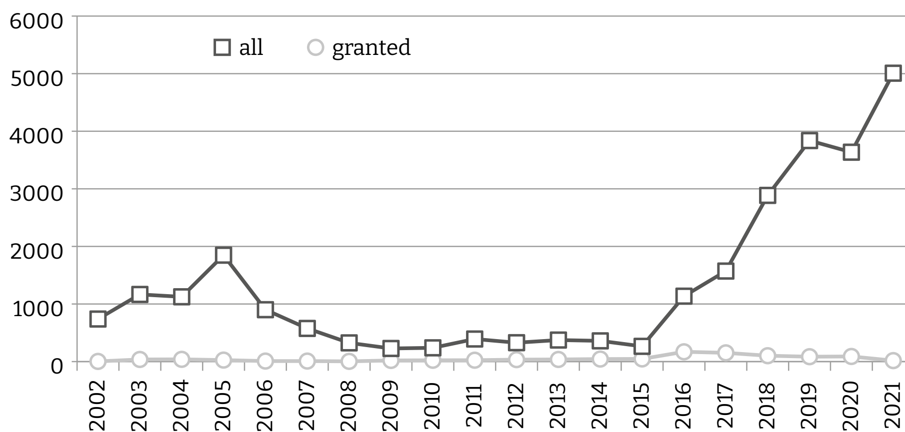
Table 1. Statistical data on international protection, reports, decisions in procedures to grant international protection status, Data for May 2023

YEAR	NUMBER OF ALL APPLICATIONS	APPLICATION – FOR RESTART OF PROCEDURE	PROCEDURE RE-STARTED	APPLICATIONS SOLVED	STATUS GRANTED	APPLICATION DENIED	TERMINATION OF PROCEEDINGS	APPLICATION REJECTED	SAFE THIRD COUNTRY	REFUGEE CRISIS	RESETTLEMENT	RELOCATION
1995	6	/	/	17	2	4	10	1	/			
1996	35	/	/	26	0	0	5	21	/			
1997	72	/	/	51	0	8	15	28	/			
1998	337	/	/	82	1	27	13	41	/			
1999	744	/	/	441	0	87	237	117	/			
2000	9244	/	/	969	11	46	831	0	81			
2001	1511	/	/	10042	25	97	9911	9	0			
2002	640	/	60	739	3	105	619	12	0			
2003	1101	35	45	1166	37	123	964	17	25			
2004	1208	35	70	1125	39	317	737	20	12			
2005	1674	77	160	1848	26	661	1120	38	3			
2006	579	61	339	901	9	561	228	43	0			
2007	434	39	56	576	9	276	238	53	0			
2008	260	18	52	325	4	145	164	12	0			
2009	202	15	22	228	20	89	96	23	0			
2010	246	35	31	239	23	55	120	27	14			
2011	358	51	19	392	24	78	177	40	73			
2012	304	43	21	328	34	75	110	57	52			
2013	272	31	23	374	37	82	177	59	19			
2014	385	27	23	360	44	51	216	49	0			
2015	277	18	22	265	46	87	89	44	0	141		
2016	1308	7	44	1136	170	96	621	249	0	1184		124
2017	1476	20	51	1572	152	89	949	382	0	0		108

YEAR	NUMBER OF ALL APPLICATIONS	APPLICATION – FOR RESTART OF PROCEDURE	PROCEDURE RE-STARTED	APPLICATIONS SOLVED	STATUS GRANTED	APPLICATION DENIED	TERMINATION OF PROCEEDINGS	APPLICATION REJECTED	SAFE THIRD COUNTRY	REFUGEE CRISIS	RESETTLEMENT	RELOCATION
2018	2875	40	27	2886	102	135	2372	277	0	0	40	21
2019	3821	39	56	3838	85	128	3273	352	0	0	0	2
2020	3548	54	29	3636	89	215	2875	457	0	0	0	0
2021	5301	40	23	5008	17	151	3445	1390	0	0	0	5
2022	6787	34	24	6900	203	141	3983	2573	0	0	0	0
2023	2521	14	13	2089	32	110	1009	938	0	0	0	0

[*Statistični podatki o mednarodni zaščiti, Poročila, Odločanje v postopkih za priznanje mednarodne zaščite, podatki za maj 2023*][43]

Graph 1. Number of applications (presented and granted)



[*Število prošenj za azil (skupaj in ugodene)*][44]

43 | Ministry of the Interior, Republic of Slovenia, 2023.
44 | SURS, 2023.

3. Analysis of case law

This section presents a detailed analysis of the relevant Constitutional Court case law related to refugees, asylum seekers, seekers of subsidiary international protection, and foreigners. These case law were found in the online database of the Constitutional Court of the Republic of Slovenia using three search methods: 1. by clicking on category 'administrative law – other personal statuses' (*upravno pravo – druga osebna stanja*) (103 results); 2. by using search string '*Asylum Act*' (*Zakon o azilu*) (117 results), and 3. by using search string 'International Protection Act' (*Zakon o mednarodni zaščiti*) (8 results). The irrelevant results were filtered and the remaining results were cross-referenced.

The relevant case law can be divided into two segments. The first deals with the successful abrogation of challenged statutory legal provisions. Every person in Slovenia, including foreigners, has the right to file a petition for constitutionality review (*pobuda za presojo ustavnosti*) against a part of a statute (usually one or a few articles or parts of an article, be it a paragraph, a point, or only part of a sentence), if he or she can demonstrate a valid legal interest.[45] Most petitions are rejected, however, a few are successful and result in the unconstitutional statutory text being abrogated. A constitutional complaint (*ustavna pritožba*), is a legal remedy (*pravno sredstvo*), allowed to every physical and legal person in Slovenia, including foreigners, if an individual act of the state (usually an administrative decision or judgement) infringed upon his or her human rights (s), protected by the Constitution. A constitutional complaint cannot be filed against a wrong or incomplete establishment of facts in the case or against the wrong or incomplete use of material law. In principle, it can only be filed after all other legal remedies, both regular and extraordinary, have been exhausted. However, it can also be filed before the exhaustion of such legal remedies if an alleged violation of human rights is evident, and if the execution of the challenged decision would result in irreversible damage.[46] In cases related to refugees and international protection, constitutional complaints are always filed against the judgement of the Supreme Court which rules against the applicant in an appeal against the Administrative Court.

3.1. Constitutional Court's abrogation of statutory provisions

In 2006, a provision of the Asylum Act was successfully challenged. It stipulated (more precisely, it was so interpreted in practice), that the deadline to appeal an administrative decision shall begin from the moment the administrative decision (written only in Slovene, not translated) is served to the asylum applicant and not from the moment it is served to their refugee counsellor or legal guardian (in cases of minor applicants). When in fact, both of them should have been served. According to the unclear wording of said provision (the Slovenian conjunction *oziroma* which can mean and or depending on the context), which in practice was, for the most part, misinterpreted to mean *or*. Therefore, only asylum applicants

45 | For more details see Sladič, 2012.

46 | Articles 50–52 of the Constitutional Court Act. See also Mavčič, 2010.

were served. With Decision no. U-I-176/05 of 8 September 2005[47] the Constitutional Court ruled that such a provision (the unclear wording of said provision) violated basic human rights, particularly the right to an effective legal remedy provided by Article 25 of the Constitution. The reason for this decision lay in establishing that such a deadline was different from the general rules of administrative procedures, which clearly state that the deadline for appeal begins only when the decision in question has been served to the representing attorney, counsel, or legal guardian. No special reason was found as to why serving decisions to asylum applicants should be any different. The applicants often neither understood the decision nor were they familiar with how to appeal (considering that they did not speak Slovene), leading to the loss of their right to appeal and subsequent prompt deportation. Therefore, the second sentence in Paragraph 2 of Article 32 of the Asylum Act was declared unconstitutional and abrogated.

The Asylum Act was further successfully challenged (Article 45b), together with an almost identical provision of the subsequent ZMZ-1 (Article 83), in a decision of 15 October 2008, Case No. U-I-95/08, Up-1462/06.[48] In both acts, the provision stated that the applicant was allowed to live outside of the Asylum Home at a private address, only, if (first line of cited Article) 'the Asylum Home is unable to provide appropriate living conditions' (e.g. owing to overcrowding). Furthermore, Article 45b of the Asylum Act (second line) stipulated an additional condition that 'the applicant had already been questioned in a regular procedure'. This line was slightly modified with Article 83 of the ZMZ-1, 'that a personal interview had been already conducted with the applicant'. Both conditions had to be met, one alone did not suffice. In practice, this meant a *de facto* mandatory pre-approval by the MI for applicants who intended to live on a private address (with their relatives, coworkers, friends, fiancé, or simply friends), an approval which was almost uniformly denied. This provision was found in conflict with Article 32 of the Constitution, which ensures freedom of movement, which, according to the Commentary of the Constitution, implies that one can move freely in Slovenia without any additional administrative permission. The Constitutional Court conducted a strict proportionality test. Freedom of movement can be curtailed for four reasons: 1. to ensure criminal proceedings (detention), 2. to prevent the spread of communicable disease, 3. to protect public order, 4. in the interests of national defence. The only relevant reason could be the protection of public order. Interestingly, the Court ruled that the obligation to conduct an interview and pre-approval were proportional limitations of the right to freedom of movement, since it was necessary to establish that the living conditions at a proposed private address were satisfactory. The Court overruled the claims of the MI that residing at a private address would compromise the efficiency of the asylum procedure. The MI could always deny pre-approval, after which the applicant was entitled to a legal remedy. The situation with the first line of Articles 45b and 83 was entirely

47 | U-I-176/05, Official Gazette of the Republic of Slovenia, No. 85/05, dated 8 September 2005.

48 | U-I-95/08, Up-1462/06, Official Gazette of the Republic of Slovenia, No. 111/2008, dated 15 October 2008.

different. According to these provisions, the limitation of freedom of movement was automatic, as it depended on vacancies within the Asylum Home. Only if there were no vacancies and overcrowding became an issue, was it possible to consider residence at a private address. The Court ruled that this was disproportional, and thus, unconstitutional. Thus, the first lines of both Articles under review were found to be unconstitutional, and the National Assembly (*Državni zbor*) instructed to remedy this unconformity within 10 months.

The ZMZ-1 was successfully challenged in connection with the principle of 'general trustworthiness' (*splošna verodostojnost*) in Case No. U-I-292/09 and Up-1427/09 of 20 October 2011[49] concerning anonymous complainants (presumably citizens of the People's Republic of China). The challenged provision, Paragraph 3 of Article 22 of the newly amended ZMZ-1, stipulated: 'If general trustworthiness of the applicant is not established, the competent organ does not consider any information about the country of origin'. The complainants presented no personal documents and refused to reveal any personal information, however, their ethnicity was established to be most probably Chinese and therefore return to the People's Republic of China was imminent. The complainants were apparently untrustworthy, as they provided many contradictory statements during their personal interviews. Untrustworthiness can be either inner, where the applicant states contradictory facts during a single interview or during subsequent phases of the asylum procedure; or exterior, where the applicant's statements are inconsistent with objective knowledge about the country of origin, for example, the applicant claims persecution in a country which is known to be safe.[50] The challenged Paragraph 3 created a 'legal automatism', which was in the opinion of the Court, contrary to the principle of non-refoulement. This principle implies that the applicant should not be returned, directly or indirectly (through a third country), to a country where he or she could face death, torture, or other types of degradation and inhumane treatment. Since the People's Republic of China is notorious for human rights violations on a massive scale, applicants – even if completely untrustworthy – should at least be allowed to propose evidence of the type of persecution they would face if returned to China. As legal automatism made this impossible, the Court found that the challenged provision could potentially violate the principle of non-refoulement, and therefore violate Article 18 of the Constitution, which prohibits torture. This prohibition is absolute: in contrast to the majority of human rights in the Slovenian Constitution it cannot be limited in any way by any other right, state of emergency, public safety and order, or public interest.[51] Thus, the Court abrogated Paragraph 3 of Article 22 of the ZMZ-1. The lower judgements of the Administrative and Supreme Court were also abrogated as they were based on this unconstitutional provision.

In the Case No. U-I-155/11 of 18 December 2013 the Constitutional Court ruled that the applicant should have an effective option to challenge the assumption of a

49 | U-I-292/09, Up-1427/09, Official Gazette of the Republic of Slovenia, No. 98/2011, dated 20 October 2011.

50 | Thomas, 2006, p. 81.

51 | Avbelj et al., 2019.

safe third state. [52] The wording of the provisions which defined 'the third country' was abstract, vague and incomprehensible. A third country was defined as the country where the applicant was located (*se je nahajal*) before arriving to Slovenia. Illegal aliens usually travel across many countries before entering Slovenia, and rarely take a direct flight into the country. No criteria were set to identify this third country. Furthermore, the ZMZ-1 of the time lacked provisions defining a procedure on what was to be done if said third country simply refused entry. For these reasons, the Court abrogated the relevant statutory provisions (Article 60 and Paragraph 1 of Article 62 of the ZMZ-1), as being contrary to the rule of law defined by Article 2 of the Constitution. In the same case, the Court also ruled on the issue of an effective legal remedy. If the applicant had arrived from a country deemed as a 'safe third country' his application for international protection was, according to Article 63, rejected by an administrative order (*sklep o zavrženju*), meaning it was never even considered on merit. The applicant was prevented from stating any facts to support his case. Legal remedies for administrative rejection includes lawsuits for administrative disputes (*upravni spor*) before the Administrative Court. However, only lawsuits against administrative denials suspend the execution of decisions — deportation in this case. Lawsuits against the rejection did not have this effect. The applicants would find themselves in a position where they would be unable to state the facts of their case, and they could only file this lawsuit in an administrative dispute when they were already in another country (which may have also initiated and even finished their deportation to the country of origin). The Court ruled that such a legal remedy was ineffective, and therefore, unconstitutional. The chief, and often the only, source of evidence in the procedure for obtaining international protection is the applicants themselves. To ensure fair procedure, they must be present in person in the territory of the country where they submit their applications. This is the only way they can answer questions and clarify matters. Although the procedure for an administrative dispute in Slovenia provides the possibility of separately requesting a suspension (delay) of administrative execution (*zahteva za zadržanje izvršitve*), which is then rapidly decided in a separate procedure, this is insufficient according to case law of the ECHR. Only a legal remedy which suspends execution is considered effective in cases of international protection. When implementing Directive 2013/32/EU (Procedural Directive),[53] Slovenia was not required to make legal remedies non-suspensive. This characteristic can neither be justified by the requirement that a procedure should be economic and prompt – not on account of basic human rights. The challenged article was found to violate both Articles 23 (Right to Judicial Protection) and 25 (Right to Legal Remedies). Therefore, it was abrogated.

In Case No. U-I-189/14 and Up-663/14 of 15 October 2015, the Court reviewed the constitutionality of the challenged provision (Paragraph 1 of Article 106 of the

52 | U-I-155/11, Official Gazette of the Republic of Slovenia, No. 114/2013, dated 18 December 2013.

53 | 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, pp. 60–95.*

ZMZ-1) which stipulated that 'application for the extension of international protection can only be considered for reasons which the applicant originally claimed'.[54] In practice, this meant that although applicants claimed numerous reasons for their applications, protection was granted for only one reason, one type of persecution. Furthermore, if the applicant had to apply for an extension of subsidiary protection, he or she had to claim the same reason for the persecution as originally claimed. All other reasons were deemed to have been already denied as insufficient. Such practice ignored real-life and changing situations on the ground in the countries of origin (e.g. armed conflict may have ended but persecution and hatred remained, the applicant could be further threatened by terrorism, organised crime, or religious intolerance). In this case, the applicant applied for an extension of subsidiary protection; however, he provided reasons different from those in his original application. Based on Article 106, his application was denied. He filed a lawsuit with the Administrative Court and lost.[55] His appeal to the Supreme Court was unsuccessful.[56] Finally, the Constitutional Court determined that an application for the extension of international protection was essentially the same as a new application for international protection. The Court overruled the objections made by the government that such a procedure would violate the principle of economy, that is, to save time and costs in the procedure, and that the applicant could always submit a new application. The latter places an excessive burden on applicants. An applicant has the constitutional right that an administrative organ and court of law address all claims for international protection, be it old claims as stated in previous application(s) or newly raised claims. By legally limiting the possibility of submitting such claims, the law established legal automatism which deprived applicants of proper legal protection. The Court also dismissed the government's argument that the denial of international protection did not imply an automatic return to the country of origin. Such a denial meant a loss of the right to reside within the territory of Slovenia, placing the applicant into potential danger, even if he or she left voluntarily. Arbitrary limitation of reasons to extend international protection could result in the applicant being exposed to torture or cruel and inhumane treatment upon returning to his or her country of origin. This violates the prohibition of torture (Article 18 of the Constitution). This human right is absolute and cannot be limited for various reasons. The applicant has the absolute right to claim the possibility, danger, and threat of torture for any reason, even if he or she may not succeed in proving it. By depriving him of this right, the challenged provision opened up the possibility of torture, which is unacceptable in the Slovenian constitutional order. Originating from Article 18, the Court abrogated the challenged provisions and erased them. The constitutional complaint was also successful, resulting in vacating the annulments of the judgements by the Supreme and Administrative Courts. Moreover, the Court instructed the Administrative Court to decide on the case again based on this changed provision.

54 | U-I-189/14, Up-663/14, Official Gazette of the Republic of Slovenia, No. 82/2015, dated 15 October 2015.

55 | Case of the Administrative Court, reference No. I U 544/2014, dated 4 June 2014.

56 | Case of the Supreme Court, reference No. I Up 245/2014, dated 30 July 2014.

In Case No. U-I-59/17, concluded on 18 September 2019,[57] the Slovenian Ombudsman successfully challenged Article 10b of the Foreigners Act,[58] which is related to rights of asylum and international protection. The challenged provision provided a special and rather controversial regime with a temporary limitation on the right to apply for international protection. This regime, called 'complex crisis of migration' (Article 10a, *kompleksna kriza na področju migracij*) could be invoked by the Government of Slovenia for a period of no more than six months and on a certain territory which the act does not specify, but logically it could apply only to Slovenian border areas, not to the entire country. The state legislature, the National Assembly, could extend this measure each time for no more than six months (but without any limitation on the number of extensions), by a vote of the absolute majority of all members of the parliament, at least 46 out of 90. *De facto* this special regime clearly constituted a state of emergency, although with a different name. It was included in the Aliens Act following the experience with massive waves of Syrian refugees crossing Slovenia in 2015 and 2016, often accompanied by economic migrants from other countries. Slovenia was logistically poorly prepared for this challenge.[59] (Despite this, the fear of chaos and heightened crime was entirely unfounded, as several refugees and migrants did not have any statistical significance in crime rates. Contrary to expectations, crime rates in 2015 and 2016 were significantly lower than those in previous years, clearly following a downward trend since 2013, when the peak was reached.[60]) Contested Article 10b of the Aliens Act specified special measures. An illegal alien was prevented entry and could be immediately returned to a neighbouring country. If he had already entered, the police would only take his personal data, and regardless of the laws regulating international protection, could reject his application as inadmissible with a police order (*sklep*) on the condition that the neighbouring country where the illegal alien was being promptly deported did not have any systemic deficiencies in the asylum procedure and could not lead to the danger of being tortured or otherwise mistreated. The alien was allowed to appeal to the MI. However, this appeal did not suspend the execution of the police order. He or she would need to wait for the result of the appeal (with a high probability of failure) in another country, provided that this country would not initiate deportation. *De facto*, this provision legalised the mass expulsion of foreigners, which was at the time (and remains) prohibited by the Constitution and ECHR. It deprived potential applicants for international protection of their right to an effective legal remedy. There were a few exceptions to this rule. It was not allowed to be used for aliens in bad health, their family members or unaccompanied minors (Paragraph 3). Minor family members of otherwise healthy illegal aliens could be subject to automatic mass deportation. The Court began its analysis by establishing that a violation of the principle of

57 | U-I-59/17, Official Gazette of the Republic of Slovenia, No. 62/2019, dated 18 September 2019.
58 | The Foreigners Act (Zakon o tujcih [Ztuj-2]), Official Gazette of the Republic of Slovenia, No. 91/21.
59 | Ladić and Vučko, 2016, pp. 16–23.
60 | Republic of Slovenia, Ministry of Interior, Police, 2016, p. 18.

non-refoulement can be either direct, deporting the alien in danger directly to their country of origin; or (more commonly) indirect, removing them to a third country, usually a neighbouring country, where they faced an imminent and real danger of being deported to the place of persecution. Every automatic removal of a person who claims to be in need of protection violates protection from torture as guaranteed by Article 18 of the Constitution. Referring to the substantial case law of the European Court of Human Rights (ECtHR) and the CJEU, the Constitutional Court has stated that circumstances in another EU country that could constitute inhumane treatment must reach a threshold of seriousness.[61] The latter is also reached if the negligence and apathy of state agencies cause applicants to become destitute and unable to fulfil their basic needs, such as food, hygiene, and shelter, resulting in danger that their physical and mental health would deteriorate and in other circumstances which seriously violate human dignity. However, such a threshold is not reached if living in another EU country is burdened with extreme uncertainty and serious deterioration in material well-being. This is also not possible if another EU country is significantly poor.[62] Nevertheless, the applicant should maintain the right to state his facts and special circumstances, and state why the country in question should not be considered safe. There are further conditions: the third country agrees to accept the applicant and provides for a fair procedure to apply for international protection. The government defended the challenged provision as a means of defending public order and, as a lesser measure, to prevent a state of emergency. However, it was clear that the provision aimed to legally establish a *sui generis* situation which would be somewhere between a normal situation and a state of emergency, perhaps a minor state of emergency. There is no such option in the Constitution, and it cannot be circumvented in such a manner. Therefore, the Court determined that it should use the general rules for limiting human rights under normal circumstances (Article 15 of the Constitution). The prohibition of torture in Article 18 is absolute and cannot be limited to any case. Article 16 of the Constitution clearly states that declaring a state of emergency cannot suspend or limit the prohibition of torture. By preventing potential applicants from arguing their case on merit and presenting circumstances in neighbouring EU states as potentially dangerous and harmful to them, the challenged provisions violated Article 18 and were therefore abrogated.

61 | To this end, the Constitutional Court cited more than 20 ECHR and CJEU judgements in footnotes, which had reached such a conclusion. For example, from the ECHR: *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; *Tarakhel v. Switzerland*, Application No. 29217/12, 4 November 2014. From CJEU: *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011.

62 | To explain this, the Constitutional Court based its reasoning on this reasoning, found in a few judgements of the CJEU, for example CJEU Case C-163/17/ Judgement *Abubacarr Jawo v Bundesrepublik Deutschland*; CJEU Joined Cases C-297/17, C-318/17, C-319/17, C-438/17/ Judgement *Bashar Ibrahim (C 297/17) Mahmud Ibrahim, Fadwa Ibrahim, Bushra Ibrahim, Mohammad Ibrahim, Ahmad Ibrahim (C 318/17), Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji (C 319/17) v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov (C 438/17).*

In this landmark case, the Court also clarified issues pertaining to EU law on human rights (migration and asylum cases). When the Constitutional Court concretises the content of human rights and fundamental freedoms, it must consider the primary law of the EU, particularly the Charter of Fundamental Rights and the case law of the CJEU. In such cases, the Constitutional Court can adhere to national standards for protecting human rights if their use neither endangers the level of protection provided by the Charter, as explained by the CJEU, nor interferes with the primacy, unity, or efficiency of EU Law.[63] This implies that Slovenian standards for protecting human rights can be used if the level of protection is equal to or higher than the protection offered by the Charter and CJEU case law.

3.2. Constitutional complaints

The legal journey of an applicant before filing the constitutional complaint can comprise two possible paths.

The first path is a 'denied-approved-denied' by the MI, the Administrative Court and the Supreme Court, respectively. The application is denied or rejected by the MI, followed by a lawsuit before an Administrative Court. The latter often rules against the MI, annuls its decision, and demands that a new one be issued (procedure re-initiated). The rulings of the Administrative Court are often discussed in detail and are familiar with human rights law, ECHR case law, and so on. The MI then appeals the ruling of the Administrative Court to the Supreme Court, which most often sides entirely with the appellant (MI). These judgements often have problems with due process as many claims of the asylum seeker are left unaddressed, violating Article 22 of the Constitution.

The second path is that of uniform denial: 'denied-denied-denied'. If the applicant's lawsuit is denied by the Administrative Court, his or her appeal to the Supreme Court is unsuccessful. The chances of succeeding with a constitutional complaint are usually slim in this case; however, it is possible, has occurred, that the legal provision on which both courts based their legalistic rulings is found to be unconstitutional.

In procedures before the Constitutional Court, many complaints are rejected by a court order (*sklep*) for failing to adhere to procedural conditions as stipulated in Paragraph 1 of Article 55b of the CCA. The most common reason for rejection was 'the lack of legal interest'. This implies that the Court found that even if the constitutional complaint succeeded, it would not result in any legal or tangible benefits for the complainant. In asylum-related cases, such rejections were issued primarily for the following reasons: because the complainant(s) had left the Asylum Home (for a period of more than three days and had not returned),[64] had moved to another

63 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-59/17, 25 May 2017, Paragraph 25.

64 | This is understood to mean the complainant(s) have arbitrarily absconded, and have withdrawn their application for international protection, thus the entire procedure is stopped, as stipulated in Article 50 of the ZMZ-1. The same applies, if an applicant 'sleeps somewhere else', spends the night outside the Asylum Home without a permit, and does not provide a reasonable explanation for doing so (also see Article 50 of the ZMZ-1).

country, or decided to return to their country of origin. For example, in 2014, out of 385 requests for international protection, 216 were considered automatically withdrawn for these reasons.[65] Other rejections were issued because complaints were late (violating the 15-days deadline and of insufficient importance to override this rule)[66] or for other reasons (the representative attorney did not possess the required qualifications).

If the Constitutional Court accepted an asylum-related complaint, there was an adequate chance that it would succeed. From 2005 to 2021, the Court ruled on various asylum-related complaints. Topics of persecution, relevant for granting subsidiary protection, included, harassment of political dissidents in the Russian Federation, 'mystical persecution' by witchcraft in Cameroon, state of war in Afghanistan, political persecution of an applicant from the Tamil minority in Sri Lanka in relation with the principle of non-refoulement, and violence against people with homosexual orientation in an unnamed (anonymised) country. Other interesting issues which had to be solved by the Court included, for example, the right of a minor sister of a refugee to be considered a member of her immediate family (right to family reunification); the issue of new evidence, emerging in a procedure to grant refugee status; the obligation to verify the situation in the country of origin, even when the applicant for subsidiary protection did not provide credible and consistent information; extension of subsidiary protection, owing to new circumstances; the possibility of challenging the presumption of safety in an EU country.

In the case of an immigrant with mental-health problems, Case No. Up-771/06-15 of 15 June 2006 the Court established a violation of human rights.[67] The complainant clearly stated completely wrong information while claiming to be a refugee; however, in the procedure for subsidiary protection, he proposed that a forensic psychiatrist be appointed as expert witness. The MI summarily denied this proposal in an expedited procedure, without even explaining the reasons for the denial. The complainant's attorney filed an administrative lawsuit and won the case before the Administrative Court. However, the Supreme Court agreed with the MI and ruled against the complainant, ordering him to leave Slovenia within one day of the final judgement. The Court found that the Supreme Court completely ignored the complainant's statements about being mentally ill and having problems perceiving reality, and therefore proposing an examination by a forensic psychiatrist. Thus, the Supreme Court deprived the complainant of the right to a fair trial, which clearly violated Article 22 of the Constitution. The judgement was annulled.

The Court established a violation of human rights, Article 22 of the Constitution (equal protection of rights), in Case No. Up-2214/06, of 20 September

65 | Ramšak, 2015, p. 232.
66 | According to Paragraph 3 of Article 50 of the Constitutional Court Act: 'In especially well-founded cases, the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of the time limit referred to in paragraph one of this Article'.
67 | Up-771/06, Official Gazette of the Republic of Slovenia, No. 66/2006, dated 15 June 2006.

2007.[68] The complainants (Mr. Abdulahi and others) were of Roma ethnicity. They claimed persecution by members of the Albanian ethnic majority in the Republic of Kosovo. Their request was denied in an expedited procedure, because their case was considered 'manifestly unfounded' (*očitno neutemeljna*). They lost their appeal to the MI and filed an administrative lawsuit before the Administrative Court, which they won. However, upon appeal of the MI to the Supreme Court (*Vrhovno sodišče*), the latter sided with the ministry and summarised and repeated the previous administrative decision. The chief reason for denying the asylum request was that the complainants failed to notify law enforcement in their country of origin, Kosovo. The MI and Supreme Court were also of the opinion that the persecution was not intensive, because the complainants were subjected only to numerous verbal-only threats, but only one actual physical assault (although this one-time assault resulted in the death of the complainant's father). Persecution must have represented a systematic and persistent violation of human rights, resulting in incessant torture or serious mistreatment known to the authorities, who refused to act and offered protection. To this end, the complainants claimed that there were no police in their region because the police had escaped and the only protection was provided by international peacekeeping units of KFOR; however, it was inadequate, as they had many other concerns. The Constitutional Court ruled that the MI abused the provisions of the expedited procedure, which should always be interpreted only as a benefit for an asylum applicant. Evidently, no persecution occurred only in cases which could not possibly under any circumstances be considered persecution (if the complainant claims no violence whatsoever, neither verbal nor psychological). As soon as an asylum applicant claims that she or he has suffered violence, the expedited procedure cannot be invoked. The MI and Supreme Court argued that (non-) existence of persecution could be inferred simply from the applicant's request for asylum and that it was possible to ascertain from the application that there, in fact, was no violence at all. Thus, they violated the equal protection of rights stipulated in Article 22 of the Constitution, and the judgement of the Supreme Court was annulled.

In 2009, the Court revisited the question of the intensity of persecution in Case No. U-I-50/08 and Up-2177/08, of 26 March 2009.[69] The complainants (Krishtof and Krishtof) claimed persecution owing to various events which had happened in the Russian Federation: denial of issuing an interior passport to one spouse, refusal to register with the Society of Old Austrians, membership in the organisation Memorial (exposing and honouring the victims of Stalinism), denial of request to access archival data, circumstances regarding possible infringement of religious freedom, and dismissal from work without explanation. The MI rejected all these

68 | In contrast to the established practice at the ECtHR, the Supreme Court of the United States and many other supreme courts, Slovenian cases before the Constitutional Court do not have official designation by the family name of the plaintiff, only a serial number. When available, we nevertheless informally state the family name of the plaintiff to make reading and analysis easier to follow. For details on this judgement, see: Up-2214/06, Official Gazette of the Republic of Slovenia, No. 89/2007, dated 20 September 2007.
69 | U-I-50/08, Up-2177/08, Official Gazette of the Republic of Slovenia, No. 30/2009, dated 26 March 2009.

claims as insufficient to grant asylum, which was later confirmed by both the Administrative and Supreme Court. The complainants failed to establish any unfavourable circumstances which would appear to threaten their well-being upon returning to the Russian Federation. The Court ruled that, in this case, the lower decisions were legal, explained in sufficient detail, and consistent, thus not violating the Constitution. The complaint also claimed other violations, such as wrong service of the decision (to the complainants instead of their attorney) and wrong use of language (only essential parts of the decisions were translated into Russian); however, these were denied as minor procedural infractions, not actually violating their human rights.

The Case No. Up-2963/08 of 5 March 2009,[70] involved highly unusual events. The complainant, named Boby Talle, a citizen of Cameroon, claimed to extremely fear returning to his country of origin, because he had been subject to 'mystical persecution' by his many uncles, participating in some type of witchcraft, who desired him dead or insane to claim his substantial inheritance. He applied for subsidiary protection on the grounds that his physical and mental well-being could be in serious danger, up to the point of being killed, if he returned to Cameroon. The MI denied his request by ignoring the fact that he had applied for subsidiary protection. The administrative lawsuit to the Administrative Court against the MI was successful, however the MI appealed to the Supreme Court, which sided with its arguments, although the complainant repeatedly argued that he had indeed applied for subsidiary protection. In this context, it could be understood that his application was disregarded by the MI, as the claims were unusual, even bizarre. The Supreme Court disregarded the application. The Court ruled that such persistent ignorance clearly violated the right to a fair trial provided for by Article 22 (2) of the Constitution. Thus, the judgement of the Supreme Court was annulled.

A case similar to Case No. Up-2214/06[71] was decided in the Case No. Up-96/09 (complainants anonymous for their protection), of 9 July 2009.[72] It involved members of the Ashkali minority in an unnamed country, who claimed to have been persecuted and beaten on two occasions by ethnic Albanians. As in *Abdulahi*, the MI used the expedited procedure to deny the asylum applications, arguing that 'there was obviously not any persecution'. The complainants again won their case in the Administrative Case, only losing in the Supreme Court against the appeal of the MI. The Court found that the expedited procedure was unjustified. As soon as an asylum applicant claims violence, the expedited procedure cannot be implemented. The Constitutional Court established a violation of Article 22 (3) and annulled the judgement of the Supreme Court.

Concerning a citizen of Sri Lanka, Case No. Up-763/09 of 17 September 2009 (the complainant stayed anonymous for his protection),[73] the Court ruled on the

70 | Up-2963/08, Official Gazette of the Republic of Slovenia, No. 22/2009, dated 5 March 2009.

71 | Abdulahi et al., see above.

72 | Up-96/09, Official Gazette of the Republic of Slovenia, No. 57/2009, dated 9 July 2009.

73 | Up-763/09, Official Gazette of the Republic of Slovenia, No. 80/2009, dated 17 September 2009.

principle of non-refoulement. The complainant had lived in the United Kingdom (UK) for six years, before he was detained in Slovenia. Employees of MI consistently misinformed him that he would be deported back to the UK, resulting in his inability to submit applications for international protection. Only later was he informed by an immigration inspector that he would be deported to Sri Lanka. As a member of the Tamil minority, he faced potentially fatal danger when returning to the country of origin. The MI denied his application for international protection. This decision was reversed by the Administrative Court only to be reversed again by the Supreme Court, which sided with the MI and ordered the complainant to leave Slovenia immediately after the final judgement. One of the arguments of the Supreme Court was that the civil war in Sri Lanka had ended and that the Tamil minority was no longer in danger. The Supreme Court completely neglected many arguments backed by media reports and the applicant's documentation that Tamils were being violently persecuted. The Constitutional Court used Articles 18 (Prohibition of Torture) and 22 to annul the Supreme Court decisions. The Court stressed that every decision to deny an asylum request must, by its very nature, include a factual assessment that the applicant's life and health would not be in danger or face any threats owing to torture, mistreatment, or similar actions. Therefore, establishing facts on what was really happening in the applicant's country remained the most crucial and important, albeit also the most difficult, task for the MI organs. They should not simply waive it away from general explanations and naive assumptions that the civil war had ended. The Court also based its decision on the ECHR and related case law of the ECHR by citing the following cases in its footnotes: *Soering v. The United Kingdom,*[74] *Vilvarajah and Others v. The United Kingdom,*[75]*Ahmed v. Austria,*[76] *Salah Sheekh v. The Netherlands,*[77] *Saadi v. Italy.*[78] Rigorous scrutiny required that (1) there were circumstances which justified the hypothesis that torture and similar practices occurred in the country in question, and (2) the applicant was a member of a relevant group of people. Citing *NA vs United Kingdom,*[79] a case also related to Sri Lanka, the Constitutional Court found for the complainant. He succeeded in proving both the conditions of rigorous scrutiny. Thus, the Supreme Court's decision violated the constitutional prohibition of torture in Article 18, which included the prohibition of deportation to countries where nobody could be subjected to torture or cruel or inhumane treatment. For these reasons, the challenged decision was abrogated.

74 | *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989.
75 | *Vilvarajah and Others v. The United Kingdom*, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991.
76 | *Ahmed v. Austria*, 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996.
77 | *Salah Sheekh v. The Netherlands*, Application No. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007.
78 | *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008.
79 | *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008.

In Case No. Up-1116/09 of 3 March 2011 the complainant was detained by oral order at the Centre for Foreigners for a period of three months on the suspicion that he would mislead the authorities and abuse the asylum procedure.[80] He received a written decision only after being detained six days. At the time of the oral order, his constitutional 'Miranda' rights were not respected,[81] because the authorities considered that such detention for foreigners was not a deprivation of liberty. The regime at the centre was strict: the complainant was often not allowed to leave his block, his cell was tiny, he had limited freedom of movement, he had the right to walk outside only for two hours a day (within the premises of the centre), he was constantly supervised by officials, he had to obey the daily schedule of activities, and he was not allowed to wear his own clothes, only grey sweatpants were provided by the institution. The complainant appealed his case first to the Administrative[82] Court and then to the Supreme Court,[83] but lost before both. In deciding on his constitutional complaint, the government claimed in its defence that such detention was not a deprivation of liberty but constituted only a restriction or limitation. The Court found the measure of detention in the case of the applicant to be completely illegitimate, and disproportional; suspicion of potentially misleading the authorities and abusing the asylum procedure somewhere in the future could not possibly constitute a valid reason to deprive anyone of liberty for a period of three months. Therefore, Article 19 (Protection of Personal Liberty) was violated. This was one of the rare constitutional complaints regarding asylum that succeeded despite both lower courts ruling against.

The Court addressed the question of relevant evidence in the asylum procedure in Case No. Up-958/09 and U-I-199/09 of 15 April 2010 (complainants remained anonymous).[84] The complainants applied for a new procedure to be granted asylum. The MI rejected their application on procedural grounds that simply an oral statement about a different situation than before cannot be considered proper evidence. The complainants won the lawsuit before the Administrative Court,[85] which was then reversed by a Supreme Court judgement,[86] siding, as usual, with MI. However, the Supreme Court did not provide any relevant evidence. Therefore, the Constitutional Court established a violation of Article 22 (4), annulled the judgement of the Supreme Court and remanded it to the Supreme Court for further consideration.

80 | Up-1116/09, Official Gazette of the Republic of Slovenia, No. 22/2011, dated 3 March 2011.
81 | According to the Constitution, Paragraph 3 of Article 19: 'Anyone deprived of his liberty must be immediately informed in his mother tongue, or in a language which he understands, of the reasons for being deprived of his liberty. Within the shortest possible time thereafter, he must also be informed in writing of why he has been deprived of his liberty. He must be instructed immediately that he is not obliged to make any statement, that he has the right to immediate legal representation of his own free choice and that the competent authority must, on his request, notify his relatives or those close to him of the deprivation of his liberty'.
82 | Case of the Administrative Court, Ref. No. I U 1199/2009, dated 15 July 2009.
83 | Case of the Supreme Court, Ref. No. I Up 313/2009, dated 27 August 2009.
84 | Up-958/09, U-I-199/09, Official Gazette RS, No. 37/2010, dated 15 April 2010.
85 | Case of the Administrative Court, Ref. No. I U 861/2009, dated 1 June 2009.
86 | Case of the Supreme Court, Ref. No. I Up 264/2009, dated 29 July 2009.

In Case No. Up-150/13-21 of 23 January 2014 brought by a citizen of Afghanistan, the Court addressed issues of arbitrary violence and individual threat.[87] In his asylum request to the MI, the complainant's claims about Taliban violence in the Afghan province of Nangarhar were rejected as unconvincing. The complainant won a subsequent lawsuit to the Administrative Court upon which the MI changed its decision and suggested that the complainant could benefit from the institute of 'internal resettlement', that is, in his case he need not return to his home province which was dangerous, however, he could stay in Kabul, the capital city, deemed relatively safe. In another lawsuit to the Administrative Court, the complainant strenuously objected to the idea of resettlement, claiming that his life in Kabul would be spent in abject poverty, as he would need to live in tents, suffer from a lack of proper hygiene, and face chronic unemployment, while facing danger from arbitrary violence owing to frequent terrorist attacks within the city. This time, even the Administrative Court denied his lawsuit and his subsequent appeal to the Supreme Court was unsuccessful. Citing the precedent *Meki Elgafaji and Noor Elgafaji vs Staatssecretaris van Justitie, C-465/07* before the Court of the EU, which interpreted the meaning of Point (c) of Article 15 in connection with Point (e) of Article 2 of the Qualification Directive,[88] the Constitutional Court ruled that the legal term 'serious harm' did not require that an individual applicant was facing such a harm owing to his personal circumstances. Serious harm could also be considered when arbitrary violence that accompanies an armed conflict reaches levels such high that the applicant may suffer serious harm only by being present in such a country or territory. Moreover, interior settlement can only be achieved if two criteria are met: first, the protection test which refers to the fact that the relevant part of the country is safe from persecution and danger of suffering serious harm, and second, the reasonable expectation test — can the applicant be expected to live there (having no relatives or friends). The Court established that both the Administrative[89] and Supreme Courts[90] failed to sufficiently determine the terms of serious harm and arbitrary violence[91] that infringed upon the complainant's right to a fair trial, as required by Article 22 (5) of the Constitution. Judgements of both courts were annulled.

In the Case No. U-I-309/13 and Up-981/13, of 14 January 2015, brought by a female citizen of Somalia, the Court affirmed the right to family reunification, even with relatives who were not recognised as family members, according to Article 16b of the ZMZ-1.[92] The petitioner, who had a valid refugee status, applied for

87 | Up-150/13, Official Gazette of the Republic of Slovenia, No. 14/2014, dated 23 January 2014.

88 | 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, pp. 9–26*.

89 | Case of the Administrative Court, Ref. No. I U 1703/2012, dated 28 November 2012.

90 | Case of the Supreme Court Ref. No. I Up 12/2013, dated 24 January 2013.

91 | For problems with translation of these terms into Slovenian, see Zagorc and Stare, 2018, p. 813.

92 | U-I-309/13, Up-981/13, Official Gazette of the Republic of Slovenia, No. 6/2015, dated 14 January 2015.

family reunification with her younger sister, a minor. As the article did not explicitly mention brothers and sisters as family members, the application was denied by the MI. The administrative lawsuit against the Administrative Court failed, and the appeal to the Supreme Court was unsuccessful. The MI and both courts interpreted Article 16b in a strictly legalistic and grammatical manner. The Court did not agree with this. It based its decisions on various conceptions of the protection of the family and family life, as found in the Universal Declaration of Human Rights,[93] the International Covenant on Civil and Political Rights,[94] and Article 8 of the ECHR. The Court reinforced its argument by citing dozens of ECHR judgements (in footnotes), explaining that, according to ECHR case law,[95] the concept of family essentially refers to the primary family (spouse and underage children); however, it is not limited to it. Relations with other relatives can be considered family bonds if they exhibit further elements of dependence that surpass normal emotional connections. The Constitutional Court stressed that the EU Charter on Fundamental Rights[96] states in its Article 52 (Paragraph 1), subject to the principle of proportionality, that limitations to those rights may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The limitations of family reunification with underage brothers and sisters do not meet this objective. Article 53 of the Constitution ensures the protection of family life. In addition to conventional primary families (communities of spouses with underage children), other family forms are possible if they live in a common household and have authentic emotional, financial, or other bonds that make them social units similar to primary families. Article 17 of the ZMZ-1 stipulates that the decision-making organ must respect the principles of family reunification. By contrast, Article 16b enumerated a list of relatives that could be considered family members. This arbitrary limitation meant an infringement on the right to family life, as guaranteed by Article 53 of the Constitution. A subsequent proportionality test revealed that this limitation was not proportional. Humanity, sovereignty, and the right of the state to control foreigners in its territory are insufficient reasons to prevent refugees' right to family life, which is next to impossible to nurture in the country of their origin. The intention of the legislature was to allow the reunification of all families which (in our culture) resemble a primary family. The law cannot predict

93 | UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
94 | UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
95 | The Court cited, among dozens of other cases, also: *Boultif v. Switzerland*, 54273/00, Council of Europe: European Court of Human Rights, 2 August 2001; *Gül v. Switzerland*, Application No. 23218/94, Council of Europe: European Court of Human Rights, 19 February 1996; *Ahmut v. The Netherlands*, 73/1995/579/665, Council of Europe: European Court of Human Rights, 26 October 1996; *Sen v. the Netherlands*, Application No. 31465/96, Council of Europe: European Court of Human Rights, 21 December 2001; *K. and T. v. Finland*, Application No. 25702/94, Council of Europe: European Court of Human Rights, 12 July 2001; etc.
96 | European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

the variety of family units in advance. Legally relevant family bonds should be considered on a case-by-case basis. Article 16b arbitrarily excluded sisters from such family bonds and thus automatically prevented many potential applicants for family reunification from even submitting evidence in their favour. Therefore, Article 16b was rendered as unconstitutional. By the time of the Court's decision, they had been replaced. The Court also annulled the judgements of the Supreme Court,[97] the Administrative Court,[98] and the decisions of the MI.[99]

Despite Article 16b being abrogated and replaced, it still caused problems for recognition of family members. In Case No. U-I-68/16 and Up-213/15, of 16 June 2016 the Court further extended the circle of legally recognised family members to the homosexual partners of applicants.[100] The Court began its analysis based on Article 14 of the Constitution, which prohibits discrimination owing to personal circumstances. Article 14 (Equality before the Law) explicitly refers to national origin, race, gender, language, religion, political or other convictions, material standing, birth, education, social status, and disability. Homosexual orientation is not (yet) explicitly mentioned; however, it is no doubt covered by 'any other personal circumstance'. As applicants for international protection enjoy the full right to family life provided by Article 53 of the Constitution, in practice, meaning the right to be reunified with family members, this right also includes same-sex spouses, officially registered or married in another country, or living in a common-law marriage. The family law which was valid at the time was the Marriage and Family Relations Act[101] (MFRA, later replaced by the more liberal Family Code[102]) which stipulated that only persons of the opposite sex could get married or form a common-law marriage. The challenged Article 16b of the ZMZ-1 simply refers to the provisions of the MFRA, which contradicts the established case law that states that the existence of a family should be considered in terms of the strength of familial bonds. If the latter strongly resembles the bonds of a primary family (spouses or parent and child) for reasons of intimacy, trust, economic (co-)dependence, and so on, they should be acknowledged as a family. Therefore, Article 16b was found to be unconstitutional.

In the case of anonymous Complaint No. Up-229/17 and U-I-37/17, of 21 November 2019 the Court addressed the issue of persecution based on homosexual orientation.[103] The complainant, from an unnamed country, claimed to have been persecuted and even raped once, as he reported on social media. However, he only

97 | Case of the Supreme Court, Ref. No. I Up 423/2013, dated 14 November 2013.
98 | Case of the Administrative Court, Ref. No. I U 1295/2013, dated 11 September 2013.
99 | Decision of the Ministry of the Interior, Ref. No. 2142-276/2010/14 (1312-04), dated 5 July 2013.
100 | U-I-68/16, Up-213/15, Official Gazette of the Republic of Slovenia, No. 49/2016, dated 16 June 2016.
101 | Marriage and Family Relations Act (Zakon o zakonski zvezi in družinskih razmerjih [ZZZDR]), Official Gazette of the Republic of Slovenia RS, No. 69/04 – officially consolidated text.
102 | Family Code (Družinski zakonik [DZ]), Official Gazette of the Republic of Slovenia, No. 15/17.
103 | Up-229/17, U-I-37/17, Official Gazette of the Republic of Slovenian, No. OdlUS XXIV, 20, dated 21 November 2019.

contacted the police once. He insisted that reporting assaults and other crimes to the police was useless, and that the police were unable and unwilling to offer him protection. The complainant was refused subsidiary protection by the MI,[104] lost the administrative lawsuit before the Administrative Court,[105] and lost his appeal to the Supreme Court.[106] The chief issue in this case was the duty of the persecuted person to report the acts of persecution to domestic law enforcement. If such a report is not completed, the applicant for asylum carries a heavier burden of proof: he or she must prove that law enforcement in the country of origin cannot provide protection. This can be so for various reasons, such as law enforcement itself is actively involved in persecution, it is corrupt and inefficient. The Court found that both the Administrative and Supreme Courts cited ample evidence that the police in the country of origin were (despite the social climate of extreme hatred towards the LGBT community) accepting criminal complaints and investigating such crimes. Moreover, many active non-governmental organisations (NGOs) and other organisations have been dedicated to helping homosexuals. The complainant was unable to prove whether police assistance was denied in his specific case. The Court found that the lower judgements were well argued and addressed all complainants' claims and concerns in detail; therefore, Article 22 of the Constitution was not violated. The complaint was denied and the judgement of the Supreme Court was affirmed.

3.3. Analysis of the developmental arc and use of foreign case law

The issues of the developmental arc and use of foreign case law were analysed together because they were observed to be related. A schematic table (Table 2) is presented for a better overview.

Table 2. Developmental arc and use of non-domestic sources in the case law of the Constitutional Court of Slovenia

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
Petitions for the review of constitutionality of laws (all resulting in abrogation):				
U-I-176/05 8 September 2005	*Merit* Unanimous	Article 23 – Right to Judicial Protection Article 25 – Right to Legal Remedies	N/A	N/A

104 | Decision of the Ministry of the Interior, Ref. No. 2142-21/2015/19 (1312-15), dated 25 November 2015.
105 | Unfortunately, in this case, the Constitutional Court did not cite the reference number nor date of the decision adopted by the Administrative Court.
106 | Case of the Supreme Court, Ref. No. I Up 240/2016, dated 10 February 2017.

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
U-I-95/08 and Up-1462/06 15 October 2008	*Merit* Unanimous	Article 32 – Freedom of Movement	N/A	N/A
U-I-292/09 Up-1427/09 20 October 2011	*Merit* 7:1 (one concurring separate opinion)	Article 18 – Prohibition of Torture	Geneva Convention, Article 33 ECHR, Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	N/A
U-I-155/11 18 December 2013	*Procedural* (unclear formulation of statutory provision) 5:3	Article 2 (rule of law – rules must be precise)	Directive 2013/32/EU (*Procedural Directive*)	*Gebremedhin vs France, Muminov vs Russia*, *Abdolkhani and Karimnia vs Turkey, M. S. S. vs Belgium and Greece* (ECHR, footnote); *European parliament vs Council of the EU* (CEU), *BVerfGE 94, 49* (German Const. Court)

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
U-I-309/13 and Up-981/13 14 January 2015	*Merit* Unanimous	Article 53 – Marriage and the Family	Universal Decl.; International Covenant on Civil and Polit. Rights; ECHR, Article 8 EU Charter	Dozens of ECHR judgements (in footnotes)
U-I-68/16 and Up-213/15 16 June 2016	*Merit* Unanimous	Article 53	ECHR, Article 8	*Schalk and Kopf vs Austria*, *P. B. and J. S. vs Austria*, *Pajić vs Croatia*, *Vallianatos and others vs Greece* (in footnotes)
U-I-59/17 18 September 2019	*Merit* 8:1 (4 concurring separate opinions)	Article 18	ECHR, Article 3	More than 25 ECHR and CJEU judgements cited in footnotes
Constitutional complaints (some finding a violation, others no violation)				
Up-771/06 15 June 2006	*Procedural* Unanimous	Article 22 – Equal Protection of Rights	N/A	N/A
Up-2214/06 20 September 2009	*Procedural* Unanimous	Article 22	N/A	N/A
U-I-50/08 and Up-2177/08 26 March 2008	*Merit, denied* Unanimous	no violation	N/A	N/A
Up-2963/08 5 March 2009	*Procedural* 6:1	Article 22	N/A	N/A

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
Up-96/09 9 July 2009	*Procedural* 5:2	Article 22	N/A	N/A
Up-763/09 17 September 2009	*Merit* 7:1	Article 18 – Prohibition of Torture	ECHR, Article 3 Directive 2004/83/EC	*NA vs The United Kingdom* (and many in footnotes)
Up-958/09 U-I-199/09 15 April 2010	*Procedural* 6:2	Article 22	N/A	N/A
Up-150/13 23 January 2014	*Procedural* 5:3	Article 22 (complainant invoked EU Directive and case law, but his claims were unanswered)	2011/95/EU (Qualification Directive)	*Meki Elgafaji in Noor Elgafaji vs Staatssecretaris van Justitie* (CJEU)
Up-229/17 and U-I-37/17 21 November 2019	*Merit, denied* 7:2	no violation	N/A	N/A

In cases ending with an abrogation, the red line of the Court's decisions can be observed in arguing strongly against any legal automatism. When finding certain statutory provisions to be unconstitutional, the Court argued its decisions on different legal grounds (violations of the freedom of movement (U-I-95/08 and Up-1462/06), the right to judicial protection (U-I-176/05), the prohibition of torture (U-I-292/09 and Up-1427/09, U-I-59/17), and the right to family (U-I-309/13 and Up-981/13, U-I-68/16, and Up-213/15)). Despite this diversity, the overall logic for decision making remains remarkably similar. The Court has been consistently strongly opposed to any legal automatism and consistently strongly in favour of each case being considered on an individual basis, not grouped together by simplifications, generalisations, or abstractions of migrant issues. Despite massive migration crisis (see U-I-59/17), applicants for protection should maintain their basic right to argue their cases and retain their right to challenge legal assumptions (as in the case of a safe third country, see U-I-155/11). In two cases related to the issue of family members (U-I-309/13 and Up-981/13, U-I-68/16, and Up-213/15), the Court also convincingly argued on merit, presenting detailed arguments as to why the issue of family bonds should not be explicitly limited by statutory law, but decided on a case-by-case basis. In both cases

concerning family reunification, the Court embraced progressive social trends in the EU: First, the multicultural nature of the concept of family because families do vary across different cultures (implying that the controversial Article 16b was clearly based on Eurocentric traditional concepts), and second, the rising recognition of same-sex partnerships as equal to spouses of different sexes.

In cases of successful constitutional complaints, the Court almost always used procedural argumentation from Article 22 – Equal Protection of Rights (Up-771/06, Up-2214/06, Up-2963/08, Up-96/09, Up-958/09, U-I-199/09, Up-150/13), meaning that the complainant was not provided a chance to argue his or her case. The only exception is Case No. Up-763/09, based on Article 18 of the Prohibition of Tortures. The reason for such decisions is that successful constitutional complaints are often lodged together with petitions for review of constitutionality, and the Court notices that the challenged provision is indeed against the Constitution. Lower courts, particularly the Supreme Court, often follow such provisions in the letter and decide in an excessively formalistic manner.

In the relevant case law of the Constitutional Court that was analysed, only two instances were observed where the Court cited the case law of another country. In the first instance, that is, Case No. U-I-155/11 of 18 December 2013 the Court cited a decision by the Constitutional Court of the Federal Republic of Germany regarding the criteria for a safe third country: BVerGe 94, 49. However, this citation did not appear to bear any significant merit, was mentioned only in a footnote. In Case No. U-I-59/17 of 18 September 2019 the Court cited the same decision in the same context.[107]

However, the Court frequently cited cases from the ECtHR and the CJEU. It routinely used the ECHR, particularly Articles 3 and 8. Other international documents (the Geneva Conventions; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Covenant on Civil and Political Rights) were also cited, however, no argument was developed on them. The Constitutional Court frequently appeared to reinforce its reasoning in a specific case by citing numerous judgements of the ECHR and the CJEU in which similar decisions had been reached or arguments spelled out. However, these citations do not refer to the use of this case law as a precedent, but rather strengthen the argument, particularly when the Court is bitterly divided (see Case No. U-I-155/11). The final reasoning is always based on the Slovenian Constitution.

It appears that the Court has so far wanted to remain 'on the safe side' by citing a veritable abundance of cases, even dozens of them, so its case law would not be considered radically progressive or conservative and antagonistic to the EU (or to the Council of Europe). In matters of migration and asylum, the Slovenian Constitutional Court is neither an innovator nor a dissident within the EU and the Council of Europe but a slow and cautious follower. Moreover, contrary to expectations, in cases concerning migration or asylum, the judges often did not divide ideologically (although their worldviews are well known to the public and some judges tend to be

107 | BVerfGE 94, 49, dated 14 May 1996. The Court cited this judgement in a footnote to prove that Slovenia has similar criteria for determining a third safe state as Germany, that is, ratification of Geneva Convention and ECHR is insufficient, these criteria must be also obeyed in practice.

more conservative). For example, in Case No. U-I-309/13 and Up-981/13, regarding the right of a Somali refugee to be reunited with her sister as a family member, the decision was reached unanimously. This is perhaps unsurprising, but also in Case No. U-I-68/16 and Up-213/15, regarding the right of a homosexual partner to be recognised as a family member, the Court was unanimous, even conservative Catholic judges voted for such a decision.

3.4. Issue of constitutional identity

The concept of constitutional identity (*ustavna identiteta*) has only begun to develop in Slovenian constitutional theory and remains modest. Jacobsohn,[108] the modern pioneer of the concept, argues that constitutional identity is at its core a legal expression of a nation's political past (history and culture) and a desire to transcend this past. It can be changed but not destroyed. However, constitutional identity is not national identity and would cease to have an identity of its own if it could simply be folded into the latter.[109]

Bardutzky specifies the Slovenian constitutional identity in four distinct categories: 1. essentially, the European constitutional tradition; 2. right to language (Slovenia as a nation is mostly defined by language); 3. pacifism and distrust of the military; and 4. gender equality and reproductive rights.[110] Similarly, Mežnar observes constitutional identity as a strong commitment to human rights – a commitment which is often left wanting, because Slovenia remains a young state with fragile institutions. Nevertheless, Slovenia's historical experience should prioritise human rights over state interests.[111]

108 | Jacobsohn, 2010, p. 355. Jacobsohn's examples in addition to the United States, Ireland, Israel and India, include Kemalist secularism in Turkey and Confucianism as the core ideology of South Korean legal system, although it is not explicitly mentioned. Perhaps the most famous is the pacifist spirit of the post-war Constitution of Japan, enshrined in the almost mythical Article 9, rejecting war and maintaining only self-defence forces.
109 | Rosenfeld, 2009, p. 30.
110 | Bardutzky, 2022, pp. 190–191. Bardutzky also critically notices that some political decisions went against the core areas of Slovenian constitutional identity. For example, membership in the NATO alliance which has often participated in military (mis)adventures in countries far away (in Iraq, Afghanistan, Libya) that had no relation to Slovenia whatsoever has gone strongly against the pacifist commitments that our army can only be used for defence. Providing the army, a limited authorisation to conduct police work on the border during the Syrian refugee crisis of 2015 clearly violated at least the spirit of the Constitution. Reproductive rights of women suffered limitations by a national referendum which prohibited biomedical assisted procreation to single women although such procreation had been legally possible before (Ibid.).
111 | Mežnar, 2019. Our comment is that Slovenia is perhaps the only country in the world which experienced three different types of totalitarianism: south of Slovenia was part of fascist Italy from 1920 to 1943, the north was occupied by Nazi Germany from 1941 to 1945, and after the war a Stalinist-type of socialism initially prevailed until political reforms in 1953. Then the political system became milder and more pluralistic, albeit within the framework of a single-party socialist state where only limited dissent was allowed. Such a unique historical experience should logically result in rejecting much state power and embracing human rights. For discussions of (non-) totalitarian aspects of Yugoslavian political system see: Flere and Klanjšek, 2014; Mastnak, 2016; Kodelja and Kodelja, 2021.

The basis for development of constitutional identity in Slovenia is the concept of '*samobitnost slovenskega naroda*' in the Preamble of the Constitution, which is officially translated as 'national identity' or as it appears in the Court's judgements as 'the identity of the Slovenian people'.[112] So far, seven judgements of the Constitutional Court have mentioned this concept, but only in *obiter dicta*, not in *rationes decidendi*.[113] None of these judgements relate to the problems of refugees, asylums, or international protection. The two most important of these seven judgements concerned the issue of potential discrimination against a Muslim religious minority in a predominantly Catholic and atheist country: the issue of state holidays[114] which are mostly set on the dates of Catholic holidays (Christmas and Easter), and the issue of ritual slaughter.[115]

No issues of constitutional identity arising in the Court's case law regarding refugees, asylum seekers, or foreigners were observed. However, as Mežnar emphasises strong protection of human rights and fundamental freedoms as one of potential future aspects of Slovenian constitutional identity, it is possible that such a constitutional theory will develop in the future.

4. Conclusion

Considering asylum and refugee issues in the case law of the Slovenian Constitutional Court, this study elucidates several critical issues and dilemmas, offering valuable insights and clarifications.

112 | This translation can be criticised to be limited, and therefore, inadequate. The archaic term 'samobitnost' means much more than only identity. If only the latter had been meant by the Constitutional Assembly, there would be other more suitable synonyms available. Literal translation of *samobitnost*, being by itself, implies a sort of 'self-essence', a set of special characteristics which are unique to the Slovenian people, culture and history. It also means independence, originality and creativity. The dictionary definition gives 'something that comes into being or develops without outside influence or assistance'. See Slovar slovenskega knjižnega jezika.

113 | Mežnar, 2019. See also: U-I-370/96, dated 5 June 1997; Rm-1/97, dated 5 June 1997; U-I-266/04-105, dated 9 November 2006.

114 | The Court ruled that the Muslim minority was not discriminated even if Muslims had to take special leave of absence to celebrate Muslim holidays for 'holidays and non-working days are the exterior expression of citizen identity. The dates express traditionally accepted values, historically connected with living on the territory of the present Republic of Slovenia'. See Mežnar, 2019, and Decision of the Constitutional Court of the Republic of Slovenia No. U-I-67/14, dated 19 January 2017.

115 | This case was decided on different grounds. The Court ruled that freedom of religion for Muslims who wanted to consume halal beef, that is, slaughter must be performed on sober, fully conscious animals, thus violating the Animal Protection Act, was in fact infringed upon. However, this infringement was proportional to the constitutional value of well-being of animals. The key factor for such a decision was the fact that Muslims in Slovenia were able to access halal meat through import and they were not deprived of it. See Decision of the Constitutional Court of the Republic of Slovenia No. U-I-140/14, dated 25 April 2018, Official Gazette of the Republic of Slovenia, No. 35/2018.

The Court has succinctly addressed the jurisdictional boundaries between the EU and Slovenia as a Member State. It asserted its competence in adjudicating implementation provisions that transpose EU Directives into national law to achieve specific objectives. However, these provisions must adhere to the principles outlined in the Slovenian Constitution and the pursuit of European goals cannot justify indiscriminate means. Moreover, the Constitutional Court retains the authority to uphold national standards for safeguarding human rights and fundamental freedoms, provided that such standards neither jeopardise the protection guaranteed by the Charter of Fundamental Rights, as articulated by the CJEU, nor disrupt the primacy, unity, and efficacy of EU law. Thus far, the Constitutional Court's perspective on maintaining a higher human rights standard than that of the EU has remained unchallenged in matters of migration and asylum in Slovenia. Nevertheless, it raises the intriguing prospect that the Court's stance may be tested should the EU encroach upon other freedoms enshrined in the Slovenian Constitution, such as by imposing stricter media censorship regulations that impinge on freedom of expression. Whether the Court's resolve holds under such circumstances remains to be seen. Notably, the entirety of EU law pertinent to migration and asylum has been effectively incorporated into the national legal framework, and instances have arisen in which certain statutory provisions have been deemed incompatible with the Constitution, necessitating their nullification. The Constitutional Court has also intervened in constitutional complaints, addressing violations of basic human rights, albeit rights already protected by the Slovenian Constitution rather than by European instruments.

The Constitutional Court has yet to deliberate explicitly on constitutional identity in the context of migration and asylum. Nonetheless, the Court's consistent emphasis on robustly safeguarding the human rights of migrants in its rulings suggests that elements of Slovenia's constitutional identity, rooted in the resolute protection of human rights and fundamental freedoms for all individuals against undue state intervention, may indeed be discerned in these decisions.

In the realms of migration, asylum, and refugee claims, the Constitutional Court plays a pivotal role in upholding human rights and ensuring due process in asylum procedures. Its recurrent affirmation of the right for asylum seekers to be heard and present their cases contrasts with the practices of lower courts and administrative authorities, including the Supreme Court, the highest judicial body in Slovenia. The latter often appears to mirror bureaucratic decision-making by the MI, frequently lacking comprehensive justification. As Slovenia evolves into an increasingly international and culturally diverse society, an optimistic outlook hinges on the anticipation that other echelons of the judiciary will emulate the Constitutional Court's lead. Exemplified by its flagship decisions, the Court has safeguarded progressive social trends such as multiculturalism and equality for same-sex spouses, and acted as a basis for these causes.

The jurisprudential evolution in the Constitutional Court's case law (the developmental arc of its decisions) reveals important developmental trajectories. Cases that culminate in the abrogation of provisions reveal Court's consistent aversion to legal automatism. During periods of pronounced migration crises, the Court resolutely upheld the principle that applicants for international protection must retain

their fundamental right to present their arguments and contest legal assumptions. The Court's earlier judgements on successful constitutional complaints predominantly focused on severe procedural violations, refraining from delving into the substantive merits of a case. Subsequently, a perceptible shift occurred, with the Court assuming a more assertive stance – facilitated by references to precedents established by the ECHR and CJEU – enabling the articulation of more comprehensive arguments. Recent years have witnessed an expansion of the Court's purview to encompass procedural aspects and the augmentation of specific human rights pertinent to asylum seekers.

Although the Constitutional Court has sparingly drawn inspiration from foreign case law, instances of such an influence are rare. Only two instances were identified in which the Constitutional Court of the Federal Republic of Germany was cited, albeit fleetingly and devoid of substantial explication, thus indicating a limited source of inspiration. Conversely, citations of case law from the ECtHR were more prevalent, with over 25 instances. A comparable pattern emerges with respect to citing case law from the CJEU, albeit in a specific context.

In future, it is conceivable that a cultural conflict may materialise between traditionalist factions within constitutional law, including the Court, and the deeply ingrained Slovenian sympathies for individuals who endure human rights violations, particularly those associated with harbouring separatist ideals – a sentiment rooted to some extent in Slovenia's historical experience.

This study aimed at providing an in-depth exploration of pivotal dimensions concerning the Constitutional Court's role in the domain of migration, asylum, and refugee matters, and revealed that the Court's unwavering commitment to human rights and nuanced jurisprudential evolution collectively underscore its significance as a guardian of fundamental freedoms within Slovenia's legal landscape.

Bibliography

Avbelj, M., Bardutzky, S., Dežman, A., Farmany, P., Galič, A., Grad, F., Igličar, A., Ivanc, B., Jambrek, P., Kaučič, I., Kerševan, E. (2019) *Komentar ustave republike Slovenije. Del 1: Človekove pravice in temeljne svoboščine.* [*Commentary on the Constitution of the Republic of Slovenia. Part 1: Human Rights and Fundamental Freedoms*]. Ljubljana: Nova univerza, Evropska pravna fakulteta.

Bardutzky, S. (2022) 'The Constitutional Development of Slovenia (1918 – 2021)' in Csink, L., Trócsányi, L. (eds.) *Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries*. Miskolc–Budapest: Central European Academic Publishing, pp. 173–196; https://doi.org/10.54171/2022.lcslt.ccice_10.

Flere, S., Klanjšek, R. (2014) 'Was Tito's Yugoslavia totalitarian?', *Communist and Post-Communist Studies,* 47(2), pp. 237–245; https://doi.org/10.1016/j.postcomstud.2014.04.009.

Government, Republic of Slovenia (2023a) *'Dejstva o migracijah' [Facts about migration]* [Online]. Available at: https://www.gov.si/zbirke/projekti-in-programi/migracije/#e175736 (Accessed: 30 June 2023).

Government, Republic of Slovenia (2023b) *'International Protection' [Online].* Available at: https://www.gov.si/en/topics/mednarodna-zascita/ (Accessed: 30 June 2023).

Jacobsohn, G. J. (2010) *Constitutional identity*. Harvard: Harvard University Press; https://doi.org/10.4159/9780674059399.

Kodelja, I., Kodelja, Z. (2021) 'Totalitarianism and the Violation of Human Rights in Education. The Case of Slovenia', *Historia scholastica*, 7(1), pp. 183–197; https://doi.org/10.15240/tul/006/2021-1-009.

Komelj, M. (2012) 'The Function of the Signifier 'Totalitarianism' in the Constitution of the 'East Art' Field' in Šuber, D., Karamanić, S. (eds.) *Retracing Images: Visual Culture after Yugoslavia*. Leiden, Boston: Brill, pp. 55–80; https://doi.org/10.1163/9789004224230_004.

Ladić, M., Vučko, K. (2016) 'Slovenia's Response to Increased Arrivals of Refugees: We Don't Want Them, But We Also Don't Understand Why They Don't Want to Stay' in Kogovšek, Š. N., Bajt, V. (eds.) *Razor – Wired: Reflections on Migration Movements through Slovenia in 2015*. Ljubljana: Peace Institute, pp. 15–30 [Online]. Available at: https://www.mirovni-institut.si/wp-content/uploads/2016/03/Razor_wired_publikacija_web.pdf (Accessed: 30 June 2023).

Mastnak, T. (2016) 'Civil society in Slovenia: from opposition to power' in Seroka, J., Pavlovic, V. (eds.) *The Tragedy of Yugoslavia: The Failure of Democratic Transformation*. London: Routledge, pp. 49–66.

Mavčič, A. M. (2010) 'Dostop posameznika do sodne presoje ustavnosti in zakonitosti', *Dignitas*, 45/46, pp. 91–107; https://doi.org/10.31601/dgnt/45/46-8.

Mežnar, Š. (2019) *'Slovenska ustavna identiteta', University of Nova Gorica* [Online]. Available at: https://www.youtube.com/watch?v=RAF4ZDRy44c (Accessed: 23 June 2023).

Ministry of Interior, Republic of Slovenia (2023a) *'Migration Directorate'* [Online]. Available at: https://www.gov.si/en/state-authorities/ministries/ministry-of-the-interior/about-us/direktorat-za-migracije/ (Accessed: 30 June 2023).

Ministry of the Interior, Republic of Slovenia (2023) *'Statistical data on international protection, Reports, Decisions in procedures to grant international protection status, Data for May 2023' Statistični podatki o mednarodni zaščiti, Poročila, Odločanje v postopkih za priznanje mednarodne zaščite, podatki za maj 2023*. [Online]. Available at: https://www.gov.si/assets/ministrstva/MNZ/Dokumenti/DM/maj-2023/Odlocanje-v-postopkih-za-priznanje-mednarodne-zascite-podatki-za-maj-2023.xlsx (Accessed: 30 June 2023).

Mozetič, P. (2016) 'Kaznovanje prosilcev za mednarodno zaščito zaradi izbire države azila', *Časopis za kritiko znanosti*, 264, pp. 159–180 [Online]. Available at: https://www.ckz.si/arhiv/264%20Balkanska%20pot/10Polona_Mozeti%E8.pdf (Accessed: 30 June 2023).

Pravno informacijski center (2023) *'Regular procedure. AIDA – Asylum Information Database, European Council on Refugees and Exiles'* [Online]. Available at: https://asylumineurope.org/reports/country/slovenia/asylum-procedure/procedures/regular-procedure/ (Accessed: 30 June 2023).

Ramšak, M. (2015) 'Predstavitev izkušenj o vlogi svetovalca za begunce pred in med postopkom za mednarodno zaščito', *Pravosodni bilten,* 2015/2, pp. 223–229.

Republic of Slovenia, Ministry of Interior, Police (2016) '*Letno poročilo o delu policije za 2016' Annual report on the work of the Police for 2016* [Online]. Available at: https://www.policija.si/images/stories/Statistika/LetnaPorocila/PDF/LetnoPorocilo2016.pdf (Accessed: 5 August 2023).

Rosenfeld, M. (2009) *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*. London: Routledge; https://doi.org/10.4324/9780203868980.

Sladič, J. (2012) 'Nekatera vprašanja procesne predpostavke pravnega interesa v postopku pred Ustavnim sodiščem RS', *Podjetje in delo*, 38(1), pp. 19–57.

Šturm, L. (ed.) (2010) *Komentar Ustave Republike Sloveije* [*Commentary on the Constitution of the Republic of Slovenia*]. Kranj: Fakulteta za državne in evropske študije.

SURS (2023) *'Number of requests for asylum (together and successful). Število prošenj za azil (skupaj in ugodene)'* [Online]. Available at: https://www.stat.si/Pages/cilji/cilj-10.-zmanj%C5%A1ati-neenakosti-znotraj-dr%C5%BEav-in-med-njimi/10.6-%C5%A1tevilo-prvih-pro%C5%A1enj-za-azil-(skupaj-in-sprejetih)-na-prebivalca (Accessed: 30 June 2023).

The Constitutional Court of the Republic of Slovenia (2020) *'What is a constitutional complaint and in what instances may one be lodged?'* [Online]. Available at: https://www.us-rs.si/faq/what-is-a-constitutional-complaint-and-in-what-instances-may-one-be-lodged/?lang=en (Accessed: 8 August 2023).

Thomas, R. (2006) 'Assessing the credibility of asylum claims: EU and UK approaches examined', *European Journal of Migration and Law,* 8(1), pp. 79–96; https://doi.org/10.1163/157181606776911969.

Zagorc, S., Stare, K. (2018) 'Razlaga instituta subsidiarne zaščite v evropskem azilnem sistemu', *Pravnik,* 73(11/12), pp. 793–930.

Slovar slovenskega knjižnega jezika [Online]. Available at: https://fran.si/130/sskj-slovar-slovenskega-knjiznega-jezika (Accessed: 24 June 2023).

PROS AND CONS OF THE EU–TURKEY REFUGEE DEAL AND WHY THE CONS PREVAIL

Ľudmila Elbert[1]

ABSTRACT

The 'EU–Turkey deal' is a catchy nickname of the official document the 'EU–Turkey Statement'; a result of meetings between EU and Turkey leaders. Although the EU–Turkey deal served as a basis for actions taken in relation to migration both on the side of the EU with its member states and on the side of Turkey, its legal nature remains questionable. Accusations emerged that the EU–Turkey deal resulted in the EU states' failure to comply with the obligations in the field of human rights, particularly the rights of refugees. Yet, according to the judicial review, the individual member states are the ones responsible for implementing the EU–Turkey deal. The purpose of this article is to examine migration-related issues of the EU–Turkey deal. As the EU–Turkey Statement deals mainly with the status of Syrian refugees, legal implications of their status after the deal are one of the main subjects of this research. This article focuses primarily on the deal's legal effects and its predominantly negative effects.

KEYWORDS

EU–Turkey Statement
legality
human rights
Syrian refugees
readmission
relocation
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solidarity

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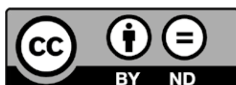

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1. Introduction

Its geographical position makes Turkey a major reception and transit country for migrants coming to Europe from the Middle East or Africa. According to the 2021 UNHCR statistics,[2] Turkey was the major refugee hosting country, and Syria (Syrian Arab Republic) was ranked first among the major refugee source countries. The data show a significant evolution as Afghanistan was at the top of the major source countries for new asylum applications in 2021. Little has changed in relation to Turkey and Syria; Turkey remains the country hosting the largest refugee population (since 2014, when it replaced Pakistan), with the vast majority of refugees coming from Syria (replacing Afghanistan).[3] These statistics confirm Turkey as a key European partner in the battle against smuggling and immigration. For the Member States of the European Union (EU), tackling the migration and refugee crisis is a common obligation which should be implemented in the spirit of solidarity and responsibility.[4] However, Afailal and Fernandez[5] warn against a new form of coloniality (also represented by the EU–Turkey deal) by classifying the population of migrants and EU citizens and countries on EU members and countries where the control of the borders has been externalised.

To handle the migration crisis, the EU and Turkey agreed on 15 October 2015 on the EU–Turkey joint action plan[6] (hereinafter 'the joint action plan'). This was one of the EU's first steps towards cooperation with third countries to stem the flow of migrants to Europe. The joint action plan was negotiated by the European Commission, but its actions were to be implemented by the EU, its institutions, and Member States on one side, and Turkey on the other. The problem of solving the migration flow into Europe was externalised outside Europe. This joint action addresses the reasons for the massive exodus from Syria, primarily due to the country´s ongoing armed conflict. Actions based on this plan aimed to strengthen cooperation between EU Member States and Turkey to prevent irregular migration flows to EU Member States and help Syrians enjoy one form of international protection (temporary protection) as well as their host facilities in Turkey.

To achieve the goals of the action plan, the EU Member States and Turkey launched the plan at their first meeting on 29 November 2015. This plan was intended to facilitate active cooperation regarding migrants not enjoying

2 | UNHCR: Figures at a glance [Online]. Available at: https://www.unhcr.org/about-unhcr/who-we-are/figures-glance (Accessed: 17 July 2023).

3 | UNHCR: 2018 in Review: Trends at a Glance (20 June 2019) [Online]. Available at: https://www.unhcr.org/media/unhcr-global-trends-2018 (Accessed: 17 July 2023). Compare with: UNHCR: 2014 in Review: Trends at a glance (18 June 2015). [Online]. Available at: https://www.unhcr.org/media/unhcr-global-trends-2014 (Accessed: 17 July 2023). UNHCR: 2013 in Review: Trends at a glance (20 June 2014) [Online]. Available at: https://www.unhcr.org/media/unhcr-global-trends-2013 (Accessed: 17 July 2023).

4 | European Council, 2015.

5 | Afailal and Fernandez, 2018, p. 215.

6 | European Commission: EU-Turkey joint action plan (2015) [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860 (Accessed: 17 July 2023).

international protection as they would not have been able to travel to Turkey and the EU. This was intended to ensure the proper application of readmission agreements and the quick return of irregular migrants to their countries of origin.

During the second meeting on 7 March 2016 to implement the action plan, heads of state discussed[7] the fight against smuggling, protection of external borders, return of irregular migrants crossing from Turkey to Greece at the expense of the EU, conditions for the resettlement of one Syrian from Turkey to the EU for every Syrian readmitted by Turkey from the Greek Islands, implementation of the visa liberalisation roadmap and the accession negotiation of Turkey to the EU, and additional funding for refugee facilities for Syrians in Turkey. However, specific implementation measures have not been successfully negotiated between the European Council (EC) and Turkey.

The third meeting between EU Member States and Turkey's representatives resulted in the form of the EU–Turkey Statement,[8] the 'EU–Turkey deal'.[9] The joint statement of the EC and Turkey encapsulated the results of their meetings, focused on deepening relations between the EU and Turkey, and aimed to address the migration crisis. It was published on the EC website. Turkey's main commitment was the readmission of every irregular migrant from Greece, based on the rules of international and EU law (especially the prohibition of collective expulsion and the principle of non-refoulement), with the main goal of ending the suffering of migrants and maintaining public order. The Greek side of the commitment was to ensure that every migrant arriving in Greece would be duly registered and that Greek authorities would process every individual asylum application. Migrants not applying for asylum or whose applications were unfounded or inadmissible, would be returned to Turkey; the EU to bear the return costs. According to the statement, for every Syrian migrant returning from Greece to Turkey, another Syrian would be resettled from Turkey to the EU[10] based on the UN's vulnerability criteria.[11] The EU–Turkey agreement deals in the form of a statement with narrower scope and does not apply to every irregular migrant; it covers only Syrian refugees.

The goals of the EU–Turkey deal have been tested by the practices of EU Member States. This contribution is divided into four main issues, while only

7 | European Council: Meeting of the EU heads of state or government with Turkey (7 March 2016) [Online]. Available at: https://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/ (Accessed: 17 July 2023).

8 | European Council: EU–Turkey statement (18 March 2016) [Online]. Available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ (Accessed: 17 July 2023).

9 | The author decided to use the form 'EU–Turkey deal', as it is a mainstream name of the EU–Turkey Statement, to make the topic clearer and more interesting for the reader, with the acknowledgement that it is not a legally correct term.

10 | See Art. 33 of the Convention Relating to the Status of Refugees. UN General Assembly: Draft Convention relating to the Status of Refugees (14 December 1950), (A/RES/429) [Online]. Available at: https://www.refworld.org/docid/3b00f08a27.html (Accessed: 17 July 2023).

11 | See UNHCR: UNHCR-IDC Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems [Online]. Available at: https://www.unhcr.org/media/unhcr-idc-vulnerability-screening-tool-identifying-and-addressing-vulnerability-tool-asylum (Accessed: 17 July 2023).

the first (second part: numbers, routes, and living conditions) is dedicated to the pros and cons of the deal. As these advantages are not of a legal nature, they will be examined only briefly. The remainder of this paper is dedicated to legal issues which constitute the cons of the deal. The third part of the article discusses the legal nature of the EU–Turkey deal, and the fourth focuses on the rules of international law violated by the actions of EU Member States and Turkey in relation to the implementation of the EU–Turkey deal.

The main purpose of the article is to review legal implications of the EU–Turkey deal. The analysis shows that the EU–Turkey deal created a legal chaos and had a negative impact on the legal and de facto status of migrants and refugees, and relationships between the EU Member States. One may conclude that this study focuses mainly on the negative side of the deal's implementation, but the deal had a few positive impacts too, e.g. the lower numbers of incoming migrants to Europe, changes in migration routes, and the very limited improvement of living conditions in refugee facilities in Turkey, all of which are not of a legal nature. Since this contribution focuses mainly on a legal analysis of the impacts of the EU–Turkey deal, it leads us to the conclusion that, from a legal point of view, cons fundamentally prevail.

2. Numbers, routes and living conditions

The EU–Turkey deal had a few positive effects. There is statistical confirmation that the number of irregular migrants coming to Europe decreased, migrants changed their routes to the EU Member States' territories, and the conditions in the Turkish refugee camps have improved.

Eurostat statistics[12] show that the number of applications for asylum in EU Member States significantly dropped in 2017, mainly in Germany and Greece (mostly refugees who came to Greece via Turkey). Following the EU–Turkey deal, the number of refugees and migrants entering Europe via the Aegean Sea decreased. Pursuant to the deal, the EU sent Syrians to Turkey who did not meet the conditions for international protection as refugees in the form of asylum or subsidiary protection, and Syrians who met the conditions for granting asylum or subsidiary protection were resettled in EU countries from Turkey.[13] It is unclear if the EU–Turkey deal was the main reason for the reduction of the numbers of migrants coming to Europe via Turkey. According to Kirişci,[14] the suspension of the asylum procedures by Greece and its forceful prevention of migrants crossing to the Greece, and the COVID-19 pandemic that forced Turkey to close its

12 | Eurostat: Asylum and first time asylum applicants – annual aggregated data (23 April 2023) [Online]. Available at: https://ec.europa.eu/eurostat/databrowser/view/TPS00191/default/table?lang=en (Accessed: 17 July 2023).

13 | DW: The EU–Turkey refugee agreement: A review (18 March 2018) [Online]. Available at: https://www.dw.com/en/the-eu-turkey-refugee-agreement-a-review/a-43028295 (Accessed: 17 July 2023).

14 | Kirişci, 2021.

borders in 2020, caused the reduced migration flow to Europe.[15] It is clear that the EU–Turkey deal changed migration routes at least for the migrants who travelled from the African continent by the East African, Central Mediterranean or Western Mediterranean routes.[16]

Another positive of the EU–Turkey deal was the support of Turkish facilities for refugees. Turkey hosts some 4 million refugees, of which over 3,6 million are Syrians. Most are seeking resettlement outside camps, where they are vulnerable. Facilities for refugees provide support to those who flee their country of origin because of violence.[17] According to the Facility´s Results Framework, the objectives of refugee facilities encompass education, health, protection, basic needs, livelihood, municipal infrastructure, migration management, and cross-cutting.[18] EU financial support (up to €6 billion) for such facilities was allocated to projects meant to be finished by mid-2021, but which were extended to mid-2025.[19]

While the EU–Turkey deal had many imperfections, one can agree with Kirişci[20] that facilities for refugees that operate as a result of cooperation of the EU Member States, organs and agencies and international organisations on one side, and governmental organs, agencies and civil communities in Turkey on the other side, proved to be a successful tool in providing protection to refugees in Turkey. It suggests that cooperation based on a problem-solving attitude is the key element in dealing with crises. However, the change must be from the ground up and not just because of political negotiations. Migration has strong social implications; society therefore is an essential aspect of migration management. Statistics for the preceding year show reduced numbers of the irregular migrants coming to Europe, change of the migration routes and improvement of the living conditions in Turkish refugee camps, being positive implications of the EU–Turkey deal.

3. Contested legal nature of EU–Turkey deal

The EU–Turkey deal and its implications were subjected to judicial review by the European Court of Justice (ECJ) in cases based on the claims of violation of persons' rights regarding actions of EU Member States and EU institutions taken in consequence of the EU–Turkey deal.

First, we can analyse the order of the ECJ in joint cases C-208/17P to C-210/17 P.[21] In these cases, three applicants (NF and NM residing on the Island of Lesbos,

15 | Ergin, 2020; Psaropoulos, 2020; Jones, 2020.
16 | Frontex: Monitoring and risk analysis: Migratory MAP [Online]. Available at: https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-map/ (Accessed: 17 July 2023). Conant, 2023.
17 | European Commission, 2022a.
18 | European Commission, 2022b.
19 | European Commission, 2023b.
20 | Kirişci, 2021.
21 | Order of the Court of 12 September, NF and Others vs. European Council, Joint cases C-208/17 P to C-210/17 P (ECLI:EU:C:2018:705).

HG residing in Athens) appealed against the order of the General Court of the European Union (General Court) of 28 February 2017 (NF vs. European Council (T-192/16, EU:T:2017:128), NG vs. European Council (T-193/16, EU:T:2017:129) and NM vs European Council (T-257/16, EU:T:2017:130)). The General Court dismissed the application seeking the annulment of the EU–Turkey Statement on the grounds of the Court's lack of jurisdiction to hear and determine it. Applicants argued that the EU–Turkey Statement was an act attributable to the EC, establishing an agreement contrary to EU law. However, the EC considered their actions inadmissible under Art. 130 of the Rules of Procedure of the General Court.

As the judgements of the General Court in cases NF, HG, and NM all have the same reasoning, we examine only one, the case of NF (T -192/16).[22] NF, a Pakistani national, fled Pakistan because of fear of persecution and serious physical harm due to assassination attempts to prevent him from inheriting his parents' property. He entered Greece from Turkey by boat on 19 March 2016. After forced submission of an application for asylum to the Greek authorities in April 2016, he was detained for seven days, after which he fled to the Island of Lesbos. He claimed he never wanted to submit the application because of the length of the asylum procedure and deficiencies in the implementation of the European Asylum System, which was confirmed by the rulings of the ECJ and the European Court of Human Rights. He submitted a claim for asylum only to prevent his return to Turkey, with the risk of being detained there or expelled to Pakistan. In NF´s application to the General Court, the applicant asked the Court to annul the agreement between the EC and Turkey dated 18 March 2016 titled the 'EU–Turkey Statement' and to order the EC to pay the costs.

The EC explained that to the best of its knowledge, no agreement or treaty in the sense of Art. 218 of the Treaty on the Functioning of the European Union (TFEU) or Art. 2 of the Vienna Convention on the Law of Treaties had been concluded between the EU and Turkey. The EU–Turkey Statement was merely the fruit of dialogue between EU Member States and Turkey without intending an agreement with legally binding effects (Para. 27). The Statement was not a legally binding agreement but a political arrangement by members of the EC, heads of states or governments of Member States, president of the EC, and president of the Commission (Para. 29).

The General Court pointed out that the action for annulment must be available in the case of all measures adopted by entities of the EU regardless of their nature or form, provided they were intended to produce legal effects (Para. 42). The General Court mainly examined Art. 263 of the TFEU, which gives the Court the power to review the legality of the act of the EU institution and order its annulment. Such an act must have been adopted by an EU entity and have legally binding effects. The court does not have the power to review the legality of the acts of national bodies, heads of EU Member States, or governments (Para. 44). If the act represented an international agreement, the Court´s power to review its legality would only refer to the measures by which an EU institution sought to conclude the international

22 | Order of the General Court of 28 February 2017, NF vs. European Council, T-192/16 (ECLI:EU:C:2018:705).

agreement at issue, not to the agreement per se (Para. 46). The role of the General Court was only to consider if the EU–Turkey deal presented a measure attributable to the EC and if it had been concluded as an international agreement (Para. 47). The court concluded that the Statement and other official documents worked with the terms 'members of the EC' and 'EU' which refer to the 'heads of the states or governments of the EU'. Therefore, the EC did not conclude the agreement with Turkey in the name of the EU, and it could not be considered as a measure adopted by the EC (Para. 71). If the meeting of 18 March 2016 represented the conclusion of the international agreement, it would be the agreement concluded between the heads of states or governments of the EU Member States and Turkey's Prime Minister (Para. 72). However, the Court did not consider that the European Commission itself presented the EU–Turkey deal (statement) as an 'EU–Turkey agreement' on its website.[23]

The Court concluded it was not within its powers to review the legality of the international agreement concluded by EU Member States (Para. 73), and dismissed the action on 28 February 2017 on the grounds of the Court's lack of jurisdiction to hear and determine it. According to Idriz,[24] the General Court, with its predetermined goal, selectively chose evidence that supported its findings that the statement was not an act attributable to an EU institution and hence was subject to review. Idriz pointed out that even though the Court referred to the principle that substance overrides form in Para. 42 of its own order, it considered the form and did not analyse the substance of the EU–Turkey Statement – contrary to previous rulings of the ECJ as well as the International Court of Justice. Idriz referred to the ERTA case[25] which had not been considered by the General Court. According to this case, ERTA doctrine (implied external powers doctrine) means that each time the Community adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. Moreover, under international law, not the formal designation of an instrument is decisive, but decisive are the content of the instrument and the intent of the parties. Idriz highlighted the rules of international law for the legal assessment of the statement. First, Art. 2 (1) (a) of the Vienna Convention on the Law of Treaties defines a treaty as an international agreement, whatever its designation. Second, in the case of Qatar versus Bahrain,[26] the International Court of Justice ruled that the minutes of foreign ministers' meetings are not mere records of meetings. They do not simply summarise the points of agreement and disagreement. They enumerate the commitments to which the parties have consented and create rights and obligations in international law for the parties, and constitute international agreements. It should be sufficient for the statement

23 | European Commission, 2016b.

24 | Idriz, 2017b.

25 | Case 22/70 Commission vs. Council (ERTA) (ECLI:EU:C:1971:32, Para. 36), ERTA doctrine is now codified under Art. 3 (2) TFEU.

26 | ICJ: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility,* Judgment of 1 July 1994, ICJ Reports 1994, p. 112, Para. 25.

to be an act intended to produce legal effects vis-à-vis third parties. However, this contradicts the position of European courts and thwarts any possibility of an EU–Turkey deal review.

The ECJ's opinion that the EU–Turkey deal was an agreement concluded between EU Member States and Turkey was followed by the European Court of Human Rights in the case of J.R. and Others.[27] Yet neither court answered the question if the EU–Turkey deal itself was capable of producing legal effects and if the EU–Turkey deal had a legal nature.[28] Although the EU–Turkey deal does not use terms such as shall or should, which would indicate obligations of result or effort,[29] an analysis of its terminology reveals the parties' intention to be bound by its terms. As Heijer and Spijkerboer[30] pointed out, the EU–Turkey deal contains Turkey's commitment to accept returned migrants, and the EU's commitment to accept one Syrian for resettlement for every Syrian returned to Turkey. This indicates both parties' intent to bind themselves, and the EU–Turkey deal should therefore be considered a treaty with legal effects.

The said three applicants lodged appeals on 21 April 2017 against the General Court´s orders to the ECJ, which considered all three cases in a joint proceeding. Applicants sought the annulment of the orders of the General Court of 28 February 2017 NF vs. European Council, NG vs. European Council and NM vs. European Council, by which the General Court had dismissed their actions for annulment of the EU–Turkey agreement. The applicants claimed to set aside the orders under appeal and refer the cases back to the General Court for adjudication, and accepting jurisdiction.

The ECJ pointed out that every appeal must precisely indicate the contested elements of the appealed order and legal arguments that specifically support the appeal; otherwise, the appeal or its grounds would be dismissed as inadmissible (Para. 12). Arguments supporting the appeal must be sufficiently clear and precise to enable the Court to exercise its powers of judicial review without running the risk of ruling *ultra petita* because the essential elements of the argument were not sufficiently coherent and intelligent (Para. 13). An appeal with general statements without specific indications of the points of the appealed decision must be dismissed as manifestly inadmissible (Para. 14). In this case, the appeals were incoherent and contained eight pleas in law, but the reasoning was not clear and apparent from the elements which they set out in a vague and confused manner, with general assertions that the General Court had disregarded a certain number of EU Law principles, without the precision of the contested elements in the orders or legal arguments in support of the annulment (Para. 16). Therefore, by 12 September 2018, the ECJ dismissed the appeals as manifestly inadmissible.

By an overly formalistic approach to the EU–Turkey Statement, the Court took the case out of the broader context of the EU–Turkey cooperation in the field of

27 | ECHR: J.R. and Others v Greece (application 22696/16).
28 | Pijnenburg, 2018.
29 | den Heijer and Spijkerboer, 2016.
30 | Ibid.

migration. Idriz contested[31] the logic of the General Court's justification, which contradicted the division of competencies between the EU and its Member States, as the EU legal order was based on the principle of the rule of law and conferred powers (Arts. 2 and 5 TEU). To determine the right procedure for concluding the deal, the content and aim of the Statement must be defined, which is the return of all irregular migrants to Turkey with effect from 20 March 2016. This falls within the area of freedom, security, and justice, in which the EU and its Member States exercise shared competence, while visa liberalisation is a matter of exclusive EU competence. As regards the EU–Turkey Readmission Agreement, which covered the issue of readmission of the third nationals by Turkey, the EU had conferred powers to conclude such agreement (Art. 79 (3) TFEU). Once the EU exercised its competence, Member States were not allowed to conclude any agreement in that area or take any action leading to acts with legal effect (Art. 3 (2) TFEU). Leino-Sandberg and Wyatt[32] describe the actions of European courts as a new trend of siding with institutional opacity. It seems that for European courts, the political sensitivity of reviewed matters is decisive and constitutes a specific concern pertaining to relocation and the fundamental rights of people escaping persecution or armed conflict.

Some authors[33] opine that the EU–Turkey cooperation on migration started long ago when the EU–Turkey Readmission Agreement[34] was signed and the Visa Liberalisation Dialogue was launched on 16 December 2013. The EU–Turkey Readmission Agreement was a legal basis for the EU's exclusive competence to act in readmission cooperation with Turkey. Consequently, the EU–Turkey deal must be considered part of the implementation of the EU–Turkey Readmission Agreement. It must be examined in light of the European Commission's clarification published on its official website, dedicated to answers about the EU–Turkey Statement,[35] which points out that legal framework for the returns according to the EU–Turkey deal was a bilateral readmission agreement between Greece and Turkey, and was succeeded by the EU–Turkey Readmission Agreement from 1 June 2016.

31 | Idriz, 2017a.
32 | Leino-Sandberg and Wyatt, 2018. They justify this trend with another case-law of the General Court (Case T-851/16 Access Info Europe vs. Commission) in which Access Info Europe as NGO in concern of compatibility of the EU-Turkey deal with the international human rights claimed the access to documents relating to the meeting of 7 March 2016 which should have been generated or received by Commission containing legal advice and/or legality of the actions to be carried out by EU and its member states implementing the statement (deal). Commission argued that release of such documents would undermine the public interest relating to international relations, the protection of court proceedings and legal advice. The General Court held that documents were covered by the legal advice exception and as merely interdepartmental consultations they did not constitute legal advice definitively fixing the institution´s position, therefore there was no overriding public interest in disclosure.
33 | Idriz, 2017b; Leino-Sandberg and Wyatt, 2018.
34 | Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (OJ L 134, 7.5.2014, pp. 3–27).
35 | European Commission, 2016a.

4. The EU–Turkey deal violating international law?

To analyse the EU–Turkey deal from the point of view of international law, we need to determine fields of international law that may be violated by the deal and (non)legal measures adopted in its correlation. As the deal covers the area of migration, specifically the status of Syrian refugees, the main areas of law covering relations between the EU, the states concerned, and individuals are the rights of refugees and human rights in general.

The legal basis of refugee rights is the UN Convention Relating to the Status of Refugees (1951) (Refugee Convention) and its Protocol Relating to the Status of Refugees (1967) (Refugee Protocol).[36] As the office of the UNHCR stated in the introductory note, the Convention and Protocol are status- and rights-based instruments built on numerous fundamental principles, mainly the principles of non-discrimination, non-penalisation, and non-refoulement. Duarte's analysis confirms[37] that all these principles may be violated by the EU–Turkey Statement. The principle of non-discrimination (Art. 3 of the Refugee Convention) is that the EU–Turkey Statement was designated mainly for Syrian refugees, which constitutes discrimination based on the country of origin. From Turkey´s point of view, the EU–Turkey Statement allowed Turkey to grant refugee status only to those fleeing Europe. Hattaway[38] pointed out that, while all refugees were to be returned by the EU to Turkey, only Syrians could benefit from EU protection in the form of resettlement, which could be the cause of discrimination.

The principle of non-penalisation (Art. 31 of the Refugee Convention) means that contracting states should not impose penalties on account of illegal entry or the presence of refugees who enter or are present in their territory without authorisation, such as immigration or criminal offences to refugees or their detention based only on the grounds of them seeking asylum. This principle was undoubtedly violated by conditions in which refugees stayed in facilities and camps in Greece, Italy and Turkey by the militarisation of these areas, not to forget 'pushbacks' at their borders.[39]

These pushbacks violate the principle of non-refoulement (Art. 33 of the Refugee Convention). It is a basic principle under international law dealing with forced return and covers the right of asylum claimants or refugees not to be sent back to their country of origin to face persecution.[40] Violation occurs when states—Greece, Turkey, or any other contracting state— do not allow refugees to apply for asylum since the asylum procedure is crucial for the determination of an irregular migrant and asylum seeker. The principle of non-refoulement was violated,

36 | UNHCR: Convention and Protocol relating to the Status of Refugees [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 17 July 2023).
37 | Duarte, 2020.
38 | Hathaway, 2016.
39 | Smith, 2023. Push-back of migrants on boats by the Greece are also subject of the judicial review of the European Court of Human Rights. See e.g. report of HRW: Cossé, 2022.
40 | Poon, 2016, p. 1196.

considering that Turkey is not a safe third country anymore when it comes to threats of life and freedom; as reports show, Turkey sent refugees, including unaccompanied children and pregnant women, back to Syria, which is a country with an ongoing armed conflict.[41] The conclusion that Turkey cannot be considered a third safe country is also based on the fact that it applies[42] geographical limitations to the Refugee Convention, under which it has no obligations for non-European refugees.

Turkey is not an EU member state; therefore, it cannot be presumed that it will apply for and guarantee rights in compliance with EU law. Turkey does not have the same substantive and procedural rules and procedures for the protection of asylum claimants and refugees, e.g. claimant records.[43] Even the European Commission[44] expressed the need for provision changes within Greek and Turkish domestic legislation according to procedural safeguards, as the inconsistency of the domestic legislation of these states had been established before the EU–Turkey deal.

This shows that EU representatives had to be aware of Turkey's struggles with the protection regime for migrants/refugees. This regime is based on the new domestic order for asylum seekers, the Law on Foreigners and International Protection[45] adopted in 2013. It provides permanent protection by refugee status for applicants coming from Europe as protection of refugees according to the definition of the 1951 Refugee Convention (Art. 61) and two forms of international protection for non-Europeans;[46] a 'conditional refugee status' for persons under direct personal threat (until completion of the refugee status determination process (Art. 62), and subsidiary protection for persons coming to Turkey from countries where a general situation of violence prevails (Art. 63). Art. 91 applies the 'temporary protection' to foreigners who were forced to leave their countries and unable to return, arrived at or crossed Turkey´s borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment. Turkey´s Temporary Protection Regulation[47] defines specific conditions for temporary protection, implementation of laws on foreigners, and international protection. Per the regulations, Syrian refugees who arrived at or crossed Turkey's borders after 28 April 2011 may enjoy only temporary protection (Art. 1 of the Temporary Protection Regulation). Individual applications

41 | See e.g.: HRW: Turkey: Hundreds of Refugees Deported to Syria: EU Should Recognize Turkey Is Unsafe for Asylum Seekers (24 October 2022) [Online]. Available at: https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria (Accessed: 17 July 2023).
42 | Hathaway, 2016.
43 | Poon, 2016, p. 1198.
44 | Communication from the Commission to the European Parliament, the European Council and the Council: Next operational steps in EU-Turkey cooperation in the field of migration (Brussels, 16.3.2016, COM (2016)166), p. 3.
45 | UNHCR: Turkey: Law on foreigners and international protection, Law No : 6458, Acceptance Date : 4/4/2013 [Online]. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf (Accessed: 17 July 2023).
46 | Heck and Hess, 2017, p. 43.
47 | UNHCR: Turkey: Temporary Protection Regulation [Online]. Available at: https://www.refworld.org/docid/56572fd74.html (Accessed: 17 July 2023).

for international protection should not be implemented during temporary protection, meaning that applicants coming from Europe may apply for the status of 'convention refugee', but applicants coming from non-European states may gain refugee status only via the UNHCR.[48]

It must be stated that although Syrians are only eligible for temporary protection, Turkey´s Temporary Protection Regulation allows them access to basic healthcare services, education and work permits, and they are not forced to be present in camps like most asylum-seeking refugees in Europe. However, this temporary status implies constant legal and social insecurity in the future.[49] Persons deported from Greece to Turkey reported that national authorities tried to prevent them from seeking asylum, and they were able to submit the application only after a lawyer's intervention after weeks of imprisonment. They may apply for refugee status only at the UNHCR, and as asylum seekers, they must settle in a satellite city where they have access to basic health care, education and employment, but very limited economic possibilities. These people gave up their international protection status, moved to Istanbul, and left the country for Europe.[50]

To protect refugees and their human rights, it is important to examine whether Turkey can be considered a safe third country. By negotiating the EU–Turkey deal, the EU assumed that Turkey was indeed a safe third country. Tunaboylu and Alpes[51] point to the EU–Turkey deal's conditions, according to which asylum seekers should be returned from Greece to Turkey: a) if they do not apply for asylum or withdraw the application, b) if they choose assisted return, c) if the application for asylum is assessed negatively, and d) if the asylum application is inadmissible according to formal Greek conditions. Thus, Turkey is considered a safe first country for asylum and a safe third country.

Such differentiation is important for the possibility that EU Member States would declare an asylum application inadmissible; i.e. they would reject it without examining its substance. Art. 35 of the 'Asylum procedures directive'[52] defines the 'first country of asylum' as the country where the person has already been recognised as a refugee or otherwise enjoys sufficient protection, and Art. 38 of this directive defines 'safe third country' as the country where the person has not already received protection in the third country but the third country can guarantee effective access to protection to the readmitted person. This article also defines conditions (procedural safeguards) under which the EU member state may apply the concept of the safe third country to the third country concerned only if the competent authorities are satisfied that within this country: a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, b) there

48 | Heck and Hess, 2017, p. 41.
49 | Ibid., p. 47.
50 | Ibid., pp. 49–50.
51 | Tunaboylu and Alpes, 2017.
52 | 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, pp. 60–95).

is no risk of serious harm,[53] c) the principle of non-refoulement is respected, d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected, and e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection according to the Refugee Convention.

Application of the concepts of the first country of asylum and third safe country in relation to Turkey means that the asylum applications submitted by a person arriving through Turkey under the EU–Turkey deal may be declared as inadmissible and rejected if such a person already enjoyed protection in Turkey (with Turkey in the position of the first country of asylum) and if such a person was able to apply for protection in Turkey (with Turkey in the position of a safe third country). Both these concepts—the first country of asylum and a safe third country—are applicable to non-Turkish nationals, where for the purposes of the EU–Turkey deal and the return of non-Turkish nationals, the concept of a safe third country is crucial. The concept of a safe country of origin is critical for Turkish nationals returning from Europe to Turkey.

Humanitarian organisations are calling for the termination of EU cooperation with Turkey on refugee protection. Amnesty International[54] called on the EU to adopt an independent resettlement plan and work with Turkey towards ending the abuse of refugee rights after reports of forced deportations (covered by the forced signing of documents 'agreeing' to voluntary return to their home countries), detentions without access to lawyers, denial of access to phones or their confiscations, all relating to the nationals of Syria, Afghanistan and Iraq. Amnesty International declared the day of the EU–Turkey Statement as a 'dark day for humanity'.[55] Human Rights Watch[56] called on the EU to recognise Turkey as unsafe for asylum seekers due to forced deportations of Syrians and the appalling conditions of their detention centres. Refugees International[57] reports reaffirm these concerns. Greece noticed the abysmal conditions of Syrian refugees after their return to Turkey, and in May 2016 stopped the deportation of some Syrian refugees to Turkey, reasoning that Turkey was not a safe country.[58]

53 | Serious harm consists of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Art. 15 of the 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).
54 | Amnesty International, 2016; Amnesty Inernational: Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey (16 December 2015) [Online]. Available at: https://www.amnesty.org/en/documents/eur44/3022/2015/en/ (Accessed: 17 July 2023).
55 | Rönsber, 2016.
56 | HRW: Turkey: Hundreds of Refugees Deported to Syria: EU Should Recognize Turkey Is Unsafe for Asylum Seekers (24 October 2022) [Online]. Available at: https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria (Accessed: 17 July 2023).
57 | Leghtas, 2019.
58 | Gkliati, 2017, pp. 217–219.

A state bound by the Refugee Convention[59] must obey the principle of non-refoulement in all asylum proceedings. Art. 33 of the Refugee Convention establishes, for every contracting state, the prohibition of the expulsion or return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion. Although Turkey is one of the Refugee Convention's original contracting parties, it has seriously breached the principle of non-refoulement by repeatedly shooting Syrians along the border, even after the earthquake of February 2023.[60] Information emerged about refugees (Afghan nationals) who had been detained in deportation centres after arriving in Turkey and were forced to sign documents in Turkish confirming their consent to voluntarily return to Afghanistan. All without the possibility of applying for asylum and access to fair asylum proceedings or the submission of a claim for international protection,[61] and despite acknowledging the human rights situation in Syria, Afghanistan and Iran.

Contracting parties to the Refugee Convention received only one exception for non-compliance with the principle of non-refoulement, which is the case when there are reasonable grounds for regarding refugees as a danger to the security of the country in which they are or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Therefore, the EU–Turkey deal heightens Turkey's massive expulsion risk. It violates international law, especially the principle of non-refoulement, and Protocol No. 4 of the European Convention on Human Rights, Art. 3, which defines the prohibition of the collective expulsion of aliens.

The situation in Greece is under the radar of the European Court of Human Rights (ECHR). Among the case law related to Greece's current situation, the Safi case[62] may serve as an example. The ECHR concluded that Greece violated Art. 2 of the European Convention on Human Rights (ECtHR)—the right to life—as to refugees' loss of life after oversights and delays caused by national authorities in conducting and organising their rescue from a capsized boat, and insufficiently and ineffectively investigating the boat's sinking which had turned out fatal for some of the refugees. The ECHR also confirmed violations in relation to Art. 3 of the ECtHR—the prohibition of torture—about degrading treatment by law enforcement personnel, particularly the body searches of refugees brought from capsized boats to Greek islands, e.g. an order issued to refugees to disrobe as a group in front

59 | UNHCR: Convention and Protocol relating to the Status of Refugees [Online]. Available at: https://www.unhcr.org/media/28185 (Accessed: 17 July 2023).

60 | Group: Turkish troops shooting Syrian civilians along border (27 April 2023) [Online]. Available at: https://apnews.com/article/turkey-syria-border-shooting-refugees-7a2fcbc48d61e67a95ab3c7583c345d2 (Accessed: 17 July 2023).

61 | Refugees International: The Return of Thousands of Afghans from Turkey back to Afghanistan is Cause for Alarm (7 May 2018) [Online]. Available at: https://www.refugeesinternational.org/statements-and-news/the-return-of-thousands-of-afghans-from-turkey-back-to-afghanistan-is-cause-for-alarm/ (Accessed: 17 July 2023). Dawi, 2022.

62 | ECHR: Safi and Others v. Greece- 5418/15.

of at least 13 people. It is questionable whether these Greek proceedings are related to the EU–Turkey deal or were just demonstrations of Greek practice after years of inadequate EU migration policies.

Accusations were levelled against the Dutch government, which held the presidency of the Council of the EU. A press release by the Boat Refugee Foundation on 20 March 2023[63] stated that the Netherlands government, as the then president of the EC, was responsible for the consequences of the EU–Turkey deal. Diederik Samsom, leader of the Dutch Labour Party, announced the 'Samson plan'—a plan to resettle 150 000–250 000 migrants from Turkey in EU Member States—in a newspaper interview in January 2016.[64] Thus, the Dutch government played an important role in creating and implementing the deal in spite of warnings from NGOs, in particular Amnesty International, that the EU–Turkey deal would lead to the violation of human rights.

In conclusion, the EU should acknowledge Turkey's unfriendly attitude towards refugees. The last presidential elections uncovered a nationalist and anti-refugee narrative of the opposition when Kemal Kilicdaroglu, opposition candidate to the recently re-elected president Erdogan, promised 'to send 10 million refugees back home if he won'.[65] Even though statistics from the UNHCR show that Turkey hosts up to four million people needing international protection,[66] this fuels further populist abuse of migration issues.

Turkey, despite its status as a (non)safe country, has trouble handling millions of migrants and refugees in its own territory. The EU's cooperation with Turkey should be limited to economic, material, or personnel improvement of refugee facilities in Turkey, at least until Turkey ratifies the Refugee Convention with its protocol expanding protection to all refugees without territorial or temporal limitations. European states should stay true to their international obligations, at least in the field of human rights and the rights of refugees, as well as to their values, and not turn a blind eye to blatant human rights violations or, even worse, to cause them.

63 | Netherlands liable for human rights violations in Greek refugee camps (27 March 2023) [Online]. Available at: https://www.statewatch.org/news/2023/march/netherlands-liable-for-human-rights-violations-in-greek-refugee-camps/ (Accessed: 17 July 2023).
64 | Rumeli Observer: Interview with Diederik Samsom on his plan (translated) – 28 January. (29 January 2016) [Online]. Available at: https://www.esiweb.org/rumeliobserver/2016/01/29/interview-with-diederich-samsom-on-his-plan-translated-28-january/ (Accessed: 17 July 2023).
65 | Aljazeera: Turkey's Kilicdaroglu promises to kick out refugees post-election (18 May 2023) [Online]. Available at: https://www.aljazeera.com/news/2023/5/18/turkeys-kilicdaroglu-promises-to-kick-out-refugees-post-election (Accessed: 17 July 2023).
66 | UNHCR: Refugee Data Finder [Online]. Available at: https://www.unhcr.org/refugee-statistics/download/?url=oy3YY0 (Accessed: 17 July 2023); See also: UNHCR: Türkiye fact sheet (February 2023) [Online]. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2023/03/Bi-annual-fact-sheet-2023-02-Turkiye-.pdf (Accessed: 17 July 2023).

5. Conclusion

The EU–Turkey deal aimed to solve the migration crisis in 2015 caused mainly by the armed conflict in Syria, and focused on the closure of the Western Balkans route leading to Europe through Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia.[67] These temporary solutions were not effective as they were not designed to provide a universal framework to deal with future migration crises. Scientific studies had recommended the preparation of migration and protection policies on global warming, ongoing armed conflicts, and radicalism. In response to migration, the EU is trying to externalise migration management.[68]

This contribution provides a brief list of the positive impacts of the deal, namely a reduced number of incoming migrants to Europe, changes in migration routes, and the marginal improvement of conditions in Turkish refugee facilities. Statistics confirm that the number of incoming irregular migrants dropped after the EU–Turkey deal, partially because of improved Turkish border controls owing to commitments per the EU–Turkey deal, and also as the result of border closures due to COVID-19. Better control at Turkey's borders led to changes in migration routes, and irregular migrants now enter Europe through the African continent via the East African, Central Mediterranean, or Western Mediterranean routes. Paradoxically, Eastern European states eliminated the pressure of the migration crisis, whereas the Mediterranean frontline states are now facing pressure. If the EU–Turkey deal had a positive impact on refugees, it must have been an improvement of their living conditions in Turkey´s facilities, where they now have access to education, health, protection, basic needs, etc. Despite this improvement, many of the four million refugees in Turkey are seeking resettlement outside the camps and other improved facilities because staying there still means being vulnerable and without access to economic possibilities.

From a legal viewpoint, it appears that the form of the EU–Turkey deal was well chosen. Its form represents pros for the EU, including its institutions and Member States, but cons for refugees, as they have very limited legal possibilities for legal review of their proceedings. Based on this observation, this contribution firstly examined the legal nature of the EU–Turkey deal. It is apparent that the ECJ focused only on the form of the EU–Turkey deal when the Court agreed with the Council's opinion that the deal was not an actual agreement between the EC and Turkey but just a statement of the institutions of the EU, its Member States and Turkey, sans legal effects. Had the Court considered that the intent of the meeting of 18 March 2016 had been to conclude an agreement, the EU–Turkey deal would now be recognised as an agreement with concomitant legal effects. The court's ruling failed to distinguish between the competencies of the EU and its Member States and the rules of international law regarding treaties, notably the content of the instrument and the intent of the parties.

67 | European Council, 2023.
68 | Wesel, 2021.

A judicial review of the EU–Turkey deal stemmed from accusations of violations of refugee rights and human rights by the actions adopted regarding the EU–Turkey deal's implementation. Close examination reveals that the actions of the states represented violations of the principle of non-discrimination as the EU–Turkey deal covered mainly Syrians, the principle of non-penalisation because migrants were detained in the frontline countries, and the principle of non-refoulement as many migrants were not allowed to apply for asylum, which was a precondition for determining their status as asylum seekers. Further, Turkey, as a state of resettlement, should no longer be considered a safe third country, not only for the limited application of the Refugee Convention, but also due to forced returns of Syrians to Syria despite the ongoing armed conflict there, detentions without access to lawyers, denial of access to phones, etc. The malfunctioning of the EU migration policy is attested to by Greece's practices and its forced return of migration boats to the open sea where migrants were abandoned.[69]

The EU's Migration Policy is in dire need of improvement. It must ensure support for frontline states without the violent relocation of migrants to unwilling states and a strong protection of human rights, especially the basic right to life. After the EU–Turkey deal, the accusations of human rights violations, issues related to EU Member States' solidarity, and the weakening of the rule of law within the EU all confirmed that the EU–Turkey deal was an expensive and ineffective tool for solving the migration crisis in Europe. The main goals of the EU–Turkey deal were not met and numerous principles, including the prohibition of collective expulsion, principle of non-refoulement and stopping migrants' human suffering, were broken. As examples teach us (e.g. the UK refugee deal with Rwanda[70]), any attempt by a state to transfer its obligations stemming from the Refugee Convention is unlawful and contrary to refugee rights and human rights law.[71] It is time for every state to accept its own responsibility and fulfil its obligations in light of basic human rights.

69 | Smith, 2023.
70 | Hardie et al., 2023.
71 | For more about European human rights see: Karska et al., 2023, p. 431.

Bibliography

Afailal, H., Fernandez, M. (2018) 'The Externalization of European Borders: The Other Face of Coloniality Turkey as a Case Study', *Athens Journal of Mediterranean Studies*, 4(3), pp. 215–224; https://doi.org/10.30958/ajms.4-3-3.

Amnesty International (2016) 'Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal', *Amnesty International,* 23 March 2016. [Online]. Available at: https://www.amnesty.org/en/latest/press-release/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/ (Accessed: 17 July 2023).

Conant, E. (2023) 'The World's Congested Human Migration Routes in 5 Maps', *International Organization for Migration* [Online]. Available at: https://weblog.iom.int/worlds-congested-human-migration-routes-5-maps (Accessed: 17 July 2023).

Cossé, E. (2022) 'European Court Slams Greece Over Deadly Migrant Pushback Inquiry on Pushbacks Is Urgently Needed', *Human Rights Watch*, 8 July 2022 [Online]. Available at: https://www.hrw.org/news/2022/07/08/european-court-slams-greece-over-deadly-migrant-pushback (Accessed: 17 July 2023).

Dawi, A. (2022) 'Turkey Deports Thousands to Taliban-Controlled Afghanistan', Voice of America, 16 June 2022 [Online]. Available at: https://www.voanews.com/a/turkey-deports-thousands-to-taliban-controlled-afghanistan/6620683.html (Accessed: 17 July 2023).

den Heijer, M., Spijkerboer, T. (2016) 'Is the EU-Turkey refugee and migration deal a treaty?', *EU Law Analysys,* 7 April 2016 [Online]. Available at: http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html (Accessed: 17 July 2023).

Duarte, M. (2020) 'EU-Turkey Refugee Deal: Buck-Passing and Bargaining on Human Lives at Risk?', *Kaygı. Bursa Uludağ Üniversitesi Fen-Edebiyat Fakültesi Felsefe Dergisi*, 19(1), pp. 276–293; https://doi.org/10.20981/kaygi.705300.

Ergin, A. D. (2020) 'What Happened at the Greece-Turkey Border in early 2020?', *Verfassungsblog*, 30 September 2020 [Online]. Available at: https://verfassungsblog.de/what-happened-at-the-greece-turkey-border-in-early-2020/ (Accessed: 17 July 2023).

European Commission (2016a) 'EU-Turkey Statement: Questions and Answers', *European Commission*, 19 March 2016 [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_963 (Accessed: 17 July 2023).

European Commission (2016b) 'Implementing the EU-Turkey Agreement – Questions and Answers', 20 April 2016. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1494 (Accessed: 17 July 2023).

European Commission (2022a) 'The Facility for Refugees in Turkey: The Facility Results Framework Monitoring Report No. 10. Results Achievement Progress (As of 30 June 2022)', *European Commission*, December 2022. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-01/10th%20Facility%20Monitoring%20Report.pdf (Accessed: 17 July 2023).

European Commission (2022b) 'The Facility for Refugees in Turkey: Results Framework', *European Commission*, June 2022 [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Facility%20Results%20Framework_Jun2022.pdf (Accessed: 17 July 2023).

European Commission (2023a) 'New Pact on Migration and Asylum', *European Commission, 3 November* 2022. [Online]. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en (Accessed: 17 July 2023).

European Commission (2023b) 'The EU Facility for Refugees in Turkey', *European Commission, June* 2023. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-08/frit_factsheet.pdf (Accessed: 17 July 2023).

European Council (2015) 'European Council meeting (15 October 2015) – Conclusions', *European Council*, 15 October 2015 [Online]. Available at: https://data.consilium.europa.eu/doc/document/ST-26-2015-INIT/en/pdf (Accessed: 17 July 2023).

European Council (2023) 'Western Balkans route', *European Council*, 22 May 2023. [Online]. Available at: https://www.consilium.europa.eu/en/policies/eu-migration-policy/western-balkans-route/ (Accessed: 17 July 2023).

Gkliati, M. (2017) 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees', *Movements*, 3(2), pp. 213–224 [Online]. Available at: https://repository.ubn.ru.nl/bitstream/handle/2066/239129/239129.pdf?sequence=1 (Accessed: 22 November 2023).

Hardie, A., Isaac, L., Haq, S. N., McGee, L. (2023) 'UK's Rwanda deportation plan 'unlawful,' court of appeal rules', *CNN World*, 29 June 2023 [Online]. Available at: https://edition.cnn.com/2023/06/29/uk/uk-government-rwanda-ruling-intl-gbr/index.html (Accessed: 17 July 2023).

Hathaway, J. C. (2016) 'Three legal requirements for the EU-Turkey deal: An interview with James Hathaway', *Verfassungsblog*, 9 March 2016 [Online]. Available at: https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/ (Accessed: 17 July 2023).

Heck, G., Hess, S. (2017) 'Tracing the effects of the EU-Turkey deal. The Momentum of the Multi-layered Turkish Border Regime', *Movements*, 3(2), pp. 35–57 [Online]. Available at: https://movements-journal.org/issues/05.turkey/04.heck,hess--tracing-the-effects-of-the-eu-turkey-deal.pdf (Accessed: 22 November 2023).

Idriz, N. (2017a) 'Taking the EU-Turkey Deal to Court?', *Verfassungsblog*, 20 December 2017 [Online]. Available at: https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/ (Accessed: 17 July 2023).

Idriz, N. (2017b) 'The EU-Turkey statement or the ´refugee deal´: the extra-legal deal of extraordinary times?', *The Migration Crisis*, *T.M.C. Asser Institute for International & European Law, Research Paper*, 4 December 2017 [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881# (Accessed: 17 July 2023).

Jones, D. (2020) 'Inside Europe: Turkey opens border for migrants', *Deutsche Welle*, 3 June 2020 [Online]. Available at: https://www.dw.com/en/inside-europe-turkey-opens-border-for-migrants/audio-52651447 (Accessed: 17 July 2023).

Karska, E., Morawska, E. H., Czepek, J., Dąbrowski, L. D., Oręziak, B., Gałka, K. (eds.) (2023) Human Rights in the European Paradigm of the Protection of Aliens. Warsaw: Cardinal Stefan Wyszyński University in Warsaw [Online]. Available at. https://wydzialy.uksw.edu.pl/wp-content/uploads/sites/10/2023/04/Human-Rights-in-the-European-Paradigm-of-the-Protection-of-Aliens-ebook.pdf (Accessed: 17 July 2023).

Kirişci, K. (2021) 'As EU-Turkey migration agreement reaches the five-year mark, add a job creation element', *Brookings*, 17 March 2021 [Online]. Available at: https://www.brookings.edu/blog/order-from-chaos/2021/03/17/as-eu-turkey-migration-agreement-reaches-the-five-year-mark-add-a-job-creation-element/ (Accessed: 17 July 2023).

Leghtas, I. (2019) 'Insecure Future: Deportations and Lack of Legal Work for Refugees in Turkey', *Refugees International Report,* 19 September 2019 [Online]. Available at: https://www.refugeesinternational.org/reports/2019/9/18/insecure-future-deportations-and-lack-of-legal-work-for-refugees-in-turkey (Accessed: 17 July 2023).

Leino-Sandberg, P., Wyatt, D. (2018) 'No public interest in whether the EU-Turkey refugee deal respects EU Treaties and international human rights?', *European Law Blog,* 28 February 2018 [Online]. Available at: https://europeanlawblog.eu/2018/02/28/no-public-interest-in-whether-the-eu-turkey-refugee-deal-respects-eu-treaties-and-international-human-rights/ (Accessed: 17 July 2023).

Pijnenburg, A. (2018) 'JR and others v Greece: What does the court (not) say about the EU-Turkey statement?', *Strasbourg Observers,* 21 February 2018 [Online]. Available at: https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/ (Accessed: 17 July 2023).

Psaropoulos, J. (2020) 'Greece on the defensive as Turkey opens border to refugees', *Aljazeera*, 1 March 2020 [Online]. Available at: https://www.aljazeera.com/news/2020/3/1/greece-on-the-defensive-as-turkey-opens-border-to-refugees (Accessed: 17 July 2023).

Poon, J. (2016) 'EU-Turkey Deal: Violation of, or Consistency with, International Law?', *European Papers*, 1(3), pp. 1195–1203 [Online]. Available at: https://www.europeanpapers.eu/fr/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law (Accessed: 22 November 2023).

Rönsberg, A. (2016) 'EU-Turkey migrant deal done', *Deutsche Welle*, 18 March 2016 [Online]. Available at: https://www.dw.com/en/eu-turkey-migrant-deal-done/a-19127595 (Accessed: 17 July 2023).

Smith, H. (2023) 'Greek government under fire after video shows 'pushback' of asylum seekers', *The Guardian,* 19 May 2023 [Online]. Available at: https://www.theguardian.com/world/2023/may/19/greek-government-under-fire-after-video-shows-pushback-of-asylum-seekers (Accessed: 17 July 2023).

Tunaboylu, S., Alpes, J. (2017) 'The EU-Turkey deal: what happens to people who return to Turkey?', *Forced Migration*, February 2017 [Online]. Available at: https://www.fmreview.org/resettlement/tunaboylu-alpes (Accessed: 17 July 2023).

Wesel, B. (2021) 'Turkey migration deal a 'stain on EU rights record', *Deutsche Welle*, 17 March 2021. [Online]. Available at: https://www.dw.com/en/turkey-migration-deal-a-stain-on-eu-rights-record/a-56903392 (Accessed: 17 July 2023).

THE PRACTICE OF THE SLOVAK CONSTITUTIONAL COURT CONCERNING MIGRATION AND REFUGEE AFFAIRS

Ľubica Gregová Širicová[1]

ABSTRACT

The judicature of the Slovak Constitutional Court concerning migration and refugee affairs after the accession of the Slovak Republic to the EU has been diverse, covering several important issues. Remarkably, in 2023, the Court took a new turn on its 'self-restraining approach' in a case related to migration and refugee matters. The article concludes that the Slovak Constitutional Court has not linked migration or asylum issues to the issue of constitutional identity in its case law. From the material viewpoint, the case law of the Constitutional Court forms four key areas: 1) fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment; 2) detention of foreigners; 3) an applicant's right to comment on evidence; 4) right to respect for family and private life. The article features a summary of the main thrust of the flagship judgments with developmental arch (where possible). Finally, the study showed that the Slovak Constitutional Court regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU.

KEYWORDS

Constitutional Court of the Slovak Republic
migration
asylum
detention of foreigners
right to comment on evidence
right to respect for family life

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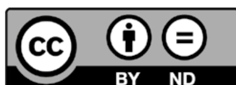

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1. Introduction

Accession to the EU has significantly influenced Slovak national law concerning the migration and refugee affairs, related activities of the Slovak state authorities and judicature of Slovak courts including the Constitutional Court of the Slovak Republic. This article aims to study the position of the Slovak Constitutional Court on migration and asylum in relation to the boundaries of the competences of the EU and Member States. It addresses the question of whether, regarding this issue, the national constitutional court has linked migration or asylum issues to constitutional identity. In addition, as a second issue, the case law of the Slovak Constitutional Court on migration and asylum is summarised for the period after accession to the EU. In this section, the main thrust of the relevant (flagship) judgments and a developmental arc of the case law is given. Finally, we examine whether the Slovak Constitutional Courts considers the case law of other countries, specifically EU Member States, or the documents and case law of another organization when developing its relevant case law.

The Constitutional Court of the Slovak Republic is a constitutional institution with several exclusive competences typical of specialized and centralized models of judicial review of constitutionality,[2] such as a constitutional review of legislation and authoritative interpretation of the Constitution of the Slovak Republic.[3] In terms of competences, the Slovak Constitutional Court is among the strongest.[4] Notable missing competences are the actio popularis and ex ante constitutional review (its competence is limited to the preventive control of the constitutionality of international treaties and referendum questions). The court executes mainly ex post review of constitutionality (of national legislation and sub-legislative acts) including abstract constitutional interpretation in disputed matters. Other important competences include the individual constitutional complaint procedure (on the protection of fundamental rights and freedoms), review of electoral complaints, proceedings in competence disputes of central State administration bodies, proceedings related to the President of the Slovak Republic, and proceedings on the responsibility of constitutional officials.[5]

2 | Drgonec, 2017, pp. 4–10.

3 | Constitution of the Slovak Republic, No. 460/1992 Coll., hereafter 'Constitution'. The Constitution ranks highest in the hierarchy of the legal acts in the Slovak Republic, together with constitutional acts, followed by international treaties with primacy over acts, then acts, and lastly, sub-legislative acts. A special position among the international treaties is attributed to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, hereafter 'ECHR'), often described as 'constitutional status'. For more on the position of the ECHR in the Slovak constitutional system, see Baraník, 2020, pp. 233–246. The relationship with EU law is elaborated in the second section of this article.

4 | Steuer, 2019, p. 2; Orosz, 2020a, p. 332.

5 | For detailed commentary on the Slovak Constitution, see Drgonec, 2019; Orosz et al., 2021; Orosz et al., 2022.

2. Position of the Slovak Constitutional Court on migration and asylum in relation to the boundaries of the competences of the EU and Member States

The relationship between EU law and the Slovak Constitution is not yet fully resolved. The Constitution contains the definition of the relationship of the Slovak legal order and EU law in Art. 7 (2);[6] however, its scholarly interpretation differs among authors who underline that the article does not definitively answer elementary questions on Slovak constitutional and EU law.[7] Therefore, there remains broad space for the Constitutional Court to fill in the gaps by its judicature. The key decision came in 2015,[8] when the Constitutional Court implied it has the power to decide on compliance of the national law with the primary EU law. According to the Constitution, the Court decides on compliance of the national law with the Constitution, constitutional laws, and international treaties. The primary EU law was categorized by the Court as international treaties; thus, it was included in the scope of reference for the national law. Furthermore, the Court subsumed the primary EU law under legally binding acts with primacy over the laws of the Slovak Republic according to Art. 7 (2) of the Constitution. However, the Constitutional Court introduced the 'self-restraining approach' to the exercise of its jurisdiction.[9] The Constitutional Court believes that if it decides that the challenged national law, its part, or its provisions are not in accordance with the Constitution, it is in principle no longer necessary to further examine their inconsistency with EU law (despite the proposal). This is because their possible discrepancy would lead to the same result and legal effect achieved by the decision according to which the challenged national law is unconstitutional. Moreover, importantly, the Court expressed its view on the following (hypothetical) situation: what if the challenged national law is in accordance with the Constitution, but inconsistent with the primary EU law (possibly confirmed in the authoritative finding by the Court of Justice of the EU)? In this context, the Constitutional Court states that if the inconsistency cannot be bridged by applying the principles of euro-conform interpretation then the question of the change in the Constitution might arise. (This question would not be within the jurisdiction of the Constitutional Court.) In conclusion, the Slovak Constitutional Court potentially views the primary EU law above the Constitution,[10]

6 | 'The Slovak republic may transfer the exercise of part of its rights to the European Communities and EU by an international treaty ratified and published in the manner established by law, or based on such a treaty. Legally binding acts of the European Communities and EU shall have primacy over the laws of the Slovak Republic' (translated by the author).
7 | For example, the scope of the article has been debated (secondary law, primary and secondary law). The discussion is summarized in Baraník, 2021, p. 95.
8 | Ref. No. PL. ÚS 3/09 from the 3rd July 2015.
9 | Ibid., p. 80.
10 | Baraník, 2021, p. 99. Strong conclusion by Šipulová and Steuer, 2023, pp. 81–104: for Slovakia, EU law gained supremacy over constitutional order, even if it meant changing the interpretation of the constitutional provisions from their original meaning.

although some authors remain cautious.[11] Some predict that in the future, the Court may need to fence the core of the Constitution to reject any unacceptable influence of EU law.[12] Thus far, the Constitutional Court has rarely used the term 'constitutional identity', and it has never used this term in relation to EU law.[13] Rather, the Slovak constitutional doctrine uses the term 'substantive core'. This topic is much debated and controversial,[14] and not necessarily the same notion as constitutional identity.[15] According to the Constitutional Court, the substantive core doctrine includes the protection of human rights, democracy, and the rule of law.[16] Again, importantly, the Court has not linked this doctrine with the effects of EU law yet.

Clearly, the Court continues to apply the 'self-restraining approach' to the interpretation of EU law, e.g. having declined to consider the compliance of the national law with the EU Charter of Fundamental Rights.[17] In case Ref. No. PL ÚS 10/2014 of 29 April 2015, the Court decided that the national law is inconsistent with the provisions of the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Consequently, the Court did not decide on the proposed inconsistency of the national law with the Charter. From a legal consequences perspective (loss of effectiveness of the challenged national legislation, and after the expiration of six months, possible loss of validity), according to the Constitutional Court, the purpose pursued by the proposal was fulfilled, which also eliminates the possible inconsistency of the national law with the provisions of the Charter.[18]

Another opportunity for the Constitutional court to apply the Charter came in case Ref. No. II. ÚS 480/2014 of 12 February 2015. Here, the merits related to the topic of this study (migration and refugee affairs): an applicant's right to comment on evidence according to which he is dangerous for the Slovak Republic (the

11 | Drgonec, 2019, p. 328. Berdisová advocates for legal pluralism rather than the search for primacy (Berdisová, 2021, pp. 109–112.).
12 | e.g. Baraník, 2021, p. 100; Dobrovičová, Jánošíková and Mazák, 2016, pp. 164, 165. More sceptically, Benko, 2018, pp. 258–259.
13 | Decision of the Constitutional Court of the Slovak Republic Ref. No. III ÚS 427/2012 of 17 December 2014, para. 59: 'the President is a significant element of the constitutional identity of the country'. The Court referred to the same wording in its decision Ref. No. PL ÚS 16/2019 of 2 April 2020, para. 27.
14 | Káčer and Neumann, 2019; Breichová Lapčáková, 2020; Orosz, 2020b; Štiavnický and Steuer, 2020; Balog, 2022; Šipulová and Steuer, 2023.
15 | Káčer and Neumann, 2019, pp. 98–105.
16 | Decision Ref. No. PL. ÚS 7/2017 of 31 May 2017; decision Ref. No. PL. ÚS 21/2014 of 30 January 2019; decision Ref. No. PL. ÚS 8/2022 of 25 May 2022.
17 | Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
18 | This approach was criticized by Mazák and Jánošíková, who proposed that the Court should change its approach and consider the compliance of the national law with the Charter. Should the Court find that the national law is in conflict with the Charter, then the national law cannot be in compliance with the ECHR or the Constitution, even if the review suggests such conflict. It would suffice to refer to the primacy of EU law and its consequence, the non-application of the Constitution in conflict with the Charter. Mazák and Jánošíková, 2015, p. 597. See also Dobrovičová, Jánošíková and Mazák, 2016, pp. 130–131. For the advantages of the self-restraining approach, see Drgonec, 2018, p. 374.

proceedings on the stay of a foreigner).[19] The Court considered whether this is a case of implementing Union law under Art. 51 Charter and identified Directive 2008/115/EC[20] as the only relevant standard, which in the Court's opinion, explicitly allows deviation from procedural standards. Therefore, the Court did not deal with the alleged violation of the Charter.[21]

In another recent decision, the Constitutional Court of the Slovak Republic interpreted the mutual relations between the EU law and national law in the context of migration and asylum. In 2019, the Supreme Court of the Slovak Republic initiated proceedings in the Constitutional Court on the compliance of certain provisions of the Act on asylum[22] with Art. 47 of the Charter. Therefore, the Constitutional Court in its decision Ref. No. PL. ÚS 15/2020 of 15 March 2023 first considered it necessary to comment on the assessment of proposals for the initiation of proceedings on the compliance of legal regulations by the ordinary courts (including the Supreme Court), in which the Charter is the proposed reference norm. In its decision, the Constitutional Court emphasized the nature of the EU law expressed in the judicature of the Court of Justice of the European Union (CJEU),[23] according to which:

> Community Treaties, unlike ordinary international treaties, established a new legal order of its own, which is incorporated into the legal system of the Member States and which is binding for their courts. In the areas defined by the Treaties, the Member States limited their sovereign rights in favor of this new legal order with its own institutions and whose subjects are not only the Member States but also their nationals.[24]

According to the Constitutional Court, the cited concept is confirmed by current jurisprudence.[25] Accordingly, it follows from the nature of EU law that if it is impossible to interpret national legislation in accordance with the requirements of EU law, the principle of the primacy of EU law requires the national court to ensure the full effect of the requirements of EU law in the case on which it is deciding. The Constitutional Court has repeatedly highlighted this particularity of EU law. The Court recalled here its decision Ref. No. PL. ÚS 3/09 of 26 January 2011,

19 | For more details on the merits of this case, see sections 3.3 (applicant's right to comment on evidence) and 3.4 (right to respect for family and private life) of this article.
20 | 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. OJ L 348, 24.12.2008, pp. 98–107.
21 | Decision Ref. No. II. ÚS 480/2014 of 12 February 2015, para. 59. The Court was criticized for not referring a question to the Court of Justice of the EU for a preliminary ruling. Dobrovičová, Jánošíková and Mazák, 2016, pp. 151–152.
22 | Act No. 480/2002 Coll. on asylum, amending and supplementing certain acts (hereafter 'Act on asylum').
23 | Hereafter 'CJEU'.
24 | The Constitutional Court refers to judgements of the ECJ from 5. 2. 1963, van Gend and Loos, 26/62, EU:C:1963:1, p. 23; and from 15. 7. 1964, Costa, 6/64, EU:C:1964:66, pp. 1158 and 1159.
25 | Judgement of the CJEU from 21. 12. 2021, Euro Box Promotion and others, C-357/19, C-379/19, C-547/19, C-811/19 a C-840/19, EU:C:2021:1034, para. 245.

that the jurisprudence of the CJEU implies that the effect of the directly applicable provisions of the Treaty and of acts of the institutions in relation to the national law of Member States is not only the loss of applicability of any existing and conflicting provision of the national law, but—given that these provisions and acts are an integral part of the legal order applicable in the territory of each Member State, over which they have priority—also the exclusion of the adoption of such national law that is incompatible with the law of the European Community.[26]

The Constitutional Court added that the ordinary court (i.e. also the Supreme Court) cannot initiate proceedings before the Constitutional Court pursuant to Art. 125 (1) of the Constitution on the compliance of national legislation with those international treaties by which the Slovak Republic transferred the exercise of part of its sovereign rights to the EU. Within the scope of their authority, the ordinary courts apply the provisions of EU law and are obliged to ensure the full effect of these standards; they will not apply any national provision ex officio in conflict with Community law (even if it is a later provision); they shall not first request or wait for cancellation of this national law by legislative means or another constitutional procedure.[27] The specialized and concentrated model of constitutional justice characterizing the Slovak constitutional system does not allow ordinary courts, without cooperation with the Constitutional Court, to enforce and apply a decision on the inconsistency of a legal regulation with a legal regulation of higher legal force.[28] However, the principle of the primacy of the EU law introduces diffuse elements into the process of checking compliance of national law with the Charter when it does not require the court of a Member State to confirm its belief of such inconsistency by another competent authority. Therefore, if the ordinary court considers that the provisions of national legislation conflict with the Charter, then as a court of an EU Member State entrusted within its jurisdiction to apply EU law, it is obliged to ensure the full effect of the requirements arising from the provisions of that law.

The Constitutional Court subsequently focused on the applicability of the Charter in the case under consideration. The Court repeated that the CJEU has developed and is still developing several situations in which the compliance of national legislation with the requirements for the protection of fundamental rights and freedoms established by the Charter can be examined. First, the Charter is applicable in the national implementation of obligations arising from the EU law, including situations where Member States have adopted stricter standards than those determined by EU law, if these national standards would limit the effective application of the EU law in the harmonized area.[29] Second, the Charter covers

26 | The Constitutional Court refers to the judgement of the ECJ from 9. 3. 1978, Simmenthal, 106/77, EU:C:1978:49, para. 17.

27 | See para. 24 of the decision.

28 | Art. 144 (2) of the Constitution.

29 | Judgement of the CJEU from 19. 11. 2019 Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry against Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry, C-609/17 and C-610/17, EU:C:2019:981, para. 48.

national legislation, which falls under derogatory exceptions defined by EU law.[30] Finally, the Charter is also applicable in situations with a sufficient connection between the national act and EU law that extends beyond the similarity of the affected areas or indirect effects of one of the areas on another.[31]

Consequently, the Constitutional Court assessed the applicability of the Charter in this case. It concluded that based on an explicit delegation from Member States, which is enshrined in the primary law of the EU,[32] the EU determines the contours of the asylum policy of all its Member States through secondary legal acts. Subsequently, the Court focused on the Act on asylum. The basis of the provisions challenged before the Constitutional Court concerns the amendment to this Act, according to which the negative opinion of the Slovak Information Service and Military Intelligence creates a new (additional) reason for not granting asylum for the purpose of family reunification or subsidiary protection in the Slovak Republic. The revised procedural directive[33] does not explicitly rely on this reason for not granting asylum or supplementary protection. This reason represents a national security exception according to Art. 72 Treaty on the Functioning of the European Union (TFEU). However, regarding the national security exception, it is necessary to comply with the conditions set by EU law. A stricter national regulation must not hinder the effective implementation thereof at the national level. Therefore, the applicability of the Charter under Art. 51 (1) of the Charter can be established with regard to the disputed provisions of the Act on asylum. Based on this, the Supreme Court of the Slovak Republic, a court of an EU Member State, is authorized within its jurisdiction to apply the EU law. In case of doubt, the Supreme Court may, according to Art. 267 TFEU, refer to the CJEU in the framework of the preliminary question, similar to the Budapest High Court (Fővárosi Törvényszék) in its proposal of 27 January 2021 in case C-159/21. As such, the Constitutional Court did not proceed in assessing the compliance of the contested provisions of the Act on asylum with Art. 47 of the Charter.[34]

Remarkably, in this case, the Court took a new turn on its 'self-restraining approach'. The applicability of the Charter was analysed before the Court delved into the proposed inconsistency of the national law with the Constitution and ECHR. Although the applicability of the Charter was confirmed, the Constitutional Court did not deal with the proposed inconsistency of the national law with the Charter, and merely recommended the Supreme Court refer preliminary

30 | Judgement of the CJEU from 18. 6. 1991 Elliniki Radiophonia Tiléorassi AE a Panellinia Omospondia Syllogon Prossopikou against Dimotiki Etairia Pliroforissis a Sotirios Kouvelas a Nicolaos Avdellas and others ('ERT'), C-260/89, EU:C:1991:254.

31 | Judgement of the CJEU from 6. 3. 2014 Siragusa, C-206/13, EU:C:2014:126.

32 | Arts. 4 (2) j), 78 (1) and (2) of the Treaty on the Functioning of the European Union (Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

33 | 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, pp. 60–95.

34 | However, the Constitutional Court did assess the compliance of the contested provisions of the Act on asylum with the Slovak Constitution and the Convention (see section 3.3).

questions to the Court of Justice of the EU. Afterwards, the Constitutional Court decided[35] that the challenged national law is not consistent with the Constitution and ECHR. Unlike in previous cases, the Court did not derive any consequences for the Charter. (Previously, it would state it is unnecessary to further analyse the Charter, because the purpose of the proceedings has already been fulfilled. The national law would then become ineffective based on its inconsistency with the Constitution and ECHR).

3. Case law of the Slovak Constitutional Court on migration and asylum

The competence of the Constitutional Court concerning migration and asylum is not specifically regulated and the general rules on its jurisdiction are applicable. A survey of its judicature shows that migration and asylum matters mainly arise in two types of proceedings: the individual constitutional complaint procedure (on the protection of fundamental rights and freedoms) and review of constitutionality (of the national legislation). This section examines the case law of the Constitutional Court from the material viewpoint, where it forms four key areas: fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment (1 case); detention of foreigners (3 cases); an applicant's right to comment on evidence (5 cases), and right to respect for family and private life (4 cases).

3.1. Fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment

In 2011, the Constitutional Court dealt with a complaint according to which the Migration Office rejected the applicant's request for asylum as inadmissible. This meant his transfer to Greece, the country responsible in this case.[36] The applicant, a citizen of Afghanistan, highlighted that should he be transferred to Greece, the insufficient level of the asylum legal system and practice in the country would mean he would not be guaranteed admission to the asylum procedure. He also expressed his concern that by subsequent deportation to his country of origin—Afghanistan—he may be exposed to a threat to his life due to serious injustice against his person. The applicant objected to the violation of his fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment or punishment according to Art. 16 (2) of the Constitution of the Slovak Republic and the prohibition of torture according to Art. 3 ECHR caused by the judgment of the Supreme Court of the Slovak Republic.

The Constitutional Court stated that given the nature of this right as characterized by its absolute guarantee, it is the duty of the ordinary court to apply the

35 | For more details, see section 3.3 of this article (Applicant's right to comment on evidence).

36 | Decision of the Constitutional Court Ref. No. III. ÚS 110/2011 of 31 May 2011.

standards of protection resulting from this article (and from the Convention), even if such protection is not explicitly stipulated in the legal norms.

Moreover, the Constitutional Court noted that the fundamental right under Art. 16 (2) of the Constitution and right under Art. 3 ECHR are indisputably rights of a material nature. The applicant did not object to their violation by the decision of the Supreme Court in connection with the violation of any of the procedural rights guaranteed to him by the Constitution. The Constitutional Court recalled its case law,[37] according to which the fundamental right under Art. 16 (2) of the Constitution and under Art. 3 ECHR include procedural components in its content. The Constitutional Court reiterated that the procedural components of both indicated rights emerge in these types of proceedings (e.g. extradition proceedings, asylum proceedings) when a person comes under the jurisdiction of another state, which in connection with the decision of a public authority of the Slovak Republic in the circumstances of the case, may negatively impact the applicant's personal sphere.

The Constitutional Court concluded that the Supreme Court underestimated the significance of the applicant's fundamental right under Art. 16 (2) of the Constitution and his rights under Art. 3 ECHR. Formally referring to the national legal regulation and purpose of the reasoning of the administrative body, the court did not consistently assess the circumstances of the case, resulting in the emergence of shortcomings in its decision with constitutional relevance.

3.2. Detention of foreigners

The nexus between detention and deportation proceedings was explained by the Constitutional Court in its decision Ref. No. II. ÚS 264/09 of 19 October 2010. The Court stated that although detention and deportation proceedings are two separate actions, they are not completely independent or isolated. This statement results from the purpose of the detention, which in the given case, is the enforcement of administrative deportation. When appropriate, the law allows the state to have at its physical disposal a person subjected to pending deportation proceedings to carry out the deportation. From this perspective, the detention must be perceived as necessary. Administrative detention may not be necessary in the same way as detention in criminal proceedings wherein the reasons therefor must be fulfilled. The Constitutional Court added that the restriction of personal freedom is clearly tied to the essence of detention for the purpose of deportation. Certainly, a definitive conclusion regarding deportation will be reached in another proceeding, but the court cannot ignore obvious facts that prevent deportation even when deciding on detention. The substantive and procedural components of personal freedom are directly and indistinguishably linked, and as such, the protection of personal freedom is regulated in detail in the Constitution and ECHR. The Supreme Court, by separating detention and deportation proceedings, and by not assessing the possibility of deportation as a condition of detention, violated the procedural component of the applicant's personal freedom. The Constitutional Court considered the most serious violation of the fundamental right to be the fact

37 | Decisions of the Constitutional Court Ref. No. II. ÚS 111/08 of 26 June 2008, Ref. No. IV. ÚS 331/08 of 26 February 2009.

that the Supreme Court explicitly rejected the connection between detention and its purpose, i.e. deportation.[38]

In its decision Ref. No. II. ÚS 147/2013 of 9 October 2013, the Constitutional Court emphasized the importance of the speed of the court's decision making when reviewing the detention decision. The Constitutional Court gave a clear message to the courts: it is their task to ensure the balance between the right to an expedited decision on deprivation of liberty according to Art. 5 (4) ECHR and right to maintain minimum investigative procedural standards.[39] According to the Constitutional Court, the ECHR in Art. 5 (1) f) assumes that a person can be detained even when his deportation has not yet been legally decided on. It is sufficient that a deportation proceeding has started, that is, a proceeding that can actually lead to deportation. However, this means that the detained foreigner does not have to be, based on Art. 5 (1) f) ECHR, realistically and effectively deportable immediately at the moment of detention. This is because his deportation is the subject of proceedings that should lead to a decision on whether or not the foreigner will be deported.

The Constitutional Court further stated that the term 'deportation proceedings' according to Art. 5 (1) f) ECHR must be understood autonomously as a set of such acts of state bodies, which according to national law, are necessary for the deportation of the person to take place, i.e. his physical handover or sending to another state. It does not necessarily have to be the proceedings of a single state body. It could also be several interrelated proceedings, at the end of which is the final act of deportation. If the person has applied for asylum, then the asylum proceedings must be considered part of the 'deportation proceedings' for the purposes of Art. 5 (1) f). Therefore, Art. 22 (1) of the Act on asylum, according to which the asylum seeker has the right to stay in the territory of the Slovak Republic, does not prevent the actual deportation of such a person to the extent that his detention cannot be considered to have been carried out 'in deportation proceedings' in accordance with Art. 5 (1) f) ECHR. However, detention must always be free from arbitrariness. Therefore, the administrative authority deciding on detention is also obliged to consider the obstacles to the execution of administrative deportation, punishment of deportation, and transfer or return of the foreigner. This applies as long as such obstacles are obvious at the time of the decision on detention, are known to the administrative authority, or emerged during the proceedings. For an asylum seeker, the high probability of granting asylum (e.g. obvious persecution of a foreigner for political, racial, or religious reasons), which would have been obvious at the time of the decision on detention, may constitute an obstacle to the detention of the foreigner for administrative deportation. In fact, the detention of such an applicant could not be considered to have been carried out 'within the deportation proceedings' in the sense of Art. 5 (1) f) ECHR.

Finally, the Constitutional Court concluded that a delayed assessment of the legality of the deprivation of personal liberty by a court, coming more than a year after the restriction of personal liberty has already ended, has the same effect as if the person had no judicial protection against such restriction. Thus, the role of

38 | See pp. 24, 31 of the decision.
39 | Berthotyová, 2017, p. 102.

ordinary courts is to ensure a balance between the right to an expedited decision and right to maintain the minimum procedural standards of the investigation within the framework of Art. 5 (4) ECHR. The one who is deprived of personal freedom will hardly appreciate the court‘s careful care for his procedural rights if the consequence thereof is the prolongation of his lack of freedom. Therefore, if the Supreme Court decides on an appeal against the judgment of the regional court and the applicable procedural regulations allow it to make a meritorious (final) decision, it is the duty of the Supreme Court to prefer this method of decision over the annulment of the first-instance decision and return of the case to the regional court for further proceedings.[40]

Decision Ref. No. I. ÚS 365/2015 of 26 August 2015 can be marked as the Constitutional Court‘s key decision on the requirement for expedited decision making on the deprivation of liberty and for periodic review at reasonable intervals. According to the Court, in principle, cases of deprivation of liberty require that the justifiability of their continued duration is periodically reviewed. The purpose of Art. 5 (4) ECHR is to enable a person deprived of liberty to demand that the court examine the lawfulness thereof. Given that the fulfilment of the conditions established by law evolves over time (especially regarding the existence of relevant and sufficient grounds for the deprivation of liberty), the possibility to request such review repeatedly at reasonable intervals should be ensured. Art. 5 para. 4 ECHR enshrines a procedural guarantee against continuing the deprivation of liberty, which, although originally ordered in a legal manner, could become illegal and lose justification. Referring to case law of the European Court of Human Rights,[41] the Constitutional Court stated that the requirements for expedited decisions on deprivation of liberty and for periodic judicial review at reasonable intervals are fundamental, because they ensure a detainee does not have to be exposed to the danger of remaining in detention long after the deprivation of liberty ceased to be justified.[42]

3.3. An applicant‘s right to comment on evidence

Already in 2012,[43] the Constitutional Court expressed critical remarks on the practice of the Migration Office and subsequent judicial review of its practice when it denied subsidiary protection, basing its decision on the ‘security interest of the Slovak Republic’. The evidence was not included in the file, the judge did not examine it during the judicial scrutiny of the administrative decision, and thus, the applicant could not comment on it. In the opinion of the Constitutional Court, the basis of the decision of the competent authorities must be clear from the files of the administrative authority and court, even without an explicitly stated reason in the reasoning of their decision. The file must clearly show the facts the

40 | See p. 104 of the decision.

41 | Shishkov v. Bulgaria, Application no. 38822/97 from 9. 1. 2003, para. 88, Saadi v. United Kingdom, Application no. 13229/03 from 29. 1. 2008, para. 45, Amuur v. France, Application No. 19776/92 from 25. 6. 1996, para. 43, Abdolkhani and Karimnia v. Turkey, Application no. 30471/08 from 22. 9. 2009, Z.N.S. v. Turkey, Application no. 21896/08 from 19. 1. 2010, para. 56 and para. 63.

42 | See para. 23 of the decision.

43 | Decision of the Constitutional Court Ref. No. IV. ÚS 308/2011 of 25 January 2012.

decision-making body considered and attributed legal relevance, especially in view of the legal consequences of the decision not to provide or cancel the applicant's subsidiary protection. According to the Constitutional Court, the procedure in the Supreme Court[44] in connection with that in the regional court[45] means a violation of the applicant's fundamental right to comment on the evidence presented.[46]

However, the Constitutional Court later limited the scope of the applicant's right to comment on evidence when this is a classified document. In its decision Ref. No. II. ÚS 480/2014 of 12 February 2015,[47] the Constitutional Court emphasized the great deal of discretion of the sovereign when regulating the foreigners' regime, especially regarding issues of legal long-term residence. In principle, the legal regulation is based on trust in the intelligence knowledge of the Slovak Information Service. From a constitutional and institutional perspective, trusting the political control thereof remains. Protection by administrative courts is limited in the particular area; therefore, foreigners may feel their rights are insufficiently protected. However, the area of state security is close to political issues where judicial discretion is limited. In the case under consideration, the law excludes the taking of evidence provided by the Slovak Information Service, thus also excluding the possibility of commenting on it. Furthermore, a statement from the Slovak Information Service can be perceived as a legal condition not considered as evidence, and is therefore outside the regime of Art. 48 (2) of the Constitution. According to the Constitutional Court, the wording of the relevant legal provisions is so unambiguous it does not allow for a shift in interpretation towards the procedural articles of the Constitution that would enable the complainant to contradict the information in the Slovak Information Service reports. The Constitutional Court further explained that the Supreme Court and the Constitutional Court in their case law found legal space for a broader judicial protection of foreigners' position. This intersection is the provision of the Act on Classified Information enabling judges to familiarize themselves with classified information and legal representatives to see the information with the consent of the Director of the Slovak Information Service under the condition of confidentiality. The Constitutional Court further recalled its earlier decision[48] that the protection of human rights and fundamental freedoms in our constitutional system is primarily the task of the ordinary courts and the Constitutional Court. Specifically, the duty of all courts to protect individuals from interference by public authorities is highlighted. This duty is a fundamental component of a rule of law that respects and honours human freedoms. Thanks to its defining features—independence and being bound by the law—the judicial power can and must protect individuals from the excesses of public power. In the case under review, the ordinary courts learned the classified

44 | Decision of the Supreme Court of the Slovak Republic, Ref. No. 10 Sža/10/2010 of 12 January 2011.
45 | Decision of the Regional Court (Krajský súd) in Bratislava Ref. No. 9 Saz/38/2010 of 6 October 2010.
46 | See p. 36 of the decision.
47 | The case was related to the breach of the applicant's rights in the proceedings on the residence of foreigners. It has been, however, argued that the conclusions are also applicable to the asylum proceedings per analogiam. Aláč, 2020, p. 23.
48 | Ref. No. II. ÚS 111/08 of 26 June 2008.

facts and thus provided vertical protection to the applicant. They did it without the applicant being able to oppose it, but as mentioned, the law does not allow opposition. The Constitutional Court added that efforts to include reasoning in decisions have been its dominant doctrine in individual protection since the introduction of a constitutional complaint in 2002. However, in this case, the legislator preferred a simple finding in the complexity of the current world. The sense of judicial protection may seem suppressed, but the ordinary courts protect foreigners by checking the more formal but relevant aspects of the process. They also familiarize themselves with the reasons regardless of whether they are untenable. Here, the judiciary returns to the conscience of the judges, for example, as is the case with a jury decision.[49]

The problem of unavailability of the evidence to the applicant (migrant) for a residence permit was raised again by the Slovak Ombudsman (Public Defender of Rights). However, the proceedings in the Constitution Court have been hindered by the argument that the Ombudsman is not legally entitled to initiate them from her own motion.[50]

In 2016, these doubts regarding unconstitutionality led the Supreme Court of the Slovak Republic to contest the conformity of the provisions of the Act on asylum and Act on the residence of foreigners[51] with the Constitution. Indeed, the Constitutional Court in its decision Ref. No. PL. ÚS 8/2016 of 12 December 2018 reached the same conclusion as the public defender of rights, i.e. that the provisions in question are not in accordance with the Constitution. The time gap since the submission of the ombudsman's first proposal in the matter was almost five years.[52] The Constitutional Court was criticized for the fact that with its decision rejecting the locus standi of the ombudsman, it interpreted the Act on the public defender of rights in a significantly formalistic and restrictive manner, and thus contributed to the substantial narrowing of the protection of human rights and freedoms in the Slovak Republic.[53]

Regarding the decision of the Constitutional Court Ref. No. PL. ÚS 8/2016 of 12 December 2018, the Constitutional Court stipulated the following: if, due to the security of the state, the person concerned cannot be notified of the exact and complete reasons forming the basis of decisions under the Act on the residence of foreigners and the Act on asylum, a judicial review of such decisions from the perspective of the protection of the rights and legally protected interests of such a person cannot be effective, it cannot be a sufficient guarantee against the possible arbitrariness of a competent state authority, and it cannot realistically fulfil the fundamental right of the affected person to judicial protection according to the Constitution of the Slovak Republic, and the right to a fair trial according to Art. 6 (1) ECHR, or the right to an effective remedy and a fair trial according to Art. 47 Charter of Fundamental Rights of the European Union.

49 | See paras. 47, 48, 49, 50, and 55 of the decision.
50 | Decision of the Constitutional Court of the Slovak Republic Ref. No. PL. ÚS 5/2014 zo of 5 March 2014.
51 | Act No. 404/2011 Coll. on residence of foreigners, amending and supplementing certain acts (hereafter 'Act on residence of foreigners').
52 | Patakyová, 2020, p. 53.
53 | Kresák, 2014, p. 210.

Finally, this topic again recently appeared in the case law of the Constitutional Court.[54] In 2018, the Asylum act was supplemented with new reasons for not granting asylum for the purpose of family reunification and for not providing subsidiary protection: in the event that the opinion of the Slovak Information Service or of the Military Intelligence disagrees with the granting of asylum or provision of subsidiary protection. This statement was crucial in proceedings on the granting of asylum/subsidiary protection before administrative authorities and subsequently before courts in the administrative judiciary. However, to the applicant, the reasons for which the Slovak Information Service or Military Intelligence did not consent were not made available because of the protection of the security of the Slovak Republic. In its submission to the Constitutional Court, the Supreme Court of the Slovak Republic stated that the application of these provisions may limit the applicant's fundamental right in the administrative proceedings and subsequently, potentially also in the court proceedings, to comment on all the evidence presented. This simultaneously implies a possible unequal status of the applicant in the proceedings before administrative authorities and before the administrative courts.

First, the Constitutional Court stated that the right to adversarial proceedings is not absolute and its scope may change depending on the specifics of a case. However, the Court explained that the importance of this right is multiplied in situations where the evidence, on which the party to the proceedings cannot comment, is decisive for the entire proceedings. By not making the evidence available en bloc for any negative opinion, the applicant is denied the opportunity to comment on the often decisive evidence in the asylum procedure.

The Constitutional Court further explained that a less invasive alternative to the non-accessibility of the reasons for the Slovak Information Service or Military Intelligence's negative opinion could be established. The affected applicant and the Ministry that decides on the granting of subsidiary protection should have an opportunity to become familiar with the justification at least to the necessary extent. Knowing at least the basic reasons for which the Slovak Information Service or Military Intelligence disagreed with the provision of subsidiary protection would allow the applicant to assess whether it is useful for him to turn to the administrative court. The fundamental right to judicial protection in the administrative judiciary presupposes the formal enabling of the examined person's access to judicial protection and an approach that will provide an effective attempt to protect the applicant's individual interests. This effectiveness depends on many factors, but especially on the right of the affected person to defend his interests under the best possible conditions. In the context of the considered Act, this means the affected person could demand from the competent authority at least the basic reasons for its decision, and thus assess the matter with knowledge regarding whether it is useful to turn to the court with the relevant proposal. The competent court can ensure the effective protection of the affected rights and legally protected interests of this person only when the subject of its scrutiny (review) is the legality of the reasons for the contested decision. Here, the Constitutional Court recalled to its previous ruling Ref. No. PL. ÚS 8/2016 (see above).

54 | Decision Ref. No. PL. ÚS 15/2020 of 15 March 2023.

Moreover, the Constitutional Court stated that to preserve the constitutionality of the Act on asylum, the relevant facts should be made available to the applicant to the necessary extent by means of the relevant opinion of the Slovak Information Service or Military Intelligence. This refers to at least the substance of the reasons relating to public security, which form the basis of decisions under the challenged legislation, in a manner that considers the necessary confidential nature of intelligence information. The opinion of the Slovak Information Service and Military Intelligence could no longer contain only a strict agreement or disagreement with the provision of subsidiary protection. This would ensure that the applicant is able comment on the evidence that led to the negative opinion of the intelligence services regarding the threat to the security of the Slovak Republic. This measure would ensure the protection of a part of the classified facts and fulfil the necessary framework for the application of constitutionally guaranteed rights. This would allow the affected persons to defend their interests under significantly better conditions than the challenged legal regulation allows.

Ultimately, the Constitutional Court concluded that the contested wording of the Act on asylum does not meet the requirements of the least invasive means of protecting the security of the Slovak Republic. The problem with this provision is that the opinion of the Slovak Information Service or Military Intelligence that agrees or disagrees with the granting of asylum or provision of subsidiary protection to an applicant does not provide sufficient guarantees of the possibility of reviewing the Ministry's decision. In case of filing an administrative lawsuit, the current legal situation does not guarantee a fair trial in the administrative courts. Therefore, the legal provision does not meet the prerequisites of necessity in limiting the fundamental right to judicial and other legal protection according to Art. 46 (1) and (2) of the Constitution, and within the framework of Art. 6 (1) ECHR as they are interpreted by the Constitutional Court. Furthermore, the basic requirement according to Art. 13 (4) of the Constitution was not fulfilled, which when restricting fundamental rights and freedoms, requires paying attention to their essence and meaning.[55]

3.4. Right to respect for family and private life

The Constitutional Court has had several opportunities to explain how to apply the rules on (permanent, temporary) residence where they coincide with the right to respect for family and private life.

The key standpoint is in decision Ref. No. III. ÚS 331/09 of 16 December 2009. The Constitutional Court stated that the right to protection against arbitrary interference with private and family life in accordance with Art. 19 (2) of the Constitution of the Slovak Republic and with Art. 8 ECHR includes not only the negative obligation of the state to refrain from interference with them, but also its positive obligation to take effective measures to ensure their effective protection. The guarantees resulting from the right to respect for family life presuppose the existence of a family, i.e. the existence of a real and effective family life. They also include the intended family life, which although not yet fully established, is based

55 | See paras. 72–74 and 77 of the decision.

on a valid and real (genuine) marriage involving a close relationship and joint life (cohabitation) of the spouses at the time of or shortly before the objected interference. In the case of the conclusion that the marriage of a foreigner with a citizen of the Slovak Republic falls within the scope of protection provided in Art. 8 (1) ECHR, the criteria resulting from Art. 8 (2) ECHR require a proper legal assessment of the denial of a permanent residence permit, whether it can be considered in the given case as an interference with the applicant's right to respect for family life.

The interpretation of this topic was further developed in decision Ref. No. II. ÚS 480/2014 of 12 February 2015.[56] The Constitutional Court held that in principle, there is no legal right to the granting of residence.[57] The Slovak state authorities have a wide discretion, while the substantive fundamental right to family protection must also be assessed from the perspective of the personal responsibility of the foreigner, who must perceive the rank of his residence status (temporary, tolerated). The legislator balanced the constitutionally protected value of state security with constitutional procedural rights or the right to protect family life, emphasizing the security of the state. The legislator prioritized security from both its own perspective and that of the secrecy of intelligence information. In the confrontation with the security of the state, the legislator prioritized only the protection of life and prohibition of torture.

Decision Ref. No. III. ÚS 414/2016 of 21 June 2016 concerned the rejection of an application for temporary residence if a third-country national provides false or misleading information. The Constitutional Court stated that one reason for the cancellation of temporary residence exhaustively regulated in Art. 36 (1) of the Act on the Residence of Foreigners is the discovery of facts justifying the rejection of an application for temporary residence, including the case when a national of a third country provides false or misleading information or submits false or altered documents or a document of another person. These acts, within the proceedings under the Act on the Residence of Foreigners, also constitute a reason for the administrative expulsion of a national of a third country regulated in Art. 82 (2) of the Act on the Residence of Foreigners.

In decision Ref. No. II. ÚS 675/2017 of 10 November 2017,[58] the Constitutional Court reiterated that it pays careful attention to the relationship between the legal protection of private and family life and security interests of the state. To ensure these security interests, the 'criminal history' of a foreigner who applies for one of the forms of legal residence in the territory of the state must be considered. When balancing the applicant's private interest in the protection of his private and family life and the public interest in the protection of public order, or of the internal security of the state, whether the interferences of the state (public authority) are justified and necessary when the branch of national law applicable to foreigners is applied is also examined.

56 | See paras. 32, 46 of the decision.
57 | Here, the Court refers to Article 4 (1) in conjunction with Article 6 (1) of Directive 2003/109/EC on the legal status of third-country nationals who are long-term residents according to the directive on family reunification.
58 | See pp. 17 and 18 of the decision.

The Constitutional Court emphasizes that the applicant must have been aware of the risks associated with the formation of his family life, as he must and should have known that there is in principle, no legal right to be granted residence. Here, the relevant administrative authorities have a wide degree of administrative discretion. The fundamental right to the protection of private and family life must be assessed from the perspective of the personal responsibility of the foreigner, who must perceive the rank of his residence status (similarly in decision Ref. No. II. ÚS 480/2014 of 12 February 2015). In this case, the courts examined facts that were essential or decisive for security risk signals related to the applicant's potential stay in Slovakia (document of the criminal history of the complainant from Italy). From the viewpoint of the necessity of the interference by the state, the rejection of the applicant's request for a tolerated residence permit is consistent with the Constitution.

4. References to the case law of other countries or documents and case law of another organization

The Constitutional Court of the Slovak Republic regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU. Where appropriate, it compares the facts of specific cases and underlines the details that lead to different conclusions.[59]

59 | To interpret Article 5 (1) and (4) ECHR, the Constitutional Court analysed the relevant judicature of the European Court of Human Rights in its decision Ref. No. I. ÚS 365/2015 of 26 August 2015 (Sanchez–Reisse v. Switzerland, Application No. 9862/82, from 21. 10. 1986; Bezicheri v. Italy, Application No. č. 11400/85, from 25. 10. 1989; Chachal v. United Kingdom, Application No. 22414/93, from 15. 11. 1996; Agnissan v. Dennmark, Application No. 39964/98 from 4. 10. 2001; Abdolkhani and Karimnia v. Turkey, Application No. 30471/08, from 22. 9. 2009; Saadi v. United Kingdom, Application No. 13229/03, from 29. 1. 2008; Gündogu v. Austria, Application No. 33052/96, from 6. 3. 1997; Longa Yonkeu v. Latvia, Application No. 57229/09, from z 15. 11. 2011; Shishkov v. Bulgaria, Application no. 38822/97 from 9. 1. 2003; Amuur v. France, Application No. 19776/92 from 25. 6. 1996, Z.N.S. v. Turkey, Application no. 21896/08 from 19. 1. 2010). Moreover, the Court referred to the judgement of the CJEU of 30 May 2013, Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie, C–534/11, ECLI:EU:C:2013:343.
In its decision Ref. No. II. ÚS 480/2014 of 12 February 2015, the Constitutional Court considered the case-law of the ECtHR (C.G. and others v. Bulgaria, Application no. 1365/07, 24 July 2008; Jeunesse v. the Netherlands, Application no. 12738/10, 3 October 2010) and of the CJEU (Judgement of the CJEU from 4. 6. 2013, ZZ v Secretary of State for the Home Department, C-300/11, ECLI:EU:C:2013:363).
In its decision Ref. No. II. ÚS 264/09 of 19 October 2010, the Constitutional Court referred to ECtHR cases Singh v. the Czech republic (Application no. 60538/00, 25 January 2005), Ali v. Switzerland (Application no. 24881/94, 5 August 1998) and Agnissan v. Denmark (Application no. 39964/98, 4. October 2001).
In its decision Ref. No. PL. ÚS 15/2020 of 15 March 2023, the Constitutional Court emphasized the nature of the EU law expressed in the judicature of the Court of Justice of the European Union (for references, see section 2 of this article).

In the reasoning of decision Ref. No. III. ÚS 110/2011 of 31 May 2011, the Constitutional Court relied on the opinions and statements of international human rights bodies when responding to the applicant's claims concerning the negative situation of asylum seekers in Greece. The Constitutional Court referred to reports of the Norwegian Helsinki Committee[60] and intervention of the Commissioner for Human Rights of the Council of Europe submitted to the European Court of Human Rights regarding asylum seekers in Greece.[61]

It can be derived from decision Ref. No. II. ÚS 264/09 of 19 October 2010 that the Constitutional Court pays attention to the judicature of other States. The Court stated: 'It is clear from comparative jurisprudence…' However, the individual references to the case law of other countries are rare. There is one major exception: the judicature of the Czech courts. The Constitutional Court in its decision Ref. No. II. ÚS 264/09 of 19 October 2010 stated that comparatively, perceiving the similarity of the legislation, the Czech cases decided by the Supreme Administrative Court are worthy of consideration.[62] Moreover, to characterize the term 'detention', it turned to the Czech Constitutional Court.[63] In decision Ref. No. II. ÚS 480/2014 of 12 February 2015, the Slovak Constitutional Court considered another decision of the Czech Highest Administrative Court.[64] The only situation with reference to other countries' case law was when the Constitutional Court recommended the general courts take as inspiration the Hungarian request for a preliminary ruling of 27 January 2021 (Fővárosi Törvényszék) in case C-159/21.[65]

5. Conclusion

The judicature of the Slovak Constitutional Court concerning migration and refugee affairs after the accession of the Slovak Republic to the EU has been diverse and covers several important issues. Bearing in mind the aims of this article, three conclusions are drawn from the case law.

60 | Norwegian Helsinki Committee (NHC), NOAS and Aitima, Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece, October 2009.
61 | Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, para. 2, of the European Convention on Human Rights, Application No. 30696/09 M.S.S. v. Belgium and Greece, Strasbourg, 31 May 2010, CommDH(2010)22.
62 | The Constitutional Court analysed case-law of the Czech Highest Administrative Court: Kamran K. (Afganistán) proti Policii České republiky o zajištění cizince, rozsudek Nejvyššího správniho soudu č. j. 1 As 12/2009-61 and D. D. proti Policii České republiky, Oblastnímu ředitelství služby cizinecké policie Ústí nad Labem, rozsudek Nejvyššího správniho soudu č. j. 2 As 80/2009-66.
63 | Decision of the Constitutional Court of the Czech Republic Ref. No. PL. ÚS 10/08 of 12 May 2009.
64 | Ruslan K. (Ruská federace) proti Ministerstvu vnitra o udělení azylu, rozsudek Nejvyššího správniho soudu č. j. 6 Azs 142/2006–58.
65 | Decision of the Constitutional Court of the Slovak republic Ref. No. PL. ÚS 15/2020 of 15 March 2023, para. 29, see above.

In 2015, the Constitutional Court implied that it has the power to decide on compliance of the national law with the primary EU law. However, the Court later introduced the 'self-restraining approach' to the exercise of its jurisdiction. In the case it decides that the challenged national law is not in accordance with the Constitution, it is in principle no longer necessary to further examine this inconsistency with EU law (despite the proposal). Remarkably, in 2023, the Court shifted course on its 'self-restraining approach' in a case related to migration and refugee matters. The applicability of the Charter of Fundamental Rights of the European was analysed and confirmed. However, the Constitutional Court did not deal with the proposed inconsistency of the national law with the Charter, but merely recommended the Supreme Court refer preliminary question to the Court of Justice of the EU. Afterwards, the Constitutional Court decided that the challenged national law is not consistent with the Constitution and ECHR (and it did not derive any consequences for the Charter). Thus far, the term 'constitutional identity' has rarely been used by the Constitutional Court, and it has never been used in relation to EU law. Therefore, the first conclusion is that the Slovak Constitutional court has not linked migration or asylum issues to the issue of constitutional identity in its case law.

The second conclusion relates to the material viewpoint. The case law of the Constitutional Court forms four key areas: i) fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment; ii) detention of foreigners; iii) an applicant's right to comment on evidence; iv) and right to respect for family and private life. Following is a summary of the relevant (flagship) judgments with a developmental arch (where possible).

1. The Slovak Constitutional Court contributed to increasing the protection for migrants and refugees in Slovakia when it emphasized the nature of the fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment as an absolute guarantee. The Constitutional Court stated that if the applicant sought protection of his right enshrined in Art. 3 ECHR (and Art. 16 of the Constitution) and according to the ordinary court, such protection is not explicitly stipulated in the legal norms, it is the duty of the ordinary court to apply the standards of protection resulting from this article (and from the Convention).

2. The study of the case law showed the evolution in the interpretation of the right to liberty in relation to the detention of foreigners. The Constitutional Court developed two arguments of procedural character. First, it is clear from the essence of detention for the purpose of deportation that the restriction of personal freedom is tied to the purpose of detention. The conclusion regarding deportation will be reached in another proceeding, but the ordinary courts cannot ignore obvious facts that prevent deportation even when deciding on detention. If the person has applied for asylum, then the asylum proceedings must be considered part of the 'deportation proceedings'. In the case of an asylum seeker, the high probability of granting asylum (for example, obvious persecution of a foreigner for political, racial, or religious reasons), which would have been obvious at the time of the decision on detention, may constitute an obstacle to the foreigner's detention for administrative deportation. Second, the Constitutional Court emphasized the importance of the speed of the court's decision making when reviewing the

detention decision. Moreover, cases of the deprivation of liberty require periodic review of the justifiability of their continued duration.

3. An interesting developmental arch in the Constitutional Court's judicature was illustrated concerning the applicant's right to comment on evidence related to the security interest of the State in the proceedings according to the Act on asylum and Act on residence of foreigners. In 2012, the Constitutional Court stated that the basis for the decision of the competent authorities (asylum, residence) must be clear from the files of the administrative authorities and courts, even without an explicitly stated reason in their decision. However, later, in 2015, the Constitutional Court limited the scope of the applicant's right to comment on evidence when they are classified documents. Finally, in 2016, the Constitutional Court established that if due to the security of the state, the person concerned cannot be notified of the reasons forming the basis of decisions under the Act on the residence of foreigners and Act on asylum, a judicial review of such decisions from the perspective of the protection of the rights and legally protected interests of such a person cannot be effective, cannot be a sufficient guarantee against the possible arbitrariness of a competent state authority, and cannot realistically fulfil the fundamental right to judicial protection, and the right to a fair trial. This conclusion was confirmed in 2023 in the context of asylum and subsidiary protection proceedings. The relevant facts should be made available to the applicant to the necessary extent. Here, at least the substance of the reasons relating to public security, which form the basis of decisions under the challenged legislation, should be clarified in a way that considers the necessary confidential nature of intelligence information.

4. The Constitutional Court has had several opportunities to explain the application of the rules on (permanent, temporary) residence where they coincide with the right to respect for family and private life. On one hand, the Court recognizes that the criteria resulting from Art. 8 (2) ECHR require a proper legal assessment of the denial of a permanent residence permit and whether it can be considered in the given case as an interference with the applicant's right to respect for family life. On the other hand, in principle, there is no legal right to the granting of residence, and the Slovak state authorities have wide discretion in this regard. The legislator balanced the constitutionally protected value of state security and constitutional procedural rights, or the right to protect family life, emphasizing the security of the state. However, when balancing the applicant's private interest in the protection of his private and family life and the public interest in the protection of public order, or of the internal security of the state, whether the interferences of the state (public authority) are justified and necessary must be examined.

Finally, the study showed that the Slovak Constitutional Court regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU. One case was identified where the Court relied on the opinions and statements of international human rights bodies (Norwegian Helsinki Committee and Commissioner for Human Rights of the Council of Europe). The references to the case law of other countries are rare, with the exception of the Czech judicature, likely due to similarities in legal systems (historically one legal system before the separation of the republics).

Bibliography

Aláč, M. (2020) 'Ingerencia Slovenskej informačnej služby do konania o azyle v kontexte judikatúry Ústavného súdu' in Košičiarová, S. (eds.) *Aktuálne otázky azylového práva II. Zborník príspevkov z medzinárodnej vedeckej konferencie*. Trnava: Právnická fakulta Trnavskej University v Trnave, pp. 15–31.

Balog, B. (2022) *Materiálne jadro Ústavy. Ústavný systém v pohybe*. Bratislava: Wolters Kluwer.

Baraník, K. (2020) *Ústava na hviezdnom nebi. Vzťah Ústavy Slovenskej republiky k medzinárodnému právu*. Praha: Leges.

Baraník, K. (2021) 'Article 7' in Orosz, L., Svák, J. et al. (eds.) *Ústava Slovenskej republiky. Komentár. Zväzok I.* Bratislava: Wolters Kluwer, pp. 74–104.

Benko, R. (2018) 'K postaveniu Charty základných práv Európskej únie v právnom poriadku Slovenskej republiky' in Orosz, L., Grabowska, S., Majerčák, T. (eds.) *VI. ústavné dni*. Košice: UPJŠ v Košiciach, pp. 244–260.

Berdisová, L. (2021) 'Medzinárodnoprávna doktrína Slovenskej republiky' in Bröstl, A., Holländer, P., Príbelsky, P. (eds.) *Ústavné právo Slovenskej republiky*. 4th edn. Plzeň: Aleš Čeněk, pp. 109–112.

Berthotyová, E. (2017) *Zaistenie cudzincov. Judikatúra s komentárom súvisiacich ustanovení zákona o pobyte cudzincov*. Bratislava: Wolters Kluwer.

Breichová Lapčáková, M. (2020) *Nezrušiteľné ústavné princípy vo viacúrovňovom právnom systéme*. Košice: Univerzita Pavla Jozefa Šafárika, Šafárik Press.

Dobrovičová, G., Jánošíková, M., Mazák, J. (2016) 'Charta v konaní pred Ústavným súdom' in Mazák, J. (eds.) *Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 95–165.

Drgonec, J. (2017) *Ústavné právo procesné*. Bratislava: C.H.Beck.

Drgonec, J. (2018) *Ústavné právo hmotné*. Bratislava: C.H.Beck.

Drgonec, J. (2019) *Ústava Slovenskej republiky. Teória a prax*. Bratislava: C.H.Beck.

Káčer, M., Neumann, J. (2019) *Materiálne jadro vslovenskom ústavnom práve. Doktrinálny disent proti zrušeniu sudcovských previerok*. Praha: Leges.

Kresák, P. (2014) 'Reštriktívny formalizmus, ako dôvod zužovania ochrany ľudských práv a slobôd v rozhodovacej činnosti Ústavného súdu SR' in Orosz, L., Majerčák, T. (eds.) *Ochrana ľudských práv a základných slobôd ústavnými súdmi a medzinárodnými súdnymi orgánmi – III – Ústavné dni*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach: Právnicka fakulta, pp. 194–211.

Mazák, J., Jánošíková, M. (2015) 'Charta základných práv EÚ v konaní o súlade právnych predpisov: Zatiaľ rutina namiesto doktríny', *Právny obzor*, 98(6), pp. 590–601.

Orosz, L. (2020a) *Teória ústavy a ústavné systémy demokratických štátov*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Šafárik Press.

Orosz, L. (2020b) 'Ústavný system Slovenskej republiky a ochrana ústavnosti po 30. januári 2019' in Szakács, A., Hlinka, T. (eds.) *Princíp právneho štátu ako súčasť materiálneho jadra ústavy. Bratislavské právnické fórum 2020*. Bratislava: Univerzita Právnická fakulta Univerzity Komenského v Bratislave, pp. 19–28.

Orosz, L., Svák, J. (eds.) (2022) *Ústava Slovenskej republiky. Komentár. Zväzok II*. Bratislava: Wolters Kluwer.

Orosz, L., Svák, J. et al. (eds.) (2021) *Ústava Slovenskej republiky. Komentár. Zväzok I*. Bratislava: Wolters Kluwer.

Patakyová, M. (2020) 'K aktívnej legitimácii verejného ochrancu práv v konaní o súlade právnych predpisov pred Ústavným súdom podľa čl. 125 ods. 1 Ústavy' in Orosz, L., Grabowska, S., Majerčák, T. (eds.) *Ústavná a zákonná úprava konania pred súdnym orgánom ochrany ústavnosti v štátoch V4 – VIII – Ústavné dni*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 39–57.

Šipulová, K., Steuer, M. (2023) 'From Minimalism to the Substantive Core and Back: The Slovak Constitutional Court and (the Lack of) Constitutional Identity' in Kovács, K. (ed.) *The Jurisprudence of Particularism: National Identity Claims in Central Europe*. Oxford: Hart Publishing, pp. 81–104; https://doi.org/10.5040/9781509960156.ch-003.

Steuer, M. (2019) 'Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky)' in Grote, R., Lachenmann, F., Wolfrum, R. (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford: Oxford University Press; https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e803.

Štiavnický, J., Steuer, M. (2020) 'The Constitutional Court of the Slovak Republic. The Many Faces of Law-Making by Constitutional Courts with Extensive Review Powers' in Florczak-Wątor, M. (ed.) *Judicial Law-Making in European Constitutional Courts*. 1st edn. London: Routledge. pp. 183–200; https://doi.org/10.4324/9781003022442-10.

THE ROLE OF THE SERBIAN CONSTITUTIONAL COURT IN THE AREA OF ASYLUM AND MIGRATION

Ivana Krstić[1]

ABSTRACT

The Constitutional Court in Serbia protects the constitutionality and legality of human rights and freedoms guaranteed by the 2006 Constitution. However, its role in asylum- and migration-related matters is limited. There are two reasons for this: the Court very narrowly interprets its own competencies which results in the rejection of the majority of constitutional complaints, and the Court serves as a protector of state authorities rather than a protector of the human rights of asylum seekers, refugees, and migrants. The jurisprudence of the Constitutional Court in this area relates to several matters: the application of a safe third country principle, rights concerning the asylum procedure, and issues relating to the freedom of movement and detention of migrants. Therefore, the Court has been unable to develop clear and coherent practice in this area. However, it is worth noting that the Court invokes relevant standards derived from the jurisprudence of the European Court of Human Rights, although the application of those standards usually does not lead to a decision to uphold the constitutional complaint. It also relies on other international sources, such as the UN Refugee Agency reports on specific countries, various United Nations and Council of Europe instruments, and reports of non-governmental organisations. Finally, the Court is not interested in the case law of the Court of Justice of the European Union (EU), despite the fact that Serbian legislation in this area is inspired by the EU acquis. Serbia is not a member state of the EU, but as a candidate country it is in the process of aligning its own legislation and practice, and referral to the jurisprudence of the Court of Justice would provide guidance on how to interpret domestic provisions, such as subsidiary protection.

KEYWORDS

asylum procedure
Administrative Court
Constitutional Court
safe third country
freedom of movement
deprivation of liberty

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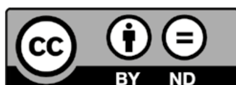

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1. Introduction

The Serbian Constitution is one of the youngest constitutions in Europe[2] and contains a broad catalogue of human rights.[3] This catalogue was inspired by the European Convention on Human Rights (ECHR) and other international human rights instruments accepted by Serbia. The Constitution proclaims equality and prohibits discrimination, protects the right to life and freedom from torture, and stipulates conditions for the deprivation of liberty and the rights of persons deprived of liberty. These rights belong to everyone, but are of particular importance to asylum seekers, refugees, and migrants. Additionally, Art. 57 explicitly guarantees the right to asylum to foreigners who have a reasonable fear of persecution based on race, gender, language, religion, national origin, political opinion, or social group. In this way, the Constitution recognises the grounds for persecution contained in the 1951 Convention on the Status of Refugees and goes further by protecting people from gender-based persecution. Therefore, the right to asylum is constitutional.

The basic role of the Serbian Constitutional Court is to protect the constitutionality and legality of human rights and freedoms.[4] A total of 15 judges, each serving a nine-year term, are expected to be protectors of human rights and provide an effective remedy for human rights violations and abuses. However, a mixed judicial electoral system,[5] as well as a lack of clear criteria for their appointment,[6] does not always ensure the highest quality of judges ready to serve justice and protect human rights. Consequently, in many cases, the Constitutional Court narrowly interprets human rights, even when it invokes the ECHR and standards derived from the jurisprudence of the European Court of Human Rights (ECtHR). In addition, the Constitutional Court is not inspired by the case law of the Court of Justice of the European Union (CJEU) and does not rely on any other EU source despite Serbia being a candidate country since 2012.

Another hurdle is the limited possibility of submitting a constitutional appeal that can be filed against individual acts or actions of state bodies or organisations entrusted with public powers that violate constitutional human rights and freedoms if other legal means for their protection have been exhausted or are not

2 | The Constitution was adopted on 30 September 2006 by a large majority in the parliament, and promulgated on 8 November 2006. See Jerinić and Kljajević, 2016, p. 4.
3 | Krstic, 2012, p. 110.
4 | Art. 166, para. 1 of the Constitutional Court.
5 | Five judges are appointed by the National Assembly (out of 10 candidates proposed by the President), five by the President (out of 10 candidates proposed by the National Assembly), and five at the general session of the Supreme Court of Cassation (out of 10 candidates proposed at a general session by the High Judicial Council and the State Prosecutor Council), the highest Court in Serbia. Serbian Constitution, Art. 172(2)-(3).
6 | The Serbian Constitution only specifies that judges need to be at least 40 years old and be prominent lawyers with 15 years of experience in practicing law. Serbian Constitution (Art. 172(5)). There is no extra clarification of their legal expertise (such as international law, human rights, etc.) and professional abilities, as well as no other criteria, such as personal qualities like social awareness, common sense, etc.

provided.[7] Violations must be committed through an individual act or action that determines the rights and obligations of the individual. Another possibility for the protection of human rights and freedoms, if unconstitutionality derives from the application of law or general act, is to initiate the procedure of assessing the constitutionality and legality of a legal act.[8]

The role of the Constitutional Court in migration and refugee law is limited, as discussed in the following Secs. The Court has so far decided on several constitutional complaints, and current jurisprudence does not allow the Court to establish solid principles in this area or even derive from previous case law. In the majority of cases, constitutional complaints were rejected, and the human rights of asylum seekers, refugees, and migrants were protected. The same approach is adopted by asylum bodies whose acts are subject to judicial review. Thus, in this study, the asylum procedure and judicial review are briefly explained in Sec. 2 for a better understanding of the decisions of the Constitutional Court as complainants refer to the illegality of the acts of these bodies. Sec. 3 then presents the decisions of the Constitutional Court on matters of asylum and migration, while Sec. 4 illustrates a very limited approach and interpretation of the Constitutional Court's competence and role in emergency situations. The main premise is that the Constitutional Court has remained in the background of human rights protection for asylum seekers, refugees, and migrants, and has not taken the lead in the development of norms and standards in this area.

2. Asylum procedure and the judicial review

The first asylum law to establish asylum procedures in Serbia was the 2007 Law on Asylum (LA),[9] which was replaced by the 2018 Law on Asylum and Temporary Protection (LATP).[10] Despite the significant improvements in the new legislation, the structure of the administrative procedure has not been changed. The first-instance body that decides on asylum applications is the Asylum Office which operates as a separate unit of the Ministry of the Interior Border Police Directorate.[11] Prior to 2015, it operated as an Asylum Unit within the Ministry of Interior, which meant that it never had a civil character.[12] The Asylum Commission is a second-instance body where appeals against the decisions of the Asylum Office can be filed. The Asylum Commission consists of nine members appointed

7 | Art. 170 of the Constitutional Court; Art. 82 of the Law on the Constitutional Court, *Official Gazette of the Republic of Serbia,* no. 109/2007, 99/2011, 18/2013, 103/2015, 20/2023; The Law on the Constitutional Court (LCC), *Official Gazette of the Republic of Serbia*, no. 109/2007, 99/2011, 18/2013, 103/2015, 40/2015, 10/2023.
8 | Art. 168, para. 2 of the Constitution.
9 | Law on Asylum (LA), *Official Gazette of the Republic of Serbia*, no. 109/2007.
10 | Law on Asylum and Temporary Protection (LATP), *Official Gazette of the Republic of Serbia*, no. 24/2018.
11 | Krstic, 2019, p. 163.
12 | Krstic and Davinic, 2013a, p. 173.

by the government over a period of four years. National legislation prescribes the conditions for becoming a member of the Commission[13] but does not guarantee that members have the necessary competence to handle asylum cases, since it does not require specific knowledge of asylum and refugee law. Moreover, there is no guarantee of independence, and the majority of members are representatives from different line ministries chaired by a representative of the Ministry of Interior.[14]

If a party is unsatisfied with the decision of the Asylum Commission, it can file a lawsuit with the Administrative Court, which performs a judicial review of the lawfulness of that decision.[15] The Administrative Court is a court of special jurisdiction operating since 1 January 2010 and[16] is established for the whole country with the competence to adjudicate administrative disputes.[17] Until 2018, complaints to the Administrative Court did not have a suspensive effect, in contrast to Art. 13 of the ECHR.[18] When the new law on asylum was adopted, it expressly introduced the suspensive effects of complaints.[19] Nevertheless, the Administrative Court has a large number of pending cases (c. 130,000) and a great influx of new cases, while having only the president and 52 judges.[20] The Court has an extremely broad jurisdiction (approximately 120 different legal areas) and a small number of asylum-related cases, indicating that asylum is an insignificant legal area for the Court.[21] There is also no specialisation within the Court in the form of compulsory training or specialised chambers, which are required in the area of asylum and migration law, as emphasised in the 2022 Report of the European Commission.[22] The Court usually decides on cases in limited jurisdiction, which means that after it upholds a claim and annuls the act, it returns the case to a competent authority for retrial.[23] This prolongs the duration of a final decision for asylum seekers. Moreover, in asylum cases, the Administrative Court usually adjudicates without oral hearings, claiming that the facts of the case are well established.[24] However, in some cases, it would be beneficial if the Administrative Court held a public hearing and established additional facts to help deliver a reasonable and just judgment.

13 | Those conditions are as follows: the person must be a citizen of the Republic of Serbia, a lawyer with at least five years of professional experience, and he/she must have specialty in the field of human rights. See Art. 21 of the LATP.

14 | European Commission, Serbia 2022 Report, Brussels, 12 October 2022, p. 62.

15 | Arts. 22 and 96, para. 1 of the LATP.

16 | Art. 11, para. 4 of the Law on organization of the courts (LOC), *Official Gazette of the Republic of Serbia*, no. 116/08, 104/2009, 101/2010, 31/2011, 78/2011, 1101/2011, 101/2013, 40/2015, 106/2015, 13/2016, 108/2016, 113/2017, 65/2018, 87/2018, 88/2018.

17 | Art. 29, para. 1 of the LOC.

18 | See, e.g. *De Souza Ribeiro v France* [GC] App no 22689/07,13 December 2012, para. 82.

19 | Art. 96, para. 2 of the LATP.

20 | Information obtained from the website of the Administrative Court [Online]. Available at: https://www.up.sud.rs/cirilica/izvestaji-o-radu (Accessed: 24 November 2023).

21 | Davinic and Krstic, 2018, p. 65.

22 | European Commission, Serbia Report, p. 63.

23 | Art. 42 of the Law on Administrative Disputes (LAD), Official Gazette of the Republic of Serbia, no. 111/2009.

24 | Art. 33 of the LAD.

Currently, it is not possible to submit an appeal against the judgment of an Administrative Court.[25]

In a case where the constitutional rights of asylum seekers and migrants are violated, the party can submit a constitutional complaint to the Constitutional Court, claiming unlawful and erroneous acts of asylum bodies and the Administrative Court, as well as other bodies deciding their status in Serbia (the Department for Foreigners).

3. Constitutional complaints in asylum and migration matters

This key Sec. will present the decisions of the Constitutional Court on constitutional complaints in two Sub-Secs.: 1) issues concerning the procedure (the right to a fair trial, right to an effective remedy, and 'safe third country' principle); and 2) issues concerning the merit (transit zones, detention of migrants, and discrimination).

3.1. Issues concerning the procedure

3.1.1. The right to a fair trial

The asylum procedure and judicial reviews must provide effective remedies for asylum seekers. Courts particularly need to provide sufficient reasons for their decisions, explaining why, on what facts, and under which law the decision was based. Nevertheless, the Administrative Court usually relies entirely on facts previously highlighted by the second-instance body, and as a result, there is no independent consideration of the claims.[26] Let us consider the case of a citizen of Somalia who claimed that the asylum procedure took too long. He argued that the Asylum Office did not allow him to follow the procedure in his own language, that he was asked suggestive questions with the aim of questioning his credibility, and that the hearing lasted for more than five hours, resulting in the rejection of his asylum claim.[27] He complained to the Asylum Commission, which revoked the decision of the Asylum Office several times without independently deciding on the merit.[28] He further contested the Administrative Court's judgment as erroneous.[29] The Administrative Court did not hold an oral hearing, even though there was a need to clarify and establish the factual situation, and did not consider the allegations or demands of the lawsuit to resolve the dispute in full jurisdiction and to

25 | Parties have two extraordinary legal remedies at their disposal: the motion to review a Court decision and the reopening of the procedure. Arts. 49–65 of the LAD.

26 | See Belgrade Center for Human Rights, 2020, p. 67.

27 | Asylum Office, 03/9-26-886/08, 31 March 2011.

28 | Asylum Commission, 04/10, 1 June 2011.

29 | Administrative Court, 11 U. 7727/11, 20 October 2011.

grant refugee protection. The evidence presented by international organisations, states, non-governmental organisations (NGOs), and the media was not considered, and the Administrative Court erred in finding that the complainant was not subjected to persecution.

In this case, the Constitutional Court rejected other claims but held that the Administrative Court violated the right to a fair trial of an asylum seeker because of the lack of a reasoned Court judgment.[30] The Court underlined that, although the obligation to explain the decision does not mean that detailed answers must be provided to all arguments presented, the decision must have sufficient precision in the explanation. It also implies an obligation to state clear, sufficient, and comprehensible reasons on which the Court bases its decision and simultaneously provide a guarantee to the party that the Court considers all allegations and evidence presented in the proceedings. The Constitutional Court further found that the Administrative Court did not assess evidence of international organisations, states, (NGOs), or media that reported a high level of violence in Somalia.

The Constitutional Court emphasised that in each case, it is important to consider *ex officio* if a person deserves subsidiary protection after the Administrative Court concludes that a refugee status cannot be granted.[31] The Court went even further in referring to the *Sufi and Elmi* cases decided by the ECtHR.[32] In this case, the ECtHR found that the level and intensity of general violence in Mogadishu, Somalia, is such 'that any returnee would be at real risk of Art. 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection'.[33] This judgment of the ECtHR was delivered in June 2011 and the Constitutional Court's decision was passed in October of the same year. The Constitutional Court found that this assessment could lead to the conclusion that the right to asylum was violated. However, with this argument, the Court immediately limited itself, underlying that according to the ECtHR case law, 'if the applicant has not been extradited or deported when the Court examines the case, the material point in time must be that of the Court's consideration of the case'.[34] It also failed to criticise the Administrative Court for not adjudicating in full jurisdiction.

The Constitutional Court annulled the Administrative Court's judgment, finding that the decision was not well reasoned. Accordingly, the Administrative Court annulled its own decision, and instead of deciding on the merit, it ordered the Asylum Commission to assess all evidence and decide if the applicant deserves

30 | Constitutional Court, Uz -6596/2011, 30 October 2014, *Official Gazette of the Republic of Serbia*, no. 124/2014 [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 23 July 2023). The Court found a violation of Art. 32, para. 1 of the Constitution.

31 | Ibid., p. 11. However, administrative bodies do not apply this standard of the Constitutional Court in their decisions. See, Belgrade Center for Human Rights, 2020, p. 59.

32 | *Sufi and Elmi v. UK*, App. nos. 8319/07 and 11449/07, 28 June 2011.

33 | Ibid., para. 293.

34 | Here the case cited *Chahal v. the United Kingdom,* ECtHR, App. no. 22414/93, 15 November 1996, para. 86; *K.A.B. v. Sweden*, ECtHR, App. no.886/11, 5 September 2013.

subsidiary protection, bearing in mind the current situation in Somalia.[35] This further prolonged the final decision in this case, which could not be considered as a trial within a reasonable time.

3.1.2. The right to an effective legal remedy

Art. 13 guarantees the right to an effective remedy.[36] The Serbian Constitution stipulates that everyone has 'the right to an appeal or other legal remedy against any decision of their rights, obligations, or lawful interests,' and it supposes that the legal remedy is accessible and effective. In one asylum case, the Constitutional Court dealt with this issue by relying on the principles derived from the ECtHR's case law.[37] In this case, a citizen of Afghanistan, who left his country of origin after being hospitalised because of a physical attack by the Taliban, applied for asylum in Serbia. On his way to Serbia, he travelled to Iran, Turkey, Greece, and North Macedonia. He complained of freedom from torture, the right to an effective remedy, and the principle of non-refoulment. His asylum request was dismissed by applying the safe third-country principle, and he challenged the fact that the first-instance body did not go into the merits of his case to assess the validity of his fear of persecution in the country of origin.[38] At that time, the composition of the second instance body was not formed, and he challenged the fact that he could not submit an appeal to the Asylum Commission. Further, he claimed that even if this happened, it would not give him an effective legal remedy because all the appeals of asylum seekers submitted to the second-instance body had been rejected thus far, not leaving reasonable prospects of success. Finally, he claimed that a lawsuit before the Administrative Court was ineffective as the Court did not engage in the merits of asylum cases.

Bearing in mind that the complainant had applied to the Constitutional Court without exhausting all legal remedies, the Court relied on the jurisprudence of the ECtHR to assess whether it could accept a constitutional complaint. The Court's starting point was the principle from *Akdivar and Others v. Turkey,* that the rule on the exhaustion of remedies must be evaluated in light of the circumstances of each case.[39] The principle also entails that only available and sufficient legal remedies need to be exhausted[40] and that their application requires some degree of flexibility and no excessive formalism.[41] The Constitutional Court reasoned that if someone claims that the practice of administrative authorities is in general futile and ineffective, that must be proved 'beyond reasonable doubt', in accordance with the ECtHR's practice.[42] However, the Court avoided citing that it means 'an

35 | Administrative Court, III-11 У. 14154/14, 18 December 2014.

36 | Art. 13 of the ECHR applies to asylum procedure. See Guide, 2022, para. 121.

37 | Constitutional Court, Uz-5331/2012, 24 December 2012, *Official Gazette of the Republic of Serbia*, no. 4/2013 [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).

38 | Asylum Commission, 03/9-26-2656/11, 28 May 2012.

39 | *Akdivar and Others v. Turkey*, ECtHR, App. no. 21893/93, 16 September 1996, para. 69.

40 | *Vernillo v. France*, ECtHR, App. no. 11889/85, 20 February 1991, para. 27.

41 | *Cardot v. France*, ECtHR, App. no. 11069/84, 19 March 1991, para. 34.

42 | *Cyprus v. Turkey*, ECtHR, App. no. 25781/94, 10 May 2001, para. 115.

accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.[43] This standard describes the issues raised by the complainant.

Regarding the argument that the Asylum Commission was not formed, the Constitutional Court found that the complaint was submitted on 12 June 2012 while the Asylum Commission was established on 20 September 2012 'only' three months later. The Constitutional Court supported its view by relying on the ECtHR's standard that 'even if a single remedy does not by itself entirely satisfy the requirements of Art. 13 of the ECHR, the aggregate of remedies provided for under domestic law may do so'.[44] By doing so, the Court did everything to protect asylum bodies and their practices. It rejected the constitutional complaint on the grounds that the decision of the Asylum Commission had not been made before the constitutional appeal, and pointed out that the exhaustion of legal remedies did not mean only their filing but also the adoption of a decision by the competent authority or Court. It also made a mistake by publishing its own, non-anonymised decision in the Official Gazette and thus violated the asylum seeker's right to privacy.[45]

3.1.3. The 'safe third country' principle

The most common reason for dismissing asylum requests, before the adoption of the new law on asylum in 2018, was when an asylum seeker came from a safe third country,[46] unless a person proved that it was not safe for them.[47] This concept derives from practice and was first recognised in a Resolution of the EU Council in 1992.[48] It is usually misused and transfers the obligation from one state to another to decide on asylum requests.[49]

Until 2018, the 'safe third country' was defined as:

> The state from the list adopted by the Government, which respects international principles of refugee protection contained in 1951 Refugee Convention and 1967 Protocol, in which asylum seeker stayed or passed by immediately before entering the territory of the Republic of Serbia, in which he/she had a possibility to seek an asylum, and in which he/she would not be exposed to torture, inhuman or humiliating treatment or returning to country where his/her life, safety and security would be endangered.[50]

43 | Ibid.
44 | *Gebremedhin v. France*, ECtHR, App. no. 25389/05, 26 April 2007, para. 53.
45 | Belgrade Center for Human Rights, 2012, p. 26.
46 | Krstic and Davinic, 2016, p. 173.
47 | Art. 33, para. 1 (6) of the LA.
48 | The Resolution on a Harmonised Approach to Questions concerning Host Third Countries, 1992.
49 | More on this see Davinic and Krstic, 2013b, pp. 97–116.
50 | Art. 1, para. 1 (11) of the Law on Asylum, *Official Gazette of the Republic of Serbia*, no. 109/2007. Since 2018, the List has been removed, and a 'safe third country' is defined as a country in which the applicant is safe from the persecution and where he/she enjoys the guarantees from non-refoulement and the possibility of accessing an efficient asylum procedure and granting protection in accordance with the 1951 Refugee Convention. Art. 45 (1) of the LATP.

In accordance with this provision, the government adopted a list of safe third-party countries in 2009.[51] The list includes all neighbouring countries, including North Macedonia,[52] Hungary,[53] Greece,[54] Turkey,[55] and Italy,[56] all of which were facing serious deficiencies in their asylum systems.

Considering that asylum requests were dismissed in a high number of cases, it is not surprising that the Constitutional Court delivered several decisions dealing with the application of the 'safe third country' principle by asylum bodies. However, these cases are also relevant from the perspective of interpreting the non-refoulement principle.[57]

In the first constitutional claim of this kind, the complainant, a Cuban citizen, claimed that his right to a fair trial and asylum had been violated.[58] The complainant argued that he was a refugee and a political opponent of the Cuban regime. He was expelled from school to distribute posters against Fidel Castro's regime, and later from university. The police searched for him several times, and he was followed and interrogated by the state authorities. He left his country of origin legally in 2009 and moved to Romania, where he stayed for three months. Thereafter, he entered Serbia for a week with the aim of extending his visa and then returned to Romania, where he stayed for another three months. Subsequently, he travelled to Serbia by train, where he stayed until the start of February 2010, when he took a bus to Montenegro and returned to Serbia. He claimed to have a well-founded fear that his extradition to Cuba would endanger his life and integrity.

The Constitutional Court rejected a constitutional complaint submitted against the Administrative Court for an erroneous decision. In this case, the concept of a

51 | The decision determining the list of safe countries of origin and safe third countries, *Official Gazette of the Republic of Serbia,* No. 67/2009, decision no. 110-5055/09, 17 August 2009.

52 | Submission by the UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: The former Yugoslav Republic of Macedonia [Online]. Available at: https://www.refworld.org/country,UNHCR,MKD,51c945134,0.html (Accessed: 24 November 2023).

53 | UNHCR urges Hungary not to amend its asylum system in rush, ignoring international standards [Online]. Available at: https://www.unhcr.org/ceu/420-ennews2015unhcr-urges-hungary-not-to-amend-its-asylum-system-in-a-rush-ignoring-international-standards-html.html (Accessed: 24 November 2023); UNHCR concerned Hungary pushing asylum seekers back to Serbia, 15 July 2016; *Ilias and Ahmed v. Hungary*, ECtHR (GC), App. no. 47287/15, 21 November 2019.

54 | See, e.g., *M.S.S. v. Belgium and Greece*, ECtHR (GC), App. no. 30696/09, 21 January 2011.

55 | UNHCR: Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey under safe third country and first country of asylum concepts [Online]. Available at: https://www.unhcr.org/media/legal-considerations-returning-asylum-seekers-refugees-greece-turkey-under-safe-third-country (Accessed: 24 November 2023).

56 | See for instance: *Sharifi and Others v. Italy and Greece,* App. no. 16643/09, judgment from 21 October 2014; *Tarakhel v. Switzerland,* App. no. 29217/12, judgment from 05 November 2014.

57 | Kovacevic, 2020b, p. 240.

58 | Constitutional Court, Uz 1286/2012, 29 March 2012, *Official Gazette of the Republic of Serbia*, no. 42/2012 [Online]. Available at: https://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).

'safe third country' was applied by the first-instance body, as the complainant spent some time in Romanian and Montenegro, both safe third countries for Serbian authorities.[59] This decision was confirmed by the second-instance body[60] and the Administrative Court,[61] reasoning that Romania and Montenegro were safe third countries, that the complainant had the possibility of applying for asylum in those countries, and that he did not prove that he was unable to do so. In this case, the Constitutional Court found that the complainant did not present any indication that Romania or Montenegro was unsafe for him but also underlined that the government's list cannot be automatically applied without considering UN Refugee Agency (UNHCR) reports. Here, the Court referred to *M.S.S. v. Belgium and Greece*[62] and emphasised that the ECtHR found that Belgium, an EU member state, violated Art. 3 of the ECHR, as Belgian authorities knew or should have known that there was no guarantee that the asylum seeker's request would be seriously considered by Greek authorities. Thus, the Court mentioned the *M.S.S.* judgment as well as UNHCR observations on Serbia as a country of asylum, underlining that the safe third-country principle cannot be applied automatically and that it must be assessed taking into consideration UNHCR reports on a situation in a particular country. The Court also referred to *T.I. v. UK*[63] where the ECtHR further assessed that the state could not automatically rely on the obligations of other states under the Dublin Convention and that the Court should consider whether there are any effective procedures that protect the asylum seeker from removal from Germany to Sri Lanka.

The Constitutional Court established the principle that a government's list could not be automatically implemented without assessing whether a particular country could be considered safe in each case. The Court further underlined that asylum bodies should also examine in detail all relevant documentation submitted by the complainant.[64] The complainant was a citizen of Somalia and had three children. He claimed that their transit through Turkey, Greece, and North Macedonia could not be considered as passing through safe third countries, as they feared 'chain refoulement' to their country of origin. He documented his claim in several reports from the Committee of Ministers of the Council of Europe, UNHCR, and NGOs. He particularly emphasised that the Administrative Court did not consider the previous constitutional decision and that it automatically applied the government's list.[65] The Constitutional Court reasoned that the government's list is subject to corrections by the UNHCR reports[66] and that the asylum request should not be

59 | Asylum Office, 03/9-26-512/10, 31 August 2010.

60 | Asylum Commissions, Az 17/10, 5 November 2010.

61 | Administrative Court, 3555/11, 14 December 2011.

62 | *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/0, 21 January 2010.

63 | T. I. v. UK, ECtHR, App. no. 43844/98, 23 July 1999.

64 | Constitutional Court, Uz-3548/2013, 19 September 2013 [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).

65 | Administrative court, U. 1371/13, 20 March 2013.

66 | In this case the main reference was given to UNHCR, Serbia as a Country of Asylum, Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia, August 2012 [Online]. Available at: https://www.refworld.org/publisher,UNHCR,COUNTRYPOS,50471f7e2,0.html (Accessed: 24 November 2023).

dismissed on the grounds that a person transited through a country from the list if its asylum procedure is contrary to the Convention on the Status of Refugees.[67] This decision also illustrates that the Administrative Court does not apply decisions of the Constitutional Court, which maintains the *status quo* in asylum procedures.

Another case involves a citizen of Sudan who transited through Turkey, Greece, and North Macedonia, where he spent 10 days without any problems.[68] He challenged the decision of the Asylum Office to dismiss his case because the UNHCR and European Commission did not release any report suggesting that the asylum system in North Macedonia was inefficient, concluding that it was a safe third country for the complainant.[69] This decision was confirmed by the Asylum Commission[70] and Administrative Court.[71] The Constitutional Court looked at the UNHCR reports of 2012 and 2016 and Amnesty International's report of 2015 and identified several deficiencies in the asylum system in Serbia and North Macedonia. The Court particularly emphasised that these deficiencies were caused by a massive influx of migrants and that they were beyond the responsibility of the states.[72] The Court further concluded that the facts of the case demonstrated that the claim was unfounded and that returning the complainant to North Macedonia by the readmission procedure did not put him at risk of being deported to Greece or Turkey.[73] Thus, the Constitutional Court demonstrated that the consideration of UNHCR reports is not thorough and detailed enough and that the question of the real possibility of accessing the asylum procedure is not conducted by Serbian authorities, including the Constitutional Court. In this case, the Constitutional Court cited its previous decisions on the application of a 'safe third country' principle mentioned above and repeated the non-automatic application of the government's list, invoking also *M.S.S. v. Belgium and Greece* case[74]. The Constitutional Court underlined the importance of this case in the opinion of the ECtHR that the existence of laws and international treaties guaranteeing human rights is not in itself sufficient to ensure protection from the risk of abuse in a situation where reliable sources (reports of the UNHCR, Council of Europe (CoE) Commissioner for Human Rights, non-governmental organisations, and research in the field) demonstrate that the practice is contrary to the principles enshrined in the ECHR[75].

67 | Constitutional Court, Uz-3548/2013, p. 7. [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).
68 | Constitutional Court, Uz-8023/2016, 11 April 2019 [Online]. Available at http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).
69 | Asylum Office, 26-5724/14, 9 December 2015. At this time, asylum practice changed, and Serbian authorities focused only on the country from which a person entered Serbia.
70 | Asylum Commission, Az-08/15, 12 April 2016.
71 | Administrative Court, U. 8418/16, 2 September 2016.
72 | Constitutional Court, Uz-3548/2013, p. 8.
73 | Ibid., p. 9.
74 | *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/0, 21 January 2010.
75 | Constitutional Court, Uz-3548/2013, p. 7.

3.2. Issues on the merit

3.2.1. Transit zone

There were many cases before the ECtHR in which the Court discussed the issue of the treatment of migrants arriving at airports. In one case, a pregnant citizen of Tunisia was arrested at the airport on the suspicion of coming to Serbia to meet her partner, an Austrian citizen, with the aim of illegally entering Austria.[76] Police informed her that she would be deported to Tunisia. However, she claimed that she received information in English and was forced to be in a transit zone, she did not have legal representation or any other right that belonged to persons deprived of liberty, and no decision was issued in her case which would allow her to appeal to it. According to her testimony, she left her country of origin as a divorcee expecting a child with a foreigner and fearing family ostracism. She also feared radical Islamists working in the pharmacy and refused to issue receipts for the medicines they requested. She claimed that the police officers did not understand her because she spoke French. After three days, she was allowed to enter Serbia as an asylum seeker. In her constitutional complaint, she argued that she did not receive immediate medical help, privacy, and adequate sleeping conditions.

In this case, the Constructional Court relied on the relevant jurisprudence of the ECtHR, which refers to the conditions of staying in transit zones and underlined the principles that were important for the decision.[77] The Court also relied on the findings of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) on its visit to Serbia from 2015 and Concluding Observations on the Second Report of Serbia to the UN Committee against Torture (CAT), as well as on a report on Serbia by the Special Rapporteur on Torture from 2017. Regrettably, the Constitutional Court reasoned that the complainant entered Serbia and left the transit zone immediately after she expressed an intention to seek asylum, and that she was in the transit zone for only three days, which is the usual time spent in this zone. The Court also reasoned that she could seek asylum at any moment and stay shorter in the transit zone, that she had medical protection and adequate accommodation, as well as contact with others by phone. Although the Court accepted that her freedom of movement was limited, it concluded that her medical condition required rest and that she had no need to leave the room in which she was accommodated. The Constitutional Court also found that she was not deprived of her liberty, but was only exposed to the

76 | Constitutional Court, Uz-3651/2015, 30 June 2022 [Online]. Available at http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).

77 | The Constitutional Court invoked the following cases: *Amuur v. France*, ECtHR, App. no. 19776/92, 25 June 1996; *Shamsa v. Poland*, ECtHR, App. no. 45355/99, 45357/99, 27 November 2003; *Mogoş v. Romania,* ECtHR, App. no. 20420/02, 6 May 2004; *Mahdid and Haddar v. Austria*, ECtHR, App. no. 74762/01, 8 December 2005; *Riad and Ildiab v. Belgium*, ECtHR, App. nos. 29787/03, 29810/03, 24 January 2008; *Nolan and K. v. Russia,* ECtHR, App. no. 2512/04, 12 February 2009; *Gahramanov v. Azerbaijan*, ECtHR, App. no. 26291/06, 15 October 2013; *Z.A. and Others v. Russia*, ECtHR (GC), App. nos. 61411/15 et al., 21. November 2019, *Khlaifia and Others v. Italy*, ECtHR, App. no. 16483/12, 15. December 2016.

limitations of freedom of movement.[78] Unfortunately, this decision shows how the Constitutional Court attempted to justify the actions of police officers while ignoring the fact that the complainant was in a vulnerable position and in a serious health situation.

3.2.2. Detention of migrants

The detention of migrants, asylum seekers, and refugees is common in many European countries. This has serious consequences on the well-being of detainees and requires strict scrutiny, legitimacy of the measure in question, and respect for the rights of persons deprived of liberty. The qualification of deprivation of liberty in the Serbian legal framework is aligned with European standards. However, several practical challenges still remain.[79] The Constitutional Court discussed these issues in several complaints and had the opportunity to establish standards in this area.

In one case, five applicants from Libya claimed that their constitutional rights were violated by the Ministry of Interior, which cancelled their stay in Serbia for security reasons and ordered a 10-year ban on entry. They claimed that the Ministry's decisions were not specific to the security risks presented by the main applicant and their family members to Serbia. None of them committed a criminal offence in the territory of Serbia, nor was any procedure initiated against them to assess security risks, especially as they were former diplomats, students of medicine and dentistry, psychologists, and minors. Therefore, they argued that the actions of the Ministry of Interior were arbitral and factually unfounded, and placed them at direct risk of torture. After their stay was cancelled, they applied for asylum, but their request was rejected.[80] However, as the situation in Libya deteriorated, they re-applied for asylum and were granted subsidiary protection based on the security situation in Libya and the main applicant's state of health.[81] The Constitutional Court did not find a violation on the part of the Ministry of Interior, as decisions on expulsion were never executed, so it dismissed the constitutional complaint.[82] The Court also did not go into the merits of the case, as the applicants were granted subsidiary protection in Serbia by the subsequent decision of the Asylum Office, which was based on its decision on the health status of the complainant, UNHCR reports, and instructions of the UK Ministry of Foreign Affairs on the security and humanitarian situation in Libya. The Constitutional Court, once again, omitted the introduction of standards in the case of individuals who posed a risk to the security of Serbia but lacked the possibility to challenge that risk.

A constitutional complaint was also submitted by 18 applicants from Afghanistan, some of whom were minors, for their arrest for the purpose of identifying persons, inhuman and degrading detention conditions which lasted for 12 hours,

78 | Ibid., p. 25.

79 | Davinic and Krstic, 2019, pp. 139–149.

80 | Asylum Office, 26-222/15, 10 December 2015; Asylum Commission, Az 23/15, 11 February 2016; Administrative Court, 16 U. 6304/16, 26 May 2016.

81 | Asylum Office, 26-222/15, 3 July 2018.

82 | Constitutional Court, Uz – 6006/2016, 19 December 2018.

and no right to an attorney during that time.[83] After their identities were established, they were sent to the Misdemeanour Court and released after seeking asylum in Serbia. The complainants claimed that their arrests were arbitrary and unlawful. During their detention, they were not given the opportunity to explain why they had left their country of origin and Bulgaria. They also claimed to have been exposed to ill treatment, including overcrowding and poor conditions in the police detention unit; waiting in the hall of the Misdemeanour Court in Pirot while the Misdemeanour proceedings were ongoing; and transportation in a police vehicle, that is, deportation to the territory of Bulgaria. They were driven to the 'green border' with Bulgaria and were ordered to leave the van. After multiple hits, they were left in the woods at minus 2 degrees, from where they travelled to Sofia. They claimed that their collective expulsion by public authorities left them with fear, humiliation, hopelessness, and uncertainty. After their expulsion, they stayed in Bulgaria on the streets and in hostels for a week, with the support of humanitarian organisations, and then returned to Serbia.

Considering this case, the Constitutional Court emphasised that the right to freedom is a fundamental constitutional right.[84] The Court invoked the relevant jurisprudence of the ECtHR, underlying that the deprivation of liberty is an autonomous concept, that it must be lawful, and that there is a difference between this right and the freedom of movement. Relying on these principles, the Constitutional Court reasoned that their arrest was lawful and non-arbitral, as the state had the right to control its borders and establish an identity for those who illegally resided and were without any identification (ID).[85] However, the Constitutional Court found that during their detention, they did not have legal representation. It also examined whether they were detained under inhuman conditions (in the overcrowded basement of a police station without furniture that could be used for rest, without heating, or in a toilet). Here, the Court underlined the requirement for minimal severity to attain the threshold for ill-treatment. Despite the terrible conditions in which persons were held, the Court did not find ill-treatment based on its decision on the facts that they received food, clothes, and shoes; that the circumstances of accommodation of a large number of persons were unexpected due to the migrant crisis and increased influx of persons in Serbia; and that they only stayed there for 12 hours and waited for the misdemeanour procedure for only 10 hours.[86] Regarding the final argument of their collective expulsion to Bulgaria, the Constitutional Court again referred to the relevant jurisprudence of the ECtHR. The Court reasoned that police officers did not act on the order of the Misdemeanour Court when they collectively expelled complainants from Serbia.[87] This was the only violation found, despite minors being exposed to terrible conditions while in detention.

83 | Constitutional Court, Uz 1823/2017, 20 January 2021, *Official Gazette of the Republic of Serbia*, no. 6/2021 [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).
84 | Ibid., p. 17.
85 | Ibid., p. 19.
86 | Ibid., p. 23.
87 | Ibid., p. 28.

In the third case, a citizen of Finland was deprived of her liberty in a hostel and was brought to a Correction Facility for Foreigners.[88] She was placed at the decision of the Ministry of Interior, which only stated that she was a threat to public and national security.[89] The Higher Court confirmed this decision.[90] She was not informed of the reasons for her detention and did not have an interpreter or legal representation. She received only written information in English on the rights of people deprived of liberty. During the detention, she could go outside for half an hour under police supervision as well as to the toilet accompanied by a police escort. One day after her arrest, she was informed of the right to consular protection. Three days later, she was transferred to the airport, where she received a decision for her expulsion.[91] She claimed that she was denied her right to freedom, the right to be informed immediately in a language she understood about the reasons for her arrest and the accusations against her, and the right to inform without delaying the person of the choice of her whereabouts. After considering the case, the Constitutional Court found that the deprivation of liberty was illegal, as the decision on her expulsion was delivered when she was already in detention.[92] However, the Court further found that other aspects of the constitutional complaint did not stand, as she said that she was fluent in English, did not need consular support, and immediately engaged a lawyer, which meant that she had proper legal representation.[93] This part of the judgment is also highly problematic because the ECHR is clear about the rights of persons deprived of their liberty.

3.2.3. Discrimination

Art. 21 of the Serbian constitution proclaims equality and prohibits discrimination through open-ended clauses. This provision is further elaborated upon in the Law on the Prohibition of Discrimination, which clearly stipulates equality for all, including asylum seekers, refugees, and migrants.[94] One constitutional complaint concerning migrants is discrimination. Specifically, a citizen of North Macedonia claimed that he was not allowed to enter Serbia because of his Roma ethnicity.[95] He claimed that, on 17 October 2010 at the border, the police told him that there was an order not to allow entry into Roma for those who travelled in groups. He also claimed that no one asked him about the purpose of his travel, invitation letters, money, or employment status and that the police only wanted to know about his

88 | Constitutional Court, Uz-1189/2015, 1 April 2021. See also almost identical cases of Bulgarian nationals, Constitutional Court, Uz-1237/2015, 1 April 2021; Constitutional Court Uz-1239/2015, 20 May 2021; decisions [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).
89 | Ministry of Interior, 138/14, 15 December 2014.
90 | Higher Court of Belgrade, 5/15, 15 January 2015.
91 | Ministry of Interior, 1875/14, 17 December 2014.
92 | Constitutional Court, Uz-1189/2015, p. 8.
93 | Ibid., p. 9.
94 | Law on the Prohibition of Discrimination, *Official Gazette of the Republic of Serbia*, no. 22/2009, 52/2021.
95 | Constitutional Court, Uz-3970/2015, 18 May 2017 [Online]. Available at: https://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).

final destination. He further argued that the other Romas with whom he travelled (12-13 persons) were also banned from entering Serbia. At the same time, public officials did not provide any reason for rejection or submit any official records of the rejected persons, while the reasons for the measure were established later in the civil procedure. It was found that from January 2010 to March 2011, the complainant entered the Serbian border 105 times, and on 17 October 2010 he travelled with several Romas on a minibus to Germany. The border police argued that he was unemployed and did not have enough money in his possessions. According to some information, in 2010, 536 citizens of North Macedonia were denied entry into Serbia, with 206 rejections in October of the same year. The border police also claimed that they do not treat persons as a group but as individuals, and that they do not know the ethical background of a person, as this information is not included in passports.[96] Consequently, the national Courts ruled that the plaintiff failed to prove that this was a case of discrimination.[97] The Constitutional Court referred to the case law of the ECtHR that concerns collective expulsion, but concluded that the complainant was subject to individual assessment of the case.[98] Regarding the assessment of discrimination claims, the Constitutional Court underlined that the complainant must show that he was treated differently from those in similar situations. The Court also invoked the relevant jurisprudence of the ECtHR to underline the principle that discrimination exists if a person is treated less favourably than another person in a similar situation.[99] Because the complainant did not have the required amount of money to enter Serbia, he did not prove that persons in his situation of non-Roma origin were allowed to enter Serbia.[100] The Constitutional Court emphasised that, according to the practice of the ECtHR,[101] the applicant needed to prove that he was discriminated against, and if so, the burden of proof shifted to the state to show that there was objective and reasonable justification for such a discriminatory act.[102] The standard is that if it is likely that discrimination has happened, then the state needs to prove and explain the high number of Roma who were denied entry into Serbian territory. Moreover, the state did not prove that other foreigners who were unemployed and did not have enough money were banned from entering Serbian territory.

96 | Ibid., p. 3.
97 | See the contested decisions First Basic Court in Belgrade, P. 7556/11, 21 June 2012; Appellate Court in Belgrade, Gz 6690/14, 16 January 2015; Supreme Court of Cassation, Rev. 1920/15, 11 February 2016.
98 | Constitutional Court, Uz-3970/2015, p. 7.
99 | *Lithgow and Others v. UK*, ECtHR, App. no. 9006/80 et al., 24 June 1986; *Fredin v. Sweden,* ECtHR, App. no. 12033/86, 18. February 1991; *Brkic and Others v. Croatia,* ECtHR, App. no. 53794/12, 6 December 2016.
100 | Ibid., p. 8.
101 | The Constitutional Court cited *Andric v. Sweden*, ECtHR, App. no. 45917/99, 23 February 1999; *Hirsi Jaama and Others v. Italy*, ECtHR (GC), App. no. 27765/09, 23 February 2012; *Mikolenko πv. Estonia, ECtHR,* App. no. 10664/05, 8 January 2008; *Abdi Ahmed and Others v. Malta,* ECtHR, App. no. 56796/13, 16 September 2014.
102 | *Darby v. Sweden,* App. no. 11581/85, 23 October 1990.

4. The limited role of the Constitutional Court in protecting constitutional rights

This Sec. illustrates the Constitutional Court's limited approach to three situations: 1) the absence of regulations, 2) the interpretation of general acts, and 3) a state of emergency. In all these situations, the Court failed to protect asylum seekers, refugees, and migrants from serious human rights violations.

4.1. The absence of regulations

Since the adoption of the LA in 2007, it has been stipulated that the Ministry of Interior would adopt a bylaw (within 60 days of entry into force on 1 April 2008) on travel documents for asylum seekers and refugees.[103] The same time limit was reiterated in the 2018 Law on Asylum and Temporary Protection.[104] However, this requirement has not yet been fulfilled, despite the fact that freedom of movement is guaranteed by Art. 39 of the Serbian Constitution and Art. 39 of the 1951 Refugee Convention. This provision clearly stipulates that states are obliged to issue refugees 'travel documents for the purpose of travel outside their territory unless compelling reasons for national security or public order otherwise require.'

Therefore, a Syrian refugee granted refugee status in Serbia in 2015 for his political activities, and the general state of insecurity in his country of origin applied to the Asylum Office for a travel document for refugees.[105] The Border Police Directorate informed him that there was no possibility of issuing him a travel document as a bylaw that would regulate the content and design of the document had not been enacted.[106] The complainant underlined that the Ministry of Interior had failed to enact the relevant bylaw and that the Border Police was unable to issue him a document. He requested that the Constitutional Court order the Minister of Interior to urgently adopt the bylaw.[107] However, the Constitutional Court dismissed the constitutional complaint as inadmissible, finding no competence in assessing the constitutionality of the non-existing acts. The Court underlined that it had the competence to assess constitutionality against individual actions or decisions and could not be lodged against inaction and the non-adoption of a general legal act.

This decision illustrates the very narrow interpretation of the Constitutional Court regarding its own competence and its limited role as a human rights

103 | Art. 58, para. 5 of the LA; Art. 67, para. 1 (4) of the LA.

104 | Art. 101, para. 1 (1) of the LATP.

105 | See also the citizen from Kazakhstan, who was granted asylum in Serbia (by a decision Asylum Office, 26-4906/15, 9 December 2015), and who complained to the Constitutional Court claiming that Art. 39 of the Constitution was violated due to the fact that the Ministry of Interior failed to adopt the bylaw regulating travel documents, stipulated as an obligation in domestic legislation, as well as in international law. Constitutional Court, Uz-4427/2016, 16 January 2018.

106 | Border Police Unit, no. 03/10, no. 26-1342/14, 11 June 2015.

107 | Belgrade Center for Human Rights, 2018, p. 88. The Constitutional Court dismissed the constitutional complaint on 20 June 2016.

protector. Additionally, this decision is unclear, because the consequences of the illegal and unjustified limitations of freedom of movement are reflected in individuals who cannot obtain that right.[108] The case was submitted to the ECtHR in 2016 and communicated with the government in 2018; the judgment was delivered in July 2023.[109] The ECtHR found that Serbian authorities, by notifying the applicant of their inability to issue him a travel document due to formal reasons, 'deprived his right to leave the country of any effectiveness for an extended period of seven years in a manner undoubtedly amounting to an interference with the meaning of Art. 2 of the Protocol No. 4 (freedom of movement).'[110] The Court noted that it could not accept the government's argument that comprehensive technical and software solutions for all travel documents in Serbia are required, which also requires financial resources, stating that the law itself entrusted the Minister of Interior to regulate this matter within 60 days of its implementation.[111]

4.2. Interpretation of general acts

The List of safe third countries, which was disputed in several constitutional complaints, is still automatically applied by administrative asylum bodies and the Administrative Court, despite the Constitutional Court's clear position on this matter. The Belgrade Center for Human Rights (BCHR), a Serbian NGO, decided to submit an initiative to assess the constitutionality and legality of the government's decisions.[112] It proposed that the Court suspend the decision as well as the execution of previous decisions. It was claimed that the decision was contrary to the Serbian Constitution and the different ranges of international conventions: the 1951 Refugee Convention and its Protocol, ECHR, Convention against Torture, and Convention on the Rights of the Child.[113] The application of the list violated the well-established principle of international law, the non-refoulment principle, which means that a person cannot be expelled to a country where he or she is in real danger of serious human rights violations. The claim was that by implementing the decision, Serbia violated the right to access an efficient and fair asylum procedure as well as the rule of non-refoulment.[114] Since 2009, after the list was adopted, Serbia has denied almost all asylum seekers the right to asylum, because the decision enables asylum requests to be rejected without involving competent authorities in the merits. Several reports have documented its erroneous application, including that of the Hungarian Helsinki Committee.[115] Thus, in conclusion, it was emphasised that Serbia declared certain third countries as safe, without

108 | AIDA, 2022, p. 193.
109 | *S.E. and Others v. Serbia*, ECtHR, App. no. 61365/16, 11 July 2023.
110 | Ibid., para. 81.
111 | Ibid., para. 87.
112 | Belgrade Center for Human Rights, Initiative for Assessing the Constitutionality of the Government's Decision on Safe Third Countries, 18 September 2012.
113 | Ibid., p. 1.
114 | Ibid., p. 3.
115 | Hungarian Helsinki Committee, Serbia: Not a safe country of asylum, 20 June 2012 [Online]. Available at: https://helsinki.hu/en/serbia-not-a-safe-country-of-asylum/ (Accessed: 24 November 2023).

previously examining whether asylum seekers have access to a fair and efficient asylum procedure in which their requests would be thoroughly examined. In other words, the automatic application of the list makes the institution of asylum illusory and denies asylum seekers the right to access an efficient and fair procedure in which their request is considered on merit.[116] Furthermore, the list was claimed to have been adopted under unclear criteria and had not been updated; thus, it no longer reflected the ongoing situation in countries. The BCHR concluded that the practice of Serbian authorities led to the conclusion that the *ratio legis* of the decision on safe countries was to avoid fulfilling the accepted international obligations.[117]

Acting on this initiative, the Constitutional Court adopted a short conclusion regarding the dismissal of the constitutional complaint. According to the Court, the decision was not of a general nature, or in other words, a general act, but contained a list of specific states.[118] This narrow way of interpreting general acts by the Constitutional Court must be criticised, as the decision had a very general nature, was applicable to almost all asylum cases, and served as the basis for dismissing asylum requests by asylum bodies in many instances.

4.3. State of emergency

Owing to the COVID-19 pandemic, Serbia declared a state of emergency on 15 March 2020.[119] The next day, the government adopted a decision on the temporary restriction of the movement of asylum seekers and irregular migrants in asylum and reception centres, including their surveillance.[120] Asylum seekers and irregular migrants were exceptionally and in justified cases allowed to leave the facilities with the permission of the Commissariat for Refugees and Migration. The decision was valid until 9 April 2020 when its provisions were transferred to the Decree on measures during the state of emergency,[121] and remained in force until 6 May 2020 when the state of emergency was lifted.[122] Subsequently, on 7 May 2020 an Order restricting movement at entrances to open spaces and facilities of reception centres for migrants and asylum centres was issued.[123] This Order extended the prohibition of leaving facilities 'until the cessation of the danger of spreading the infectious disease caused by COVID-19.' This Order was terminated on 14 May

116 | Initiative, p. 5.
117 | Ibid.
118 | Constitutional Court, IUo- 812/2012, 24 April 2013.
119 | Decision on the declaration of the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 29/2020. More on state of emergency in Serbia see Krstic and Davinic 2020.
120 | Decision on Temporary Restriction of Movement of Asylum Seekers and Irregular Migrants Accommodated in Asylum Centre and Reception Centers in the Republic of Serbia, *Official Gazette of the Republic of Serbia,* no. 32/2020.
121 | Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 53/2020.
122 | Decision on lifting the State of Emergency, *Official Gazette of the Republic of Serbia*, no. 65/2020.
123 | Order on the Restriction of Movement on open space and facilities of reception center for migrants and asylum seekers, Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia, no. 66/2020.*

2020.[124] A constitutional complaint was submitted claiming that the detention of migrants was illegal, arbitrary, and a collective deprivation of their liberty. Some claimed that the strict regime imposed on the freedom of movement of asylum seekers and migrants amounted to the deprivation of liberty.[125]

In its decision, the Court found that the restrictions on movement were constitutional.[126] It underlines that restrictions on freedom of movement were extended to all citizens, depending on their level of vulnerability, and were loosened with a better epidemiological situation.[127] The Court further argued that the order aimed to prevent the uncontrolled movement and voluntary abandonment of asylum and reception centres of persons who may be carriers of the COVID-19 virus.[128] Thus, it rejected the claim that the restriction of movement was an arbitral, illegal, and collective deprivation of liberty based on discriminatory criteria and without the possibility of judicial protection. The Court found that this was not a deprivation of liberty, either according to its purpose or content.[129] The Court reasoned that the purpose of temporary restrictions on freedom of movement was effective protection from dangerous infectious diseases of asylum seekers and irregular migrants and adequate protection of the general population in Serbia. Both purposes are legitimate, legally acceptable, and constitutionally justified. If asylum seekers and irregular migrants were allowed to move freely, they would be exposed to severe risk.[130] Simultaneously, the risk of exposing other persons in Serbia to the possibility of contracting the disease had significantly increased. The Constitutional Court emphasised that asylum seekers and irregular migrants, in most cases, do not intend to stay and live permanently in Serbia and try to move to other countries without prolonged retention. In other words, the Court suggested that in specific circumstances in which State borders were maximally secured, they would certainly not have real opportunities to leave Serbian territory. However, if they succeeded, they would face severe problems in neighbouring countries, which supposedly demonstrated that their treatment in Serbia was still much better than that in the adjoining region.[131] Finally, the content of the measure was effective protection from dangerous infectious diseases, precisely targeting categories of persons who had a significantly increased risk of spreading dangerous infectious diseases in relation to other persons. This decision is unsatisfactory as an explanation and illustrates the Constitutional Court's need to defend the government at all costs while using a strange analogy and discriminatory argumentation.[132]

124 | Order on the termination of the Order on the restriction of movement on open spaces and facilities od reception centers for migrants and asylum seekers, Decree on Measures adopted during the State of Emergency, *Official Gazette of the Republic of Serbia,* no. 74/2020.
125 | See, e.g., Kovacevic, 2020a.
126 | Constitutional Court, IUo-45/2020, Official Gazette of the Republic of Serbia, no. 126/2020, 25 October 2020 [Online]. Available at: http://www.ustavni.sud.rs/page/jurisprudence/35/ (Accessed: 24 November 2023).
127 | Ibid., p. 29.
128 | Ibid., p. 31.
129 | Ibid.
130 | Ibid., p. 32.
131 | Ibid.
132 | See also Belgrade Center for Human Rights, 2020, p. 91.

5. Conclusion

The role of the Serbian Constitutional Court in the development of asylum and migration laws is very modest.

The Constitutional Court delivers either short decisions (especially on the dismissal of constitutional complaints or initiatives for the assessment of the constitutionality and legality of certain acts) or decisions containing information on disputed acts and relevant national and international law, while the decision's rationale is usually brief. There is no single judgment that links asylum and migration issues to the issue of constitutional identity; however, the Court acts as a defender of national authorities rather than that of human rights. Moreover, in a decision concerning the state of emergency and restrictions on the freedom of movement of asylum seekers, refugees, and migrants, it is visible that the Constitutional Court approved the view of the national authorities that migrants are particularly dangerous for spreading the virus, which lead to the distinction between 'us' and 'them'. Another unusual conclusion of the Court was the arrogant attitude that Serbia provides better treatment and protection for migrants than neighbouring countries, which was not necessarily true and was not up to the Court to express such a view.

Moreover, not only were a few constitutional complaints submitted and decided by the Court, but the Court also limited its own role, especially when it interpreted general acts or the absence of regulations that were supposed to be enacted, violating important constitutional rights such as freedom of movement. The Court is aware that the majority of decisions do not develop or interpret existing national norms, as only five decisions concerning asylum and migration are published in the Official Gazette of the Republic of Serbia. These judgments concern the following standards: the importance of a reasoned judgment and the *ex officio* consideration of subsidiary protection after it is found that refugee protection cannot be granted; interpretation of the effective legal remedies in asylum procedure; non-automatic application of the government's list on 'safe third countries'; standards related to deprivation of liberty of migrants and conditions of their detention; and the restrictions on freedom of movement of asylum seekers, refugees, and migrants during the state of emergency. Only for the issue of a 'safe third country' principle can it be concluded that they are flagship judgments, as the Constitutional Court developed a standard on the importance of individual case assessment without the automatic application of the government's list, which led to the amendment of this principle in a new asylum law.

Furthermore, the Constitutional Court did not have the opportunity to derive from its own practice (developmental arc), as it dealt with the same matter in only a few cases, repeating the same standards on which it based the decision. It is particularly important that the Court reconsider its conclusions on the restrictions on the freedom of movement for asylum seekers, refugees, and migrants during a state of emergency. The ban on movement was not based on an assessment of individual circumstances, such as health conditions, but rather on an arbitrary assessment by the authorities. Furthermore, the Court introduced aspects of

its reasoning in its judgment based on stereotyped notions which justified the violations. However, the proportionality of a measure, such as its length (almost 50 days), intensity of the restrictions on freedom of movement and social contact, duration, degree of supervision, and severity of the prescribed penalties for violating the measure, was not properly assessed.

Finally, on a positive note, the Constitutional Court has regularly relied on the relevant jurisprudence of the ECtHR. Usually, the Court invokes several judgments adequately, incorporating these standards into its decisions; however, it wrongly applies these standards to concrete cases. For example, the Court correctly invokes principles of the right to an effective remedy but then concludes that the complainant had this right, even though the Asylum Commission was inoperative for several months, without any justification. Therefore, it is necessary to incorporate these principles into concrete cases. Moreover, the Constitutional Court relies on different UN resources, CoE instruments, and the findings of different supervisory bodies (such as the CPT), UNHCR reports, and NGO reports. However, the Court does not rely on the jurisprudence of the CJEU, although the law on asylum was inspired by the EU acquis, and the interpretation of some provisions of asylum directives can provide clear guidance on the correct interpretation of some institutions. Reference to the legislation and case law of other EU member states would also be beneficial for interpreting norms in the areas of asylum and migration. In the future, the Constitutional Court is expected to have more determination and guidance in correctly applying international standards in the areas of asylum and migration.

Bibliography

2022 Update AIDA Country Report: Serbia (2022) *European Council on Refugees and Exiles*, 12 May [Online]. Available at: https://ecre.org/2022-update-aida-country-report-serbia/ (Accessed: 24 November 2023).

Belgrade Center for Human Rights (2012) 'The Right to Asylum in the Republic of Serbia 2012', *Belgrade Center for Human Rights*, 2012 [Online]. Available at: http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2012.pdf (Accessed: 24 November 2023).

Belgrade Center for Human Rights (2018) 'The Right to Asylum in the Republic of Serbia 2018', *Belgrade Center for Human Rights*, 2018 [Online]. Available at: http://azil.rs/en/wp-content/uploads/2019/02/Right-to-Asylum-2018.pdf (Accessed: 24 November 2023).

Belgrade Center for Human Rights (2020) 'The Right to Asylum in the Republic of Serbia 2020', *Belgrade Center for Human Rights*, 2020 [Online]. Available at: http://azil.rs/en/wp-content/uploads/2021/02/Right-to-Asylum-in-Serbia-2020.pdf (Accessed: 24 November 2023).

Davinic, M., Krstic, I. (2018) 'The Capacity of the Administrative court to deal with Asylum Cases', *Annals of the Faculty of Law*, 66(4), pp. 56–83; https://doi.org/10.5937/AnaliPFB1804056D.

Davinic, M., Krstic, I. (2019) *Vodic za primenu relevantnih propisa u oblasti azila i migracija*. Belgrade: Grupa.

European Court of Human Rights (2022) 'Guide on Article 13 of the European Convention on Human Rights. Right to an Effective Remedy', *European Court of Human Rights*, 31 August [Online]. Available at: https://www.echr.coe.int/documents/d/echr/guide_art_13_eng (Accessed: 24 November 2023).

Jerinić, J., Kljajević, T. (2016) *Analiza stručnih i političkih predloga za ustavnu reformu*. Belgrade: Friedrich Ebert Stiftung [Online]. Available at: https://library.fes.de/pdf-files/bueros/belgrad/12950.pdf (Accessed: 24 November 2023).

Kovacevic, N. (2020a) 'Deprivation of Liberty of Refugees, Asylum seekers and Migrants in the Republic of Serbia through Measures of Restrictions and Measures of Derogation from Human and Minority Rights made under the Auspices of the State of Emergency', *A11 – Initiate for Economic and Social Rights* [Online]. Available at: https://www.a11initiative.org/wp-content/uploads/2020/05/Deprivation-of-liberty-of-refugees.pdf (Accessed: 24 November 2023).

Kovacevic, N. (2020b) 'Zabrana proterivanja (non-refoulement) u praksi Ustavnog suda Srbije u svetlu opsteprihvacenih pravila medjunarodnog prava: od prihvatanja do neprimenjivanja', *Pravni zapisi*, 11(1), pp. 229–253; https://doi.org/10.5937/pravzap0-26122.

Krstic, I. (2012) 'Human Rights Protection in Serbia from a constitutional standpoint' in *Tackling Constitutional Challenges on the Road to the European Union: Perspectives from South-East European Accession Countries*. Skopje: Association Zenith, Konrad Adenauer Stiftung, pp. 108–125.

Krstic, I. (2019) 'Chapter 6 The Efficiency of the Asylum System in Serbia: Main Problems and Challenges' in Stoyanova, V., Karageorgiou, E. (eds.) *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*. Leiden: Brill Nijhoff, pp. 158–184; https://doi.org/10.1163/9789004368293_008.

Krstic, I., Davinic, M. (2013a) *Pravo na azil – medjunarodni i domaci standardi.* Belgrade: Faculty of Law, University of Belgrade.

Krstic, I., Davinic, M. (2013b) 'Zloupotreba koncepta sigurne trece zemlje' in Vasić, R., Krstić, I. (eds.) *Development of Serbia's legal system and harmonization with the EU law.* Belgrade: University of Belgrade, Faculty of Law, pp. 97–116.

Krstic, I., Davinic, M. (2016) 'The Efficiency of Serbian Asylum Procedure', *Asylum and Migration in Europa,* ZeuS Sonderband, pp. 207–220; https://doi.org/10.5771/9783845274812.

Krstic, I., Davinic, M. (2020) 'Serbia: Legal Response to Covid-19' in King, J., Ferraz, O. (eds.) *The Oxford Compendium of National Legal Responses to Covid-19.* Oxford: Oxford University Press; https://doi.org/10.1093/law-occ19/e7.013.7.

CONSIDERATIONS REGARDING THE LEGAL REGIME AND THEORY OF ILLEGAL MIGRATION IN ROMANIA

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ABSTRACT

In the global political and economic context, the problem of migration is of special importance. Romania is one of the European countries situated at the confluence of several migration paths. This study provides a comprehensive overview of the basic migration related issues in Romania, encompassing fundamental concepts, the specific challenges confronting the nation with regard to illegal migration, and the existing international, European, and national regulations governing this domain. It further outlines the key principles applied by competent national authorities when addressing migration concerns and offers a concise presentation of the rights and responsibilities held by migrants within Romania. Through this exploration, the paper highlights the multifaceted landscape of migration in Romania, underlining its significance in domestic and global contexts.

KEYWORDS

migration
refugee regime
asylum legislation
refugee's rights and obligations

1. Introduction

According to Art. 2 of the Protocol no. 4 of the European Convention of Human Rights[2], freedom of movement is one of the most important fundamental rights guaranteed at an international level. Any person legally present in the territory of a state has the fundamental freedom to leave the territory of any

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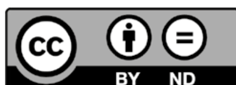
2 | See for the text of the given Protocol and practical explanations related to the text [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Guide_Art_2_Protocol_4_ENG#:~:text=1.,Article%202%20of%20Protocol%20No.,out%20in%20the%20second%20paragraph (Accessed: 8 September 2023).



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country, including their country of origin, freedom of movement, and the right to establish, by choosing their residence within a state's territory. The condition of being legally present in a state's territory expresses the state's discretionary power to regulate the entry and residence of foreigners on the state's territory, considering that the conditions of legal residence are mentioned in national law. Here, we find a controversy because even if international conventions and European laws guarantee the freedom of movement of persons, the conditions for exercising the right are mentioned in national laws and are implemented under the discretionary power of national institutions[3]. The power of the state to define and apply a certain legal regime regarding migration is part of its internal sovereignty, defined by Max Weber as the monopoly of the state to exercise organized coercive power[4].

The freedom of movement can be limited to exceptional situations. Restrictions[5] need to be legally regulated, necessary, and proportional to protect public security, public order, public health, the fundamental rights and freedoms of others, and to prevent criminality in a democratic society[6].

The overly restrictive conditions applied by some countries in terms of the rules and conditions of entry to state territory make exercising the international right to free movement extremely difficult[7] and create a context for illegal migration.

According to the general theory of migration, national governments can apply one of the following five international regimes[8] to legislate the statutes of foreigners in their countries:

1. The national regime is a form of legal protection granted to foreigners which implies that the state grants the same level of protection to foreigners as its citizens, with the exception of rights (e.g., the right to occupy public functions which involve the exercise of public power), and obligations (e.g., the obligation to defend the country, mandatory military service, loyalty to the country) granted exclusively to its citizens. This type of regime expresses the universal character of the fundamental rights and freedoms protected at the international level[9].
2. The special regime granted to foreigners implies a set of privileges based on the provisions of international treaties and agreements.

3 | Renucci, 2009, p. 228.

4 | The internal sovereignty of a country refers to its competence to adopt laws, regulations, to establish its internal policies in and independent manner and to exercise the state's coercive power inside the state's territory via police forces and its national army. See Dănișor, 2007, p. 75.

5 | See Art. 2 Para. 4 of the Protocol No. 4 of ECHR Convention.

6 | The measures representing a limitation of the freedom of movement needs to have an exceptional character. Please see ECHR Decision, 22nd of February 1994, *Raimondo c. Italy*, Paras. 39, 40.

7 | Dănișor, 2007, p. 196.

8 | Ibid., p. 195.

9 | Gîrleșteanu, 2012, p. 29.

3. The regime of the most favoured nation implies that foreigners will benefit, at least from the set of rights and freedoms accorded to the most favoured third country nationals.
4. The regime of mutually recognized minimum level of protection is based on multilateral or bilateral agreements and involves the allocation of a certain set of rights granted by the signatory states of the named convention on a mutual basis.
5. The mixt regime implies a combination of the characteristics of the aforementioned regimes.

In the case of illegal migration, national governments can opt for formal or informal pushback operations, extradition, and expulsion to end illegal situations.

In the following sections, the study presents the basic concepts related to migration, the challenges faced by Romania in the context of illegal migration, international, European, and national regulations regarding migration, the presentation of basic principles applied in the context of migration by competent national authorities, and a short presentation of the rights and obligations of migrants in Romania.

2. Concepts related to migration in Romania

The international migration law does not have a universal definition of migration-related terms and concepts and certain expressions and terms have different meanings in different legal systems. Therefore, the meaning of these terms in Romanian law and regulations need to be clarified. The meaning of Romanian legislation and the legal doctrine of certain terms are clarified below.

Refugees/asylees are persons who are fleeing from their countries because of armed conflicts or persecutions, seeking political protection. As such, in Romanian legal doctrine, the 'refugee' is a political concept that refers to persons which are unable, or unwilling to return to their countries, because of a well-founded fear of prosecution, due reasons related to race, religion, nationality, being part of a certain social group, or by expressing a certain political opinion[10]. On the international stage, the legal statute of refugees was governed by the UN Convention of 1951[11] and the protocol adopted in 1967. One of the principles of international law regarding refugees is the principle of non-refoulment[12], which guarantees that

10 | United Nations – Human Rights: Differentiation between migrants and refugees [Online]. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf (Accessed: 3 September 2023); Kälin et al., 2004, p. 179.

11 | Convention and Protocol Relating to the Status of Refugees [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 3 September 2023).

12 | For more information regarding the principle, please see: Hamdan, 2016.

refugees will not be returned to their home countries or countries of origin if their lives or liberties are endangered. Thus, the basic obligation of the host countries is to offer them protection and asylum.

A concept related to refugees is that of asylum seekers, which are persons claiming to be a refugee and which have applied for asylum, but whose claims are under analysis at competent national authorities. In the absence of a legal definition, from the analysis of Romanian legal doctrine, we can deduce that asylum seekers are foreigners who in their home country are subject to prosecution for their political, democratic, or humanitarian activities and seek a safe place in the territory of another state[13]. Therefore, any refugee is an asylum seeker before he/she earns the refugee statute. From a legal perspective, the concept of asylum seekers includes first-time applicants in Romania. Those who gain this statute after an initial refusal decision is not considered in statistical data asylum seekers[14].

The term migrant is considered an umbrella term in public international law[15] without a clear legal definition. Migrants are persons living in their home country for a variety of reasons, usually choosing to move to another country to enhance their living standards or benefit from education. The national provisions of host countries define legal statutes applicable to immigrants.

The difference between a 'refugee' and an 'immigrant' is based on the forced character of displacement in the case of first. A 'refugee' is not only someone who flees their country to escape war or persecution, but one for whom it is dangerous to return to their country and it is for this reason that they may appeal for help and protection[16]. To enter the state territory, immigrants need to possess valid documents which can prove their identity, reliable documents which can justify the reason for their stay and their financial resources, proof that they do not belong to the category of undesired persons or to the category of persons whose access to the state territory has been prohibited, are not mentioned in the Schengen Information System for forbidden entrance in the EU, and are not representing a threat to national security[17].

A special category of migrants are the economic migrants[18], defined as individuals searching for better jobs and economic security. If refugees and migrants lack the ability or willingness to return to their home countries, they are free from constraints and can return to their home countries whenever they want. Moreover, for many economic immigrants, the purpose of their stay is simply to earn money and then return home to buy land, build a house, support immediate and extended

13 | Drăganu, 1998, p. 153.
14 | Asylum Information Database, Country Report: Romania, 2021, p. 9 [Online]. Available at: https://asylumineurope.org/wp-content/uploads/2022/05/AIDA-RO_2021update.pdf (Accessed: 23 August 2023) (hereinafter referred to as 'AIDA Report, 2021').
15 | Chetail, 2019, p. 9.
16 | See for details Onghena, 2015 [Online]. Available at: https://www.cidob.org (Accessed: 4 September 2023).
17 | Art. 6 of the *Government Emergency Ordinance no. 194/2002* (hereinafter EO no. 194/2002), published in the *Official Gazette* No. 421 from 5.06.2008.
18 | See for more details related to economic immigrants and the differences between them and refugees: Cortes, 2004, p. 3; Glossary, p. 61.

family members, and retire to their homeland. A second observable difference concerns the fewer social contacts which refugees and migrants have with their home countries through return visits, whereas economic immigrants maintain strong relations with family members, relatives, and friends who remain in their home countries. Another difference is the capacity of migrants to integrate into their home country. Refugees can stay in their home country for a longer period and have a better capacity to integrate themselves into the population of their home countries by making efforts to create social contacts, learn language skills, and so on.

Another category of migrants is environmental migrants, who live in their home countries due to sudden or progressive changes in the environment that adversely affect their lives or living conditions[19].

A related concept which must be clarified is that of foreign citizen. According to Romanian legislation[20], a foreign citizen is a person who does not hold Romanian citizenship, or the citizenship of one of the EU Member States, the citizenship of the Swiss Confederation, or that of the Member States of the European Economic Area or is a stateless person. According to Art. 4 of Law no. 21/1991,[21] Romanian citizenship can be acquired through birth, adoption, or release based on request. Romanian legal doctrine defines citizenship as a permanent political and juridical relationship between an individual and a state[22]. According to Art. 1 of Law no. 21/1991 on citizenship[23], citizenship is defined as the connection and belonging of a person to the Romanian State.

Another concept which needs to be clarified is that of child. According to national legal standards and relevant European and international legislation, the concept is defined as any human under the age of 18[24]. Even if there is uncertainty about the claimed age of an individual who presents themselves as a child, that person should be treated as a child and referred to as the appropriate authority responsible for determining the age. In Romanian legislation, children are considered inherently vulnerable, particularly when they are unaccompanied or separated from their families. Therefore, special attention and sensitivity must be given to specific needs and protection. This includes appointing a representative as soon as possible to ensure that rights and interests are protected.

From the perspective of the territorial dimension of migration, we can differentiate between the concept of country of origin (or home country, referring to the country of nationality or the country of habitual residence of a migrant person), country of destination (or host country), and country of transit (where a migrant person decides to pass on to during their journey to the country of destination)[25].

19 | For more details: Ivanov and Bekhyashev, 2016.
20 | Art. 2 Para. 1 a) of EO No. 194/2002.
21 | Published in the *Official Gazette* No. 576 from 13.08.2010.
22 | Muraru and Tănăsescu, 2005, p. 114.
23 | Republished in the *Official Gazette* No. 576 from 13.08.2010.
24 | See Art. 1 of the UN Convention on the Right of the Child.
25 | International Organization for Migration, 2019, p. 39.

The term migrant crisis[26] in international law usually refers to large-scale migration flows, and mobility patterns caused by political, economic, or environmental crises with a sudden or slow onset.

The concept of right of asylum[27] can be defined from two perspectives. From the perspective of the state, which refers to the decision adopted by competent national authorities regarding the granting or refusal of asylum rights as a manifestation of the state's discretionary power. From the perspective of the asylum seeker, this represents a fundamental right, defined in Art. 14 of the Universal Declaration of Human Rights and by Resolution no. 2312/XXII of the UN General Assembly from the 14th of December 1967.

The concept of illegal migration refers to noncompliant, unauthorised, or undocumented forms of migration. In the doctrine, the adjective 'illegal' refers to the irregular character of migration and is not necessary to the criminal law connotation of the term. The objective of national strategies for tackling illegal migration is to identify temporary or durable solutions for immigration, where the situation of refugees can be satisfactorily and permanently resolved, enabling them to live as normal lives as possible under given conditions[28].

Additional important concepts are 'safe countries of origin' and 'safe third countries' used by Romanian legislators in the Asylum Act[29].

According to Art. 77, Para. 1 of the Asylum Act,[30] 'safe countries of origin' are countries that meet certain criteria, which include the following: observance of human rights and fundamental freedoms as guaranteed by the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, and the Convention against Torture; functioning on democratic principles, political pluralism, and free elections, along with functional democratic institutions, ensuring the guarantee and respect of fundamental human rights; effective mechanisms for reporting violations of human rights and fundamental freedoms; compliance with the principle of non-refoulement, as defined by the provisions of the Geneva Convention; existence of political stability factors.

The list of safe countries of origin was established by the Ministry of Internal Affairs, based on a proposal from the Inspectorate General for Immigration (IGI), and considers information from various sources, including other EU member states, European Asylum Support Office (EASO), United Nations High Commissioner for Refugees (UNHCR), the Council of Europe, and other international organisations. Periodic reviews have been conducted to update the list.

When an asylum applicant comes from a country designated as safe country of origin, their application is usually rejected as unfounded. However, if the applicant can provide evidence or demonstrate a well-founded fear of persecution or serious harm, they are given access to regular asylum procedures.

26 | Ibid., p. 139.

27 | See for details: Corlățean et al., 2017, p. 275.

28 | Ibid., p. 59.

29 | See for a detailed presentation: AIDA Report, 2021, pp. 78–83.

30 | *Law No. 122/2006 on Asylum in Romania*, published in *Official Gazette* No. 156 in 25 August 2006 (hereinafter cited as the Asylum Act).

However, according to Art. 97, Para. 1 of the Asylum Act, a safe third country is a country in respect of which there are sufficient guarantees that the rights of an applicant for international protection are respected on its territory. The following principles are considered when determining whether a country qualifies as a safe third country: life and freedom are not threatened by race, religion, citizenship, membership in a particular social group, or political opinion; the principle of non-refoulement, in accordance with the Refugee Convention, is respected; the prohibition of expulsion to a state where a person may be subjected to torture or cruel, inhuman, or degrading treatment is respected; there is a possibility to request refugee status, and, if granted, to benefit from protection in accordance with the Refugee Convention.

When the criteria for a safe third country are applicable, and the third country agrees to readmit the applicant, the General Inspectorate for Immigration – Directorate for Asylum and Integration (GII-DAI) can reject the asylum application as inadmissible. However, it is essential to consider whether there is a link between the applicant and a third country indicating that the country is safe for the applicant's personal situation.

The law requires a list of safe third countries to be published in the Official Gazette; however, such a list is not available or has not yet been published. Non-governmental organizations (NGOs) and the UNHCR confirm that there is no list of safe third countries and that this concept has not yet been applied in practice.

Another important difference, which needs to be done from a theoretical point of view is the difference between the term 'push-back operation' and 'readmission'[31].

Push-backs[32] refer to the illegal actions of state actors (and sometimes non-state actors) of forcibly returning people, often protection seekers and refugees, back over state borders to the territory of another country without allowing them to apply for asylum or seek international protection. This practice usually involves physical force, violence, and inhumane or degrading treatment applied by the police. Push-backs typically occur at unofficial border crossing points, known as 'green borders' to avoid detection by authorities.

Key points about push-backs[33] are the following: conducted by state authorities or border police; occur at unofficial border crossing points to evade detection; violate various fundamental human rights, including the prohibition of torture; usually happen without any administrative procedures or official documentation.

Readmission[34] is an administrative procedure that allows countries to return individuals to their previous country or country of origin based on bilateral or multilateral agreements. These agreements outline the scope and specific procedures for the return of individuals. When the returning country wants to initiate

31 | For more details about the characteristics of the two concepts, please consult: Giuffré, 2020, p. 36.
32 | Tazzioli, 2019, p. 267.
33 | Vaughan-Williams, 2015, p. 60.
34 | See for more details: Cygan et al., 2004, p. 208.

readmission, it sends an official request to the receiving country. The return of the individual takes place through official border-crossing points and is facilitated by proper state-issued documentation.

Key points about readmission procedure are the following: conducted based on bilateral or multilateral agreements between countries; involves official requests and acceptance by the receiving country; requires administrative procedures and proper documentation; often used for regular migration control purposes.

Pushbacks are generally more common than readmissions because of their simplicity and effectiveness. Pushbacks can occur swiftly without the need for administrative processes, making them the preferred method for state actors seeking to control migration. However, these pushbacks are illegal and violate human rights, including the principle of non-refoulement, which prohibits returning individuals to places where their lives or freedom may be at risk.

Readmission procedures are conducted in compliance with international and bilateral agreements to ensure a more formal and regulated process for returning individuals. While readmissions may be considered legitimate and lawful, they can be time-consuming and require cooperation between the concerned countries.

It is essential to recognise the human rights implications of both pushbacks and readmission procedures to ensure that any actions taken in migration control adhere to international law and protect the rights of individuals seeking refuge or asylum.

Finally, the differences between *expulsion* and *extradition* must be clarified.

Expulsion[35] is the legal institution referring to measures adopted by public authorities of a state to oblige a migrant to leave the territory of a country in cases of illegal stay. It is a safety measure adopted to avoid danger, protect the legal, economical, and social order of a state and national security.

Extradition[36] is another measure adopted to oblige a person to leave the territory of the country, but at the origin it is the request from another country. It is a measure of interstate assistance in criminal matters with the objective of ensuring the transfer of an individual who is criminally prosecuted or convicted. Extraditions are based on the provisions of an international convention, based on reciprocity, and the decisions taken by national courts.

3. Challenges faced by Romania regarding Illegal Migration

From a geographical perspective, Romania is at the intersections of several routes of migration, which originated until the Russian invasion of Ukraine from the Middle East, South-East Asia, and Africa. Romania is considered a transit

35 | Dănișor, 2007, p. 197.
36 | Ibid., p. 198.

country and a country of temporal establishment for migrants[37], regardless of their origin. As an EU Member State, Romania is involved in collective European efforts to efficiently control, coordinate and monitor the immigration crisis in Europe. Romania represents one of the European countries with an essential input in the European Border and Coast Guard Agency (Frontex) missions besides Germany, Greece, Italy, and Hungary.

According to the most recent statistical data[38] from the General Inspectorate for Immigration (GII), via the Directorate General for Asylum and Integration (DAI) a total number of 12,368 applications for asylum were made in 2022. Refugee status was granted to 467 applicants, subsidiary protection measures were granted to 546 applicants, 2,934 requests were rejected and 1,288 were pending at the end of the year. The rejection rate of applications was significant (74.33 %). These asylum seekers were from Ukraine, India, Bangladesh, Syria, Pakistan, Afghanistan, Turkey, Somalia, Nepal, and Sri Lanka, with most applicants being men.

The phenomenon of illegal migration represents a form of manifestation of organized crime[39] which, due to its dimensions, affects the national economies of transit and destination countries and their social security systems.

The causes of illegal migration include political instabilities, armed conflicts, poor living standards, and the ingenuity of criminal organisations interested in substantial profits, discovering rapid and functional solutions to the restrictions and repressive actions of authorities.

The challenges generated by illegal migration[40] are diverse and complex and are reflected at the social, economic, political, and security levels. Among the social challenges of illegal migration, the implications of low-income-earning nationals in illegal migration activities from the proximity of borders needs to be emphasised. such as the instigation of violence, political and religious extremism, and the potential proliferation of different types of illnesses.

The economic and political challenges of illegal migration refer to the management of costs related to the refugee crisis in important host countries, increased duration of transport of goods due to extensive control mechanisms at borders, proliferation of illegal work mechanisms due to the presence of a cheap workforce in host countries, increase in the unemployment rate, and worsening of living conditions in the national population.

From the perspective of security challenges, illegal migration can increase the rate of criminality in host countries, contribute to the infiltration of terrorist groups and members of extremist groups in the national population and the diverse forms of aggression which can appear in refugee centres.

The adoption of national policies tolerant of illegal migration can cause serious problems in host countries, such as social conflicts, xenophobia, ethnic segregation, an increase in population dissatisfaction related to unfair competition

37 | Möhle, Huth and Becker, 2017, p. 34.
38 | See for details regarding statistical data Asylum Information Database: Nica, 2022, p. 8.
39 | De Ruyver et al., 2002, p. 368.
40 | See e.g. LeMay, 2006, p. 107.

represented by the illegal workforce, and an increase in criminal phenomena (tax evasion, drug trafficking, forms of physical violence, etc.).

In Romania, the following issues and challenges related to migration, asylum, and integration[41]have been identified:

1. legal and illegal pressure exerted by migration poses challenges to the capacity of the Immigration Management Commission in efficiently managing the immigration phenomenon. The need for clear national policies, integration measures, and an efficient system for the return of illegal immigrants has been highlighted;
2. despite the efforts of competent institutions, there is a labour shortage in Romania. The country needs to identify solutions to integrate foreign workers into the labour market through information campaigns, projects, and facilities to accept and accommodate qualified foreigners;
3. economic and democratic disparities between Europe and neighbouring areas, along with armed conflicts and crises, may lead to refugee challenges for European asylum systems. Romania must strengthen its asylum system to ensure the protection of fundamental rights and liberties for people seeking international protection;
4. there is a need to inform and raise awareness among Romanian citizens about various aspects of immigration. A lack of public understanding may lead to social tension, and transparent and timely information from the authorities can counteract misinformation and prevent social unrest;
5. migration flows may include individuals with past or potential terrorist connections. Owing to the lack of proper documentation, verifying their identities and backgrounds in countries facing insecurity and terrorism is challenging. This poses security risks, including potential support for terrorist organizations within Romania, radicalization, and involvement in violent or terrorist acts.

In response to these challenges, there is a real need for a well-managed immigration system that considers both the benefits of legal immigration and the security implications associated with illegal migration and the implementation of integration measures, strengthening the asylum system, promoting public awareness, and addressing security concerns related to illegal migration flows.

41 | See also information: European Parliament: Migration and asylum in Central and Eastern Europe [Online]. Available at: https://www.europarl.europa.eu/workingpapers/libe/104/romania_en.htm (Accessed: 20 August 2023).

4. International, European and National Legislation regarding Migration

4.1. International Regulations

The global standards[42] for international migration include agreements related to the human rights of migrants, rights of migrant workers, refugee protection, and measures to combat migrant smuggling and human trafficking. These agreements have been accepted by various member states to varying extents.

At the heart of the international framework for safeguarding refugees are the 1951 UN Convention relating to the status of refugees[43] and the 1967 UN Protocol relating to the status of refugees[44]. The 1951 Convention serves as the foundation for the international refugee protection regime by providing a definition for the term 'refugee',' outlining the rights afforded to refugees, and establishing the legal responsibility of States to protect refugees. This Convention expressly forbids the expulsion or involuntary repatriation of individuals granted refugee status, emphasising the principle of non-refoulement, which ensures that no refugee is returned to a country or territory where their life or freedom would be in jeopardy.

In what regards the protection of migrant workers the International Labour Organization (ILO) has adopted three legally binding instruments that are relevant for the protection of migrant workers. These instruments include the Convention Concerning Migration for Employment, Convention Concerning Migration in Abusive Conditions, Promotion of Equality of Opportunity and Treatment of Migrant Workers, and the 2011 Convention Concerning Decent Work for Domestic Workers. Additionally, non-binding recommendations complement these conventions.

The 1949 Convention concerning Migration for Employment[45] primarily addresses the recruitment and working conditions of migrant workers. It establishes the principle of equal treatment for migrant workers and nationals concerning living and working conditions, remuneration, social security, employment taxes, and access to justice.

The 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers[46] was

42 | See for more information, available at: https://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf (Accessed: 3 September 2023).

43 | The 1951 Refugee Convention [Online]. Available at: https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention (Accessed: 7 September 2023).

44 | 5. Protocol relating to the status of refugees [Online]. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5 (Accessed: 7 September 2023).

45 | Migration for Employment Convention, 1949 [Online]. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C097,/Document (Accessed: 8 September 2023).

46 | Migrant Workers (Supplementary Provisions) Convention, 1975 [Online]. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312288 (Accessed: 8 September 2023).

the first multinational effort to tackle irregular migration and advocate sanctions against human traffickers. This emphasises that Member States must uphold the basic human rights of all migrant workers, including irregular migrants. Additionally, it stipulates that lawfully present migrant workers and their families should receive equal treatment and have equal opportunities, such as access to employment, trade union rights, cultural rights, and individual and collective freedoms.

The 2011 Convention concerning Decent Work for Domestic Workers[47], which became effective in 2013, was the first multinational instrument to establish global labour standards for domestic workers, guaranteeing them the same basic rights as other workers. This convention ensures that domestic workers, regardless of their migration status, enjoy fundamental labour rights, including reasonable working hours, limitations on in-kind payments, clear employment terms, and respect for core labour principles and rights, such as freedom of association and the right to collective bargaining.

Regarding the regulation of smuggling and international human trafficking, there are two protocols aimed at addressing irregular migration, focusing on human trafficking and migrant smuggling, which complement the United Nations Convention against Transnational Organized Crime[48]. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000, became effective in 2003 and received ratification from 157 United Nations Member States. The Protocol defines human trafficking as the illicit acquisition of people through improper means such as force, fraud, or deception, with the intent to exploit them. Its objectives include preventing and combating trafficking in persons, protecting and assisting victims of such trafficking, particularly women and children, prosecuting those responsible for these crimes, and promoting cooperation among the States Parties to address this issue. According to the provisions outlined in the Protocol, migrant smuggling entails facilitating, for financial or other material gain, the unlawful entry of an individual into a state in which that person is not a national or permanent resident. The Protocol serves as a potent instrument in the fight against and prevention of the illicit smuggling of individuals, often referred to as 'human cargo'.

Although the ECHR does not explicitly grant a specific right to asylum, it contains provisions that safeguard individuals from being turned away or exposed to the risk of torture or other forms of inhuman or degrading treatment or punishment. This prohibition is based on the principle of non-refoulement. To ensure protection from arbitrary removal, individuals must have access to fair and efficient asylum procedures. They must also receive adequate information about the relevant procedures in a language that they can understand and have the right to seek legal advice. Additionally, the European Court of Human Rights (ECtHR)

47 | Domestic Workers Convention, 2011 [Online]. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189 (Accessed: 8 September 2023).

48 | United Nations Convention against Transnational Organized Crime and Protocols Thereto [Online]. Available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html (Accessed: 8 September 2023).

has emphasised the significance of interpretation services in guaranteeing access to asylum procedures for those in need of protection.

Under the ECHR, Arts. 2 (which guarantees the right to life) and 3 (which prohibits torture, inhuman, or degrading treatment or punishment) prohibit the return or deportation of an individual to a situation where they would be exposed to a genuine risk of treatment that contradicts the principles outlined in these articles. In such cases, states are held accountable for violations of their obligations as defined by the ECHR. This underscores the commitment to prevent actions that could lead to loss of life or infliction of inhumane or degrading treatment, even if the ECHR does not explicitly grant a specific right to asylum.

Under Art. 5 (Right to Liberty and Security) of the ECHR, the detention of migrants and asylum applicants must adhere to specific principles and criteria. Detention in such cases must be provided for by national law, conducted in good faith, and closely connected to the legitimate aims pursued. These principles and criteria aim to ensure that any detention of migrants or asylum seekers is lawful, nonarbitrary, and conducted with appropriate safeguards to protect their rights under the ECHR.

Collective expulsion is prohibited under Art. 4 of Protocol No. 4 to the ECHR. This article explicitly prohibits the collective expulsion of migrants. It emphasises that no one should be arbitrarily expelled and that each case must be examined individually to ensure that rights and protections under the ECHR are upheld.

Under Art. 15 of the ECHR, states have the possibility of derogating certain provisions of the ECHR in exceptional circumstances, such as during times of public emergency that threaten the life of the nation.

4.2. Some of the most relevant EU Legislation

At the EU level, fundamental treaties do not mention or regulate rights to asylum. However, Art. 18 of the EU Charter of Fundamental Rights[49] establishes a qualified right to asylum, and Art. 19 includes important principles such as non-refoulement and the prohibition of collective expulsion. The Charter also provides an autonomous right to an effective remedy and fair trial principles offering broader protection than the ECHR. The EU can apply a more generous interpretation of rights than the ECHR, thus demonstrating its commitment to upholding fundamental rights in the context of migration and asylum. Art. 47 of the Charter grants individuals an autonomous right to an effective remedy and lays down principles related to fair trials. Art. 52 specifies that the minimum level of protection provided by the Charter provisions is that which is guaranteed by the ECHR. However, the EU has the flexibility to apply a more generous interpretation of rights than proposed by the ECtHR. Thus, the EU can provide a higher level of protection for individual rights.

EU law establishes the following common rules and mechanisms to manage external borders:

1. Common Rules for Short-Term Visas*:* EU Member States have common rules governing the issuance of short-term visas. Short-term visas are typically

49 | Published in OJ series C No. 326 from 26 October 2012, pp. 391–407.

granted for purposes such as tourism, business, and family visits, and these rules ensure a consistent approach across EU countries;
2. Implementation of Border Controls: The EU has established common rules for the implementation of external border controls. These rules are in place to ensure the security and integrity of the Schengen Area, which allows for passport-free travel among participating EU countries;
3. Preventing Irregular Entry: EU Member States work collectively to prevent irregular entry into the Schengen Area. Irregular entry refers to the unauthorised or illegal crossing of borders. The aim is to maintain the security and order of the border areas;
4. Frontex – European Border and Coast Guard Agency: Frontex is responsible for supporting EU Member States in managing their external borders. It provides technical and operational support through various means, including joint operations, rapid border interventions, and the deployment of experts to assist Member States facing disproportionate migratory challenges;
5. European Border Surveillance System (Eurosur), which serves as an information exchange system between EU Member States and Frontex. It facilitates the sharing of real-time information on border-related issues and enhances coordination and situational awareness;
6. Frontex Standing Corps: By 2027, Frontex is expected to have a standing corps of 10,000 operational staff dedicated to supporting EU Member States in border control and return tasks. These standing corps will contribute to a more coordinated and effective response to border management challenges.

Under EU law, the Schengen Borders Code – Regulation (EU) No. 2016/399[50] establishes rules for crossing EU external borders at designated points, requires Member States to maintain effective border surveillance to prevent unauthorised entry, and emphasises the importance of conducting these activities while fully respecting fundamental rights. This framework aims to strike a balance between security and the protection of individual rights at external EU borders.

The Schengen Information System (SIS) ruled by Regulation (EU) No. 2018/1861[51] is a critical tool for managing entry bans and alerts to prevent individuals from re-entering the Schengen Area through other Member States. It ensures the enforcement of entry restrictions, while providing mechanisms for individuals to challenge entry bans that they believe are unjust. This system helps maintain security and order within the Schengen Zone.

The local border traffic regime, governed by Regulation (EC) No. 1931/2006[52], represents a specific exception or derogation from the general rules governing border controls for individuals crossing the external borders of EU Member States. This regime is designed to facilitate and streamline border crossings for residents living in border areas of neighbouring third countries.

50 | Published in the OJ series L No. 77 from 23 March 2016, pp. 1–52.
51 | Published in the OJ series L No. 312 from 7 December 2018, pp. 14–55.
52 | Published in OJ series L No. 405 from 30 December 2006, pp. 1–22.

Under EU law, specifically Art. 4(4) of the Return Directive (Directive 2008/115/EC), certain minimum rights and principles apply to persons who have been apprehended or intercepted in connection with irregular border crossing.

The EU asylum acquis, including the Asylum Procedures Directive, applies once an individual arrives at the border, including territorial waters and transit zones. Thus, rules and procedures for seeking asylum in the EU come into play when a person reaches the external borders of an EU Member State.

4.3. Relevant National Legislation

The major legislative act regulating asylum rights and related procedures in Romania is the Asylum Act – Law No. 122 from the 4th of May 2006 on Asylum in Romania[53]. The Act mentioned above has several implementing decrees, guidelines, and regulations on asylum procedures, reception conditions, and detention as follows:

- The Asylum Decree: Government Decree No. 1251 of 13 September 2006 regarding the Methodological Norms for Applying Act 122/2006[54];
- The Aliens Ordinance: Government Emergency Ordinance No. 194 of 12 December 2002 regarding the regime for foreigners in Romania[55];
- Integration Ordinance: Government Ordinance No. 44 of 29 January 2004 regarding the social integration of foreigners granted international protection or a right of residence in Romania, and the citizens of the Member States of the European Union, the European Economic Area and citizens of the Swiss Confederation[56];
- The Integration Decree: Governmental Decision No. 945 of November 52020 for the approval of the Methodological Norms for the application of the Government Ordinance No. 44/2004 regarding social integration[57];
- Order No. 441 of 4 April 2008 for determining the attributions of the authorities responsible for implementing the data in the Eurodac system and for establishing the practical methodology of cooperation in the application of European regulations, with amendments and additions[58];
- Public Custody Centres Regulation: Regulation of Internal Order in the Regional Centres of Accommodation and Procedures for Asylum Seekers of 25 August 2016[59];
- Regulation of Centres for Aliens Taken into Public Custody of 30 July 2014;[60]
- Government Decision No. 1.596 of 4 December 2008 regarding the resettlement of refugees in Romania[61];

53 | Published in the *Official Gazette* No. 428 from 18 May 2006.
54 | Republished in the *Official Gazette* No. 421 from 5 June 2008.
55 | Republished in the *Official Gazette* No. 421 of from 5 June 2008.
56 | Published in the *Official Gazette* No. 93 from 31 January 2004.
57 | Published in the *Official Gazette* No. 1070 from 12 November 2020.
58 | See ORDIN nr. 441 din 4 aprilie 2008 (*actualizat*) [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/168995 (Accessed: 23 September 2023).
59 | Published in the *Official Gazette* No. 680 from 2 November 2016.
60 | Published in the *Official Gazette* No. 590 from 7 August 2014.
61 | Published in the *Official Gazette* No. 831 from 10 December 2008.

| Emergency Ordinance No. 15 of 27 February 2022 regarding the provision of humanitarian support and assistance by the Romanian state to foreign citizens or stateless persons in special situations, coming from the area of the armed conflict in Ukraine[62].

5. Important Principles Applicable in Asylum Related Matters in Romania

A national immigration[63] strategy is built upon a set of general principles[64] that guide its implementation and objectives[65]. The principles are as follows:

1. Principle of legality: all activities conducted to achieve the strategic objectives of the National Strategy are fully compliant with the law;
2. Principle of responsibility: each authority and institution responsible for immigration is responsible for implementing the National Strategy in their respective areas of competence;
3. Principle of sovereignty: reflects the right of the Romanian state to establish policies related to the admission, residence, and return of third-country nationals to promote its political, economic, social, cultural, and humanitarian interests while adhering to obligations under international treaties and agreements with other states;
4. Principle of cooperation and coherence: involve active cooperation in drafting and implementing a common immigration policy within the European Union and aligning the National Strategy with measures and policies established in other member states;
5. Principle of respect for fundamental human rights and freedoms: all activities conducted by the authorities and institutions responsible for immigration must comply with provisions from international conventions and treaties on fundamental human rights and freedoms that Romania is a party to;
6. Principle of unitary action: aims to implement the state policy and legal provisions in the field of immigration in a unified manner with concerted efforts at all levels.

62 | Published in the *Official Gazette* No. 193 from 27 October 2022.
63 | National Strategy on Immigration 2021-2024 [Online]. Available at: https://igi.mai.gov.ro/wp-content/uploads/2022/01/National-Strategy-on-Immigration-2021-%E2%80%93-2024.pdf (Accessed: 25 September 2023).
64 | The general principles applicable to immigration policy in EU Member States can be found in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A common immigration policy for Europe: Principles, actions and tools {SEC(2008) 2026} {SEC(2008) 2027} (presented by the Commission) /* COM/2008/0359 final */ [Online]. Available at: https://eur-lex.europa.eu/RO/legal-content/summary/a-common-immigration-policy-for-europe.html (Accessed on: 8 September 2023).
65 | AIDA Report, 2021, pp. 19–20.

7. Principle of transparency: involves actively informing and consulting civil society about decisions and procedures related to immigration.
8. Principle of partnership: encourages active participation, involvement, and consultation with other relevant stakeholders, such as NGOs, international organisations, UN agencies, academia, and the private sector, to achieve the objectives of the National Strategy;
9. Principle of equal opportunities and treatment between women and men: demonstrates a commitment to implementing legal provisions and guidelines related to gender equality, non-discrimination, and accessibility, considering the positive impact of the strategy's objectives on these aspects;
10. Principle of multiculturalism: acknowledges and embraces the coexistence of diverse individual characteristics, beliefs, ideologies, and habits in a relatively limited area, reflecting a multicultural approach to immigration and integration.

These principles provide a comprehensive framework for guiding actions and policies related to immigration in Romania with a focus on upholding human rights, transparency, cooperation, and responsibility among the various stakeholders involved in managing the migration phenomenon.

In addition to the principles mentioned above, the concept of non-refoulement is a principle of international law that prohibits the expulsion, return, or deportation of individuals to a country or territory where they may face persecution, torture, inhuman or degrading treatment, or other serious human rights violations[66]. The obligation of non-refoulement is primarily placed on the Member States of international conventions and treaties related to asylum and refugee protection. This is specifically outlined in the 1951 Refugee Convention and its 1967 Protocol. These instruments provide a legal framework for refugee protection and establish the principle of non-refoulement as a fundamental safeguard for those seeking international protection.

This obligation is not limited to a specific branch or agency of a state, instead, it applies to all organs of the state, including the government, immigration authorities, border officials, law enforcement, and any other person or entity acting on its behalf. This implies that all relevant authorities within a country are bound by the principle of non-refoulement and must comply with its provisions.

The principle of non-refoulement applies to any form of forced removal or return, including but not limited to deportation, expulsion, extradition, unofficial transfer, and 'handovers' of individuals to other countries. It also encompasses rejections at the border, where there is a risk of persecution or serious harm if the person is returned to their country of origin or another territory.

Moreover, the principle also covers indirect returns, which means returning a person to a third country where there is a risk that they will be sent back to a place of persecution or harm. In such cases, a thorough assessment of the risk of indirect return must be conducted before any action is taken, and a person's safety and protection must be ensured. Asylum seekers should not be returned to a third

66 | See for more details on definition: Lülf, 2015, pp. 167–187.

country to process their applications if there is insufficient guarantee that they will not face refoulement.

These guarantees include assurances that the person will be readmitted to the respective country, provided with effective protection against return, allowed to apply for and benefit from asylum procedures, and treated in accordance with accepted international standards on human rights and refugee protection.

6. Asylum Seekers' Rights and Obligations in Romania[67]

In Romania, asylum seekers who seek international protection because of fear of persecution or serious harm in their home country are granted certain rights[68] and expected to fulfil specific obligations[69] as part of the asylum process.

These rights and obligations are aimed at ensuring a fair and transparent process while maintaining the integrity of the asylum system and can be grouped according to their object, as follows:

6.1. Rights and obligations related to the asylum procedure:

1. Right to be assisted by a lawyer during the asylum procedure: Asylum seekers have the right to legal representation to help them understand and navigate the asylum process and to advocate for their rights.

2. Right to information: The competent authorities responsible for processing asylum applications are required to inform immigrants of the possibility of submitting asylum requests. To improve access to accurate information on the asylum procedure, the Border Police distribute leaflets in several international languages, including rare languages such as Arabic, Kurdish, Pashto, and Farsi. These leaflets cover details about the rights and obligations of asylum seekers and information about the assistance provided by NGOs. For example, in the context of the war in Ukraine, the National Council for Refugees and Stateless Persons (CNRR), in collaboration with the UNHCR, identified information needs at the borders with Ukraine and Moldova and drafted and translated 10,000 leaflets about the asylum procedure into Ukrainian and distributed them at border-crossing points with Ukraine and the Republic of Moldova. In 2022, the CNRR distributed leaflets containing information on the DOPOMOHA[70] platform to people coming from

67 | Rights and duties of asylum-seekers [Online]. Available at: https://help.unhcr.org/romania/rights-and-duties-of-asylum-seekers/ (Accessed: 4 September 2023).
68 | Art. 17 of Asylum Law.
69 | Art. 19 of Asylum Law.
70 | The platform's name, 'DOPOMOHA', meaning 'help' in Ukrainian, reflects its purpose of offering aid and support to those seeking refuge and assistance in Romania due to the conflict in Ukraine. DOPOMOHA is a web support and information platform aimed at assisting migrants fleeing the war in Ukraine. It serves as a valuable project created by Code for Romania in collaboration with various organizations, including the Department for Emergency Situations (DSU), The UN Refugee Agency (UNHCR), the International Organization for Migration (IOM), and the National Romanian Council for Refugees (CNRR). As

Ukraine. The leaflets provided official and secure information along with contact details for relevant Romanian authorities. While information leaflets have been distributed in several international languages, there is recognition that there is a need for updated information leaflets in other languages. Consequently, the CNRR has started working on a new leaflet that specifically addresses the right to seek asylum in Romania, which is expected to be disseminated in 2023. To display these leaflets at border-crossing points, approval from the authorities (Border Police) is required[71].

In practice, the study published by AIDA has shown that, for example, at Moravița crossing point CNRR leaflets in English on the rights and obligations of foreigners taken into public custody, FRONTEX leaflets on access to the asylum procedure in English and French, and a booklet on the right to complain in several languages are available. FRONTEX leaflets are reported as the most widely used.

Any person detained at the border for illegal crossing or presenting themselves at a border-crossing point is informed of the right to make an asylum application. Authorities conduct interviews, hearings, and investigations with the help of interpreters. Border Police provide information about the right to make an asylum application, orally and in writing. The UNHCR made leaflets in English, French, Arabic, and various Arabic dialects available for this purpose.

NGO representatives have access to border-crossing points after third-country nationals submit their asylum applications. To be informed about a migrant's presence, NGOs require direct communication from the Border Police, UNHCR Romania, the migrant's family or friends, or the migrants themselves. A Memorandum of Understanding between the UNHCR and the General Inspectorate of the Border Police, enables mutual notification when immediate intervention is needed at border-crossing points or transit areas.

3. Access to an interpreter: According to Art. 45, Para. 2 of the Asylum Act, applicants have the right to request an interpreter during their personal interview. If necessary, to present all the reasons for their asylum application, the interview can be conducted with the support of an interpreter in the language indicated by the applicant or a language they understand and can communicate with clearly.

The remuneration for interpreters in the asylum process was increased from 23 RON/€4.6 per hour to 50 RON/€10 per hour. Regional Centres, including Timișoara, Rădăuţi, Galaţi, and Giurgiu, reported challenges in finding interpreters for certain languages, particularly rare languages such as Somali, Tigrigna, and other languages from Ethiopia and Eritrea. Double interpretation, in which the interview is interpreted from one language to another and then into Romanian, was used in some cases; however, its usage varied between centres. It was not used in certain regions, and in other cases, it was used for languages such as Tamil

a web-based platform, DOPOMOHA offers various resources, including information about the asylum procedure, access to essential services, legal assistance, and general support for migrants in navigating their situation in a new country. The collaboration between the mentioned entities indicates a concerted effort to improve the support and integration of those seeking safety and protection in Romania. AIDA Report, 2021, p. 25.

71 | Ibid., p. 24.

or Sinhala to English to Romanian, or Amharic to English to Romanian. In cases where no interpreter is available for a specific language, some centres resort to conducting interviews through videoconferencing with interpreters located elsewhere. Some centres did not recruit new interpreters in 2022, which could have contributed to the shortage of interpreters for certain languages. For example, the Regional Centre in Bucharest mentions that interpreters are available in various languages including Arabic, English, Pashto, Dari, Punjabi, Hindi, Urdu, Farsi, Turkish, Spanish, French, Somali, Kurdish, Sorani, Kurmanji, Persian, Russian, Ukrainian, Sinhala, Tigrinya, Tamil, Amharic, and Oromo.

Overall, the availability of interpreters in Romania's asylum system can be challenging, particularly in less common languages. However, efforts to utilise videoconferencing and double interpretation, in some cases, demonstrate an attempt to address the issue and ensure that applicants can effectively communicate their reasons for seeking asylum. The AIDA 2021 report noted a scarcity of female interpreters in some regional centres. Although efforts have been made to increase the number of female case officers by 2022, meeting the demand for interpreters of specific genders remains challenging in most cases. Problems regarding the quality and conduct of the interpreters were also identified. Some interpreters lacked sufficient training, leading to issues with impartiality. Specific complaints included interpreters engaging in private conversations with asylum seekers, providing summaries rather than full translations, and not reading the transcripts at the end of the interviews.

4. Right to contact and be assisted by an NGO or UNHCR: Asylum seekers have the right to seek assistance and support from NGOs and the UNHCR throughout the asylum procedure.

5. Right to be provided with a free of charge translator during the asylum procedure: Asylum seekers who do not speak Romanian or are not proficient in it have the right to receive interpretation services during interviews and other proceedings.

6. Right to receive information in a language that they understand: Asylum seekers have the right to be informed about their rights and the asylum process in a language they can understand.

7. Right to access their personal asylum file and request copies of it: Asylum seekers have the right to access and review documents related to their asylum case and to request copies of these documents.

a) Obligation to accept being photographed and finger-printed: Asylum seekers are required to provide biometric data, including photographs and fingerprints, as part of the asylum application process.
b) Obligation to give truthful and complete information regarding their identity and reasons for seeking protection: Asylum seekers are expected to provide honest and accurate information about their identity, nationality, and reasons for seeking asylum.
c) Obligation to provide documents regarding their identity (including passport) if available: Asylum seekers should provide any relevant identity documents they possess, including passports.

d) Obligation to hand over any other documents relevant to their asylum claim: Asylum seekers should submit any additional documentation or evidence that supports their asylum claim.
e) Obligation to attend the asylum interview(s) and not leave the country irregularly: Asylum seekers are required to attend scheduled interviews and meetings related to their asylum applications. They should not leave the country without proper authorisation during the process.
f) Obligation to abide by the laws in Romania: Asylum seekers are expected to respect and comply with Romanian laws and regulations while in the country.

8. Rights and duties of asylum seekers related to accommodation and residence: Accommodation in a Regional Reception Centre for asylum seekers lacking the financial resources to live independently: To ensure the provision of reception conditions, most asylum seekers are accommodated in Regional Centres for Accommodation and Procedures for Asylum Seekers. These centres are managed by the GII-DAI (See Table 1). The centres were established to provide appropriate living conditions and facilitate the processing of asylum applications. The overall aim of such reception facilities is to ensure that asylum seekers have a safe and supportive environment during the asylum process, which can be a challenging and uncertain period for them. Providing their basic needs allows them to focus on their asylum applications and ensures that they are treated with dignity and respect while their cases are being evaluated. It is essential for countries to provide basic allowances and support to asylum seekers during their stay to meet their essential needs and ensure their well-being[72].

Table 1. Names and capacities of Regional Reception Centres

Regional Reception Centre Location	Capacity	Asylum seekers accommodated during 2022
TIMIȘOARA	250	2,688
ȘOMCUTA MARE	100	1,627
RĂDĂUȚI	130	1,583
GALAȚI	200	803
BUCHAREST	10	256
GIURGIU	100	1,079
Total	790	8,036

Source: AIDA Report, 2021, p. 97.

72 | Art. 55, Para. 2, letters a-g of Asylum Decree, modified by Decision 277 of 27 February 2022.

a) The right for special care for asylum seekers in vulnerable situations (children under 18 years old, with medical needs, or disabilities).
b) Financial support from the GII, in situations where the capacity of Regional Reception Centres is exceeded, subject to available funds.
c) The right to remain on Romanian territory throughout the entire asylum procedure.
d) The right to receive a temporary identification document during the asylum process.
e) The right to participate in cultural accommodation classes, to facilitate integration.
f) The obligation to not leave the city/town of residence without the permission of the GII.
g) Reporting any changes in residence status to the authorities within five days.
h) Respecting the rules of the Regional Accommodation Centre where the asylum seeker has temporary residence[73].

9. Rights of asylum seekers related to financial assistance from state funds:
a) Financial assistance for food and other expenses: Asylum seekers are entitled to a daily food allowance. As of 27 February 2022, the allowance has doubled from 10 RON / €2.08 per person to 20 RON / €4.08 per person.
b) Financial assistance for adequate clothing[74]: Asylum seekers can request a one-time clothing allowance to cover their clothing needs. During the summer of 2022, the allowance increased from 67 RON / €13.95 per person to 135 RON / €27.55 per person. In the winter, the allowance increased from 100 RON / €20.83 per person to 200 RON / €40.81 per person.
c) Additional social assistance, depending on individual situation and needs.
d) Pocket Money[75]: Asylum seekers receive pocket money for other daily expenses. As of 27 February 2022, the allowance has doubled from 6 RON / €1.25 per day per person to 12 RON / €2.45 per day per person. This allowance is intended to cover expenses related to local transportation, cultural services, press, repair, maintenance services, and personal hygiene products.

These measures are designed to offer financial relief and support to individuals during the asylum process, especially if basic needs of asylum seekers are not met adequately. By providing such allowances, the Romanian government aims to ensure that asylum seekers have access to essential resources, adequate food, appropriate clothing, and the ability to cover their daily expenses.

Besides the rights mentioned above, Romania provides an allowance for all children[76], regardless of nationality, up to the age of 18. This financial allowance

73 | Failure to comply with the rules of the Regional Centre may result in sanctions, such as a temporary suspension of financial assistance (6 lei/day) for one to three months or temporary or permanent eviction from the Reception Centre.
74 | AIDA Report, 2021, p. 89.
75 | *Ibid.*
76 | See for details *Law No. 277/2010 on Family Allowance*, published in the *Official Gazette* No. 889 from 30 December 2010.

is meant to support families and children and is offered in addition to other forms of material support provided by the government. The state child allowance is determined by the Income and Social Support (ISR) and varies based on the age and circumstances of the child[77]: for children up to the age of two or three in the case of a disabled child, the allowance amounts to 600 RON / €122; and for children between the ages of two and 18 years, the allowance amounts to 243 RON / €49.

The child allowance is an important measure to assist families in meeting the needs of their children and contributing to their wellbeing and development. By providing financial support to children, the State aims to ensure that all children have access to basic necessities and opportunities for growth irrespective of their nationality.

Governments must periodically review and adjust such allowances to account for changes in the cost of living and ensure that they remain effective in supporting families and children in need. Additionally, these measures demonstrate a commitment to promoting the welfare and rights of children within the country.

10. Rights and obligations of asylum seekers to receive medical assistance and treatment: Ensuring access to medical care is crucial for safeguarding the health and well-being of individuals seeking asylum, especially because they may have experienced challenging circumstances in their home country or during their journey to host countries. The legal provisions demonstrate Romania's commitment to providing humanitarian support to asylum seekers during their stay in the country. Legal provisions offer guarantees for the impossibility to suspend rights associated with medical care during the asylum proceedings. Right to medical assistance cannot be suspended: The entitlement to medical assistance cannot be suspended under any circumstances. This ensures that they continue to receive necessary medical care throughout the asylum process. The rights and obligations associated with medical assistance are as follows:

a) Access to free basic medical assistance and treatment, covering essential medical services;
b) Emergency medical assistance in a hospital for no costs;
c) Free medical treatment for acute or chronic life-threatening illnesses, which pose an immediate risk to the life of the asylum seeker
d) Proper medical care for special medical needs;
e) Obligation to attend a medical examination after applying for asylum;
f) Confidentiality of medical information, regarding the medical situation of the asylum seeker.

According to the provisions of *Government Emergency Ordinance No. 194/2002*[78] *regarding the foreigner's regime in Romania*, foreigners need to prove the existence of valid health insurance to request or extend their residence rights. As mentioned above, asylees and beneficiaries of other forms of international protection are

77 | Art. 1 of *Law No. 61/1993 on the State Child Allowance*, republished in the *Official Gazette* No. 767 from 14 November 2014.
78 | Republished in the *Official Gazette* No. 21 from 5 June 2008.

excluded from this rule; therefore, they are not obliged to provide annual proof of health insurance to the GII.

According to the provisions of Art. 10, letter b) of *Government Ordinance No. 137/2000*[79] any form of discrimination against a person, or group of persons on the grounds of belonging to a particular group, or based on race, nationality, religion, or other criteria, and the refusal to grant access to public health services, is considered a contravention. In discrimination related cases, the National Council for Discrimination, a national administrative-judicial authority specialising in discrimination matters, can be petitioned by an injured person.

11. Asylum seekers' rights related to education: Ensuring access to education for children seeking asylum is vital for their wellbeing and integration into society. The legal provisions in this domain highlight Romania's commitment to provide equal educational opportunities to all children, including those below the age of 18 who are seeking asylum. The authorities acknowledge the significance of education and recognise that children should receive education as soon as possible. Education provides knowledge and skills and plays a crucial role in supporting a child's emotional and social development.

Art. 2, Para. 4 of *Law. No. 1/2011 – National Law of Education*[80] guarantees that people who are benefitting from a form of international protection in Romania have equal rights of access to all levels and forms of pre-university and higher education systems and to lifelong learning projects, without any discrimination, according to *Law. No. 272/2004 on the protection and promotion of children's rights*[81] and *Government Ordinance No. 137/2000*[82]*, regarding discrimination*. Asylum seekers have the following rights:

a) Right to attend kindergarten and school for children below the age of 18 under the same conditions as Romanian children.
b) Romanian language classes for integration meant to aid in the integration process into the national education system, organised by the Ministry of Education, Research, Youth, and Sports, in collaboration with the GII.
c) The recognition of foreign diplomas and certificates by a request made to the National Centre for Recognition and Equivalence of Diplomas (CNRED), a governmental agency functioning under the coordination of the Ministry of Education. The recognition of diplomas and qualifications implies a written formal request, a transcript of the grades, proof of payment of administrative taxes, and a copy of an identification document.

Regional Reception Centres personnel and several NGOs are making efforts to ensure that children have access to education and provide guidance and support to help children enrol in schools, receive the education they need, and foster a sense of belonging within the country's educational system and society.

79 | Republished in the *Official Gazette* No. 166 from 7 March 2014.
80 | Published in the *Official Gazette* No. 18 from 10 January 2011.
81 | Republished in the *Official Gazette* No. 159 from 5 March 2014.
82 | Cited above.

12. Employment related rights of asylum seekers:[83]

Legal provisions regarding the employment rights of asylum seekers aim to support their integration and self-sufficiency in Romania by allowing them to participate in the labour market on equal terms with Romanian citizens. By granting the right to work without a work permit, the country facilitates access to employment opportunities and promotes social and economic inclusion of individuals seeking asylum. The basic employment-related rights and obligations of asylum seekers are as follows:

a) Right to work after 3 months of applying for asylum, permitting asylum seekers to find employment opportunities in the country under the same conditions as Romanian citizens and without the need to have a separate work permit. Beneficiaries of international protection have the same rights as Romanian citizens when it comes to accessing the labour market. However, certain professionals such as doctors may have restrictions on practice unless specific conditions are met, such as being married to a Romanian citizen or having Long-Term Residence permit.
b) Continuation of work if residing and working legally, in the case of persons legally residing and working in Romania.
c) Right to obtain a document certifying the right to work.

However, a lack of knowledge of Romanian (and sometimes English) can hinder beneficiaries' access to the labour market. Employers may be reluctant to hire foreigners who cannot communicate effectively. Additionally, many beneficiaries may not have diplomas or certificates that certify their studies, which limits their ability to apply for certain positions.

Access to the labour market can vary depending on the economic power of the city or region. Some areas may offer better job opportunities, leading beneficiaries to relocate to larger cities or other countries. The COVID-19 pandemic has also affected job opportunities for beneficiaries, particularly those working in the HORECA (Hotels, Restaurants, and Catering) sector. Some organisations, such as AIDRom and IOM Romania, provide support to beneficiaries in finding jobs and navigating the labour market.

Overall, while beneficiaries of international protection have the legal right to work in Romania, practical challenges such as language barriers, a lack of recognised qualifications, and regional differences can still impact their ability to access employment opportunities. Efforts by organisations and employers' awareness of the rights and qualifications of beneficiaries can help improve their integration into the labour market.

Other important rights of asylum seekers:

13. Right of association: Foreigners, stateless persons who have obtained refugee status, forms of subsidiary protection, or foreigners who have obtained long-term residence permits have the right to participate in any apolitical and non-lucrative association or professional organisation, and trade unions.

14. The right to acquire citizenship and acquisition and release of Romanian citizenship are not conditioned by the loss of citizenship in another state. Romania

83 | For more details see AIDA Report, 2021, pp. 103–104.

allows for double or multiple citizenship, that is, individuals can simultaneously hold Romanian and citizenship of another country.

Law No. 21/1991[84] governs the acquisition and release of Romanian citizenship. The means of acquiring Romanian citizenship, as stated in Arts. 1 and 2 of the law, include birth, adoption, and naturalisation through request. However, for migrants, only birth and adoption are relevant options.

Regarding adoption, Art. 6 specifies that a foreign child or stateless person can acquire Romanian citizenship through adoption by Romanian citizens. If the adoptee is of legal age, consent is required, and the law creates a fiction that presumes the child to be born into the adoptive family.

For individuals seeking to release their Romanian citizenship upon request, Art. 4 outlines specific criteria that must be met. These criteria include residence in Romanian territory for at least eight years (or five years, if married and living with a Romanian citizen), loyalty to the Romanian State, means for a decent life, good behaviour, knowledge of the Romanian language and culture, and familiarity with the Constitution and the National Anthem.

If the criteria are met, the request is submitted to the President of the National Authority for Citizenship, who makes the final decision. If the request is approved, the individual takes an oath and becomes a Romanian citizen. If the request is denied, the decision can be appealed at the Bucharest Court of Law and subsequently at the Bucharest Court of Appeal.

Additionally, Art. 10 of the Law allows for the granting of Romanian citizenship to individuals who have previously lost it, allowing them to maintain their foreign citizenship and residence abroad. These individuals must meet the same criteria, except for the first and last two criteria. However, the acquisition of Romanian citizenship and holding dual citizenship may have implications for individuals in other countries that do not recognise or allow dual citizenship. The Romanian State cannot guarantee the safety or recognition of another country's citizenship, and individuals should be aware of the potential consequences of holding dual citizenship according to the laws of their other country of citizenship.

15. Right for integration: Romanian integration of refugees is focused on providing them with access to economic, cultural, and social opportunities. The government has offered various support measures and initiatives to facilitate integration into Romanian society. Some of these measures include: a) Romanian language courses to help individuals learn the Romanian language, which is essential for effective communication and integration into the local community; b) professional skills enhancement courses, provided to help immigrants polish their professional abilities, making it easier for them to find suitable employment opportunities; c) information on rights and obligations; d) courses on history, culture, civilisation, and the Romanian legal system, to help immigrants better understand the country's culture and legal system, fostering a sense of belonging and understanding; and e) meetings with Romanian citizens, to encourage mutual understanding and promote social interaction, for a harmonious and inclusive society. To realise the aforementioned actions, Romanian authorities are

84 | Republished in the *Official Gazette* No. 405 from 17 June 2010.

collaborating with international NGOs to provide additional support and resources for the integration of immigrants into Romanian social life.

16. Right to family reunification: Romanian legislation[85] makes no distinction between refugees and beneficiaries of subsidiary protection in terms of criteria and conditions for family reunification. Eligibility for family reunification is similar in both categories. The family members of a beneficiary of refugee status or subsidiary protection, provided they were in the country of origin at the time of the asylum application made by the sponsor, are the spouse and minor, unmarried children of the beneficiary or the spouse, regardless of whether they are born in marriage or out of wedlock or adopted in accordance with the national law of the country of origin. Legal provisions do not set a waiting period before a beneficiary of international protection (refugee or subsidiary protection) applies for family reunification. There is no prescribed deadline for submitting an application for family reunification. Beneficiaries of international protection can apply for the reunification of their family members as long as they are not present in Romania. Unlike other countries, Romanian legislation does not require beneficiaries of international protection to prove income, accommodation, or health insurance for family reunification. The main requirement is to demonstrate the family relationship with the intended family member or the fact that marriage was concluded before entering Romania.

Every Regional Centre in Romania can oversee family reunification applications. The beneficiary of international protection must submit an application along with original documents (such as birth certificates, marriage certificates, and identity cards) to prove family ties with the intended family members. If the original documents are unavailable, another document demonstrating family relationships must be provided. To gather additional data and information about family ties and clarify relevant aspects of the asylum application for family members, GII-DAI conducts an interview with the beneficiary of international protection. This process ensures that the necessary documentation is obtained to verify family ties and facilitates the family reunification process for beneficiaries of international protection in Romania.

In Giurgiu, ten family reunification applications were made, and all of them were admitted, indicating a 100% approval rate. In Timișoara, there were seven cases of family reunification in 2022, and all of them were admitted. In Galaţi, around 50 family reunification applications were made, with 40 of them being admitted and four rejected. Additionally, one application was made by an unaccompanied minor. In Rădăuţi, 60 family reunification requests were lodged, and 52 of them were admitted, while eight were rejected. Bucharest reported 236 applications for family reunification. However, statistics on the number of admitted applications were not provided.[86]

The International Organization for Migration reported providing support to 42 people during the family reunification procedure. By the end of 2021, 11 of these applications were admitted, but some were still pending. At the regional centre of

85 | Art. 71 of Asylum Act and Art. 30 of Asylum Decree.
86 | AIDA Report, 2021, pp. 146–148.

Şomcuta Mare, nine requests for family reunification were submitted in 2022, with six of them being admitted.

7. Conclusions

The problem of migration is highlighted as being of particular importance in global political and economic contexts. This suggests that migration is a critical issue with far-reaching implications. Romania's geographical location is emphasised, as it sits at the confluence of several migration paths. As such, Romania faces unique challenges.

This study provides a comprehensive overview of migration-related issues in Romania by thoroughly examining various aspects of migration, including its legal, regulatory, and practical dimensions. This study specifically addresses the challenges related to illegal migration, indicating that this is a significant concern for Romania because of the security and social implications.

The existence of international, European, and national regulations governing migration in Romania underscores the importance of legal frameworks to manage migration flows and ensure migrant rights. This paper outlines the key principles applied by national authorities when addressing migration concerns and provides information on the numerous rights and responsibilities of migrants within Romania.

Overall, the migration phenomenon in Romania can be described as multifaceted, not one-dimensional, and involving legal, social, economic, and political dimensions. The challenge for authorities globally and in Romania is to find proper regulatory paths to maintain migration in legal limits.

Bibliography

Bogusz, B., Cholewinski, R., Cygan, A., Szyszczak, E. (2004) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. Leiden: Brill; https://doi.org/10.1163/9789047406051.

Chetail, V. (2019) *International Migration Law*. Oxford: Oxford University Press.

Cortes, K. E. (2004) 'Are Refugees Different from Economic Immigrants? Some Empirical Evidence on the Heterogenity of Immigrant Groups in the United States', *Discussion Paper Series*, 2004/1063; https://doi.org/10.2139/ssrn.524605.

Dănișor, D. C. (2007) *Drept constituțional și instituții politice. Teoria general*. Bucharest: C. H. Beck.

De Ruyver, B., Vermeulen, G., Beken, T. V. (eds.) (2002) *Strategies of the EU and US in Combating Transnational Organized Crime, Insitute for International Research on Criminal Policy*. Antwerp: Maklu Publishers.

Drăganu, T. (1998) *Drept consituțional și instituții politice. Tratat elementar*. Bucharest: Lumina Lex.

Gîrleșteanu, G. (2012) *Drept constitutional și instituții politice*. Bucharest: Universul Juridic Publishing House.

Giuffré, M. (2020) *The Readmission of Asylum Seekers under International Law*. Chicago: Bloomsbury Publishing; https://doi.org/10.5040/9781509902514.

Hamdan, E. (2016) *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment*. Leiden: Brill Nijhoff; https://doi.org/10.1163/9789004319394.

Heintze, H.-J., Thielbörger, P. (2015) *From Cold War to Cyber War. The Evolution of International Law of Peace and Armed Conflict over the last 25 years*. London: Springer Cham; https://doi.org/10.1007/978-3-319-19087-7.

International Organization for Migration (2019) 'Glossary on Migration' International Organization for Migration [Online]. Available at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (Accessed: 24 November 2023).

Ivanov, D. V., Bekhyashev, D. K. (2016) *Environmental Migration in International Law*. Cambridge: Cambridge Scholar Publishing [Online]. Available at: https://www.cambridgescholars.com/resources/pdfs/978-1-4438-9476-0-sample.pdf (Accessed: 20 November 2023).

Kälin, W., Müller, L., Wyttenbach, J. (eds.) (2004) *Das Bild der Menschenrechte*. Zürich: Lars Müller Publishers.

LeMay, M.C. (2006) *Illegal Immigration: A Reference Handbook*. Santa Barbara: ABC-Clio.

Muraru, I., Tănăsescu, S. (2005) *Drept constituțional și instituții politice*. Bucharest: All Beck.

Möhle, M., Huth, S., Becker, J. (2017) 'Global asylum flows in the context of EU Enlargement: The consequences of the safe third country rule', *Migration Waves in Eastern Europe (1990-2015). A Section from 16 Years of SEER (Special issue)*, pp. 29–40; https://doi.org/10.5771/9783845279398.

Pătraşcu, B., Dumitrescu, C. A., Ionescu, C., Bălăceanu, C., Macarovschi, L., Popescu, R. M., Corlăţean, T., Jora, C., Popescu, A.M., Tilea, C.M. (2017) *Constituția României. Comentarii și explicații*. Bucharest: C. H. Beck.

Renucci, J.-F. (2009) *Tratat de drept european al drepturilor omului*. Bucharest: Editura Hamangiu.

Tazzioli, M. (2019) *The Making of Migration: The Biopolitics of Mobility at Europe's Borders*. London: Sage Publications; https://doi.org/10.4135/9781526492920.

Vaughan-Williams, N. (2015) *Europe's Border Crisis: Biopolitical Security and Beyond*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198747024.001.0001.

THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA CONCERNING MIGRATION AND ASYLUM ISSUES

Lana Ofak[1]

ABSTRACT

This study analyses the case law of the Constitutional Court of the Republic of Croatia on migration and asylum issues initiated after Croatia acceded to the European Union. After the introduction (Sec.1), the study provides an overview of the relevant sources of migration and asylum laws (Sec. 2). The central part of the study (Sec. 3) analyses the legal reasoning of the Constitutional Court, which shows the change in its approach towards applying more significant standards of protection guaranteed by the EU Law and the Convention for the Protection of Human Rights and Fundamental Freedoms, especially regarding the principle of ex nunc evaluation of the and the duty to ensure that the receiving third country is safe. The study also shows that further improvements in practice are required, as indicated by the cases against Croatia lodged before the European Court of Human Rights and other international human rights bodies concerning the issue of illegal pushbacks (Sec. 4). The study ends with main conclusions relating to the Constitutional Court's role in safeguarding asylum seekers' human rights as guaranteed by the EU law and the European Convention (Sec. 5). The conclusion is that the Constitutional Court follows the applicable case law of the Court of Justice of the EU and the European Court of Human Rights. However, in some cases there seems to have been a lack of opportunity for asylum seekers to exhaust legal remedies against the decisions or actions taken by Croatian public authorities and ultimately access the Constitutional Court.

KEYWORDS

asylum seekers
international protection
Constitutional Court
Republic of Croatia
European Convention on Human Rights
European Union law

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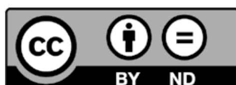

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1. Introduction

This study analyses the case law of the Constitutional Court of the Republic of Croatia (hereinafter, Constitutional Court) regarding migration and asylum issues, specifically cases in which third-country nationals or stateless persons, that is, persons who are not citizens of the European Union (EU), seek international protection in Croatia.

Croatia became an EU member on 1 July 2013. As a new EU member state, it was not initially a destination for transit immigrants. However, given that the number of migrants worldwide is constantly growing, it is realistic to expect Croatia to eventually face the problem of a larger number of asylum seekers. Regarding the statistics, in 2014 there were 453 asylum seekers in Croatia. In the same year, 16 persons were granted asylum and 10 had subsidiary protection.[2] In 2022, the procedure for Croatia's entry into the Schengen Zone was completed, and it became a Schengen State on 1 January 2023. The year 2022 was also marked by a large influx of registered irregular migrants in Croatia and the largest number of applications for international protection, 12,827. In the same year, 21 people were granted asylum. In the first three months of 2023, Croatia received 7,884 requests for international protection. This trend is evident in other European Union (EU) countries as well. In 2022, EU countries received the most applications for international protection since 2016. This increase may be explained by the removal of COVID-19-related restrictions, conflicts, and food insecurity in many regions. Additionally, secondary movements within the EU and a significant number of applications by nationals from visa-free countries who arrived legally also contributed.[3] Moreover, approximately four million people who benefited from temporary protection were fleeing Ukraine.[4]

In this context, it is important to consider the Constitutional Court's approach when dealing with migration and asylum issues. In 2014, Lalić Novak conducted research on whether the Constitutional Court and administrative courts promote higher standards of protection for asylum seekers.[5] Research related to the period before Croatia's accession to the EU shows that the Constitutional Court developed certain standards for the protection of asylum seekers regarding the right to procedural fairness.[6] However, the Constitutional Court did not significantly influence the development of the Croatian asylum system, which can be explained by the relatively small number of constitutional complaints initiated in these matters.[7]

2 | Statistical data is available on the website of the Ministry of Interior [Online]. Available at: https://mup.gov.hr/pristup-informacijama-16/statistika-228/statistika-trazitelji-medjunarodne-zastite/283234 (Accessed: 30 June 2023).
3 | European Union Agency for Asylum, 2023.
4 | Ibid. See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022.
5 | Novak, 2014, pp. 939–959.
6 | Ibid., 956.
7 | Ibid.

This study examines cases initiated after Croatia's accession to the EU. The review of the relevant sources and case law stems from an analysis of 15 cases decided by the Constitutional Court between 2014 and 2022.[8] This study demonstrates and analyses the legal reasoning of the Constitutional Court that shows the change in its approach towards applying greater standards of protection guaranteed by the EU law and the Convention for Human Rights and Fundamental Freedoms (hereinafter, European Convention or Convention).[9] However, the study also shows that further improvements in practice are required, as indicated by cases against Croatia lodged before the European Court of Human Rights (hereinafter: ECtHR). This study discusses all the constitutional issues examined in the case law of the Croatian Constitutional Court concerning migration and asylum issues. Croatia is the EU's newest Member State, and only a few constitutional issues have been raised. Specifically, the Constitutional Court has never dealt with the question of EU and member states competencies or the boundaries of their competencies. These issues have never been discussed in migration and asylum cases, or in general. The Constitutional Court has never linked migration or asylum issues with constitutional identity. As the analysis shows, the main role of the Constitutional Court has so far been related to safeguarding the human rights of asylum seekers, as guaranteed by the EU law and the European Convention.

2. Relevant Sources of Immigration and Asylum Law

Under the Constitution of the Republic of Croatia (hereinafter, the Constitution), courts administer justice according to the Constitution, the Acquis of the EU, international treaties, laws (legislative acts), and other valid sources of law. [10] The Constitution, in accordance with the legal tradition of continental Europe, established the Constitutional Court, which, among other things, decided on constitutional complaints against individual decisions taken by state bodies, bodies of local and regional self-government, and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms. This Sec. explains the main sources of immigration and asylum law that the Constitutional Court applies when deciding on constitutional complaints.

Pursuant to the Constitutional Act on the Constitutional Court of the Republic of Croatia, if other legal remedies are provided against the violation of constitutional rights, a constitutional complaint may be lodged only after this remedy has

8 | Table of cases is given at the end of this study.

9 | Convention for Human Rights and Fundamental Freedoms, Official Gazette (hereinafter: OG) – International Treaties no. 18/97, 6/99 – consolidated text, 8/99 – correction, 14/02, 1/06 and 13/17.

10 | See Arts. 115 and 141c of the Constitution of the Republic of Croatia, OG no. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14. The consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014 edited and translated by the Constitutional Court of the Republic of Croatia is available at: https://usud.hr/en/the-constitution (Accessed: 30 June 2023). Hereinafter, the numbering from this consolidated text will be used.

been exhausted.[11] In asylum cases, the exhaustion of legal remedies occurs as follows: The Ministry of Interior decides upon its application for international protection. An appeal cannot be submitted against the decision of the Ministry, but an administrative dispute can be initiated before the administrative court.[12] Against the judgment of the administrative court for rejecting or dismissing the action for the annulment of the Ministry's decision, an appeal may be filed with the High Administrative Court of the Republic of Croatia.[13] A constitutional complaint may be submitted within 30 days of receiving the decision of the High Administrative Court.[14] The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in two situations: (1) when the court of justice does not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or (2) in cases where the disputed individual acts grossly violate constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.[15]

2.1. Constitution

According to the case law of the Constitutional Court, in cases where the application for international protection was dismissed or rejected by the competent public authority as well as their action and appeal in administrative disputes, asylum seekers in their constitutional complaints mostly claimed violation of the constitutional right to life and the prohibition of torture, humiliation, and degradation, and inhuman treatment in connection with the constitutional right to asylum, as well as violation of the constitutional right to a fair trial. In certain cases, they alleged a violation of the constitutional prohibition on the expulsion of foreigners legally residing in the Republic of Croatia. In addition, in some cases, they claimed that they had been discriminated against and that their right to access a lawyer during their stay in the reception centre for foreigners had been violated. The relevant provisions of the Constitution are as follows:

1. Each person has a right to live. There should be no capital punishment in the Republic of Croatia (Art. 21).
2. No one may be subjected to any form of ill treatment without their consent to medical or scientific experiments (Art. 23, para. 1).

11 | Art. 62, para. 2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, OG no. 99/99, 29/02, 49/02 – consolidated text. The Constitutional Act is available in English on the website of the Constitutional Court [Online]. Available at: https://usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf (Accessed: 30 June 2023).

12 | Art. 32 of the Act on International and Temporary Protection, OG no. 70/15, 127/17 and 33/23.

13 | See Art. 66a of the Administrative Disputes Act, OG no. 20/10, 143/12, 152/14, 94/16, 29/17 and 110/21.

14 | Art. 64 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.

15 | Ibid., Art. 63, para. 1.

3. Foreign citizens and stateless persons may be granted asylum in the Republic of Croatia unless they are prosecuted for non-political crimes and activities, contrary to the fundamental principles of international law. No alien legally residing in the territory of the Republic of Croatia shall be expelled or extradited to another state, except in cases where decisions made in compliance with international treaties or laws are enforced (Art. 33).
4. Anyone shall be entitled to have their rights and obligations or suspicion or accusation of a criminal offence decided upon fairly and within a reasonable time by an independent and impartial court established by law (Art. 29, para. 1).
5. All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinions, national or social origin, property, birth, education, social status, or another status. All persons shall be equal before the law (Art. 14).
6. Human liberty and personality are inviolable. No one shall be deprived of liberty, nor shall liberty be restricted, except when specified by law upon which a court shall decide (Art. 22).
7. Any person arrested or detained shall have the right to appeal to a court, which must decide the lawfulness of the arrest without delay (Art. 24, para. 3).

2.2. European Convention of Human Rights and the Case Law of the European Court of Human Rights

The European Convention is the most relevant international legal act for the Constitutional Court of the Republic of Croatia. The Croatian constitutional legal order accepts a legal monism system. Under Art. 134 of the Constitution, international treaties which have been concluded and ratified in accordance with the Constitution, which have been published and entered into force, shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. According to this constitutional provision, international treaties in force in the Republic of Croatia enjoy supra-legislative status, but in relation to the Constitution, they retain a sub-constitutional status. However, as Omejec points out, the case law of the Croatian Constitutional Court shows that international treaties actually enjoy a quasi-constitutional status in the Croatian constitutional legal order because they serve as standards for the review of the national legislation, particularly of the acts of Parliament.[16]

When an individual (a physical or legal person) files a constitutional complaint before the Constitutional Court, he or she may argue that the court and public authorities have violated his or her constitutional rights by denying the rights he or she enjoys based on an international treaty.

The Constitutional Court regularly refers to ECtHR case law irrespective of the state against which the judgment was passed. Therefore, it accepts that the judgments of the ECtHR extend beyond the boundaries of the particular cases.[17] The

16 | Omejec, 2009, p. 2.
17 | See Ofak, 2020, pp. 688–706.

binding effect of the case law of the ECtHR for the whole judiciary was emphasised by the Constitutional Court in its Decision on 23 January 2013:

> […] the domestic case law must be built to observe the international legal obligations that for the Republic of Croatia arise from the Convention. It must be in conformity with the relevant legal reasoning and case law of the ECtHR because, for the Republic of Croatia, they represent binding standards of international law.[18]

In asylum cases, the Constitutional Court examined constitutional complaints regarding the violation of the following rights and freedoms guaranteed by the European Convention: the right to life (Art. 2), the prohibition of torture (Art. 3), the right to liberty and security (Art. 5), the right to an effective legal remedy (Art. 13), and the prohibition of discrimination (Art. 14).

2.3. European Union Law and the case law of the Court of Justice of the European Union

The Constitution prescribes the application of EU Law in the following way (Art. 141c):

> The exercise of the rights ensuing from the European Union Acquis Communautaire shall be equal to the exercise of rights under the Croatian legal order.
> All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union Acquis Communautaire.
> Croatian courts shall protect individual rights based on the European Union Acquis Communautaire.
> State bodies, local and regional self-government bodies, and legal persons vested with public authority shall apply European Union law directly.

As Rodin pointed out, Art. 141c can be understood as a legal norm which implicitly prescribes the direct effect and supremacy of the EU law over Croatian law.[19] Croatian courts, including the Constitutional Court, are obligated to protect subjective rights under the EU Acquis Communautaire (Art. 141c, para. 3). This provision acknowledges the direct effect of the EU Law on the Croatian legal system. Art. 141c, para. 4 of the Constitution prescribes a direct administrative effect. Administrative authorities, including municipal authorities and other legal persons vested with public authority, shall be under the same obligation as the National Court to apply the direct-effect doctrine.[20]

Regarding the question of the hierarchy of the EU law over the Croatian Constitution, there has so far been only one mention of this issue in cases concerned with the constitutionality of the popular initiative referendum related to the separation of supporting and non-core activities in the public sector (outsourcing) and

18 | U-III-3304/2011, decision of 23 January 2013, para. 32.
19 | Rodin, 2011, p. 89.
20 | Ibid., pp. 89–90.

the monetisation of Croatian highways. In its decision, the Constitutional Court concluded that a referendum was not allowed because the text of the referendum question proposed by the organising committee was not in accordance with the Constitution.[21] Regarding the issue of compliance of the referendum question with the EU law, the Constitutional Court assessed that it was unnecessary to examine it because the Constitution, by legal force, is higher than the EU law.[22] Thus, by declaring that the referendum question was incompatible with the Constitution, examining its compatibility with the EU law was unnecessary. The Constitutional Court did not explain the supremacy of the Croatian Constitution over EU law. Horvat Vuković (2019) stressed that 'such a laconic rejection of the supremacy of EU law' can be considered 'a reckless failure of the Court to clarify the limits of the effects of EU law in the context of preserving the specific Croatian constitutional identity'.[23]

According to the results of one study that investigated the application of the Charter of Fundamental Rights of the European Union (hereinafter Charter) [24] before the Constitutional Court,[25] it can be observed that the Constitutional Court directly applied the EU law in the proceedings initiated by a constitutional complaint in a limited number of cases, mostly concerning migrations or asylum.[26] Majić's (2021) research showed that in certain cases where the applicants referred to the Charter but omitted to substantiate their claims and point out to any of the rulings of the Court of Justice of the EU (hereinafter: CJEU), the Constitutional Court had not conducted an enquiry into the application of the EU law on its own motion.[27] However, in a later case, the Constitutional Court changed its approach to applying the Charter and EU Law directly on its own motion. In the landmark case Oral, the Constitutional Court found a violation of Art. 141c of the Constitution when the court failed to directly implement 'the Dublin acquis of the European Union', that is, the common European system of asylum protection.[28] As Majic (2021) points out, following this new development of applying the Charter *proprio motu*, the Constitutional Court had to solve the dilemma of how to deal with complaints in which the European Convention and the Charter were applicable, especially in cases where the standards of protection afforded to an individual by the EU law were not the same as those afforded by the Convention.[29] In a subsequent landmark decision, X. Y.,[30] the Constitutional Court examined the equivalence of standards of protection afforded to asylum seekers by the EU law and the Convention and applied the

21 | U-VIIR-1159/2015, decision of 8 April 2015, para. 46.
22 | Ibid., para. 45.
23 | Horvat Vuković, 2019, p. 262.
24 | Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
25 | See Majic, 2021, pp. 198–222.
26 | Ibid., pp. 207–209. These cases are addressed in Sec. 3 of this study.
27 | Majic, 2021, pp. 207–208. See, for instance, U-III-6958/2014, decision of 27 February 2018.
28 | U-III-208/2018, decision of 10 July 2018, para. 22. The case are explained in Sub-Sec. 3.2.
29 | Majic, 2021, p. 209.
30 | U-III-424/2009 and U-III-1411/2009, decision of 17 December 2019.

higher standards pursuant to the case law of the ECtHR concerning the *ex nunc* evaluation of an asylum application.[31]

2.4. International and Temporary Protection Act

Before Croatia's accession to the EU, the procedure for granting asylum protection was prescribed by the Asylum Act.[32] The Asylum Act remained valid until the new Act on International and Temporary Protection (AITP) entered into force in 2015.[33] This Act prescribes the principles, conditions, and procedures for international protection and temporary protection; the status, rights, and obligations of asylum seekers, asylees, foreigners under subsidiary protection, and foreigners under temporary protection; and the conditions and procedures for the revocation and cessation of asylee status and subsidiary and temporary protection.[34]

31 | Majic, 2021, pp. 211–213. The case is explained in Sub-Sec. 3.2.
32 | Asylum Act, OG no. 79/07, 88/10, 143/13.
33 | Act on International and Temporary Protection, OG no. 70/15. This Act has so far been amended twice (OG no. 127/27 and 33/23). English version of the Act is available at: https://www.refworld.org/pdfid/4e8044fd2.pdf (Accessed: 30 June 2023). However, this consolidated version does not include the latest amendments to the Act from 2023.
34 | Pursuant to Art. 2 of the AITP, under this Act the following EU Directives are transposed into the Croatian legal order: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for providing 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), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003), 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, 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), and Directive 2013/33EU 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 180/96, 29.06.2013). Furthermore, this Act regulates the application of the following EU regulations: Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) 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, 5.9.2003), 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), (OJ L 180, 29.6.2013), 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), Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014

Art. 6 of the AITP prescribes the principle that prohibits expulsion or return (non-refoulement). It is forbidden to expel or return a third-country national or stateless person to a country:

1. In which his/her life or liberty is threatened on account of his/her race, religious or national affiliation, membership in a particular social group, or political opinion or
2. In which they could be subjected to torture, inhuman or degrading treatment, or
3. Which could extradite them to another country, whereby the principle of non-refoulment would be undermined.

An asylum shall be granted to applicants who are outside the country of their nationality or habitual residence and have a well-founded fear of persecution due to their race, religion, nationality, affiliation with a certain social group, or political opinion, as a result of which they are not able or do not wish to accept the protection of that country (Art. 20). Subsidiary protection shall be granted to an applicant who does not meet the conditions to be granted asylum if justified reasons exist to indicate that if returned to his/her country of origin, he/she would face a real risk of suffering serious harm and who is unable or, owing to such risk, is unwilling to avail themselves of the protection of that country. Serious harm assumes the threat of death by penalty or execution, torture, inhuman or degrading treatment or punishment, and serious and individual threats to the life of the civil population due to arbitrary generalised violence in situations of international or internal armed conflict (Art. 21). The AITP further states the reasons for persecution, such as race, religion, nationality, ethnicity, political opinion, and belonging to a certain social group, including sexual orientation or gender identity (Art. 22). According to the AITP, acts of persecution must be sufficiently serious in nature or repeated that they constitute a serious violation of fundamental human rights, in particular the rights from which derogation cannot be made under Art. 15, para. 2 of the European Convention, such as acts of physical or emotional violence, including sexual violence, discriminatory measures, judicial prosecution, or punishment which is disproportionate or discriminatory (Art. 23).

Art. 24 prescribes the principle of 'sur place' according to which a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which took place after the applicant left the country of origin, including the activities the applicant has engaged in after he/she left the country of origin. Acts of persecution or serious harm may be committed by state bodies, parties, or organisations that control the state or a significant part of the state territory, or non-state actors, if it is shown that state bodies, parties, or organisations that

amending Regulation (EU) No. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) 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 39, 8.2.2014) and Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ L 468, 30.12.2021).

control a significant part of the state territory, including international organisations, are unable or unwilling to provide protection against persecution or serious harm (Art. 25). While assessing the application, the AITP contains provisions concerning internal resettlement according to which the possibility of internal resettlement to a specific part of the country of origin is also established, where the applicant does not have a well-founded fear of persecution or of suffering serious harm or may receive effective protection from persecution or from suffering serious harm. Internal resettlement is possible if the applicant can travel to that part of the country safely and lawfully, gain admittance, and reasonably expect to settle there (Art. 27).

Rules regarding the assessment of facts and circumstances specify that the applicant is obliged to cooperate with the Ministry, furnish all available documentation, and present true and accurate information relating to his/her identity, age, nationality, family, country, address of previous residence, former applications, travel routes, identification and travel documents, and reasons for applying for protection. Furthermore, when assessing the application, the Ministry of Interior has the duty to collect and consider all the relevant facts and circumstances, especially taking into consideration:

1) Relevant statements and evidence presented by the applicant, including information about whether they were or could be exposed to persecution or the risk of suffering serious harm

2) Current facts about the country of origin and, if necessary, the country through which he/she travelled, including the laws and regulations of that country and how they are applied, as contained in various sources, especially those of the United Nations High Commissioner for Refugees (hereinafter, UNHCR), the European Union Agency for Asylum (previously the European Asylum Support Office; EASO) and other organisations dealing with the protection of human rights, and

3) The position and personal circumstances of the applicant, including factors such as gender and age in order to assess whether the procedures and acts to which he/she was or could be exposed would amount to persecution or serious harm.

The fact that the applicant has already been exposed to persecution, serious harm, or the threat of such persecution or harm is a serious indication of the applicant's well-founded fear of persecution or the risk of suffering serious harm, unless good reasons exist to consider that such persecution or serious harm will not be repeated (Art. 28).

Art. 29 specifies benefit of the doubt according to which the applicant's statement shall be deemed to be credible in the part in which certain facts or circumstances are not supported by documentation if:

1. The general credibility of the applicant's statement has been established
2. The applicant has made an effort to support his/her application with documentation
3. All relevant elements available to him/her were lodged with a satisfactory explanation regarding the lack of other relevant elements
4. It is established that the applicant's statements are consistent and convincing, and do not contradict the specific and general information available which is relevant for deciding on an application, and

5. The applicant requested international protection as soon as possible or has justified why he/she did not do so.

If the application has been rejected or the procedure is discontinued, the applicant may lodge a subsequent application supported by the relevant facts and evidence which arose after the decision became enforceable or which the applicant for justified reasons did not present during the previous procedure related to meeting the conditions for approval of international protection. The admissibility of the subsequent application shall be assessed based on the facts and evidence it contains and in connection with the facts and evidence already used in the previous procedure (Art. 47).

2.5. Other Sources

Under Art. 115, para. 3 of the Croatian Constitution, courts administer justice according to the Constitution, legislative acts, international treaties, and other valid sources of law. Thus, there are no restrictions on the legal sources that courts can apply to their judgments. Furthermore, Art. 3 of the Constitution prescribes the highest values of the constitutional order which form the basis for its interpretation: freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system. These fundamental values are considered part of the general principles that allow courts to prevent unacceptable consequences of applying the law in a manner contrary to the principles. In addition to the principles that are explicitly prescribed in the Constitution, the Constitutional Court also acknowledges the existence of implicit principles derived from domestic constitutional law, foreign constitutional case law (in particular, the case law of the German Federal Constitutional Court), and European and international law, including soft law such as the opinions, reports, and studies of the Venice Commission.[35] Additionally, the decisions of the Committee of Ministers of the Council of Europe delivered in proceedings for the execution of the ECtHR judgments may also be considered a source of law concerning the compatibility of national laws with the standards guaranteed by the European Convention.[36]

In migration and asylum cases, as shown in Sec. 3, there have been no cases where the Constitutional Court took account of the case law of other countries.[37] Regarding the documents and case laws of other organisations, the Constitutional

35 | Constitutional Court of the Republic of Croatia, Role of Constitutional Courts in upholding and applying constitutional principles, Answers to the Questionnaire for the XVIIth Congress of the Conference of European Constitutional Courts, Batumi, 29 June to 1 July 2017, p. 4 [Online]. Available at: http://www.confeuconstco.org (Accessed: 30 June 2023). See also Ofak, 2020, p. 704.

36 | Majic, 2021, p. 214.

37 | For cases regarding the principle of tax equality, as well as the requirement for the precision of the legal norm where the Constitutional Court considered the case law of the German Federal Constitutional Court please see: Constitutional Court of the Republic of Croatia.

Court considers reports published by the European Council on Refugees and Exiles (ECRE) (Sub-Sec. 3.5).

3. The Impact of the Constitutional Court's Case Law in Migration and Asylum Issues

Out of the 15 cases of constitutional complaints of asylum seekers that the Constitutional Court has decided in the period from 2014 to 2022,[38] this Sec. analyses the most important ones, that is, 'flagship' decisions, which contain crucial legal reasonings of the Constitutional Court regarding the resolution of asylum applications.

3.1. Initial case law of not applying EU law on its own motion

As mentioned in Sub-Sec. 2.3., the Constitutional Court decided not to conduct enquiries into the application of the EU Law on its own motion in cases where applicants omitted to substantiate their claims regarding violation of the EU migration and law and point out to any of the judgments of the CJEU. In the case of S. A. K., the asylum seeker complained of an inability to access free legal assistance and to have the costs of legal representation reimbursed, referring to Art. 47 of the Charter which guarantees the right to an effective remedy and to a fair trial. Since he failed to specify any judgment by the CJEU, the Constitutional Court briefly concluded that the applicant's case did not raise any relevant questions regarding the potential violation of the right to an effective remedy and a fair trial, as prescribed by the Charter.[39]

This method was pursued in an internationally known tragic case of the death of a six-year-old Afghan child, M. H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. Her family members lodged several constitutional complaints, *inter alia*, regarding the lack of an effective investigation into M. H's death.[40] The Constitutional Court examined their complaints under the procedural limb of Art. 2 (right to life) of the European Convention) and found that the investigation of M. H. 's death had been effective. The Constitutional Court

38 | U-III-684/2014, decision of 19 October 2016; U-III-6958/2014, decision of 27 February 2018; U-III-4880/2015, decision of 14 February 2019; U-III/2729/2016, decision of 16 November 2016; U-III-3862/2016, decision of 26 May 2022; U-III-4940/2017, decision of 29 March 2018; U-III-208/2018, decision of 10 July 2018; U-III-4865/2018, decision of 4 March 2021; U-IIIBi-1385/2018, decision of 18 December 2018; U-III-2556/2019, decision of 24 March 2021; U-III-424/2019, decision of 17 December 2019; U-III-2556/2019, decision of 24 March 2021; U-IIIBi-665/2019 decision of 4 March 2021; U-III-557/2019 decision of 11 September 2019 and U-III-5963/2020 decision of 14 October 2021.

39 | U-III-6958/2014, para. 8.

40 | U-IIIBi-1385/2018, decision of 10 July 2018 and U-IIIBi-665/2019, decision of 4 March 2021.

also found no breach of Art. 2 of the Convention in its substantive aspect, in that it had not been proven that the state authorities were responsible for the death of M. H. Applicants lodged applications before the ECtHR.[41] In its judgment, the ECtHR held that there had been:

1. A violation of Art. 2 concerning the investigation into the death of the Afghan family's daughter
2. A violation of Art. 3 (prohibition on inhuman and degrading treatment) with respect to applicant children
3. No violation of Art. 3 concerning adult applicants
4. A violation of Art. 5, para. 1 (right to security and liberty) with respect to all applicants
5. A violation of Art. 4 of Protocol No. 4 of the Convention (prohibition of collective expulsions of aliens) with respect to the applicant mother and her five children, and
6. A violation of Art. 34 (right of individual petition) with respect to all applicants.

The Court found that the investigation into the death had been ineffective, the applicant children's detention had amounted to ill treatment, and the decisions around the applicants' detention had not been dealt with diligently. It also held that some applicants had suffered collective expulsion from Croatia and that the State had hindered the effective exercise of the applicants' right of individual application by restricting access to their lawyer.[42] Unlike the ECtHR, the Constitutional Court did not observe that the case was governed by the Directive 2013/32/EU on common procedures for granting and withdrawing international protection and the Directive 2013/33/EU laying down standards for the reception of applicants for international protection.[43]

As Majic (2021) observed, the follow-up cases in asylum and migration cases show a new approach by the Constitutional Court to directly apply the relevant EU law.[44]

3.2. New approach to applying EU law on its own motion

In the Case Oral, the applicant was a Turkish citizen who had been granted asylum by the Swiss Federation.[45] He was detained in Croatia on an arrest warrant issued by the Turkish Republic. As he was already granted asylum in a country that adopted the Dublin Association Agreement,[46] the applicant complained that the order of his extradition to the Turkish Republic had violated Art. 31 of the Croatian

41 | M.H. and Others v. Croatia, applications nos. 15670/18 and 43115/18, judgment of 18 November 2021.

42 | Ibid. Registrar of the Court, Press Release, Multiple violations concerning Afghan family whose daughter died at Croatian border, ECHR 348 (2021), available at: https://hudoc.echr.coe.int/ (Accessed: 30 June 2023).

43 | M.H. and Others v. Croatia, paras. 85–88.

44 | Majic, 2021, p. 208.

45 | U-III-208/2018.

46 | See Swiss State Secretatiat for Migration, 2023.

Constitution which prohibited the extradition of individuals who reside lawfully in Croatia or the EU. In addition, he argued that his extradition would contravene the principle of non-refoulement in connection with his right to life and the prohibition of torture and degrading treatment. Although he did not refer to the application of the EU law, the Constitutional Court applied the principle of mutual trust between member states participating in the Dublin system–that is, the common European asylum protection system. The Constitutional Court cited the relevant case law of the CJEU[47] and the ECtHR.[48] It concluded that the principle of mutual trust, through Art. 141c of the Constitution, requires the Croatian state authorities, including judicial authorities, to respect decisions on the recognition of refugee status and appropriate protection made by the competent authorities of other countries participating in the common Dublin system–in this case, the Swiss Confederation. The Constitutional Court also pointed out that in proceedings whose outcomes depend on the correct application of the EU Law, domestic courts are obliged to respect the fundamental rights of the participants in the proceedings, as determined by the Constitution.[49]

In the absence of the case law regarding the boundaries of competences between the CJEU and the Constitutional Court, it appears from the current case law that the Constitutional Court acts as a guard supervising compliance with the EU Law, interpreted in accordance with the judgments of the CJEU.

3.3. Principles of equivalence and effectiveness

The Constitutional Court also applied the EU law on its own motion in Case X. Y.[50] The case concerned an Iraqi national whose application for asylum and his subsequent application were rejected. The applicant complained, inter alia, that his right to an effective legal remedy had been violated because an appeal lodged against the judgment of the first-instance administrative court did not have a suspensive effect, and that he would be deported to Iraq without having his appeal finally decided by the High Administrative Court. First, the Constitutional Court established that according to the case law of the ECtHR,[51] Art. 13 of the European Convention neither obliges states to establish a two-level court system, nor does it generally guarantee the right to appeal against the decisions of the courts of the first instance, and thus does not guarantee the right to a suspensive appeal.[52] Second, the Constitutional Court verified that according to the case law of the CJEU,[53] an appeal lodged in the court of the second instance does not need to have

47 | C-411/10 N. S. v Secretary of State for the Home Department and C-493/10 M. E., A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, judgment of 12 December 2011.
48 | M.S.S. v. Belgium and Greece, application no. 30696/09, judgment of 21 January 2011 and Tarakhel v. Switzerland, application no. 29217/12, judgment of 4 November 2014.
49 | U-III-208/2018, paras. 23–27.
50 | U-III-424/2009 and U-III-1411/2009.
51 | A.M. v. the Netherlands, application no. 29094/09, judgment of 5 July 2016.
52 | U-III-424/2009 and U-III-1411/2009, para. 125.
53 | C-180/17 X and Y v Staatssecretaris van Veiligheid en Justitie, judgment of 26 September 2018.

an automatic suspensive effect. Finally, the Constitutional Court referred to the principles of equivalence and effectiveness. It pointed out that the settled case law of the CJEU establishes that procedural rules governing actions to safeguard the rights which individuals derive from the EU law must not be any less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the EU (principle of effectiveness).[54]

The Constitutional Court concluded that the AITP provides more favourable protection to foreigners who are international or subsidiary protection applicants. In contrast to the general rules of the Administrative Disputes Act, the AITP provides for the automatic suspensive effect of a lawsuit initiating an administrative dispute against the Ministry's decision. Moreover, for situations in which this lawsuit does not have an automatic suspensive effect (when a subsequent request is rejected for procedural reasons), applicants have the right to submit a proposal for a suspensive effect. Therefore, the legal remedies provided by the AITP guarantee more favourable protection to asylum seekers, by enabling them to legally reside in the Republic of Croatia during the entire duration of the first-instance administrative dispute, in contrast to the Foreigners Act, which, due to the application of the general rules of the Administrative Disputes Act, does not contain a rule on the automatic suspensive effect of the lawsuit. Thus, foreigners who do not seek international protection in the Republic of Croatia do not have the right to a lawsuit with an automatic suspensive effect, either against decisions establishing that their legal stay has ended or against expulsion decisions. The Constitutional Court assessed that there was no violation of the right to an effective legal remedy as guaranteed by the Charter, secondary EU Law and Croatian Law implementing the EU Law in this particular case.[55]

3.4. Principle of ex nunc evaluation of the circumstances and the benefit of the doubt

In Case A. B., an Iraqi woman claimed in a subsequent application for international protection that she was a victim of genital mutilation and domestic violence, including rape. The Administrative Court in Zagreb and the High Administrative Court did not believe her claims of shame and discomfort, which she cited as the reasons that prevented her from making allegations of domestic violence in the initial application for international protection.[56] In its decision to accept the constitutional complaint, the Constitutional Court explained the principle of *ex nunc* evaluation of circumstances as follows:

> In cases of providing international protection, since the state has the obligation under Article 3 of the Convention not to expose an individual to the risk of ill-treatment, the existence of this risk must be assessed according to the facts that were known or

54 | Ibid., paras. 34–35.
55 | U-III-424/2009 and U-III-1411/2009, paras. 144–146.
56 | U-III-557/2019, decision of 11 September 2019.

> should have been known to the competent state authorities at the time of making the decision on the application for international protection. The assessment of the facts must focus on the foreseeable consequences of returning the applicant for international protection to the country to which he is to be returned, assessing the general situation in that country and the applicant's personal situation. If it is established that there is a danger that the person, in the country to which he/she should be returned, would be subjected to treatment contrary to Article 23, para. 1 of the Constitution, or Article 3 of the Convention, regardless of whether this danger arises from the general situation, personal situation or a combination of both situations, such expulsion will lead to a violation of these provisions. The competent authorities, therefore, are obligated to consider not only the evidence proposed by the applicant for international protection but also all other evidence relevant to the case being examined. The assessment of this danger should be strict (compare with the case of J.K. v. Sweden, §§ 83, 85-87).[57]

Regarding the application of the benefit of the doubt, the Constitutional Court established the following:

> In principle, it is the duty of applicants for international protection to submit evidence in support of the validity of their claims. However, due to the particularity of the situation in which they find themselves, it is often necessary to apply the benefit of the doubt when evaluating the credibility of their statements and submitted documents. However, if there are strong reasons to doubt the accuracy of the claims made, it is up to the applicant for international protection to provide a satisfactory explanation for the alleged inaccuracies. Even if the testimony of the international protection applicant appears unconvincing on some details, this does not necessarily undermine the overall general credibility of his claim (compare with J.K. v. Sweden, § 91 and § 93 and F.G. v. Sweden, § 120).[58]

By applying the principle of the benefit of the doubt to the applicant's situation, the Constitutional Court acknowledged that interviews with victims of domestic violence require great sensitivity and understanding of the complexity of the psychological effects of such abuse from those who conduct these interviews. Moreover, these facts must be considered combined with the cultural context of the applicant's situation and the environment from which she comes, in which women are treated differently than men, and which is indicated, among other things, by the genital mutilation that the applicant suffered and due to which she falls under the 'vulnerable group'. These reasons explain why the applicant could not speak openly about her psychological trauma in front of the two men who conducted the interview. The Constitutional Court determined that the competent courts were obliged to evaluate her testimony in the context of all these facts, with the benefit of doubt. Additionally, the applicant proposed a series of evidence on the circumstances of her personal situation, including the credibility of the statements.

57 | Ibid., para. 5.6.
58 | Ibid., para. 5.7.

However, the Administrative Court in Zagreb rejected all of her evidentiary proposals, making it impossible to prove the merits of the application. In this way, the applicant was deprived of effective guarantees of a fair procedure that protected applicants from arbitrary expulsion for international protection, which resulted in the violation of her rights guaranteed by Art. 23, para. 1 of the Constitution and Art. 3 of the Convention.[59]

Concerning the application of the principle of *ex nunc* evaluation of the circumstances, Case X. Y. should be mentioned again. In this case, as Majic observed, the Constitutional Court applied the principle of *ex nunc* evaluation, consulted the relevant country reports, and thus examined on its own motion the applicant's allegations as to the specific risks he would face if deported and, finally, the possibility of removing the risk by internal relocation. [60] Having conducted a detailed *ex nunc* evaluation of the circumstances, the Constitutional Court found no reason why the applicant could not return to any other area of Iraq outside of Baghdad, which would be the most favourable and safest for him, according to his choice.

3.5. Duty to ensure that the third country is 'safe'

In addition to complaints about the death of their family member, M. H., the Afghan family, filed further constitutional complaints concerning the dismissal of their asylum applications in Croatia.[61] Based on Art. 3 of the Convention, their main argument was that they would be removed from the territory of the Republic of Croatia, despite clear indications that they would not have access to an appropriate asylum procedure in the Republic of Serbia that could protect them from expulsion or return (refoulement). In its decision to accept their complaints, the Constitutional Court stressed that the prohibition of inhuman or degrading treatment was one of the most important values in democratic societies. Regarding the expulsion of foreigners, if there are reasonable grounds to believe that the person in the receiving state would face a real risk of exposure to treatment contrary to Art. 3 of the Convention, the individual may not be removed to that country. The Constitutional Court also pointed out that the ECtHR in its case law established that national authorities applying the 'safe third country' principle have the obligation to thoroughly examine the relevant conditions in the third country, particularly the access and reliability of its asylum system. In principle, general deficiencies of the asylum system that are well documented in authoritative reports, particularly by the UNHCR, Council of Europe, and EU bodies, are considered known. The expelling state cannot simply assume that the asylum seeker will be treated in the receiving third country in accordance with Convention standards, but must first check how the authorities of that country apply their asylum legislation in practice.[62]

59 | Ibid., para. 5.10–5.14.
60 | Majic, 2021, p. 212. U-III-424/2009 and U-III-1411/2009, paras. 60–108.
61 | U-III/4865/2018, U-III-837/2019 and U-III-926/2019, decision of 4 March 2021.
62 | Ibid., para. 21. The Constitutional Court cited the following case law of the ECtHR: M.S.S. v. Belgium and Greece and F.G. v. Sweden, application no. 43611/11, judgment 23.3.2016.

As the disputed decision regarding the removal of the applicant to the Republic of Serbia was not related to the situation in Afghanistan or to the assessment of the merits of the applicant's asylum request, the Constitutional Court's task was not to examine whether the applicants were exposed to the risk of abuse in their country of origin. The Constitutional Court, in its decision in case X. Y.,[63] established that it would analyse the situation in the country to which the migrants are returning if they are still in the Republic of Croatia. To determine the state of rights and treatment of migrants and seekers of asylum and international protection, the Constitutional Court reviewed the report of the Belgrade Center for Human Rights 'The Right to Asylum in the Republic of Serbia 2019', which was based on relevant data from the UNHCR and the amended reports on the state of asylum in Serbia in 2019 available on the ECRE website.[64]

The Constitutional Court stated that an effective system had not yet been established in the Republic of Serbia that would enable asylum applicants who are removed from the Republic of Croatia to submit an asylum application in that country promptly. The authorities in the Republic of Serbia use methods to prevent the asylum seekers to apply for international protection, including prosecution through misdemeanour courts. According to available data, even though the asylum system is regulated satisfactorily at the normative level, it is difficult for asylum seekers to join the system of asylum and international protection in the Republic of Serbia. Thus, there are no adequate procedural guarantees that applicants, when they return to Serbia, will not be threatened by automatic refoulement, that is, an automatic return to Bulgaria.[65]

The Constitutional Court established that the Ministry of Interior and the administrative courts, when assessing the situation in the Republic of Serbia, limited themselves to the normative framework and the number of approved applications for asylum and international protection without checking the relevant reports of bodies and non-governmental organisations dealing with the protection of refugees on the actual treatment of persons returning from Croatia to Serbia and whether they are threatened with automatic refoulement. In addition, these authorities failed to establish all the decisive circumstances surrounding the status of the applicant in the Republic of Serbia (and, before that, in Bulgaria).[66] The Constitutional Court accepted the applicant's allegations that in the administrative and judicial proceedings, it was not established with sufficient certainty that the Republic of Serbia was a safe European third country and that the Republic of Croatia did not fulfil its procedural obligations from Art. 3 of the Convention regarding their return to the Republic of Serbia.[67]

63 | U-III-424/2009 and U-III-1411/2009. See previous Sec.

64 | European Council on Refugees and Exiles (ECRE), Asylum Information Database (AIDA) [Online]. Available at: https://asylumineurope.org/reports/ (Accessed: 30 June 2023).

65 | U-III/4865/2018, U-III-837/2019 and U-III-926/2019, para. 24.

66 | Ibid., para. 24.

67 | Ibid., para. 25.

4. Cases against Croatia before the European Court of Human Rights

In addition to the abovementioned case,[68] in which the ECtHR established violations of the European Convention, a violation was established in the Daraibou case.[69] This case concerned a fire that broke out in the basement of a police station, which at the time had acted as an illegal migrant detention centre. Three migrants detained in the room died in the fire, and the applicant, who was also a detained migrant, suffered severe injuries. The ECtHR noted that the search to which the migrants were subjected before being placed in the premises of the police station was not thorough. Although two lighters were taken from them after the search, another lighter and burned cigarette stubs were found in the room where they were located. The ECtHR found serious deficiencies in how detainees were monitored during their stay at the police station. Furthermore, the applicant, referring to a handwritten note from the criminal file written by an unidentified person, claimed that the building in which he was detained did not have a usage permit or evacuation plan in the case of fire. However, local authorities have never examined this issue. All the aforementioned circumstances suggest that the police station building and its staff were poorly prepared to deal with the fire on their premises. Consequently, the ECtHR found that the state authorities did not provide the applicant with sufficient and reasonable protection of his life and body, as required by Art. 2 of the Convention. Therefore, the material aspect of the art. was violated.[70]

Regarding the thoroughness of the investigation, the ECtHR found that several questions remained unanswered, such as those related to the search and surveillance of detainees and the adequacy of the space in which they were detained. The procedures carried out were only related to the narrow question of the possible criminal or disciplinary responsibility of individual police officers and did not deal with the more extensive question of the existence of institutional deficiencies that allowed tragic accidents to occur. As a result, the ECtHR concluded that the domestic authorities did not apply provisions that guaranteed respect for the right to life and did not deter similar life-threatening behaviour in the future. Thus, the procedural aspects of Art. 2 of the Convention were violated.[71]

Daraibou's case also shows the deficiencies in the system of legal remedies available in Croatia. The Croatian Government submitted that the applicant had failed to exhaust an effective domestic remedy because he had never lodged a constitutional complaint before addressing the ECtHR. The applicant stressed that he could not lodge a constitutional complaint, because there had been no final decision regarding his rights or obligations. He never had the status of a victim but rather that of a suspect in criminal enquiries. The ECtHR assessed that at the time

68 | M.H. and Others v. Croatia.

69 | Daraibou v. Croatia, application no. 84523/17, judgment of 17 January 2023.

70 | Ibid., paras. 86–93.

71 | Ibid., paras. 105–113.

of lodging his application, a constitutional complaint did not constitute an effective remedy for the positive obligations of the state under Art. 2 of the Convention.[72]

In recent times, several cases against Croatia are pending before the ECtHR. The case of N.O. against Croatia was a continuation of the Oral case decided by the Constitutional Court.[73] Although the Constitutional Court accepted his constitutional complaint, and in the end, he was released from detention, the applicant lodged an application before the ECtHR. Under Art. 5, para. 1 (f) of the Convention, the applicant complained that the domestic authorities failed to act with the required diligence in that they had been informed of his refugee status in Switzerland from the outset and yet kept him in detention for a protracted period, intending to extradite him to Turkey. He also complained, invoking Art. 6, para. 1, about the domestic authorities' failure to reimburse him for the costs of his legal representation in the extradition proceedings, despite his persistent requests.[74]

Reports of pushbacks and violent police practices at the Croatian border have been documented since 2017 and were continued until 2022.[75] In three applications against Croatia pending before the ECtHR, the applicants complained, under Art. 3 of the Convention, that by summarily returning them to Bosnia and Herzegovina without any assessment of the risk they would face in that country, the Croatian authorities exposed them to dire living conditions and a dysfunctional asylum system, which must have been known to the Croatian authorities. They further complained that they had been expelled from Croatia to Bosnia and Herzegovina with a group of foreigners without reviewing their situation. They also complained that they had been transported without access to any procedure or remedy to challenge their removal.[76]

In 2022, a Rohingyan child submitted complaints against Croatia and Slovenia to the UN Child Rights Committee regarding multiple violations of the Convention on the Rights of the Child.[77] He was repeatedly pushed back from Croatia to Bosnia and Herzegovina and was subjected to violence. He was subjected to a 'chain' pushback in Slovenia, forcibly returned first to Croatia by Slovenian authorities and then onwards to Bosnia and Herzegovina by Croatian authorities.[78] Furthermore, as the ECtHR noted in the M.H. case, on 12 July 2019 the Federal Administrative

72 | Ibid., paras. 65–71.

73 | U-III-208/2018.

74 | N.O. against Croatia, application no. 3745/18 lodged on 17 January 2018, communicated on 1 February 2022.

75 | See ECRE Reports for Croatia [Online]. Available at: https://asylumineurope.org/reports/country/croatia/ (Accessed: 30 June 2023) and case of M.H. and Others v. Croatia, paras. 103–115.

76 | S.B. against Croatia, application no. 18810/19, lodged on 1 April 2019, A.A. against Croatia, application no. 18865/19, lodged on 1 April 2019 and A.B. v. Croatia, application no. 23495/19, lodged on 26 April 2019, all communicated on 26 March 2020.

77 | European Center for Constitutional and Human Rights [Online]. Available at: https://www.ecchr.eu/en/case/pushbacks-un-child-rights-croatia-slovenia/ (Accessed: 30 June 2023).

78 | ECRE, Country Report: Croatia, 2022 Update, p. 16. [Online]. Available at: https://asylumineurope.org/wp-content/uploads/2023/06/AIDA-HR-2022-Update.pdf (Accessed: 30 June 2023).

Court of Switzerland suspended the transfer of a Syrian asylum seeker to Croatia because of the prevalence of summary returns at the Croatian border with Bosnia and Herzegovina. The court acknowledged the increasing number of reports that the Croatian authorities denied access to asylum procedures and that many asylum seekers were being returned to the border with Bosnia and Herzegovina, where they were forced to leave the country.[79] Cases against Croatia before the ECtHR are of constitutional importance because they demonstrated lack of constitutional protection for asylum seekers and deficiencies in filing constitutional complaints. The Constitutional Court should deal with the issue of illegal pushbacks by using its competence to monitor compliance with the Constitution and law and report to the Croatian Parliament on detected violations thereof (Art. 125, Indent 5 of the Constitution).

5. Conclusion

The analysis of the case law of the Constitutional Court concerning migration and asylum issues regarding cases initiated after Croatia's accession to the EU showed that the issue of boundaries of competences between the EU and the Member States was never raised. Additionally, there were no cases in which the Constitutional Court linked migration or asylum issues with constitutional identity.

The essence of the Constitutional Court's role in migration and asylum law is to serve as the guardian of human rights guaranteed by the Croatian Constitution, European Convention, and the EU law. The first main finding concerns the application of the EU law. The Constitutional Court demonstrated its willingness to apply the EU Charter of Fundamental Rights and secondary EU Law on its motion. This new approach stems from the application of Art. 141c of the Constitution which prescribes the direct effect of the EU Law. Croatian courts are obligated to protect subjective rights under the EU Acquis Communautaire (Art. 141c, para. 3). Under this constitutional provision, the Constitutional Court applied the principle of mutual trust which requires Croatian state authorities, including judicial authorities, to respect decisions on the recognition of refugee status and appropriate protection provided by the competent authorities of other countries participating in the common Dublin system (Case Oral, Sub-Sec. 3.2). In addition, although it did not directly refer to Art. 141c of the Constitution, the Constitutional Court also applied on its own motion the principles of equivalence and effectiveness developed in the case law of the CJEU (Case X. Y., Sub-Sec. 3.3). The second main finding is that the Constitutional Court regularly referred to the case law of the ECtHR, regardless of the state against which the application was lodged. As follows from the flagship cases, the Constitutional Court applies the standards of protection guaranteed by the European Convention concerning the principle of *ex nunc* evaluation of the circumstances (cases A. B. and X. Y., Sub-Sec. 3.4) and the duty to

79 | M.H. and Others v. Croatia, para. 113.

ensure that the receiving third country is safe (cases M.H. and X.Y., Sub-Sec. 3.5.). Thus, the conclusion is that the Constitutional Court provides a higher standard of protection for the rights of asylum seekers in conformity with the relevant case law of the ECtHR. Since pursuant to Art. 31 of the Constitutional Act on the Constitutional Court, the decisions of the Constitutional Court are binding to all state authorities, including the public authorities and the administrative courts that deal with migration and asylum cases, it is expected that they will respect the new case law of the Constitutional Court and align their actions and decisions with it. Specifically, this means directly applying the EU law and the standards of protection guaranteed by the European Convention as demonstrated by the Constitutional Court. It is possible that the new practice will lead to an increase in the number of approved applications owing to the prohibition of the return of asylum seekers to unsafe countries.

There have been no cases considering the case law of other countries in migration and asylum issues, although there is a possibility that the Constitutional Court referred to foreign constitutional case law (in particular, the case law of the German Federal Constitutional Court) in other issues (regarding the principle of tax equality and the requirement for the precision of the legal norm).

However, cases against Croatia initiated before the ECtHR and other international bodies for the protection of human rights indicate deficiencies in respecting the rights of seekers of international protection pursuant to international human rights conventions. In some of these cases, it was not possible for asylum seekers to submit legal remedies against the decisions or acts of Croatian public authorities and reach the Constitutional Court. Considering that against all individual acts of public authorities, there must be judicial review of their legality (Art. 19, para. 2 of the Constitution), and given that against all individual decisions of state bodies and other public authorities, there must be the possibility of protection before the Constitutional Court in cases of alleged violation of constitutional rights (Art. 125, indent 4 of the Constitution), the lack of efficient legal remedies raises serious constitutional concerns. If these issues continue to appear in practice, the Constitutional Court should not stay silent and should activate its duty to monitor compliance with the Constitution and law and report detected violations to the Croatian Parliament.

Bibliography

European Union Agency for Asylum (2023) 'Almost 1 million asylum applications in the EU+ in 2022' [Online]. Available at: https://euaa.europa.eu/news-events/almost-1-million-asylum-applications-eu-2022 (Accessed: 30 June 2023).

Horvat Vuković, A. (2019) 'Ustavni sud Republike Hrvatske kao "europski" sud i očuvanje nacionalnih standarda zaštite temeljnih ljudskih prava i sloboda', *Zbornik Pravnog fakulteta u Zagrebu*, 69(2), pp. 249–276; https://doi.org/10.3935/zpfz.69.2.04.

Lalić Novak, G. (2014) 'Pravo na azil u sudskoj praksi – promiču li hrvatski sudovi više standarde zaštite tražitelja azila i azilanata', *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave*, 14(4), pp. 939–960 [Online]. Available at: https://hrcak.srce.hr/file/198733.pdf (Accessed: 24 November 2023).

Majic, H. (2021) 'The Croatian Constitutional Court and the EU Charter of Fundamental Rights – A Limbo between the Charter, the ECHR and National Constitution', *EU and Comparative Law Issues and Challenges Series*, 5(1), pp. 198–219; https://doi.org/10.25234/eclic/18304.

Ofak, L. (2020) 'The Impact of the Pan-European General Principles of Good Administration on Croatian Administrative Law: Arising from the Case Law of the Croatian Constitutional Court' in Stelkens, U., Andrijauskaitė, A. (eds.) *Good Administration and the Council of Europe: Law, Principles, and Effectiveness*. Oxford: Oxford University Press, pp. 688–706; https://doi.org/10.1093/oso/9780198861539.003.0028.

Omejec, J. (2009) 'Legal framework and case-law of the Constitutional Court of Croatia in deciding on the conformity of laws with international treaties', *Report CDL-JU(2009)035 of 17 November 2009 to the Venice Commission*, 17 November [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)035-e (Accessed: 30 June 2023).

Rodin, S. (2011) 'Pravo Europske unije i pravni poredak Republike Hrvatske nakon 20 godina hrvatskog Ustava' in Arsen, B. (ed.) *Dvadeseta obljetnica Ustava Republike Hrvatske*. Zagreb: Hrvatska akademija znanosti i umjetnosti, pp. 87–118.

Rohingya child challenges Croatia and Slovenia over violent pushbacks (2023) *European Center for Constitutional and Human Rights* [Online]. Available at: https://www.ecchr.eu/en/case/pushbacks-un-child-rights-croatia-slovenia/ (Accessed: 30 June 2023).

Swiss State Secretatiat for Migration (2023) [Online]. Available at: https://www.sem.admin.ch/sem/en/home.html (Accessed: 30 June 2023).

THE PRACTICE OF NATIONAL CONSTITUTIONAL COURTS CONCERNING MIGRATION AND REFUGEE AFFAIRS – THE CZECH REPUBLIC

Šimon Otta[1]

ABSTRACT

This article focuses on the relationship between the Czech Constitutional Court and European Union law, with an emphasis on asylum and migration policies. After introducing the Czech Constitutional Court, the article focuses on its relevant case laws in relation to European Union law and the transfer of powers from the Czech Republic to the Community institutions. Thereafter, it explores whether the Czech Constitutional Court perceives asylum and migration issues as part of the Czech constitutional identity, which the European Community must not interfere with, and presents the basic legal framework within which the Constitutional Court considers these issues. Finally, it examines the comparative method of interpretation in the case law of the Constitutional Court, supplemented by extensive citations of relevant decisions of the Constitutional Court.

KEYWORDS

Constitutional Court of the Czech Republic
European Union
migration
asylum
comparative method

1. Introduction

Although in its early years, the activities of the Constitutional Court were not frequent or significant in the Czech state, the Czech constitutional judiciary has a rich historical tradition. The first Constitutional Court in the Czech (then

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Czechoslovak) state was already enshrined in the 1920 Constitution.[2] However, during the period of the First Republic,[3] the Constitutional Court never received support and the supremacy was held by the Supreme Administrative Court. After the early years of the Second World War and communist dictatorship, a full-fledged constitutional judiciary returned to the Czech Republic with the establishment of an independent state.[4] Despite its difficult beginnings and historical period, the Constitutional Court is today an inseparable part of the Czech state that enjoys a consistently high level of support and credibility among the population.[5]

This article focuses on the position of the Czech Constitutional Court in relation to asylum and migration policies and its influence by European Union (EU) legislation, particularly whether the Czech Constitutional Court considers asylum and migration issues as part of the Czech constitutional identity, which the EU should not interfere with in any way. Next, it presents the basic jurisprudence of the Constitutional Court on these issues. Finally, it examines the comparative interpretation and its use in the jurisprudence of the Czech Constitutional Court.

2. General Provisions of the Constitutional Court of the Czech Republic

The position of the Constitutional Court of the Czech Republic is regulated primarily by two legal provisions – the Constitution of the Czech Republic[6] and Act No. 182/1993 Coll., on the Constitutional Court.

2.1. Constitution of the Czech Republic

Provisions regulating the position of the Constitutional Court are found primarily in its Title Four regulating judicial power, specifically in Articles 83–89. According to Article 81, independent courts exercise judicial power on behalf of the Republic. Under Article 83, the Constitutional Court is a judicial organ for the protection of constitutionality. Although fundamental rights and freedoms are under the protection of the judicial power (Article 4), which is exercised on behalf of the Republic by independent courts (Article 81) — all courts in the Czech

2 | Constitutional Charter of the Czechoslovak Republic of 29 February 1920, No. 121/1920 Coll.

3 | The period of the First Republic in the history of the Czech (then Czechoslovak) Republic was 1918–1938.

4 | For the history of constitutional justice in the Czech Republic, see e.g. Langášek, 2011, p. 319; Krejčí, 1948, pp. 121 et seq.; Blahož, 1995, pp. 419 et seq.

5 | The Constitutional Court has long been ranked in public opinion polls as the most trusted state institution in the Czech Republic – cf. *Největší důvěru mají Češi dlouhodobě v Ústavní soud, BIS věří méně než polovina, 2021.*

The current Justice Minister stated in a recent interview that he considers the Constitutional Court 'the most powerful public authority in the country'. Blažek, 2023.

6 | Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic.

Republic[7] — only the Constitutional Court has the status of a special body (court) for the protection of constitutionality, which deals with the control of constitutionality and performs certain other decision-making functions of constitutional importance.[8] It is clear from the composition of Title Four of the Constitution that the Constitutional Court is not part of the system of courts under Article 91; that is, it is separate from the system of courts for civil, criminal, and administrative matters (which it repeatedly states in its decisions).[9] The Constitutional Court, the only state body of its type in the Czech Republic, is an application of a model of concentrated and specialised constitutional justice.

Although the Constitutional Court is not part of the system of civil, criminal, and administrative courts, it belongs to the judiciary in terms of the classical separation of powers; nevertheless, it occupies a special, autonomous, and, to some extent, superior position within it. It is entitled to review their decisions (including those of the Supreme Court and the Supreme Administrative Court), however, only from the constitutionality perspective and, particularly, compliance with constitutionally guaranteed procedural rules. In its rulings, the Constitutional Court promotes the idea of minimising interference in the decision-making of courts (and public authorities in general) or emphasises the principle of subsidiarity in its decision-making.[10]

Article 87 of the Constitution of the Czech Republic contains an exhaustive list of proceedings in which the Constitutional Court decides. Article 87(1) states: a) repeal of laws or their individual provisions; b) repeal of other legislation or individual provisions thereof; c) constitutional complaints by local authorities against unlawful state intervention; d) constitutional complaints against final decisions and other interference by public authorities with constitutionally guaranteed fundamental rights and freedoms; e) an appeal against a decision on the verification of the election of a deputy or senator, doubts about the loss of eligibility and the incompatibility of the performance of the duties of a deputy or senator under Article 25; f) a constitutional action by the Senate against the president of the Republic under Article 65(2); g) a motion by the president of the Republic to annul a resolution of the Chamber of Deputies and the Senate under Article 66; h) measures necessary for the implementation of a decision of an international court which is binding on the Czech Republic, if it cannot be implemented otherwise; i) whether a

7 | The system of courts of the Czech Republic is regulated by Article 91(1) of the Constitution, according to which 'The system of courts consists of the Supreme Court, the Supreme Administrative Court, supreme, regional and district courts'.

8 | Sládeček et al., 2016, pp. 909–910.

9 | E.g. Resolution of the Constitutional Court of 24 November 2015, Case No. II.ÚS 2711/15, Paragraph 11, Resolution of the Constitutional Court of 25 February 2016, Case No. I.ÚS 1897/15, Paragraph 11, ruling of the Constitutional Court of 23 February 2021, Case No. IV.ÚS 2732/20, Paragraph 14.

10 | In this respect, cf. e.g. the Constitutional Court's ruling of 25 September 1997, Case No. III ÚS 148/97, the Constitutional Court's ruling of 4 June 1998, Case No. III ÚS 142/98, the Constitutional Court's ruling of 7 February 2001, Case No. II ÚS 158/99. Logically, this thesis appears in the vast majority of refusal resolutions – cf. e.g. the Constitutional Court's resolution of 26 May 2015, Case No. IV ÚS 3583/14 and the Constitutional Court's resolution of 3 June 2015, Case No. IV ÚS 1213/15.

decision to dissolve a political party or any other decision concerning the activities of a political party is in conformity with the Constitution or other laws; j) disputes concerning the scope of competences of state authorities and bodies of territorial self-government, if they do not fall within the competence of another authority under the law.

Pursuant to Article 87(2) of the Constitution, the Constitutional Court also decides on the compatibility of an international treaty under Articles 10a and 49 with the constitutional order prior to its ratification. Pending the decision of the Constitutional Court, the treaty cannot be ratified.

Article 84 of the Constitution determines the composition of the Constitutional Court, which comprises 15 judges appointed for a period of ten years. They are appointed by the president of the Republic with the consent of the Senate. A citizen of suitable character who is eligible for election to the Senate, has a university degree in law, and has been engaged in the legal profession for at least 10 years may be appointed as a judge of the Constitutional Court.

2.2. Constitutional Court Act

The position of the Constitutional Court is regulated primarily by the Constitution and Constitutional Court Act. This Act primarily implements the basic provisions of the Constitution and the following section presents only the most important facts.

The Act specifies the composition of the court. The Constitutional Court, comprising 15 judges, has a president and two vice presidents.[11] The president represents the Constitutional Court externally, administers the Constitutional Court, convenes meetings of the full court, sets the agenda for its deliberations, directs its proceedings, appoints presidents of the Chambers, and performs other tasks assigned by the law. He is represented by his or her vice president, who may, with the consent of the plenary of the Constitutional Court, perform certain tasks assigned to them by the president.[12]

Further, the Act specifies the manner in which the Constitutional Court decides, either in plenary[13] or in individual chambers.[14] The plenary chamber comprises all judges. Unless otherwise provided by law, the plenary session may act and deliberate if at least ten judges are present. In the plenary session, the Constitutional Court decides on the most important proceedings such as the repeal of laws, the Senate's constitutional action against the president of the Republic, or whether a decision to dissolve a political party or another decision concerning the activities of a political party conforms to the Constitution or other laws. The Constitutional Court also rules over four three-member chambers. Individual

11 | Paragraph 2 of the Act.

12 | Paragraph 3 of the Act.

13 | Paragraphs 11–14 of the Act. It should be noted that the Constitutional Court may, by its own decision pursuant to Section Paragraph 11(2)(k) of the Constitutional Court Act, decides on the so-called attraction of other decision-making by the plenary.

14 | Paragraphs 15–24 of the Act.

chambers primarily decide on individual constitutional complaints;[15] therefore, most decision-making activities occur in these chambers.

The Constitutional Court decides in the form of rulings or resolutions.[16] It decides on the merits of the case by way of ruling and on other matters by way of resolution. In the vast majority of cases, it does not decide on the merits. Most of its work comprises individual constitutional complaints, which it rejects in approximately 90%[17] of cases for one of the reasons provided for in the Constitutional Court Act.[18] In the remaining cases, it decides on the merits, either by ruling in favour or rejecting the complaint.

3. General comments on the review of European law by the Czech Constitutional Court

3.1. Case Sugar quotas

The relationship between EU law and the constitutional order[19] (or the constitutional limits of the effect of European law in the Czech legal system) was first defined by the Constitutional Court in its ruling of 8 March 2006 Pl. ÚS 50/04, which is better known in the Czech Republic as 'Sugar Quotas'. In this ruling, the Constitutional Court assessed the compatibility of several provisions of the government regulation on the establishment of certain conditions for the implementation of measures of the common organisation of markets in the sugar sector with

15 | The procedure for individual constitutional complaints is regulated by Article 87(1)(d) of the Constitution, according to which the Constitutional Court decides on constitutional complaints against final decisions and other interference by public authorities with constitutionally guaranteed fundamental rights and freedoms. This procedure is further specified in Sections 72 to 84 of the Constitutional Court Act.

16 | Paragraph 54 of the Act.

17 | Statistical data on the decision-making activity of the Constitutional Court [Online]. Available at: https://www.usoud.cz/statistika (Accessed: 7 November 2023).

18 | § 43 of the Act, according to which the Constitutional Court rejects the petition:
– if the petitioner has not remedied the defects in the petition within the time limit set for that purpose, or
– if the petition is filed after the time limit set for its submission by this Act, or
– if the application is filed by someone manifestly not entitled to file it; or
– if the application is one which the Constitutional Court does not have jurisdiction to hear; or
– if the application is inadmissible, unless otherwise provided for in this Act, or
– if the application is manifestly unfounded.

19 | The concept of constitutional order is a specific concept of the Czech legal order. This concept is enshrined primarily in Article 112 of the Constitution and means the unenclosed set of all valid constitutional laws which together constitute the Constitution of the Czech Republic in a broader sense. Therefore, this term expresses that in addition to the Constitution of the Czech Republic, other constitutional laws in the legal order of the Czech Republic stand alongside the Constitution and together with it constitute the Constitution in the broader sense. Pavlíček et al., 2015, p. 332.

the constitutional order. Here, the Constitutional Court adopted an open approach in principle in relation to EU law, limiting the effect of EU law, particularly through the principle of primacy and direct effect, based on the delegation of powers (referring to the similar practice of other national supreme courts) as follows:

> Article 10a,[20] which was inserted into the Constitution by Constitutional Act No. 395/2001 Coll. (the so-called Euronovella of the Constitution), is a provision allowing the transfer of certain powers of the Czech Republic's authorities to an international organisation or institution, i.e. primarily the EU and its institutions. At the moment when the Treaty establishing the EC, as amended and as amended by the Accession Treaty, became binding on the Czech Republic, the powers of national authorities which, under primary EC law, are exercised by the EC institutions were transferred to those institutions.
> In other words, at the moment of the Czech Republic's accession to the EC, the transfer of these powers was implemented by the Czech Republic granting these powers to the EC institutions. The scope of these powers exercised by the EC institutions then limited the powers of all competent national authorities, regardless of whether they are normative or individual decision-making powers.
> However, according to the Constitutional Court, this grant of part of the powers is a conditional grant, since the original holder of sovereignty and the resulting powers remains the Czech Republic, whose sovereignty continues to be constituted by Article 1(1) of the Constitution of the Czech Republic, according to which the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law based on respect for the rights and freedoms of man and the citizen. According to the Constitutional Court, the conditionality of the delegation of these powers is manifested at two levels: at the formal level and at the material level. The first of these planes concerns the very attributes of state sovereignty, while the second plane concerns the substantive components of the exercise of state power. In other words, the delegation of a part of the powers of national authorities can last as long as these powers are exercised by the EC authorities in a manner compatible with the preservation of the foundations of the state sovereignty of the Czech Republic and in a manner that does not threaten the very essence of the substantive rule of law. If one of these conditions for the implementation of the transfer of powers is not fulfilled, i.e. if the developments in the EC or the EU threaten the very essence of the state sovereignty of the Czech Republic or the essential elements of the democratic rule of law, it would be necessary to insist that these powers be reassumed by the national authorities of the Czech Republic, while it is true that the Constitutional Court is called upon to protect constitutionality (Article 83 of the Constitution of the Czech Republic). The above applies in the formal dimension within the framework of the current constitutional regulation. As far as

20 | Article 10a of the Constitution:
(1) An international treaty may delegate certain powers of the authorities of the Czech Republic to an international organisation or institution.
(2) The ratification of an international treaty referred to in subsection (1) requires the consent of Parliament, unless a constitutional law provides that ratification requires the consent of a referendum.

> the essential elements of a democratic state governed by the rule of law are concerned, these, according to Article 9(2) of the Constitution of the Czech Republic, lie even beyond the disposal of the Constitution itself.

Therefore, the Constitutional Court conditions the transfer of powers on two correctives: formal and material. The formal corrective limits the transfer of powers to its compatibility 'with the preservation of the foundations of the state sovereignty of the Czech Republic'. In this respect, the formal aspect is linked to Article 1(1) of the Constitution. The substantive aspect concerns the manner in which delegated powers are exercised, which must not jeopardise 'the very essence of the substantive rule of law'. This limitation is based on Article 9(2).[21] The material limits of the delegation of powers are even, as the Constitutional Court has indicated, 'beyond the disposal of the constitution-maker himself.' Thus, the Constitutional Court appeared to accept the primacy of EU law, even over the provisions of the constitutional order, only with the exceptions formulated above.[22]

The following paragraph of the ruling is also important, according to which:

> if, therefore, the exercise of delegated powers by the EC institutions were implemented in a manner regressive to the existing notion of the essential elements of a democratic state governed by the rule of law, this would be an implementation contrary to the constitutional order of the Czech Republic, which would require the re-assumption of these powers by the national authorities of the Czech Republic.

In the paragraph, the Constitutional Court for the first time expressed its view on the delegation of powers to the EC institutions, which has since been referred to in the Czech Republic as 'as long as'. The Constitutional Court has thus clearly followed the case law of the German Federal Constitutional Court,[23] which had previously reserved the right to assess whether the development of European law is compatible with the democratic requirements of the Federal Republic of Germany.[24]

3.2. Case Euro Warrant

The Constitutional Court's ruling of 3 May 2006 Pl. ÚS 66/04, which is known in the Czech Republic as 'Euro Warrant' and in which the Constitutional Court dealt with the provisions of the Criminal Procedure Code which introduced the European Arrest Warrant[25] from EU law into the Czech legal system, issued shortly after the ruling in the sugar quota case, reinforces the general conclusions of this

21 | Article 9(2) of the Constitution: alteration of the essential elements of a democratic state governed by the rule of law is inadmissible.
22 | Bobek et al., 2022, pp. 136–137.
23 | Solange I, BVerfGE 37, pp. 271 et seq.; Solange II, BVerfGE 73, pp. 399 et seq.; Vielleicht, BVerfGE 52, pp. 187 et seq., Eurocontrol, BVerfGE 58, pp. 1 et seq.
24 | Pavlíček et al., 2015, pp. 1108–1009.
25 | 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.

initial ruling. This speaks of the exclusion of the review of individual norms of community law unless developments in the EU threaten the material core of the Constitution. Moreover, the ruling emphasises that this was an exceptional and highly unlikely situation.[26]

But as bobek points out,[27] despite the rhetoric to the contrary,[28] the Constitutional Court is willing to consider the constitutionality of a particular EU act if it is challenged to be contrary to the essential elements of the democratic rule of law; that is, it is not necessary that developments in the EU threaten those essential elements; it is sufficient that one particular EU norm violates them.

At a subsequent point in the ruling, the Constitutional Court recalled in what respect its review jurisdiction is limited in relation to the legislation adopted to implement EU law. Where,

> the delegation of power does not give the Member State any discretion as to the choice of means, i.e. where Czech legislation reflects a binding norm of European law, the doctrine of the primacy of Community law does not, in principle, allow the Constitutional Court to review such a Czech norm in terms of its conformity with the constitutional order of the Czech Republic, subject, however, to the exception set out in paragraph 53.[29]

3.3. Case Treaty of Lisbon I

The above conclusions were not changed in principle by the ruling of the Constitutional Court in the case of the first review of the Lisbon Treaty — the ruling of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08. In this decision, the Constitutional Court reviewed the compliance of the Lisbon Treaty with the entire constitutional order and not only with the limited standard of Sugar Quota Case. However, this fact could not affect the question of the primacy of EU law in the Czech Republic, because, as the Constitutional Court stated:

> EU law, which has been applied as an autonomous legal order alongside the legal order of the Czech Republic since [the Czech Republic's accession to the EU] on the basis of Article 10a of the Constitution, [...] bases (its) priority application only on the existence of valid and effective norms, which the provisions of the Lisbon Treaty are not yet.[30]

This key fact needs to be emphasised here. There is clearly a difference between reviewing an effective international law obligation on the basis of a transfer of competence under Article 10a of the Constitution, the provisions of

26 | Paragraph 53 of the ruling.
27 | Bobek et al., 2022, pp. 137–138.
28 | In this regard, cf. paragraph 53 of the ruling, in which the Constitutional Court referred to a passage of the Sugar Quotas ruling in which it ruled out a review of individual norms of Community law in terms of their compatibility with the Czech constitutional order in the event that developments in the EU do not threaten the essential elements of the Czech Republic.
29 | Paragraph 54 of the ruling.
30 | Paragraph 90 of the ruling.

which are given priority and direct effect (as the Constitutional Court recognised in Sugar Quotas), and an unratified international treaty (such as the Lisbon Treaty at the time of the Constitutional Court's decision), which in itself cannot even have the quality of an obligation within the meaning of Article 1(2) of the Constitution and through which, of course, no delegation of powers under Article 10a of the Constitution has yet occurred. In this respect, the standard applied by the Constitutional Court to the preliminary review of the Lisbon Treaty is, therefore, not transferable to the review of the constitutionality of valid and effective EU rules, which should continue to be guided by the principles set out in the Sugar Quota and Euro Warrant judgements. However, this does not imply that the Constitutional Court's Lisbon I ruling is not relevant to these issues, not least because the Constitutional Court addressed the question of control over the exercise of delegated powers.[31]

Moreover, passages in this award could potentially affect the application of the Sugar Quota Standard. Certainly, the more detailed definition of the content of the concept of 'essential elements of a democratic state governed by the rule of law' may facilitate the application of the material focus criterion of the Constitution in the future when reviewing the constitutionality of EU law. Although the Constitutional Court refused to provide any exhaustive list of what constitutes the essential elements of a democratic state governed by the rule of law, it did state, among other examples, that:

> the guiding principle is undoubtedly the principle of inalienable, non-transferable, non-excludable and irrevocable fundamental rights and freedoms of individuals, equal in dignity and rights; to protect them, a system is built on the principles of democracy, the sovereignty of the people, the separation of powers, respecting in particular the aforementioned material concept of the rule of law.[32]

However, the Constitutional Court emphasised that the more detailed content of the essential elements of a democratic state governed by the rule of law, which is usually of a general nature, is, in specific cases, the result of the interpretation of the authorities applying the Constitution.[33]

3.4. Case Holubec

In relation to EU law, the Czech Constitutional Court was the first constitutional court of a Member State to defy the Court of Justice and describe its decision as *ultra vires*, which did not have an effect in the Czech Republic. This happened in the Holubec case – Constitutional Court ruling of 31 January 2012, Pl. ÚS 5/12. The significance of the Holubec ruling for the relationship between Czech Republic and EU law and the constitutional anchorage of the Czech Republic in the EU is marginal. Subsequent developments confirm that this ruling represents a peculiar and excessive 'fencing in' of the Constitutional Court's jurisprudence, having

31 | Bobek et al., 2022, pp. 139–140.
32 | Paragraph 93 of the ruling.
33 | Ibid.

its origins in the political and judicial circumstances of the Czech Republic rather than being a well-thought-out and future-proof contribution shaping the Constitutional Court's position on EU law.

Moreover, the Holubec case materialised a several-year dispute between the Constitutional Court and the Supreme Administrative Court regarding how pensions will be paid after the breakup of Czechoslovakia to citizens who previously worked (at least partially) for employers from another state. This question was regulated by an international treaty concluded with the dissolution of the federation between the Czech and Slovak Republics.[34] Under this treaty, pensions were always to be paid to Czech and Slovak citizens by the state in which the citizen's employer was established on the date of the division of the federation or before that date (if the citizen was no longer working at the time of the division of the federation).[35] In the 1990s, the Slovak koruna was weaker than the Czech koruna. Pension indexation was sporadic in Slovakia, in contrast to the Czech Republic. Both led to the fact that Czech citizens who used to work for Slovak employers often had significantly lower pensions than their neighbours or friends who worked for Czech employers. Soon after, the complainants challenged the system as discriminatory. In a series of judgements, the Constitutional Court repeatedly held[36] that the provision in question violated Article 30 of the Charter of Fundamental Rights and Freedoms, which regulates the right to material security in old age.[37] Therefore, the citizens concerned should be entitled to a compensatory allowance from the Czech State to compensate for their disadvantages. Thus, citizens of the Czech Republic could ask the social security administration to pay them the difference between their 'Slovak' pension and the pension to which they would be entitled if the Czech pension scheme applied to them.

The administrative courts in the Czech Republic have disagreed with this case law of the Constitutional Court, and the Supreme Administrative Court itself, as the highest judicial body of administrative justice in the Czech Republic,[38] has led this resistance to the Constitutional Court. After several years of argumentation through mutually disagreeing court decisions, this grew into a personal dispute between judges of the Supreme Administrative Court and those of the

34 | Treaty between the Czech Republic and the Slovak Republic concluded on 29 October 1992 within the framework of measures intended to resolve the situation following the division of the Czech and Slovak Federative Republic on 31 December 1992 (promulgated under No 228/1993 Coll.).

35 | Cf. particularly Article 20 of the treaty in question.

36 | The first was the ruling of the Constitutional Court of 3 June 2003, Case No. II ÚS 405/02, Slovak Pensions I.

37 | Article 30(1) of the Charter of Fundamental Rights and Freedoms: 'Citizens have the right to adequate material security in old age and in the event of incapacity for work, as well as in the event of the loss of a breadwinner.'

38 | Paragraph 12(1) of the Administrative Procedure Act: The Supreme Administrative Court, as the supreme judicial authority in matters falling within the jurisdiction of the courts in the administrative justice system, shall ensure uniformity and legality of decision-making by deciding on cassation complaints in cases provided for by this Act and by deciding in other cases provided for by this Act or by special law.

Constitutional Court.[39] As the Supreme Administrative Court could not win this fight, it decided to involve the Court of Justice in this confrontation with the top Czech courts, in the Landtová case.[40] In that case, the Supreme Administrative Court asked the Court of Justice whether the case law of the Constitutional Court and the resulting preferential treatment of Czech nationals were compatible with Regulation No. 1408/71 coordinating social security systems, particularly, with the principle of equal treatment set out in Article 3(1) of that regulation and with the requirement of non-discrimination on grounds of nationality prohibited by EU law. The Court of Justice determined that the mere existence of the old-age allowance, as established by the Constitutional Court, does not infringe on EU law.[41] However, the fact that the case law of the Constitutional Court allowed payment of this allowance only to persons of Czech nationality, and residents in the Czech Republic were contrary to EU law.[42]

After receiving the Court's reply, the Supreme Administrative Court decided[43] that the rule established by the Constitutional Court would not apply, owing to its conflict with EU law, to the assessment of all claims for benefits arising from the date of the Czech Republic's accession to the EU (when Regulation No 1408/71 was applied). However, the Supreme Administrative Court also acknowledged that the Constitutional Court, as the supreme guardian of constitutionality, is entitled to declare that it maintains its case law despite the judgement of the Court of Justice, which would imply concluding, as in the Sugar Quota case law, that the powers delegated to the EU have been exceeded.

The Constitutional Court did not evaluate the implications of the Landtová case. Instead, it returned the blow with vengeance. This was done by means of another parallel constitutional complaint concerning Slovak pensions, specifically brought by Mr Holubec, who also did not ask the Court of Justice for a preliminary ruling, as EU law requires it to do in such a case. Instead, it described the Court's decision in Landtová as an ultra vires act. The Constitutional Court specifically faulted the Court for not considering the history of the Czechoslovak Federation and the circumstances of its division. Thus, the Constitutional Court applied Regulation No. 1408/71 to a situation which does not have a cross-border element since it relates to the situation of nationals of the formerly unitary state. The Constitutional Court emphasised:

> not to distinguish between the legal situation resulting from the break-up of a State with a unified social security system and the legal situation resulting from the free movement of persons in the European Communities or the European Union in the field of social security is to disregard European history and to compare incomparable situations.

39 | This culminated in the Constitutional Court's ruling of 3 August 2010, Case No. III ÚS 939/10, Slovak Pensions XV, in which the Constitutional Court stated that 'disobedient' judges of the Supreme Administrative Court should face disciplinary proceedings.
40 | Judgement of 22 June 2011, Landt, C-399/09, EU:C:2011:415.
41 | Paragraphs 31–40 of the judgement.
42 | Paragraphs 41–49 of the judgement.
43 | Judgement of the Supreme Administrative Court of 25 August 2011, No. 3 Ads 130/2008-204.

Thus, in the Constitutional Court's opinion, the Court of Justice acted ultra vires when, by applying Regulation No. 1408/71, it departed from the powers which the Czech Republic had delegated to the EU under Article 10a of the Constitution.

The Constitutional Court's ruling in Holubec must be evaluated considering extra-legal facts, rather than sophisticated legal reasoning. The real reasons for the position of the Constitutional Court are not found in the unconvincing argument about the absence of a foreign element and the impossibility of applying the regulation but rather in the personal prejudice of the judges of the Constitutional Court by the procedure of the Supreme Administrative Court, which, through the Court, was settling accounts in a domestic jurisprudential skirmish.[44] The Czech government's adherence to the opinion of the Supreme Administrative Court, and the 'insensitive' rhetoric of the Court in the Landtová case and its refusal to deal with the Constitutional Court's opinion appears to have only increased the frustration that was subsequently reflected in the ruling of the full Constitutional Court.

3.5. After the Holubec case

In the case law of the Constitutional Court issued after the Holubec ruling, either immediately or in the long-term, it is not possible to identify a decision that would subscribe to this ruling, at least as far as its anti-EU argumentation is concerned. Contrarily, 'pro-EU' rulings following the line of the Sugar Quotas began to reappear in the case law of the Constitutional Court, almost as if the Holubec ruling had never even been issued.[45]

This trend has been confirmed in other decisions of the Constitutional Court, for example, when the Constitutional Court (again) stated that 'only the Court of Justice gives a binding interpretation of EU law'[46] and that the Constitutional Court is also obliged, if the interpretation of EU law is not clear within the meaning of the CILFIT judgement, to refer a preliminary question to the Court of Justice.[47] Can thus be summarized that the Constitutional Court has consistently maintained a friendly approach to EU law, which operates within the Czech legal system directly based on powers delegated to the EU under Article 10a of the Constitution. The Constitutional Court has assumed the position of a kind of 'watchdog', reserving to itself the final word in cases where the boundaries entrusted to the European Union and its law are abandoned. Against this background, the Holubec case cannot be regarded as a relevant precedent. Rather, it is an aberration caused by personal disputes and extra-legal circumstances which the Constitutional Court did not follow. Contrarily, in other decisions issued in recent years, the Constitutional Court has demonstrated a friendly and pro-EU face.[48]

44 | Kosař and Vyhnánek, 2018, pp. 854–872.

45 | Bobek et al., 2022, p. 150.

46 | The Constitutional Court's ruling of 3 November 2020, Pl. ÚS 10/17, Paragraph 53.

47 | The Constitutional Court's ruling of 7 April 2020, Pl. ÚS 30/16, Paragraph 159.

48 | Bobek et al., 2022, p. 151.

4. The position of the Czech Constitutional Court in relation to asylum and migration policy and its influence on EU legislation

This article examines whether the Czech Constitutional Court has connected the issues of migration and asylum to the issue of constitutional identity. In the European legal area, the concept of constitutional identity has been invoked, particularly in the context of the Lisbon Treaty, which enshrined the obligation to respect national (and within that framework, constitutional) identity in Article 4 (2) of the Treaty on European Union. This Article defines national identity as a basic political and constitutional system that includes local and regional governments. In the Czech legal environment, the notion of constitutional identity has been addressed primarily by Kosař and Vyhnánek, who identified three possible conceptions of Czech constitutional identity: (1) a narrow version of 'legal' constitutional identity that corresponds to the Czech eternity clause as interpreted by the Constitutional Court, (2) a broader version of 'legal' constitutional identity based on the material focus of the constitution that goes beyond the Czech eternity clause in many aspects, and (3) a 'popular' constitutional identity that relies primarily on traditional narratives concerning formative events in the history of Czech statehood as perceived by Czech citizens and their elected representatives.[49]

The Czech Constitutional Court has not yet dealt with the relationship between the competencies of the EU and the Czech Republic in the areas of migration and asylum. The most significant comment on this issue was made by the Constitutional Court in its second ruling, which assessed the compatibility of the Lisbon Treaty with the Czech constitutional order.[50] Here, a group of Senators sought to assess the compatibility of the Lisbon Treaty as a whole and its selected provisions with the Czech constitutional order. The Constitutional Court concluded that the Lisbon Treaty and its ratification were in accordance with the Czech constitutional order, thus allowing for ratification by the president of the Republic.

In these proceedings, a group of senators challenged the compatibility of selected provisions of the 'Treaty of Rome' (i.e. the TFEU): Articles 78(3) and 79(1) [with the constitutional order].[51] According to them, these provisions imply that the Czech Republic will no longer always decide the composition and number of refugees in its territory. Thus, the EU will obtain the power to participate in

49 | Kosař and Vyhnánek, 2018, p. 855.

50 | The Constitutional Court's ruling of 3 November 2009, Pl. ÚS 29/09.

51 | Article 78(3) of the TFEU: Where one or more Member States are in a state of emergency resulting from a sudden influx of third-country nationals, the Council, acting on a proposal from the Commission, may adopt temporary measures in favour of the Member States concerned. The Council decides after consulting the European Parliament.
Article 79(1) of the TFEU: the Union shall develop a common immigration policy aimed at ensuring at all stages the effective management of migration flows, fair treatment of third-country nationals legally residing in the Member States, and the prevention and strengthening of the fight against illegal immigration and trafficking in human beings.

decisions which may have a significant impact on the composition of the Czech population and its cultural and social character. This contradicts the principle that is enshrined in Articles 1(1) and 10a of the Constitution — powers relating to decision-making in matters of exceptional cultural or social impact are not transferable and must always remain entirely within the competence of the Czech Republic's institutions. Their transfer to an international organisation or institution would be contrary to the characteristics of the Czech Republic as a sovereign state. Additionally, the senators argued that these provisions of the TFEU only vaguely defined the conditions under which the EU Council may act. Therefore, Article 78(3) of the TFEU also contravenes the principles of reasonable generality and, consequently, of sufficient clarity of the legal provision. Consequently, it is contrary to the principle of legal certainty as a prerequisite for the existence of the rule of law.[52]

The Constitutional Court did not share the concerns of the group of senators, indicating only briefly that Articles 78(3) and 79(1) of the TFEU essentially represent a transposition of the existing Article 64(2) of the Treaty establishing the European Community, with the change brought about by the Lisbon Treaty, which comprises strengthening the participation of the European Parliament in EU decisions. Furthermore, Article 79(5) of the TFEU explicitly grants Member States the right to determine the volume of entries of third-country nationals entering their territory to seek work or engage in business, so that the Lisbon Treaty instead leaves the regulatory mechanism for the movement of third-country nationals to Member States. Therefore, the contested provisions constitute a specific form of common regulation through temporary measures in the event of a sudden influx of asylum seekers. The Constitutional Court regards the specification of that mechanism as a largely political question, which is primarily a matter for the government which negotiated the treaty and the chambers of parliament which agreed to its ratification. The Constitutional Court considers such an arrangement permissible under Article 10a of the Constitution and not contrary to the constitutional order.[53]

No other decision in which the Constitutional Court dealt with the regulation of migration by the EU and possible interference with the constitutional identity of the Czech Republic was issued in the Czech Republic. Although the Czech Republic has been a rather harsh critic of European migration quotas, particularly under the government of Prime Minister Andrej Babiš, and the Court of Justice[54] has found in one of its judgements that the Czech Republic has not fulfilled its obligations under EU law by refusing to comply with the temporary mechanism for relocating applicants for international protection, no other case of this nature has yet reached the Constitutional Court.

52 | Paragraphs 19–20 of the ruling.
53 | Paragraph 154 of the ruling.
54 | Judgement in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and Czech Republic*, of 2 April 2020, ECLI:EU:C:2020:257.

5. Other key decisions of the Czech Constitutional Court on migration and asylum issues

It is difficult to select representative cases regarding the individual key decisions of the Czech Constitutional Court on migration and asylum. The Czech Constitutional Court does not often comment on these areas; moreover, individual decisions do not represent any overall treatise in these areas, however, are connected either with an individual constitutional complaint of foreigners or asylum seekers or concern the abolition of a statutory provision, typically from the Asylum Act[55] or the Act on the Residence of Foreigners on the Territory of the Czech Republic.[56]

The above conclusions can be summarised on statistical grounds. The case law of the Constitutional Court searched on the official search engine using the keyword 'migration' yielded only 36 results. Of these, 26 were complaints made by natural persons. In these proceedings, 21 cases resulted in the rejection of the constitutional complaint, mostly for a manifest lack of merit, and a smaller number for inadmissibility. The rejection of a constitutional complaint meant that the Constitutional Court did not deal with the substantive assessment of the case.

However, the keyword asylum yielded 325 results. Considering the 30-year existence of the Constitutional Court, this is not a high number, and the vast majority of cases are individual constitutional complaints of individual asylum seekers, in which the Constitutional Court typically focuses on the specific case at hand and its facts without stating any general conclusion.

5.1. Effective control of migration can be a legitimate objective of the adopted legislation

The Constitutional Court has concluded that the legitimate aim of certain adopted legislations is the effective control of migration in the Czech Republic. It reached this conclusion in a ruling assessing the compatibility of several amended provisions of the Asylum Act with a constitutional order.[57] Specifically, the Constitutional Court stated:

> 52. The framework thus constructed was to examine first whether the impugned provision pursued a specific (and defensible) legitimate aim. In the light of the sources outlined above, the legitimate aim here was to be the effective control of migration (cf., for example, the judgment of the European Court of Human Rights of 14 June 2011 in *Osman v. Denmark*, Application No. 38058/09, § 58). Particular regard was paid to the prevention of illegal stays of foreigners and to the increased efficiency of the administrative procedure, since the subsequent departure of a foreigner without a residence

55 | Act No. 325/1999 Coll., on Asylum.

56 | Act No. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic.

57 | The Constitutional Court's ruling of 27 November 2018, Pl. ÚS 41/17.

> permit from the territory of the State rendered the continuation of the residence permit procedure meaningless, according to the legislator. The Minister of the Interior, in his comments on the proposal, emphasised that a number of foreigners abuse the application for a temporary or permanent residence permit to temporarily legalise their stay in the territory of the Czech Republic or to avert imminent deportation without a real family relationship with a citizen of the Czech Republic. The contested provision is intended to prevent this purposeful practice.
> 57. The legitimate objectives of the contested legislation are effective control of migration and undoubtedly also compliance with the laws of the Czech Republic. However, these objectives are pursued by means of a procedural device (the institution of the stay of proceedings) which absolutizes the public interest and ignores the individual interest. The expulsion of a foreign national of a Czech citizen is carried out while denying him or her the right to enjoy the fundamental rights and freedoms guaranteed by the Charter on the territory of the State (Article 42(2)). If such an applicant for a residence permit wishes to assert his or her right after the termination of the proceedings on his or her application, he or she has no choice but to re-enter the Czech Republic and resubmit the application. If the case-law in the case of restrictions on the right of access to a court postulates the way of weighing values and principles in the search for a reasonable balance between the means employed and the aim of the legal regulation (paragraph 47), it is not possible to find that this requirement is met in the given situation.

Although the Constitutional Court struck down the contested provision of the law because several provisions of the constitutional order had been violated, it also acknowledged that the legitimate aim of certain adopted legislation may be the effective control of migration in the Czech Republic. However, the Constitutional Court also weighs this legitimate aim against other fundamental rights and compares whether it is in accordance with the constitutional order and thus the fundamental rights guaranteed by it.

5.2. General views on the right to asylum and its international anchorage

The Constitutional Court expressed its opinion on the right to asylum in its ruling of 30 January 2007, IV. ÚS 553/06. The Constitutional Court examined a constitutional complaint from a Russian citizen who had not been granted asylum in the Czech Republic. The Russian citizen sought asylum because he was allegedly subject to politically motivated criminal prosecution in his home state. However, according to the administrative authorities, and subsequently the courts, the complainant failed to prove that fact. In his constitutional complaint, the complainant alleged, inter alia, a violation of Article 43 of the Charter of Fundamental Rights and Freedoms, according to which 'the Czech Republic grants asylum to foreigners persecuted for exercising political rights and freedoms. Asylum may be refused to those who have acted in violation of fundamental human rights and freedoms'. The Constitutional Court stated the following regarding the constitutional enshrinement of the right to asylum in the Czech Republic.

In the Universal Declaration of Human Rights, the right to asylum is enshrined in Article 14, which reads as follows:
'Article 14
(1) Everyone has the right to seek refuge from persecution in other countries and to enjoy asylum there.
(2) This right shall not be invoked in cases of persecution genuinely justified by non-political crimes or acts contrary to the purposes and principles of the United Nations.'
Despite its exceptional historical and political significance, the Universal Declaration has the same legal nature as other UN General Assembly resolutions. It is a recommendation and therefore does not create obligations for States nor is it a direct source of law. It is not legally binding on national courts as it is not an international treaty. Consequently, the Universal Declaration of Human Rights cannot be effectively invoked in an application before the national courts (nor does the applicant do so). According to the publication 'Refugee Protection – A Guide to International Refugee Law' published by the United Nations High Commissioner for Refugees and the Inter-Parliamentary Union (available in English translation at http://www.unhcr.cz/), 'The term asylum is not defined in international law; however, it has become a unifying term for the totality of protection granted by a country to refugees on its territory. Asylum implies, at the very least, basic protection – i.e. a prohibition of forcible return (refoulement) to the borders of an area where the refugee's freedom or life could be threatened – for a temporary period, with the possibility of remaining in the host country until a solution can be found outside that country. In many countries, however, the term asylum means much more than this and includes the rights set out in the 1951 Convention and sometimes goes beyond them.' Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights explicitly mention the right to asylum.
Neither the Convention nor its Protocols provide for a right to political asylum. Nor is the principle of 'non-refoulement' explicitly expressed in the Convention.
The existence of an analogy of 'non-refoulement' is only inferred from the case-law of the European Court of Human Rights ('the European Court'). However, it is a fact that, within the Council of Europe, the Parliamentary Assembly had already adopted Recommendation 293 (1961) on the right of asylum in 1961, according to which the Committee of Ministers should have included in the Second Appendix to the Convention a right to asylum from persecution, except for persecution for non-political offences, which was not done. This recommendation is also referred to by the Parliamentary Assembly of the Council of Europe in Recommendation 1236 (1994) on the right to asylum, where it states, inter alia, that the Council of Europe, although it has never incorporated the right to asylum into a legally binding document, has always asked its members to treat refugees and asylum seekers 'in a particularly liberal and humanitarian spirit', in full respect of the principle of 'non-refoulement'. The Parliamentary Assembly has repeatedly recommended that the Convention be amended to guarantee the right to asylum.
The right to asylum is not explicitly mentioned in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (published by Decree No. 143/1988 Coll.).

> The Geneva Convention (published by Decree No. 208/1993 Coll.), including its 1967 Protocol, does not provide for the right to asylum.
> It follows from the foregoing that there is no international instrument binding the Czech Republic to accept and decide on an application for refugee status or asylum, still less to accept such an application.
> The Charter of Fundamental Rights and Freedoms explicitly mentions political asylum in Article 43 (which is systematically included in Title Six – Common Provisions), which reads: 'The Czech and Slovak Federal Republic shall grant asylum to foreigners persecuted for exercising political rights and freedoms. Asylum may be refused to those who have acted in violation of fundamental human rights and freedoms'. The Constitutional Court is of the opinion that the quoted article cannot be regarded as a constitutional enshrinement of the fundamental (i.e., inalienable, non-transferable and irrevocable within the meaning of Article 1 of the Charter) right to political asylum; in other words, the right to asylum cannot be regarded as a natural human right.
> However, it does not follow from the above that Article 43 of the Charter is merely proclamatory and not directly applicable (cf. Article 41(1) of the Charter), i.e. that a foreigner persecuted for exercising political rights and freedoms could only claim political asylum within the framework of a statutory regulation.
> On the other hand, the right of asylum cannot be regarded as a right of entitlement; neither the Charter nor the international human rights treaties to which the Czech Republic is bound guarantee that the right of asylum must be granted to the applicant alien. A decision not to grant political asylum to an alien need not therefore be incompatible with Article 43 of the Charter.
> In the present case, the Constitutional Court has found nothing to suggest that the wording of the contested decision is inconsistent with Article 43 of the Charter.

In general terms, the Constitutional Court stated four basic conclusions in this ruling:

The right to asylum cannot be considered a right of entitlement. Neither the Charter of Fundamental Rights and Freedoms nor the international human rights treaties by which the Czech Republic is bound guarantee that the right to asylum must be granted to applicants. The decision not to grant political asylum to an alien, therefore, need not be incompatible with Article 43 of the Charter of Fundamental Rights and Freedoms.

However, a constitutional complaint alleging that asylum has not been granted may be examined by the Constitutional Court considering other provisions protecting fundamental human rights and freedoms, particularly in cases where the complainant is to be subject to administrative expulsion from the Czech Republic, to the penalty of expulsion or to extradition abroad under the Criminal Procedure Code.

A decision to expel an alien asylum seeker may raise a problem in terms of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (with which Article 7(2) of the Charter of Fundamental Rights and Freedoms corresponds) if there are serious and verified grounds for believing that the person concerned is exposed to a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

A judicial review of the lawfulness of decisions issued by public authorities in matters of the international protection of refugees must meet the requirements of a fair trial under the relevant provisions of Title 5 of the Charter of Fundamental Rights and Freedoms.

5.3. Foreigners do not have a constitutionally guaranteed fundamental right to enter and reside in the Czech Republic

According to the constant jurisprudential conclusion of the Constitutional Court, there is no subjective, constitutionally guaranteed right of foreigners to reside in the Czech Republic or to enter it, since it is a matter of the sovereign state, what (non-discriminatory) conditions allow foreigners to reside in its territory.[58,59] This conclusion implies a stricter review of certain rights of foreigners, for example, when the Constitutional Court considers this conclusion when reviewing deportation sentences imposed on foreigners and their proportionality. As there is no constitutionally guaranteed right of foreigners to enter and stay in the Czech Republic, the Constitutional Court concluded that the Czech legislature had much more discretion in setting the expulsion penalty, and the Constitutional Court determined that expulsion penalties imposed on foreigners for an indefinite period (i.e. essentially for life) were in accordance with the constitutional order.[60] According to the Constitutional Court:

> 9. It is essential, first of all, that the penalty of expulsion constitutes, in terms of constitutionally guaranteed rights, a special type of punishment applied in relation to persons who do not enjoy the fundamental right to reside on the territory of the State or to enter its territory. It is thus one of the manifestations of the sovereignty of the State which, by imposing it, decides to prevent, in future, the entry into its territory of those foreign nationals for whom the legal (and, of course, constitutional and international law) conditions are met. However, the constitutional right of a foreign national convicted of a criminal offence to return to the territory of the Czech Republic after a certain period of time following expulsion (Article 14(4) of the Charter *a contrario*) This means that the state, and thus the legislator, has much greater discretion in determining the conditions for the execution of this sentence, unlike penalties that affect rights explicitly enshrined in the constitutional order. This does not relieve the courts of the obligation to consider the existence of exceptional circumstances as an exception to this rule arising from the constitutional order, which may be specific circumstances arising, for example, from the family status of the convicted person or the humanitarian and political situation in the country to which the offender has been or is to be deported. However, such circumstances must be the subject of evidence in individual court proceedings, and the legal system of the Czech Republic provides

58 | Cf. a long series of decisions of the Constitutional Court – e.g. already III.ÚS 219/04 of 23 June 2004, or the ruling of the Constitutional Court of 9 December 2008, Case No. Pl.ÚS 26/07, Point 37 with citation of other decisions.

59 | The opposite conclusion applies to citizens of the Czech Republic, who, according to Article 14(4) of the LZPS, have the right to free entry into the Czech and Slovak Federal Republic. Nor can a citizen be forced to leave his or her homeland.

60 | The Constitutional Court's ruling of 18 September 2014, Case No. III ÚS 3101/13.

for such exceptions. Therefore, although the execution of the sentence of indefinite deportation is undoubtedly an interference with the liberty of the individual within the meaning of Article 1 of the Charter, it does not constitute an unjustified interference. From the above-mentioned point of view of the protection of the dignity of the individual, it is essential that that value is not violated *a priori* by his expulsion. The increased discretion of the legislator is also logical in that the Czech Republic may have only minimal factual and legal means to assess the circumstances which might argue for the abolition of the expulsion sentence, unlike in the case of imprisonment. It is very difficult to imagine that the Czech authorities could, in certain geographical areas, carry out any effective examination of the offenders of serious criminal offences for which the penalty of indefinite expulsion is imposed, with regard to their rehabilitation or other purpose of the sentence imposed. It should be emphasized here that the focus of the assessment of the need for such a penalty may be in its imposition, since the purpose is to prevent further negative impact of the offender on the population of the State in its territory, as well as to warn other potential alien offenders that they may face such an irremovable penalty.

6. Comparative interpretation

In Czech legal theory, comparative interpretation is classified as one of the six methods of interpreting law. Methods of interpreting law are distinguished into standard methods and non-standard methods. Standard methods include linguistic, logical, and systematic interpretations. Non-standard methods include historical, teleological, and comparative interpretations.[61] Non-standard methods of interpreting law have in common that they go beyond the letter of the law and argue *e ratione legis*.[62] In summary, comparative interpretation involves comparing similar legal institutions in different legal systems.[63]

In the case law of the Czech Constitutional Court, a comparative interpretation appears occasionally. Using ‘comparative’ while searching for the case law of the Constitutional Court yields 124 results; ‘comparative interpretation’ yields 101 results. However, the lower frequency of use of this method is compensated by the fact that the Constitutional Court often uses it in its major decisions, in which it primarily comments on new or hitherto unaddressed legal issues for which it seeks inspiration in the legislation of other countries.

61 | Gerloch, 2013, p. 134.
62 | Ibid.
63 | Ibid., p. 138.

6.1. Examples of the use of comparative interpretation by the Constitutional Court

6.1.1. Essential elements of a democratic law state

For example, the Constitutional Court used the comparative method in a case law, as early as 1997.[64] In a ruling in which the Constitutional Court primarily assessed the imposition of fines on competitors under the Competition Protection Act, it had to comment on the content of one of the unclear legal concepts of the Czech legal system, the content of the concept of 'essential elements of a democratic state governed by the rule of law'. Using the comparative method, it illustrated, inter alia, which facts fall under the above concept within the meaning of Articles 9(2) and (3) of the Constitution. From a comparative perspective, the Constitutional Court selected three European states which have been positively defined in their Constitutions: the Federal Republic of Germany, the Hellenic Republic, and the Portuguese Republic. The Constitutional Court stated:

> From a comparative point of view, we can mention Article 79(3) of the Basic Law of the Federal Republic of Germany, which, in addition to the principle of federation, also includes under the constitutional and therefore immutable elements of the Constitution the fundamental rights and the binding of the legislature, the executive and the judiciary by these rights, as well as the principles of a democratic and social state, the sovereignty of the people, representative democracy, constitutionality and the binding of the executive and the judiciary by law and the law, and the right of resistance. Similarly, the Constitution of the Hellenic Republic, in Article 110(1), provides for the immutability of the foundations of the State, its parliamentary form, and a number of explicitly mentioned fundamental rights and freedoms. In an extensive casuistic manner, the Constitution of the Portuguese Republic, in Article 110(1), defines the fundamental rights and freedoms of the State. Article 288 of the Portuguese Constitution, which sets out, in particular, the sovereignty of the State, its unitary structure, its republican form, the separation of State and Church, the rights, freedoms and guarantees of citizens, political pluralism, the separation of powers, the protection of constitutionalism, the independence of the courts and local self-government.

6.1.2. Case Melčák

The ruling of the Constitutional Court in the Melčák case[65] is a popular example depicting the use of comparative interpretation. For the first time, the Constitutional Court addressed whether it was entitled to review constitutional laws for compliance with the constitutional order, or only 'ordinary' laws.[66] Moreover, the Constitutional Court described the immutability of the material focus

64 | The Constitutional Court's ruling of 29 May 1997, Case No. III. ÚS 31/97.

65 | The Constitutional Court's ruling of 10 September 2009, Case No. Pl.ÚS 27/09.

66 | Article 87(1)(a) of the Constitution states that the Constitutional Court decides to repeal laws or their individual provisions if they are contrary to the constitutional order. Therefore, the question was whether the Constitutional Court, by an expansive interpretation, would extend the interpretation of this provision and acquire the power to review constitutional laws as well.

of the Constitution in relation to its impact on Article 87(1)(a). The Constitutional Court concluded that the term 'law' used in Article 87(1)(a) should be interpreted extensively and include constitutional law; it used comparative inspiration from the Federal Republic of Germany along with the Republic of Austria, since both of these states confer on their constitutional courts the power to review constitutional laws. The Constitutional Court stated:

> The drafters of the Basic Law of the Federal Republic of Germany of 1949 reacted to the German history of 1919 to 1945 by, among other things, removing the 'material focus of the constitution' from the disposition of the constitution-maker, in other words, by enshrining the 'imperative of immutability' (*Ewigkeitsklausel*). According to him, the amendment of the Basic Law concerning the fundamental principles of the federal system, the basic principles of the protection of human rights, the rule of law, the sovereignty of the people and the right to civil disobedience is inadmissible (Article 79(3) of the Basic Law). According to the doctrine and case-law of the Federal Constitutional Court, the consequence of the regulation of the inviolability of the 'material core' of the Constitution is a procedure whereby the Federal Constitutional Court would finally decide on the conflict of a 'constitutional law' with the material core of the Constitution, including the alternative of declaring the amendment to the Basic Law legally null and void. (5) The doctrinal view that it was for the Federal Constitutional Court to rule that a constitutional law amending the Basic Law in contravention of Article 79(3) of the Basic Law was invalid was established shortly after the Basic Law came into force (footnote 6) and was subsequently confirmed by the case-law of the Federal Constitutional Court itself (BVerfGE, 30, 1/24).
> The Constitution of the Republic of Austria defines the procedural limitations of the constitution-maker for the area of its material focus and at the same time establishes the competence of the Constitutional Court in this respect. According to Austrian constitutional law, 'the subject of the Constitutional Court's review competence are federal and state laws, both simple and constitutional laws' (footnote 7). Article 140 of the Federal Constitution, which generally establishes the court's competence to review norms, read in conjunction with Article 44(3) of the Federal Constitution, according to which a complete revision of the Constitution, or even a partial revision if one third of the members of the National Council or the Federal Council so request, must be approved by referendum. The doctrine takes the view that it is for the Constitutional Court to assess, including by means of an *a posteriori* review of the norms, compliance with that procedure from the point of view of the constitution-modifying intervention of the constitution-maker in the 'material focus of the constitution'. He also bases his view on the legal opinion of the Austrian Constitutional Court expressed in decisions VfSlg. 11.584, 11.756, 11.827, 11.916, 11.918, 11.927 and 11.972. Drawing on the criticism of legislative practice which, by adopting constitutional laws in areas of simple law, circumvents the reviewing power of the Constitutional Court, the Court concludes that such a procedure by the constitutional legislator 'cannot aim' at breaking the fundamental principles of the Federal Constitution.
> [...]
> Just as in the German case Article 79(3) of the Basic Law is a reaction to the undemocratic developments and Nazi rule in the period before 1945 (and similarly Article 44(3)

> of the Federal Constitution of the Austrian Republic), Article 9(2) of the Constitution is a consequence of the experience of the decline of legal culture and the trampling of fundamental rights during the forty years of Communist rule in Czechoslovakia. As a consequence of this analogy, the interpretation of Article 79(3) of the Basic Law by the Federal Constitutional Court of Germany and similar practices in other democratic countries are therefore deeply inspiring for the Constitutional Court of the Czech Republic.

6.1.3. Anchoring the right to housing in the Czech constitutional order and the use of the comparative method also for 'non-legal' arguments

Finally, in the recent ruling of the Constitutional Court in May this year,[67] the Constitutional Court dealt with the enshrinement of the right to housing in the Czech constitutional order, its nature, the absence of statutory regulation of social housing in the Czech Republic and its impact on the fundamental rights of socially disadvantaged persons. The Constitutional Court applied a rather extensive comparative passage, which was, to some extent, unconventional compared with the comparisons that it presented in its case laws in the past.

The Constitutional Court used its own comparative analysis of social housing in five European countries: France, Ireland, Germany, Spain, and Slovakia. This comparative analysis is interesting primarily because the Constitutional Court did not focus only on legal institutions (as it did in previous years – cf.). However, in the commented ruling, it did not interpret only an isolated legal institution through the comparative method but comprehensively the entire legal regulation of social housing in selected European countries, considering non-legal facts such as the volume of state investments directed to support social housing or the proportion of social housing in individual municipalities. The Constitutional Court stated:

> 31. The fact that countries with different systems of housing policy (unlike the Czech Republic) have been addressing the issue of housing for a long time and, above all, in an active manner, is evident from the comparative analysis of the Constitutional Court.
> Comparative analysis of social housing in Europe
> 32. For the purposes of assessing the applicants' constitutional complaint, the Constitutional Court commissioned an analysis of social housing systems in five European countries: France, Ireland, Germany, Spain and Slovakia. In doing so, it drew on the publicly available research results of the Ministry of Labour and Social Affairs, Overview of social housing systems in selected European countries and their comparison, 2018. In: Social Housing of the Ministry of Labour and Social Affairs [online]. Ministry of Labour and Social Affairs of the Czech Republic [cited 2022-01-01]. Available from: http://socialnibydleni.mpsv.cz/cs/novinky/143-prehled-systemu-socialniho-bydleni-ve-vybranych-evropskych-zemich-a-jejich-komparace, updated by the Constitutional Court as of November 2022. The selected countries are characterised by mutually different social housing systems, whether in terms of the concept of social housing, the breadth of the target group, the type of providers, or the way it is financed. There is their proximity to the Czech Republic's environment, and thus the potential

67 | The Constitutional Court's ruling of 25 April 2023, Case No. II. ÚS 2533/20.

applicability of the procedures to our territory. From the analysis of 22.11.2022, No. A 2022-9-DU, the following is clear.

33. In France, the Housing Development, Development and Digitalisation Act was promulgated on 23 November 2018 with the aim of building more, better and cheaper and changing the social housing system. The law regulated the system of awarding social housing and reviewing the occupancy status. It provides new social housing opportunities by making it easier to share low-cost housing. It has also made it possible to set aside rental housing from the social housing stock for young people under 30 years of age, as they are also affected by poverty. Like many other countries, France has responded to the housing needs of its citizens following the COVID-19 pandemic. In 2021, a protocol of commitment was signed between the government and social housing stakeholders to build 250,000 social housing units between 2021 and 2022. The Law on Differentiation, Decentralization, Deconcentration and Various Measures to Simplify Public Action was promulgated on 21 February 2022. This law maintains the social housing construction targets of the municipalities covered by the Solidarity and Urban Renewal Law beyond 2025. In France, municipalities will thus (still) have to have at least 20% or 25% of social housing and thus be obliged to manage a relatively significant housing stock for the poorest persons (municipalities that are late in complying with this obligation will be given more time to do so).

34. Ireland has agreed to the Government's new housing policy for Ireland to 2030. This is a multi-year housing plan with the largest ever budget in excess of €20 billion to fund it, with the aim of improving Ireland's housing system and providing more housing for people with different needs. The updated housing plan responds to emergencies, notably the war in Ukraine, the energy crisis and rising interest rates. At the same time, Ireland is taking steps to eradicate homelessness in the context of the signing of the Lisbon Declaration on a European Platform to Combat Homelessness. The Government's policy to reduce homelessness by taking a person-centred approach to enable people sleeping rough or in long-term emergency accommodation with complex needs to access permanent safe accommodation, while providing intensive support and associated access to health services. The Housing for All programme is supported by €20 billion of public investment in housing by the end of 2025 and is also primarily targeted at middle-income households. Under this model, rents are set to cover only the costs of financing, construction, management and maintenance of housing. Cost rents are aimed at achieving rents that are at least 25 % lower than what they would be on the open market.

[...]

38. As the comparative analysis of the Constitutional Court and the Ministry of Labour and Social Affairs shows, all states have either adopted a long-term housing plan or are developing existing housing laws, regardless of whether or not the right to housing is explicitly constitutionally enshrined in the state. Specific legislative approaches vary from state to state. In a number of cases, housing law also takes into account middle-income groups or young people who, for various reasons, find market housing unaffordable or financially unsustainable in the long term. States are also reflecting the current situation in Ukraine and the pandemic situation, with links to existing housing legislation. The strategy to reduce homelessness and the efforts to comprehensively address the issue of these particularly vulnerable people is no exception.

> Although Slovakia, as our closest historical neighbour, has the smallest social housing fund of the developed countries (together with the Czech Republic), it is still larger than ours.
> 39. The present case, although the Constitutional Court could not uphold it, pointed to the unfortunate fact that the Czech Republic has not yet adopted adequate legal regulation of social housing. This state of affairs is unsustainable in the long term; the availability of social housing in accordance with the Czech Republic's international obligations cannot be left to the discretion of local authorities, or to non-profit organisations, charities or volunteers. It cannot be overlooked that in the present case (or in any other case) it is above all the absence of statutory regulation which predetermines the procedural failure of the complainants within the limits of an action for intervention under the Administrative Justice Procedure Code.

7. Conclusion

This article examines the position of the Czech Constitutional Court in relation to asylum and migration policies and its influence by EU legislation, particularly whether the Czech Constitutional Court considers asylum and migration issues as part of the Czech constitutional identity, which the EU should not interfere with in any way. Next, it presents the basic case law of the Constitutional Court on these issues, and finally answers whether the Czech Constitutional Court uses the comparative method of interpretation in its decision-making and, if necessary, demonstrates its use in practice.

The article concludes that the Constitutional Court has not yet commented on the issue of migration or asylum as part of Czech constitutional identity. In the second review of the compliance of the Lisbon Treaty with the Czech constitutional order, the Constitutional Court briefly addressed this issue; however, it was not a comprehensive assessment or even a delimitation of the EU. The Constitutional Court merely stated that the new provisions contained in the Lisbon Treaty were essentially built on older provisions already enshrined in primary European law and which, by being implemented in the Lisbon Treaty, did not represent any substantive change in content. Therefore, this article focuses more on the general approach of the Czech Constitutional Court to the transfer of competences from the Czech Republic to the EU and the control of this transfer by the Constitutional Court. The article concludes that the Czech Constitutional Court is generally open to the transfer of powers from the Czech Republic to the EU and respects the primacy of European law; however, it monitors this transfer from the background and is prepared to intervene if the EU exceeds its limits and guarantees and threatens the essential requirements of the Czech Republic as a democratic state governed by the rule of law. However, as the Constitutional Court has stated, it cannot imagine the circumstances under which this would have happened. These conclusions are not altered by the fact that the Czech Constitutional Court is the first constitutional court of a Member State to declare a judgement of the Court of Justice ultra vires, which cannot, therefore, have an effect in the Czech Republic.

However, this was a specific situation caused by a domestic dispute between the Constitutional Court and the Supreme Administrative Court. Moreover, this isolated decision by the Constitutional Court has not been followed up since then, and there is no indication that it will occur again.

Further, the article presented the primary decisions of the Constitutional Court, which reflected its view on asylum and migration issues.

Finally, the article explored the comparative method and its use in the decision-making practices of the Constitutional Court. Although the comparative method of interpretation is occasionally used in the practice of the Constitutional Court, it is used by the Constitutional Court in its substantive decisions, in which it often provides new legal interpretations that are based precisely on arguments on foreign legislation. Therefore, it can be concluded that the Constitutional Court applies a comparative method of interpretation in its decisions and seeks inspiration for it from foreign legislation. However, the Constitutional Court emphasises that it applies such legislation comparatively, emerging mostly from European (or American) legal doctrine and having its origin primarily in democratic legal states in which fundamental rights are respected and, therefore, have the same value base as the Czech Republic.

Bibliography

Blahož, J. (1995) 'Vznik a počátky vývoje ústavního soudnictví', *Právník*, 134(5), pp. 419–447.

Blažek, P. (2023) 'Ústavní soud je nejmocnější orgán veřejné moci v zemi', *Česká justice,* 14 May [Online]. Available at: https://www.ceska-justice.cz/2023/05/ministr-spravedlnosti-blazek-ustavni-soud-je-nejmocnejsi-organ-verejne-moci-v-zemi/ (Accessed: 7 November 2023).

Bobek, M., Bříza, P., Hubková, P. (2022) *Vnitrostátní aplikace práva Evropské unie.* Praha: C. H. Beck.

Gerloch, A. (2013) *Teorie práva. 6. aktualizované vydáni.* Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.

Kosař, D., Vyhnánek, L. (2018) 'Ústavní identita České republiky', *Právník*, 157(10), pp. 854–872.

Krejčí, J. (1948) 'Ústavní soud' in Hoetzel, J., Weyr, F. (eds.) *Slovník veřejného práva československého Svazek 5*. Brno: Rovnost, p. 1098.

Langášek, T. (2011) *Ústavní soud Československé republiky a jeho osudy v letech 1920-1948*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk.

Největší důvěru mají Češi dlouhodobě v Ústavní soud, BIS věří méně než polovin (2021) Aktuálně, 27 August [Online]. Available at: https://zpravy.aktualne.cz/domaci/nejvetsi-duveru-maji-cesi-dlouhodobe-v-ustavni-soud/r~163cfdf0073d11ecb91a0cc47ab5f122/ (Accessed: 7 November 2023).

Pavlíček, V., Gronský, J., Hřebejk, J. (2015) *Ústavní právo a státověda. II. díl. Ústavní právo České republiky*. Praha: Leges.

Sládeček, V., Mikule, V., Suchánek, R., Syllová, J. (2016) *Ústava České republiky: Komentář*. Praha: C. H. Beck.

IRREGULAR MIGRATION IN POLAND AND THE IMPORTANCE OF READMISSION AGREEMENTS IN THEORY AND PRACTICE

Joanna Ryszka[1]

ABSTRACT

Poland is a Member State of the European Union and a part of the Schengen area, which ensures free movement without controls at its internal borders while strengthening the security of its external borders. It plays a special role here, as its eastern border is simultaneously its external border. This importance has been further increased by recent events in the eastern part of Europe, particularly through the smuggling of migrants and refugees into the European Union from, inter alia, Iraq, Afghanistan, and other countries in the Middle East and Africa via the Belarusian-Lithuanian, Belarusian-Polish, and Belarusian-Latvian borders in 2021, and because of Russia's aggression against Ukraine on 24 February 2022 resulting in millions of people fleeing war and seeking protection, particularly in the eastern part of the European Union. The increased migratory movement along the eastern borders of the Republic of Poland observed in 2021, was a direct cause of the changes introduced in Polish legislation on foreigners. The possibility of returning migrants apprehended immediately after crossing the border in violation of the law was introduced. In such cases, the competent commanding officer of the Border Guard could draw up a report on crossing the border and issue an order to leave Poland. The appeal against this order may be presented to the Commander-in-Chief of the Border Guard, which, however, does not suspend it. The aim of these provisions was to protect the border from a mass influx of irregular migrants. However, it is questionable whether they simultaneously ensure the fundamental human right to be treated with dignity.

KEYWORDS

irregular migration
refugee status and subsidiary protection
asylum and temporary protection
readmission
residence permit for humanitarian reasons
residence permit for tolerated stay

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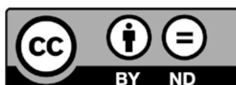

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1. Introduction

The Schengen area allows free movement of persons between the Member States of the European Union (EU).[2] These rules abolish controls at internal borders while strengthening the security of external borders. Poland became bound by these rules with its accession to the EU in 2004, while it became a full member of the Schengen area in 2007 with respect to land and sea borders and in 2008 with respect to air borders. Since then, it has become part of an 'area without borders' between Member States and reinforced control with third countries. Poland plays a special role here as its eastern border is simultaneously the external border of the Union and the Schengen area. It can only be crossed at border-crossing points and during fixed opening hours. When crossing it, all persons, including both regular and irregular migrants, are subject to systematic border checks for entry into and exit from the EU.

Irregular migration covers people who cross a border unlawfully, visa overstayers, children born to undocumented parents, and migrants who lose their regular status because of non-compliance with certain requirements or rejected asylum seekers. The irregular migration has been at the forefront of political debate in the most of the EU's Member States and the Union as such since the outbreak of the 'migration crisis' of 2015.[3] More than one million people arrived in the EU, most of whom were fleeing from war and terror in Syria but also from North Africa. Further, illegal migration in the EU was affected by the actions of the Belarusian government against the restrictive measures adopted by the EU. In June 2021, Belarus began to organise flights and internal travel to facilitate the transit of migrants to the EU, first to Lithuania, and then to Latvia and Poland. Consequently, several legislative measures have been adopted in these countries to protect their territories from a massive influx of irregular migrants. However, they have repeatedly violated international regulations, including the principle of non-refoulement. Moreover, on 24 February 2022 Russia launched military aggression against Ukraine. Since then, millions of people have fled the war, seeking protection in EU countries, primarily in the central-eastern part. Therefore, the EU intensified its work and activities to improve its control over external borders and migration flows. Therefore, migration issues are currently one of the most important challenges to maintaining security and simultaneously ensuring that the human right to dignity is respected. Irregular migration poses challenges to countries of origin, transit, and destination and the migrants themselves. They often face many difficulties in their migratory process, considering complicated procedures of obtaining refugee status.

One of the direct cause concerning the changes introduced in Polish legislation on foreigners was the increased migratory movement along the Polish eastern border taking place in 2021. Consequently, an important rule was amended: that

2 | Agreement on the Benelux Economic Union, 1985, Convention implementing the Schengen Agreement, 1990.
3 | Spencer and Triandafyllidou, 2022, p. 192.

any person who declares a willingness to apply for international protection should be allowed into Poland, and this application is to be accepted by the competent Border Guard post. For example, amendments in the form of leaving an application for international protection unprocessed by foreigners apprehended after illegally crossing the border have been met with negative assessment, including that of the Ombudsman,[4] as not supported by the applicable international and EU law.

This study presents the legal basis for granting international protection to irregular migrants in the Polish legal order, along with its practical application. Therefore, it analyses the forms of international protection available to foreigners in Poland, including the procedures that apply here. Moreover, special attention has been paid to the procedure for the return of migrants who have crossed the border in violation of the law and with respect to whom there are no prerequisites justifying the initiation of proceedings for an obligation to return. The importance of readmission agreements is also highlighted, with an indication of how they are implemented in Poland.

2. Legal basis

The basic form of international protection granted in Poland is the refugee status stated in Article 56 of the Constitution of the Republic of Poland in 1997.[5] It states that foreigners enjoy the right to asylum in Poland, and in situations where they seek protection from persecution, they may be granted refugee status. This status is granted considering the international agreements Poland is party to, such as the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[6] which although does not explicitly refer to either the right to asylum or the possibility of obtaining refugee status, is significant regarding foreigners' treatment in Poland. Examples include the prohibition of discrimination in the exercise of the rights guaranteed therein, provided for in Article 14 ECHR, or the protection against torture and inhuman or degrading treatment or punishment, provided for in Article 3 ECHR.[7] Moreover, Article 4 of Protocol No. 4 of the ECHR, which prohibits the collective expulsion of aliens, is relevant.[8] Other international agreements of significance are the Convention Relating to the Status of Refugees, drawn up in Geneva on 28 July 1951 together with the Protocol Relating to the Status of Refugees, drawn up in New York on 31 January 1967.[9] These two acts of international law are directly referred to in EU primary law, specifically in Article 18 of the Charter of Fundamental Rights of the EU.[10] Moreover, Article 78 of the Treaty on the Functioning of the EU provides a common policy on asylum,

4 | Opinion of the Ombudsman, 2021.
5 | Journal of Laws 1997 No. 78 item 483.
6 | Journal of Laws 1993 No. 61 item 284 as amended.
7 | Safjan and Bosek, 2016, issue 4.
8 | Journal of Laws 1995 No. 36 item 175.
9 | Journal of Laws 1991 No. 119 item 515 and Journal of Laws 1991 No. 119 item 517, accordingly.
10 | OJ C 326, 26.10.2012, pp. 391–407.

subsidiary and temporary protection in the EU.[11] It is, inter alia, based on respect for the principle of non-refoulement, which expresses the prohibition of returning an applicant for international protection to a country where his or her life or freedom is threatened. Specific issues related to foreigners' rights are also governed by the relevant provisions of EU secondary legislation. In particular, 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[12] and a set of directives concerning temporary protection, returning illegally staying third-country nationals, status for refugees or subsidiary protection, and granting and withdrawing international protection should be mentioned here.[13]

The Polish legal order decided to separate the issue of entry and residence of foreigners from the issue of granting them protection.[14] The rules and conditions for the entry of foreigners into the territory of Poland, their transit through its territory, and their stay in and departure from Poland are defined by provisions of the Act of 12 December 2013 on foreigners.[15] The principles, conditions and procedure for granting protection to foreigners within the territory of Poland are set out in the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.[16] The procedure for granting refugee status was also based on the provisions of the Code of Administrative Proceedings which are applicable only to the extent that the Act on granting protection to foreigners within the territory of the Republic of Poland itself does not provide otherwise. Border traffic at crossing points with the Russian Federation, the Republic of Belarus, and Ukraine was suspended on 15 March 2020 based on the Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the temporary suspension or restriction of border traffic at certain crossing points.[17] Its amendment on 21 August 2021 introduced the possibility of turning back to the state borderline those persons who were found at a border crossing point where border traffic had been suspended or restricted.[18] The amendment was also introduced to the ordinance of the Minister of the Interior on 24 April 2015 on guarded centres and detention centres for foreigners. As of 13 August 2021, they had to increase their capacity to accommodate several foreign nationals. It has been possible to reduce the area per foreigner in a room for foreigners or in a residential cell from 4 m^2 to 2 m^2 for a period not exceeding 12 months. In response to the ongoing migratory pressure

11 | OJ C 326, 26.10.2012, pp. 47–390.
12 | OJ L 180, 29.6.2013, pp. 31–59.
13 | Council Directive 2001/55/EC, Directive 2008/115/EC, Directive 2011/95/EU, Directive 2013/32/EU, Directive 2013/33/EU.
14 | Mikołajczyk, 2008, p. 34.
15 | Journal of Laws 2023, item 519, consolidated text, as amended.
16 | Journal of Laws 2022, item 1264, consolidated text, as amended.
17 | Journal of Laws 2020, item 435, as amended. Adopted on the basis Article 16.3, Point 2 of the Act of 12 October 1990 on the protection of the state border, Journal of Laws 2019, item 1776.
18 | Journal of Laws 2021, item 1536.

from mid-2021, it was decided to erect a special barrier on the border with Belarus.[19] A similar response, through deterrence by building fences, was decided for the migration crisis by other EU Member States in 2015/2016 – erecting walls on Hungarian borders only as an example.[20]

3. Forms and grounds of international protection

Pursuant to Article 3.2 of the Act on foreigners, a foreigner is any person who does not possess Polish citizenship, regardless of having the citizenship of another state or being stateless. Foreigners in Poland may apply for refugee status, subsidiary protection, asylum, or temporary protection. Before 1 May 2014, that is before the entry into force of the Act on Foreigners, which amended the Act on Granting Protection to Aliens on the Territory of the Republic of Poland, the refugee procedure also included – in the case of refusal to grant refugee status and refusal to grant subsidiary protection – the adjudication of the prerequisites for granting a permit for tolerated stay and, in the case of refusal to grant such a permit, led to a decision to expel the foreigner. The refugee procedure has been limited only to the adjudication of refugee status and subsidiary protection and the procedure for granting refugee status has been referred to as the procedure for granting international protection (an applications for refugee status have been referred to as applications for subsidiary protection). Additionally, foreigners may apply for a residence permit for humanitarian reasons and a permit for tolerated stay.[21]

Foreigners applying for international protection do not always have the full ability to communicate, which may negatively affect the effectiveness of granting protection. Polish legislation addresses this problem by providing that, when foreigners cannot write, a signature can be replaced by a fingerprint. The name of such a person is to be inserted into the application together with a statement affixed at the request of a person who cannot write. The provision of translations into Polish documents drawn up in a foreign language which are admissible as evidence can also be considered convenient for foreigners.[22]

In accordance with Article 13 of the Act on granting protection to foreigners, refugee status is granted to foreigners. If it is a result of justified fear of persecution in the country of origin owing to race, religion, nationality, political opinion, or membership of a particular social group, he/she cannot or does not want to benefit from the protection of that country. Refugee status is also granted to a minor child of a foreigner who has been granted refugee status in Poland, born on that territory. The persecution indicated here constitutes a serious violation of human rights. Persecution may comprise, inter alia, the use of physical or mental violence, including sexual violence; the application of legal, administrative, police or

19 | Based on the provisions of the Act on the Construction of the State Border Security.
20 | Karageorgiou and Noll, 2022, p. 147; Menéndez, 2016, p. 400.
21 | Kowalski, 2016, p. 96.
22 | Articles 10 and 11 of the Act on granting protection to foreigners.

judicial measures in a discriminatory manner or of a discriminatory nature or the absence of a right of appeal to a court against a disproportionate or discriminatory punishment (an open catalogue provided for in Article 13.4 of the Act on granting protection to foreigners). It may occur, although it is not certain or likely, and the requirement to establish 'reasonable grounds' indicates the need to establish objective and realistic grounds for the risk of persecution.[23]

Moreover, foreigners may benefit from subsidiary protection, provided for in Article 15 of the Act on granting protection to foreigners and is available to those who do not meet the conditions for being granted refugee status, and returning to their country of origin may expose them to the real risk of suffering serious harm. This may include the imposition of the death penalty or execution, torture, inhuman or degrading treatment or punishment, or a serious and individualised threat to life or health resulting from the widespread use of violence against the civilian population in situations of international or internal armed conflict. However, the mere existence of the risk of suffering serious harm through torture, inhumanity, degrading treatment, or punishment as one of the grounds for granting protection to foreigners is insufficient. Therefore, it is necessary to demonstrate that foreigners, owing to their individualised situation, may be exposed to such treatment.[24] Subsidiary protection can only be granted as a result of refugee status proceedings in a single procedure. Therefore, it is complementary to refugee status, which implies that foreigners cannot apply for it (as in the case of a permit for a tolerated stay).[25] However, the authority conducting the proceedings, when refusing a foreigner refugee status, must examine ex officio whether repatriation to the country of origin would not expose the person to a 'real risk of suffering serious harm'. If a foreigner cannot be granted subsidiary protection because there is no risk of 'serious harm' in his or her case, it should be checked whether he or she meets the criteria for a tolerated stay permit.[26] This solution provides a broad scope for international protection that may be granted to foreigners in Poland.

Asylum is another form of international protection. It is based on Article 56.1 of the Constitution of the Republic of Poland. Foreigners may exercise this right based on the principles set out in national legislation, Article 90 of the Act on granting protection to foreigners. It can be granted (on the basis of an administrative decision) when it is necessary to provide protection to a foreigner. Owing to the discretionary nature of asylum, it has minor practical significance as a form of international protection for foreigners.[27] The strict distinction between asylum and refugee status and the introduction of this separate legal institution into domestic law is a peculiarity of Polish law.[28]

The Act on granting protection to foreigners contains provisions concerning temporary protection,[29] however, its application requires a decision by the Union

23 | Chlebny, 2006, p. 53; the CJEU in case C-391/16, C-77/17, C-78/17.
24 | Judgment of the Provincial Administrative Court, V SA/Wa 91/11.
25 | The CJEU of 8.05.2014 in case C-604/12.
26 | Mikołajczyk, 2008, pp. 38, 48.
27 | Judgment of the Provincial Administrative Court, V SA/Wa 2289/07.
28 | Kowalski, 2016.
29 | Articles 106–118a.

authorities.[30] Temporary protection may be granted to foreigners arriving in large numbers in the Republic of Poland who have left their country of origin or a specific geographical area because of invasion, civil war, ethnic conflict, or gross human rights violations. Temporary protection, for no longer than one year, is granted until it becomes possible for foreigners to return to their previous place of residence. Thereafter, it can be extended for a further six months, but not more than twice. The Head of the Office for Foreigners may refuse to grant temporary protection in case of specific behaviour of foreigners, such as the suspicion of committing a crime against peace, war crime, crime against humanity, or acts contrary to the purposes and principles of the United Nations. Such a refusal to grant temporary protection is resolved through a final decision.[31]

A permit for residence for humanitarian reasons[32] can be granted in several situations: the threat to foreigners' right to life, liberty, and security when returning to their country of origin – it concerns a real threat to the freedoms and rights; the mere possibility is insufficient.[33] the risk of being subjected to torture, inhumanity, degrading treatment, or punishment – the rationale for exposing a foreigner to degrading treatment can be justified by the state of his or her health, but only on the condition that it is demonstrated that the foreigner will not be able to count on basic medical care in his or her country of origin;[34] the threat of forced work; the deprivation of the right to a fair trial or punishment without a legal basis; violation of the right to family, private life – the Polish courts have considered 'family life' to be a state that determines the intensity of ties (of an emotional, social, economic, biological nature),[35] and children's rights. It is noteworthy that the grounds for granting a residence permit for humanitarian reasons overlap significantly with the grounds for granting refugee status and subsidiary protection.[36] A residential permit on humanitarian grounds may be denied in the case of a crime committed against peace, war, or humanity, and in the case of crimes committed in Poland or outside when an act constitutes a crime under Polish law or constitutes a threat to state defence, security, or the protection of public security and order. As a result of the prerequisites set out above, refusal to grant a foreigner a residence permit for humanitarian reasons constitutes an obligation of an appropriate administrative authority.[37] In deciding whether to refuse residence on humanitarian grounds to persons who pose such a threat, the seriousness and frequency of the offences

30 | Chlebny, 2021.
31 | Chlebny, 2013, pp. 21–40.
32 | Articles 348–350 of the Act on foreigners.
33 | Judgment of the Supreme Administrative Court, II OSK 990/16, judgment of the Provincial Administrative Court, IV SA/Wa 2634/16, judgment of the Supreme Administrative Court, II OSK 889/17.
34 | Judgment of the Supreme Administrative Court, II OSK 257/18, and judgment of the Provincial Administrative Court, IV SA/Wa.
35 | Judgment of the Provincial Administrative Court, IV SA/Wa 3068/16; judgment of the Provincial Administrative Court, IV SA/Wa 3278/16; judgment of the Supreme Administrative Court, II OSK 1902/18.
36 | Kumela-Romańska, 2022.
37 | Judgment of the Supreme Administrative Court, II OSK 362/17.

committed by foreigners are considered.[38] Such a permit may be withdrawn if the circumstances under which it was granted have ceased or changed in such a way that the permit is no longer required. Moreover, it covers situations where foreigners have concealed information or documents, presented false information or documents, or have left Poland.

If there are circumstances to refuse a residence permit on humanitarian grounds, foreigners may also be granted a tolerated stay permit,[39] such as if a return is to a country where the right to life, liberty, and security would be threatened; or if there would be a threat of torture, inhuman, or degrading treatment or punishment; if foreigners could be forced to work, deprived of the right to a fair trial, or punished without legal grounds. However, it can be refused if it constitutes a threat to state defence, security, or the protection of public security and order, and may be withdrawn when the reason for granting the permit ceases to exist or when foreigners have left Poland.

Russia's armed attack on Ukraine on 24 February 2022 caused many Ukrainians to seek international protection from the war in Poland. The situation of Ukrainian nationals varies depending on the years in which the refugee procedure was conducted. In 2016, applications from Ukrainian nationals who were neither from Crimea, occupied by the Russian Federation, nor from the Donetsk or Lugansk regions met neither the conditions for refugee status nor subsidiary protection. There was no risk of persecution on any of the grounds required by the refugee definition. According to Article 18.1 of the Act on granting protection to foreigners: '[i]f there are no circumstances in a part of the territory of the country of origin which justify the fear of persecution or of suffering serious harm and there is a reasonable expectation that the foreigner will be able to move and reside safely and legally in that part of the territory, it shall be considered that there is no well-founded fear of persecution or an actual risk of suffering serious harm in the country of origin'. Applications of this type were often submitted by persons who were already illegally residing in Poland and sought to obtain a basis for residence through the refugee procedure. In doing so, they cited the precarious situation in Ukraine and the generally raised fear of war, including fear of being drafted into the army and possibly participating in the conflict in eastern Ukraine. Applications from persons from the eastern regions of Ukraine were considered to meet the prerequisite for granting subsidiary protection under Article 15.3 of the Act on granting protection to foreigners, because of the threat of serious harm from a serious and individualised threat to life or health resulting from the widespread use of violence against the civilian population in a situation of international or internal armed conflict. However, the applications of Ukrainian nationals originating from Crimea, as a rule, met the prerequisites for granting refugee status.[40] The same applies to Ukrainians fleeing hostility from February 2022 onwards.

38 | Judgment of the Supreme Administrative Court, II OSK 1902/18.
39 | Articles 351–353 of the Act on foreigners.
40 | Kowalski, 2016, p. 110.

4. Procedure for granting international protection

The decision to grant or refuse international protection (i.e. granting or refusing refugee status or subsidiary protection and revoking refugee status or subsidiary protection) is taken by the Head of the Office for Foreigners.[41] The application for granting international protection is submitted by a foreigner to the Head of the Office for Foreigners through the commanding officer of the Border Guard division or the commanding officer of the Border Guard post. The same procedure is applied to foreigners staying in a guarded centre, detention centre for foreigners, detention centre, or penitentiary institution.[42]

An application for international protection can be submitted directly by a foreigner or indirectly, on behalf of persons accompanying him or her and dependent on him or her for economic, health, or age reasons, that is, the spouse and minor children, provided they are not married (including a child born during the proceedings). This application is to be submitted in a special form containing the following data provided by Article 26 of the Act on granting protection to foreigners. The application form is contained in the Ordinance of the Minister of Interior and Administration of 27 May 2008 on the specimen form of the application for granting the refugee status:[43]

1. name(s) and surname in the mother tongue, information about the last place of residence and place of work in the country of origin, military service in the country of origin and knowledge of languages;
2. indication of the language in which the applicant wishes the interview to be conducted during the procedure for granting international protection;
3. identification of the persons on behalf of whom the applicant is making the application;
4. name(s) and surname in the mother tongue of the spouse, information about the identity documents held by the spouse and knowledge of languages;
5. data of a minor child on behalf of whom the applicant is making the application, that is, the spouse's name, surname and surname in the applicant's mother tongue. Name (s) and surname, date of birth, gender, and parents' names;
6. spouse's declaration of consent to submit the application on his/her behalf or his/her minor child;
7. information on departure from the country of origin, including information on leaving the country of origin in the last 5 years and visas or residence permits in another country issued to the applicant and the person on behalf of whom the applicant is applying;
8. information on entry and stay in the territory of the Republic of Poland, including information on the place of residence and address for correspondence in the territory of the Republic of Poland, as well as on decisions issued

41 | Article 23 of the Act on granting protection to foreigners.
42 | Article 24 of the Act on granting protection to foreigners.
43 | Journal of Laws No. 92, item 579.

against the applicant obliging him/her to return to the country of origin from the territory of the Republic of Poland or another Member State;
9. information on the state of health of the applicant and the person on behalf of whom the applicant is applying, as well as the violence they have suffered;
10. outline the reasons for applying for international protection, including information on detention, arrest, ongoing criminal proceedings and court decisions rendered in relation to the applicant or a member of his/her family in a country other than the Republic of Poland;
11. information on previous applications for granting international protection by the applicant or a member of his/her family in the Republic of Poland or another country;
12. information on criminal proceedings conducted against the applicant and the person on behalf of whom the applicant is acting, in the Republic of Poland;
13. data of the member of the applicant's family who resides in the territory of the Republic of Poland or another Member State, that is, forename(s) and surname, date and place of birth, address of residence, degree of relationship, and legal title to stay;
14. specimen of the applicant's signature.

Any data on which the authority assesses factual findings concerning the applicant must be updated. Therefore, it is of the utmost importance to conduct supplementary evidence procedures. The evidence of the applicant's interview is crucial, without which the authority will not be able to assess whether the foreigner's return to the country of origin will pose a risk for the foreigner.[44] The Act on granting protection to foreigners introduces a model of a single, consolidated procedure in cases of granting refugee status. This means that the authority in a single procedure decides whether to grant protection to the foreigner and in what form, or whether to rule on his or her expulsion. If the foreigner does not meet the prerequisites for granting refugee status, the authority determines whether the applicant may benefit from subsidiary protection and subsequently from a permit for tolerated stay.[45] Among the most frequent reasons undermining the assessment of the credibility of the applicant for international protection were such factors as: lack of any knowledge about the organisation of which the applicant was alleged to be an active member and in which membership was supposed to be the reason for his or her persecution, inconsistency in the explanations provided, application for refugee status in connection with the threat of expulsion only after an illegal stay in Poland, or confronted with information obtained through Polish diplomatic missions.[46]

According to Article 28 of the Act on granting protection to foreigners, the acceptance of the application for international protection and its registration

44 | Chlebny, 2010, pp. 42–58.
45 | Chlebny, 2010, pp. 42–58.
46 | Judgments of the Supreme Administrative Court: II OSK 908/09, II OSK 908/09, II OSK 941/07 or II OSK 1325/07.

should occur immediately, but no later than three working days from the date of acceptance of the declaration of the intention to file such an application. In the case of a mass influx of foreigners, this period is extended to ten working days. The declaration of intention to submit an application for international protection is registered by the Border Guard authority in a special register referred to in Article 119.1 Point 1 of the Act. The Head of the Office for Foreigners may leave an application for international protection unprocessed under the following situations: when it does not contain the name of the applicant or the country of origin, and these deficiencies could not be remedied, and when the application was submitted by a foreigner apprehended immediately after illegally crossing the external border of the EU.[47] An exception is made for foreigners who have come directly from a territory where their life or freedom was threatened by the danger of persecution or the risk of serious harm and who have presented credible reasons for illegal entry into the territory of the Republic of Poland and have applied for international protection immediately after crossing the border.[48] The last case is presented in more detail later in section five of the article.

By the Act of 9 March 2023 amending the Act on foreigners and certain other acts,[49] changes have been made to the competences previously conferred on the Head of the Office for Foreigners. Some of them, that is, with regard to decisions concerning residence, return, expulsion, and transfer, were transferred to the Commander-in-Chief of the Border Guard as a higher-ranking authority in relation to commanders of Border Guard divisions and posts. Simultaneously, the performance of tasks related to granting and organising assistance to foreigners in voluntary return and assistance in transferring a foreigner to another country responsible for examining an application for international protection has been concentrated in the hands of the Commander-in-Chief of the Border Guard. The amendment also brings national law in accordance with EU changes to the Schengen Information System (SIS), which aimed to streamline the process of returning illegally staying third-country nationals to their home countries and improve border checks.

5. Decisions on turning back to the state border line

From the moment international protection is applied, the foreigner is entitled to remain in Poland. However, if it is assumed that the applicant did not declare to the Border Guard officers his or her intention to apply for such protection, their obligation is to conduct a control of the legality of the applicant’s stay in Poland. The scope of the procedure for the formal and immediate return of migrants who have crossed or attempted to cross the border in violation of the law was extended based

47 | Article 33 of the Act on granting protection to foreigners.
48 | Act on granting protection to foreigners, Article 33.1a.
49 | Journal of Laws 2023, item 547.

on an amendment to the Act on Foreigners adopted on 14 October 2021.[50] On this basis, a case in which a foreigner has been apprehended immediately after illegally crossing the external border of the EU is an additional exception to the principle of conducting proceedings to oblige a foreigner to return.[51] In such a situation, the commanding officer of the Border Guard post with jurisdiction over the place where the border was crossed draws up a report on crossing the border and issues an order to leave Poland. An appeal against such a decision may be presented to the Commander-in-Chief of the Border Guard, however, it does not suspend the execution of the decision. In the previous legal order, a specific return procedure was in force, which made it possible to remove a foreigner from Poland only based on a decision obliging the foreigner to return, issued by the Commander of the Border Guard post. Such a decision could be appealed against by presenting the appeal to the Head of the Office for Foreigners. This legal order has changed in a specific factual situation related to the massive influx of foreigners into the territory of the EU in 2015 and 2016.[52]

Submitting an application for international protection will be a challenge for foreigners in the conditions of crossing the state border in the aforementioned situation. This issue has been addressed by the ECtHR in its various judgments. This is because they explicitly protect the rights of foreigners who wish to apply for refugee status. In all cases of expulsion, there is a risk that they will be deprived of access to an adequate asylum procedure, and that compliance with the principle of non-refoulement will be undermined.[53] Applicants for international protection should be allowed to remain in the country pending examination of their applications.[54] Moreover, such a declaration may be lodged in the territory of a given state, at the border, or in a transit zone, and may not be subject to additional administrative formalities.[55] In its case law, the ECtHR also refers to the use of detention for migrants. Therefore, it should not be applied to children or families with children. Unfortunately, neglecting the best interests of the child continues to be a practical problem of human rights violations along Poland's eastern border.[56] These conclusions could also be applied to pushbacks because they are more severe for both the physical and mental health of children, not to mention respect for their dignity.

Before the aforementioned novelisation, the practice of pushbacks was sanctioned by the ordinance of the Minister of the Interior and Administration on 21 August 2021. The ordinance granted the Border Guard the competence to return persons who crossed the border irregularly to the state border. According to the Polish courts, the Minister of Internal Affairs and Administration could limit or suspend border traffic at border crossing points by means of an ordinance. However, this should not apply to foreigners who crossed the border outside any

50 | Journal of Laws 2021, item 352.
51 | Article 303.1 Point 9a of the Act on foreigners.
52 | Kumela-Romańska, 2022, p. 128.
53 | Judgment of the ECtHR, *D.A. and Others v. Poland*.
54 | Judgment of the ECtHR of 23.07.2020, *M.K. and Others v. Poland*.
55 | Judgment of the CJEU in Case C-808/18.
56 | Judgment of the ECtHR Bistieva and others v. Poland, Kosińska; 2019, pp. 129–139; Kosińska, 2021, p. 75.

border crossing point.[57] A new form of administrative act has been introduced – an order to leave Poland, issued by the commanding officer of the Border Guard post to a foreigner 'apprehended immediately after crossing the border in violation of the law'. A ban on re-entry to Poland and other countries in the Schengen area for six months to three years can also be applied to such foreigners. What deserves criticism is that the Border Guard does not collect any data on foreign nationals' situations, including personal data, country of origin, reasons for leaving the country, or foreigners' intentions to apply for international protection in Poland.[58] This may raise doubts regarding the correct application of the principle of non-refoulment. Its application should aim to strike the right balance between the need to protect state borders and respect the rights of foreigners under international and EU law binding on Poland. Furthermore, it requires an examination of the facts in each individual case and prohibits the denial of protection in the absence of such a review. Under no circumstances may this activity be waived in the event of a mass influx of migrants requiring protection.[59] Furthermore, all applicants should be provided with food, water, clothing, adequate medical care, and, if possible, temporary shelter by the appropriate national authorities.[60] Such necessary assistance may also be provided by international organisations and civil society actors; however, in Poland, it was hampered by the state of emergency imposed in the border area on the basis of Ordinance of the President of the Republic of Poland of 2.08.2021 on the imposition of a state of emergency in the area of a part of the Podlaskie province and a part of the Lubelskie province.[61]

The commanding officer of the Border Guard post with jurisdiction over the place where the border was illegally crossed draws up a record of its crossing and issues a decision to leave Poland. An appeal against such a decision may be presented to the Commander-in-Chief of the Border Guard, however, does not suspend the execution of the decision. This does not appear to be a suitable solution, considering the verification of such decision correctness and the possibility of violating the conditions of international protection.[62] According to § 3.2b of the aforementioned Border Ordinance, if persons referred to in Paragraph 2a (i.e. persons not belonging to those listed in Paragraph 2 are detected at a border crossing point where border traffic has been suspended or restricted and outside the territorial scope of the border crossing point, they are to be turned back to the state border line. The catalogue contained in Paragraph 2a includes the following persons: 1) citizens of the Republic of Poland; 2) foreigners who are the spouses or children of citizens of the Republic of Poland or are under the permanent guardianship of citizens of the Republic of Poland; 3) foreigners who hold the Card

57 | Order of the District Court in Bielsk Podlaski, VII Kp 203/21.
58 | *Opinion of the Polish Ombudsman*, 2023.
59 | Lauterpacht and Bethlehem, 2004, pp. 118–119; Goodwin-Gill, McAdam and Dunlop, 2021, pp. 241–345; Łubiński, 2022, p. 50.
60 | Judgment of the ECtHR, *Amiri and Others v. Poland*.
61 | Journal of Laws of 2021, item 1612; Zdanowicz, 2023, pp. 109–112, 'Poland's border with Belarus: Commissioner calls for immediate access of international and national human rights actors and media, 2021.
62 | Grześkowiak, 2023, p. 20; Rogala, 2021, p. 16.

of the Pole and their spouses; 4) members of diplomatic missions, consular posts and representatives of international organisations and members of their families and other persons crossing the border of the Republic of Poland on the basis of a diplomatic passport; 5) foreigners possessing the right of permanent or temporary residence in the territory of the Republic of Poland; 6) foreigners possessing the right to work in the territory of the Republic of Poland; 7) foreigners who drive a means of transport for the carriage of persons or goods, and their journey occurs within the framework of professional activities involving the transport of goods or the carriage of persons; 8) drivers performing road transport as part of international road transport or international combined transport; 9) school pupils studying in the Republic of Poland, after documenting to a Border Guard officer that they are studying in the Republic of Poland, and their guardians who cross the border together with the pupils to participate in such studies; 10) citizens of the Member States of the EU, the Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation, and their spouses and their children; 11) foreigners holding a permanent or temporary residence permit or a residence permit for a long-term resident of the EU; 12) students, participants of postgraduate studies, specialist training and other forms of education, as well as doctoral students studying in the Republic of Poland; 13) scientists conducting research or development work in the Republic of Poland; 14) persons crossing the border of the Republic of Poland based on a national visa for the purpose of repatriation or a visa for the purpose of arrival in the territory of the Republic of Poland as a member of the repatriate's closest family; 15) foreigners whose arrival occurs in connection with participation, as a competitor, a member of the training staff, a doctor, a physiotherapist or a referee, in international sports competitions organised on the territory of the Republic of Poland; 16) foreigners crossing the border of the Republic of Poland based on a visa issued for humanitarian reasons; 17) citizens of the Republic of Belarus; 18) citizens of Ukraine; 19) fishermen; 20) foreigners who have obtained a visa to participate in the Poland programme, Business Harbour programme; 21) foreigners arriving to the Republic of Poland for business purposes upon a written invitation stating the business purpose, issued by a competent entity; 22) citizens of the United Kingdom of Great Britain and Northern Ireland and their spouses and children; 23) persons whose arrival occurs in connection with their participation in an international competition or music festival organised on the territory of the Republic of Poland by a state or local government cultural institution; 24) participants of Erasmus+ and European Solidarity Corps projects. This provision was the subject of several judgments before provincial administrative courts on the issue of pushbacks made to the eastern border of Poland. Courts generally refused to prioritise the ordinance provisions of the Act on granting protection to foreigners — where the applicant declares seeking international protection and the Act on foreigners — in the event that there is no such declaration.[63] Once the Border Guard officers discovered that the complainant had illegally crossed the Polish border, they either

63 | The Provincial Administrative Court in Białystok, II SA/Bk 244/23, II SA/Bk 145/23, II SA/Bk 493/22, II SA/Bk 494/22, II SA/Bk 492/22.

enable the complainant to formally submit an application for international protection as soon as possible, initiate proceedings obliging the complainant to return, or apply the procedure under Article 303b of the Act on foreigners. The automaticity resulting from Article 303b of the Act on foreigners in issuing and executing decisions on leaving Poland, together with the withdrawal from the assessment of the foreigner's individual situation violates the prohibition of collective expulsion of foreigners.[64] In this case foreigners were forced to leave Poland and cross to the Belarus side of the border. The authority did not provide them any opportunity to present their arguments against turning back to Belarus. Nor did it examine the factual and legal situation of these persons. It did not even establish whether the foreigners had any legal title to stay in Belarus, to which they were turned back. In situations where foreigners have not been apprehended immediately after crossing the border, the procedure under Article 302.1 Point 10 of the Act on foreigners should be applied, which excludes the application of the procedure under Article 303b, Point 1, in conjunction with Article 303.1 Point 9a.[65]

To sum up, the aforementioned provision of § 3.2b of the Border Ordinance allows for arbitrary and forced return of a foreigner to the state border line what in practice results in 'automatic' removal from Poland. It excludes prior implementation of the appropriate procedures provided by the Act on foreigners or the Act on granting protection to foreigners, and thus violates the principle of non-refoulement; therefore, it should not be applied. It remains in conflict with the norms of statutory rank as well as with Article 56.1, of the Constitution of the Republic of Poland, which guarantees foreigners the exercise of their right to asylum in Poland. Applicants' removal from Poland has the practical effect of preventing applications for international protection and, ultimately, potentially exposing them to danger.[66]

6. Readmission agreements and its importance in migration crisis

Readmission means the transfer by the Requesting State and admission by the Requested State of persons (own nationals of the Requested State, third-country nationals or stateless persons) who have been proven to have entered, stayed or resided illegally in the territory of the Requesting State. Thus, the primary purpose of readmission is to facilitate the return or admission of persons residing in the territory of a particular state without the required documents.[67] It was used as one of the EU's answers to the mass influx of irregular migrants in 2015/2016 – apart from deterrence response through building of fences at external EU borders,

64 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk.
65 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk 492/22.
66 | Judgment of the Provincial Administrative Court in Białystok, II SA/Bk 145/23.
67 | Zdanowicz, 2011, p. 140.

a responsibility shifting to external partners – Turkey, in this case, has also been applied. The EU-Turkey statement of 18 March 2016 should be mentioned here to stop the flow of irregular migration from Turkey to Europe.[68] Turkey pledged to accept the return of all Syrian nationals who were able to enter Greece without a visa or permit. However, the EU has committed to resettle as many Syrians as will be sent back to Turkey. However, the broad personal scope of this agreement has proven controversial, because it includes Syrian nationals who sought asylum in Greece.[69]

Readmission procedures in Poland are determined by Polish migration laws and international readmission agreements to which Poland is a party. The stages of the procedure are as follows. The first step involves identifying the concerned person. When a person suspected of illegally crossing a border is apprehended by border services or law enforcement authorities, an identification process is conducted to establish his or her identity and country of origin. After this identification, Polish authorities may contact the country to which the person is obliged to return in accordance with the readmission agreements. In the next step, an application for readmission containing information about the person and evidence of illegal border crossing is submitted. If the readmission application is accepted, the person is transferred. Throughout the process of transferring a person to the home country, relevant legal procedures are followed, including ensuring the right to appeal, protection from violence or inhuman treatment, and respect for human rights.

Poland has signed approximately 30 readmission agreements governing the return of foreigners who illegally crossed the border. These include the following countries (with the date of signing of the agreement): Austria (10 June 2002), Bulgaria (24 August 1993), Croatia (8 November 1994), the Czech Republic (10 May 1993), Greece (21 November 1994), Hungary (25 November 1994), Ireland (12 May 2001), Lithuania (13 July 1998), Latvia (29 March 2006), Macedonia (15 November 1994), Moldova (15 November 1994), Romania (24 July 1994), Slovakia (8 July 1993), Slovenia (28 August 1996), Spain (21 May 2002), Sweden (1 September 1998), Switzerland (19 September 2005), Ukraine (24 May 1993), Vietnam (22 April 2004). Poland is also a party to readmission agreements with third countries concluded at Union level. These include the following countries: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, the Macao Special Administrative Region of the People's Republic of China, Macedonia, Montenegro, Moldova, Pakistan, Russian Federation, Serbia, Sri Lanka, Turkey, Ukraine.

The third countries with which Poland cooperates most frequently in the implementation of readmission agreements include Ukraine, Russia, Moldova, Pakistan, and Georgia. The implementation of these agreements (based on the relevant implementation protocols) has generally been smooth, that is, the number of readmission applications has been matched by the number of readmission authorisations. Third countries with sporadic cooperation in the implementation of readmission agreements include Sri Lanka, Albania, Montenegro, Macedonia,

68 | European Council Press Release No. 144/16.
69 | Karageorgiou and Noll, 2022, p. 14; Menéndez, 2016, pp. 402, 409–412.

Serbia, Bosnia and Herzegovina, Hong Kong, and Macau (figures for 2000).[70] In 2016, almost 20,000 foreigners were transferred from Poland to other countries under readmission and other agreements and arrangements (more than 13,000 the year before). In turn, 1,583 people were transferred to Poland (1,074 the year before).

EU readmission agreements in facilitating effective returns are significant. They systemise the rules and deadlines for the confirmation of identity and transfer of third-country nationals to their country of origin, particularly with regard to third countries with which Poland has not cooperated or had problems in the past. Furthermore, the aforementioned agreements establish direct contact with the authorities responsible for implementing the agreements in question. Before the application of readmission agreements, such as in Georgia, Pakistan, and Sri Lanka, the efficiency of confirming identity and obtaining replacement travel documents was low. Cooperation in the aforementioned area occurred through diplomatic representation, which was not obliged by deadlines to respond to enquiries submitted by the Border Guard.[71]

In connection with the migration crisis in the Polish-Belarusian section of the state border, the Border Guard noted a change in the profile of illegal migration. So far, the largest number of foreigners to whom the Border Guard issued a return decision were foreigners coming primarily from the countries of the former USSR (Ukraine, Belarus, Russia, Georgia, Moldova) and Vietnam. In 2021, there was an increase in the number of return decisions concerning citizens of Iraq (2021 – 1357 persons, 2020 – 22 persons) and Afghanistan (2021 – 253 persons, 2020 – 44 persons). In 2021, cooperation with Iraq on identification and forced returns was among the most problematic because of the large-scale of the phenomenon and the lack of consent from Iraqi authorities for the implementation of involuntary returns. The Iraqi Embassy in Warsaw received 427 requests for identification of Iraqi citizens and issuance of a replacement travel document for return to their country of origin – 227 requests went unanswered. Only 20 travel documents on returning to the country of origin were issued. Approximately 70% of all foreigners detained in guarded centres are Iraqi nationals.[72]

7. Latest statistics on irregular migration in Poland

From 1 August 2021 to 18 July 2022 officers of the State Border Guard in Bialystok accepted 44 applications for international protection in Poland owing to illegal border crossings. Many foreigners who illegally entered Poland (exceptions are a minority of cases) travel to Western Europe and thus do not seek protection in Poland.[73] By 31 December 2021 almost 6,000 foreigners were under the care of the

70 | Practical aspects of reducing irregular migration in Poland, 2011.
71 | Entry bans and readmission, 2014.
72 | European Migration Network Annual Report, 2021.
73 | Judgment of the WSA in Białystok of 27.10.2022, II SA/Bk 558/22.

Head of the Office for Foreigners (2,800 more than a year earlier), and the largest number of applicants were Belarusians – 2,257, Afghans – 1,781 (991 evacuees), Iraqis – 1400, Russians – 987, and Ukrainians – 261. Of these, 18% lived in one of the centres for foreigners, and the remaining 82% received a cash benefit for independent functioning.[74]

On 4 January 2022 the Polish Border Guard reported that 39,670 attempts to illegally cross the Polish-Belarusian border were recorded in 2021. By comparison, 129 such attempts were made in 2020, 20 in 2019 and only 4 in 2018.[75] In the first half of 2022, 5.1 thousand foreigners applied for refugee status in Poland (the largest number of applications for international protection were submitted by nationals of Belarus – 1.5 thousand, Ukraine – 1.2 thousand, Russia – 0.8 thousand, Iraq – 0.5 thousand, Afghanistan – 0.2 thousand persons). International protection was granted to 2.3 thousand persons (they were mostly citizens of Belarus – 2.1 thousand, Afghanistan – 50, Ukraine – 40), negative decisions were given to almost 0.8 thousand foreigners (the most numerous groups were citizens of Russia – 330, Iraq – 280, Tajikistan – 50 persons), and 2.4 thousand proceedings were discontinued (primarily concerning citizens of Iraq – 950, Afghanistan – 390, Ukraine – 320 people.[76]

In February 2023, the number of irregular crossings of the Polish-Belarusian border decreased significantly compared with that in autumn of 2021. By 2022, 9.9 thousand foreigners applied for international protection in Poland. These were mostly citizens of Belarus – 3.1 thousand, Russia – 2.2 thousand, Ukraine – 1.8 thousand, Iraq – 0.6 thousand and Afghanistan – 0.4 thousand persons). The number of applications submitted was approximately 28% higher than that in 2021.[77] The Border Guard reported 29 attempts to illegally cross the border on 5 February 2023, 31 such attempts on 4 February 2023 and 55 attempts on 3 February 2023. The number of people who actually crossed the border and the percentage of those who avoided detention by Polish border guards remain unknown, although it is known that not all of these crossings are reflected in Border Guard statistics, and some migrants manage to reach Germany and further west through Poland.[78]

In comparison with earlier years, one can observe changes in this respect. Based on statistical data concerning the number of foreigners detained in Poland in connection with their illegal stays, it may be inferred that between 2008 and 2010, the number decreased from 5,430 in 2008 to 4,005 in 2010. Simultaneously,

74 | European Migration Network Annual Report, 2021.

75 | Data available at: https://twitter.com/Straz_Graniczna/status/1478327785903038469?t=k2VdF_GmykZQBEunvENA9g&s=19 (Accessed: 24 June 2023).

76 | Data available at: https://twitter.com/Straz_Graniczna/status/1478327785903038469?t=k2VdF_GmykZQBEunvENA9g&s=19 (Accessed: 24 June 2023).

77 | Ochrona międzynarodowa w 2022 r. – ponad dwukrotny wzrost rozpatrzonych wniosków [Online]. Available at: https://web.archive.org/web/20230604134047/https://udsc.prowly.com/224477-ochrona-miedzynarodowa-w-2022-r-ponad-dwukrotny-wzrost-rozpatrzonych-wnioskow (Accessed: 24 June 2023).

78 | Ochrona międzynarodowa w 2022 r. – ponad dwukrotny wzrost rozpatrzonych wniosków [Online]. Available at: https://udsc.prowly.com/224477-ochrona-miedzynarodowa-w-2022-r-ponad-dwukrotny-wzrost-rozpatrzonych-wnioskow (Accessed: 24 June 2023).

the total number of foreigners actually expelled from the territory of the country remained at a similar level: 6,945 in 2009 (including 573 under forced return), and 6,768 in 2010)[79] The factors most responsible for the increase in the number of applicants for international protection in Poland in 2021 were political emigration from Belarus, the evacuation of nearly a thousand Afghans from Kabul because of the return to power of the Taliban, and the increase in illegal immigration, primarily from Iraq, as a result of Belarusian authorities creating an artificial migration route to Poland and other EU countries.[80]

8. Conclusion

The migration crisis, which began in 2015 and continues to this day, poses a significant challenge for both the EU and its individual Member States. Those whose borders also form the external borders of the EU face a special situation, such as Poland, with its eastern border simultaneously being the external border of the Union. Foreigners in Poland may apply for different types of international protection, such as refugee status, subsidiary protection, asylum and temporary stay, permits for humanitarian reasons, and permits for tolerated stay.

The increased migratory movement at the eastern borders of the Republic of Poland, which began in 2021, was a direct cause of the changes introduced in Polish legislation concerning foreigners, with the primary aim of protecting the borders from a massive influx of illegal migrants. Unfortunately, a balance between simultaneously providing protection for foreigners has not been established. The possibility of returning migrants apprehended immediately after crossing the border in violation of the law is a notable example. The limited possibility for such foreigners to apply for international protection raises serious questions about its compatibility with international and EU legal orders; however, it remains applicable. Therefore, statutory procedures for the international protection of foreigners should be applied here instead of the regulations provided in the Border Ordinance. Collecting relevant data from foreigners applying for international protection in exchange for returning them to the border without such an activity would undoubtedly contribute to strengthening compliance with the principle of non-refoulement.

Considering the practice of returning irregular migrants to state borders, the importance of readmission agreements and effective implementation of their provisions appears to be significant. Readmission procedures in Poland are determined by Polish migration laws and international readmission agreements to which Poland is a party. These take form of bilateral agreements and those adopted within the EU framework. The added value of the latter is important, particularly because it systemises the rules and deadlines for the confirmation of the identity and transfer of third-country nationals to their country of origin. This

79 | Practical aspects, 2011.
80 | Raport Roczny ESM, 2021.

is particularly important with regard to third countries with which Poland has not cooperated or has problems connected with this cooperation. The one between the sending and receiving countries is of the most importance, considering that the readmission application must be accepted by the latter; for example, poor cooperation with the Iraqi authorities regarding the implementation of migrant returns in 2021.

The latest statistics on irregular migration remain high, which is unlikely to change in the coming years. The reason for migrants seeking protection may not be simply warfare, as in the case of Ukraine, but insufficient vital resources in the form of water or food shortages, which are gradually disappearing because of a constantly deteriorating environment. The international community's commitment to the principle of non-refoulment excludes the possibility of migrants being transferred to a dangerous country, which is also called a country that does not provide livelihoods. Therefore, it is necessary to strengthen international cooperation and develop mechanisms that will help reduce the causes of migration and assist those who have become victims. Therefore, the activity of developing new proposals for action currently being discussed in the framework of the EU migration policy is welcomed.

Bibliography

Chlebny, J. (2006) 'Ustalanie okoliczności faktycznych w sprawie o udzielenie cudzoziemcowi ochrony', *Zeszyty Naukowe Sądownictwa Administracyjnego,* 2006/5, pp. 52–63.

Chlebny, J. (2010) 'Dowód z przesłuchania strony w postępowaniu o nadanie statusu uchodźcy', *Zeszyty Naukowe Sądownictwa Administracyjnego,* 2010/5-6, pp. 42–58.

Chlebny, J. (2013) 'Ochrona tymczasowa przed wydaleniem cudzoziemca', *Zeszyty Naukowe Sądownictwa Administracyjnego,* 2013/6, pp. 21–40.

Chlebny, J. (2021) 'Postępowanie w sprawie udzielenia cudzoziemcom ochrony' in Matan, A., Łaszczyca, G. (eds.) *System Prawa Administracyjnego Procesowego. Tom IV. Postępowania autonomiczne i szczególne. Postępowania niejurysdykcyjne*. Warszawa: Wolters Kluwer, pp. 601–610.

Council of Europe (2021) 'Poland's border with Belarus: Commissioner calls for immediate access of international and national human rights actors and media', *Council of Europe Newsletter on migration and refugees,* November 2021 [Online]. Available at: https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-november-2021 (Accessed: 20 October 2023).

European Migration Network (2014) *Entry bans and readmission. Poland's entry bans policy and use of readmission agreements. Report produced by the National Contact Point to the European Migration Network in Poland*. Warsaw: Ministry of the Interior – Migration Policy Department.

European Migration Network (2021) *EMN Annual Report on Migration and Asylum. Part 2, Poland 2021.* Warsaw: Ministry of the Interior – Migration Policy Department.

European Migration Network (2022) *Raport Roczny ESM dot. migracji i azylu, część 2, Polska 2021 r.* Warsaw: Ministry of the Interior – Migration Policy Department.

Goodwin-Gill, G. S., McAdam, J., Dunlop, E. (2021) *The Refugee in International Law.* Oxford: Oxford University Press; https://doi.10.1093/law/9780199207633.001.0001.

Grześkowiak, M. (2023) 'Od aktywizmu do "polityki przyzwolenia". Komisja Europejska wobec nieregularnej migracji w latach 2015–2021 ze szczególnym uwzględnieniem kryzysu humanitarnego na granicy polsko-białoruskiej', *Państwo i Prawo,* 2023/3, pp. 21–47.

Karageorgiou, E., Noll, G. (2022) 'What Is Wrong with Solidarity in EU Asylum and Migration Law?', *Jus Cogens*, 4(2), pp. 131–154; https://doi.10.1007/s42439-022-00059-4.

Kosińska, A. M. (2019) 'Case of Bistieva and others v. Poland', *Polish Review of International and European Law,* 8(2), pp. 129–139; https://doi.org/10.21697/priel.2019.8.2.06.

Kosińska, A. M. (2021) 'Legal Responses in the Area of Migration Security after 2015 Migration Crisis in Italy, Germany and Poland. Whose Security Does National Law Protect: Migrants or Citizens?', *Journal of Human Security*, 17(1), pp. 66–79; https://doi.org/10.12924/johs2021.17010066.

Kowalski, M. (2016) 'Konflikt na Ukrainie a praktyka udzielania ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej' in Pudzianowska, D. (eds.) *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*. 1st edn. Warszawa: Wolters Kluwer, pp. 96–116.

Kumela-Romańska, M. (2022) *Ustawa o cudzoziemcach. Komentarz, wyd. II*. Wolters Kluwer.

Lauterpacht, E., Bethlehem, D. (2003) 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*. Cambridge: Cambridge University Press, pp. 87–177; https://doi.org/10.1017/CBO9780511493973.008.

Łubiński, P. (2002) 'Hybrid Warfare or Hybrid Threat – The Weaponization of Migration as an Example of the Use of Lawfare – Case Study of Poland', *Polish Political Science Yearbook*, 51(1), pp. 43–55; https://doi.org/10.15804/ppsy202209.

Menéndez, A. J. (2016) 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration', *European Law Journal,* 22(4), pp. 388–416; https://doi.org/10.1111/eulj.12192.

Mikołajczyk, B. (2008) 'Nowa forma ochrony udzielanej cudzoziemcom', *Państwo i Prawo,* 2008/10, pp. 34–45.

Rzecznik Praw Obywatelskich (2021) 'Opinion of the Ombudsman to the Senate on the amendment of the Law on foreigners' *Biuletyn Informacji Publicznej RPO,* 5 October [Online]. Available at: https://bip.brpo.gov.pl/pl/content/rpo-cudzoziemcy-wydalanie-opinia-senat (Accessed: 14 May 2023).

Rzecznik Praw Obywatelskich (2023) 'Opinion of the Polish Ombudsman to the European Court of Human Rights', *Biuletyn Informacji Publicznej RPO,* 27 June [Online]. Available at: https://bip.brpo.gov.pl/pl/content/rpo-migranci-pushbacki-etpc-opinia (Accessed: 15 October 2023).

Rogala, R. (2021) 'Prawo cudzoziemca do ubiegania się na granicy o udzielenie ochrony międzynarodowej', *Europejski Przegląd Sądowy,* 2021/11, pp. 11–23.

Safjan, M., Bosek, L. (eds.) (2016) *Konstytucja RP. Tom I*. Warszawa: C.H.Beck.

Spencer, S., Triandafyllidou, A. (2022) 'Irregular Migration' in Scholten, P. (eds.) *Introduction to Migration Studies. An Interactive Guide to the Literatures on Migration and Diversity*. Cham: Springer, pp. 191–207; https://doi.org/10.1007/978-3-030-92377-8_12.

Zdanowicz, M. (2011) 'Readmisja w relacjach Polski i Rosji', *Białostockie Studia Prawnicze,* 2011/9, pp. 131–141; https://doi.org/10.15290/bsp.2011.09.06.

Zdanowicz, M. (2023) 'The Migration Crisis on the Polish-Belarusian Border', *Białostockie Studia Prawnicze,* 28(1), pp. 103–115; https://doi.org/10.15290/bsp.2023.28.01.06.

Legal Sources

Agreement between the Governments of the States of the Benelux Economic Union (1985), the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 15th Jun 1985, *OJ L 239, 22.9.2000*.

Act of 12 December 2013 on foreigners, Journal of Laws 2023, item 519.

Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland, Journal of Laws 2022, item 1264.

Charter of Fundamental Rights of the EU, *OJ C 326, 26.10.2012, pp. 391–407.*

Constitution of the Republic of Poland of 1997, Journal of Laws 1997 No. 78 item 483.

Convention for the Protection of Human Rights and Fundamental Freedoms on 4 November 1950, Journal of Laws 1993 No. 61 item 284 as amended.

Convention relating to the Status of Refugees, done in Geneva on 28 July 1951, Journal of Laws 1991 No. 119 item 115.

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, signed on 19th June 1990, *OJ L 239, 22.9.2000.*

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, pp. 12–23.*

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, *OJ L 348, 24.12.2008, pp. 98–107.*

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, pp. 9–26.*

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, pp. 60–95.*

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, pp. 96–116*.

Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the temporary suspension or restriction of border traffic at certain border crossing points, Journal of Laws 2020, item 435.

Ordinance of the President of the Republic of Poland of 2.08.2021 on the imposition of a state of emergency in the area of a part of the Podlaskie province and a part of the Lubelskie province, Journal of Laws of 2021, item 1612.

Protocol No. 4 to the ECHR on the prohibition of collective expulsion, Journal of Laws 1995 No. 36 item 175.

Protocol relating to the Status of Refugees, done at New York on 31 January 1967, Journal of Laws 1991 No. 119 item 517.

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, pp. 31–59.*

Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, pp. 47–390*.

Jurisprudence

Judgment of the CJEU of 8.05.2014 in case C-604/12, H.N. v Minister for Justice, Equality and Law Reform and Others, ECLI:EU:C:2014:302.

Judgment of the CJEU of 14.052019 in case C-391/16, C-77/17, C-78/17, M v. Ministerstvo vnitra i X i X. przeciwko Commissaire général aux réfugiés et aux apatrides, ECLI:EU:C:2018:486.

Judgment of the CJEU of 17.12.2020 in Case C-808/18, European Commission v. Hungary, ECLI:EU:C:2020:1029.

Judgment of the ECtHR of 10.10.2018, Bistieva and others v. Poland, Appl. No. 75157/14.

Judgment of the ECtHR of 23.07.2020, M.K. and Others v. Poland, Appl. No. 40503/17, 42902/17 and 43643/17.

Judgment of the ECtHR of 8.07.2021, D.A. and Others v. Poland, Appl. No. 51246/17.

Judgment of the ECtHR of 25.08.2021, Amiri and Others v. Poland, Appl. No. 42120/21.

Judgment of the Provincial Administrative Court of 29.01.2008, V SA/Wa 2289/07, LEX No. 483202.

Judgment of the Provincial Administrative Court of 7.07.2011, V SA/Wa 91/11, LEX No. 1276957.

Judgment of the Supreme Administrative Court of 25.01.2017, II OSK 990/16, LEX No. 2237729.

Judgment of the Provincial Administrative Court of 27.02.2017, IV SA/Wa 2634/16, LEX No. 2303313.

Judgment of the Provincial Administrative Court of 23.10.2017, IV SA/Wa 1709/17, LEX No. 2461518.

Judgment of the Supreme Administrative Court of 14.11.2017, II OSK 889/17, LEX No. 2415204.

Judgment of the Supreme Administrative Court of 1.08.2018, II OSK 257/18, LEX No. 2552415.

Judgment of the Provincial Administrative Court in Białystok of 15.09.2022, II SA/Bk 492/22, LEX No. 3411630.

Judgment of the Provincial Administrative Court in Białystok of 13.04.2023, II SA/Bk 145/23, LEX No 3546573.

CRIMES AGAINST HUMANITY AND WAR CRIMES IN SLOVAKIA?

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ABSTRACT

The negative impact of the COVID-19 pandemic on global society both during the crisis and in its aftermath was tremendous. Governments chose various methods to cope with the deathly virus. While some were highly effective, others were not. In Slovakia, the government conducted mass testing of its population. The mass testing was free of charge performed by the government. The testing, using antigen tests, was conducted four times during weekends in buildings housing hospitals, schools, or administrative offices. Although testing was not explicitly obligatory, certain restrictions were applied to those who did not undergo testing. For instance, it prevented free movement of the untested; they were banned from visiting places that the government deemed not necessary or not of fundamental need, such as workplaces, libraries, banks, car service stations, opticians, dry cleaners, post offices, or the gas station. However, groceries, drug stores, or shops selling essential household products could be visited without a certificate of having tested negative for COVID-19.

In April 2021, a group of Slovak citizens, calling themselves 'Order of the Law Fellowship', filed a complaint with the International Criminal Court stating that the mentioned mass testing conducted by the government, was allegedly part of an involuntary experiment done on the population of Slovakia. The group claimed that the government must be held responsible for allegedly committing crimes against humanity and war crimes, stipulated in the Rome Statute as core international crimes. This article aims to analyse their claims regarding the charges against the government, keeping in mind the character and severity of the core international crimes.

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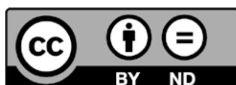

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1. Introduction

The COVID-19 pandemic led to many severe casualties worldwide. From causing the death of almost seven million people to a million others suffering from several protracted and long-lasting health issues, it became an invisible enemy that countries fought using different methods to save the lives of their citizens. Some were effective, others were less so. The Slovak Republic, like almost all European countries, besides introducing restrictions, introduced a novel scheme of mass testing its population. The mass testing was free of charge performed by the government. The testing was conducted four times during weekends in buildings housing hospitals, schools, or administrative offices. Antigen test was the type of testing conducted. Although testing was not explicitly obligatory, certain restrictions were applied to those who did not undergo testing. For instance, it prevented free movement of the untested; they were banned from visiting places that the government deemed not necessary or not of fundamental need, such as workplaces, libraries, banks, car service stations, opticians, dry cleaners, post offices, or the gas station. However, groceries, drug stores, or shops selling essential household products could be visited without a certificate of having tested negative for COVID-19.

The anniversary of the Velvet Revolution is regularly an occasion for protests and demonstrations for the dissatisfied population in Slovakia. This was the case during the pandemic in 2020 as well, when thousands of protesters gathered in main squares and in front of government buildings. Their frustration was regarding the COVID-19 restrictions imposed by the government. People raised slogans for reducing the limitations on freedom of movement, freedom of association, as well as for stopping the mass testing. However, it is worth mentioning, that before the protest began, news about the organisational activities of the opposition to gather these people had already spread.[3]

In April 2021, a group of Slovak persons, calling themselves 'Order of the Law Fellowship', represented by three prominent Slovak lawyers, filed a complaint with the International Criminal Court claiming that the mass testing conducted by the government was allegedly part of an involuntary experiment performed on the population of Slovakia. Their claim rested on several arguments that are analysed below. Two main claims pointed out alleged perpetration of crimes against humanity and war crimes by the Slovak Government. This article therefore aims to identify the misunderstandings of the complainants considering the basis of

3 | Struhárňanská, 2022.

international criminal law. To elaborate it, the first section deals with laws applicable by the International Criminal Court (hereinafter ICC or the Court). The Rome Statute of the International Criminal Court (hereinafter Rome Statute) regulates this aspect of the ICC functioning. The second section focuses on crimes against humanity and their alleged violation by the acts of the Slovak Government. In the third section, war crimes and their alleged perpetration by the Slovak Government are analysed. The conclusion summarises the most important findings in relation to the allegations that crimes have been committed under international law in Slovakia.

2. Law applicable by the International Criminal Court

Art. 21 of the Rome Statute precisely determines the law that the ICC shall apply. First, it is to be emphasised that any interpretation and application of a law must be consistent with internationally recognised human rights and without any discrimination.[4] Only within this area can the principal legal framework for the functioning of the ICC be applied. Nevertheless, in the Rome Statute itself, Elements of Crimes and Rules of Procedure and Evidence are determined as primary sources of law applicable by the Court.[5] It means that the ICC is expressly instructed to follow first this troika of legal norms. Only where appropriate, applicable treaties and principles and rules of international law can be applied as the second option. One may ask whether the Nuremberg Code might be found somewhere in these options of law application by the ICC as it was submitted by the members of the 'Order of the Law Fellowship'. In fact, they began their complaint by referring to the Nuremberg Code and related international treaties and later linked it with the Rome Statute.

The authors of the complaint claim that mass testing falls under the category of human experimentation, for which conditions have been stipulated in the ten points of the Nuremberg Code and later incorporated in the binding document of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine, also called the Oviedo Convention.[6] Later, all the arguments of an alleged violation of the Rome Statute, explicitly Art. 7 para. 1 sec. f) and h) and Art. 8 para. 2 sec. a (II), a (III), and b (XXI), rest on this concept of mass testing as a human experimentation, although such a term is not included in the Rome Statute, establishing the International Criminal Court as such.

However, an important question arises in this context: What does constitute human experimentation? Could it be incorporated into another definition of a crime included in the Rome Statute? Unfortunately, no exact definition for this is mentioned in the Oviedo Convention either. Additionally, in seeking for a

4 | Compare Art. 21 para. 3 of the Rome Statute.
5 | Compare Art. 21 para. 1 of the Rome Statute.
6 | Complaint of the Order of the Law Fellowship, 2021, paras. 2.2–2.5.

definition of such a crime in any legally binding document, one needs to consider the Geneva Conventions stipulating prohibition of human experiments. The Third Geneva Convention in its Art. 13,[7] the Fourth Geneva Convention in its Art. 32,[8] the Additional Protocol I in its Art. 75,[9] or the Additional Protocol II in its Art. 4 [10] clearly mention the prohibition of mutilation and medical, scientific, or biological experiments; however none of them define the concept of experimentation as such. It is the same case with the Rome Statute and its wording.

Since the issue under discussion is related to the pandemic situation, it is necessary to mention another legally binding treaty, particularly Art. 12 of the International Covenant of Economic, Social and Cultural Rights,[11] which requires countries to prevent, treat, and control epidemic, endemic, occupational, and other diseases to achieve the full realisation of the highest attainable standards of physical and mental health. A pandemic situation therefore demands even stronger promotion of medical research and health education as well as fostering the recognition of factors that favour positive health results. Yet, this definitely has restrictions: a certain space is needed to apply innovative methods in situations of emergency, such as the pandemic.[12]

First, one must ask, What was the reason for setting up the mass testing including such strict rules? The answer is obvious: the daily news informed the public of the situation in the hospitals, where the medical staff was under extreme pressure from the number of severely sick COVID-19 patients. The percentage of

7 | Article 13 of the Third Geneva Convention relative to the Treatment of Prisoners of War reads as follows: 'In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest …'

8 | Art. 32 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in time of War reads as follows: 'This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.'

9 | Art. 75 sec. 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, Protocol I, reads as follows.: 'The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: a) violence to the life, health, or physical or mental well-being of persons, in particular: i) murder; ii) torture of all kinds, whether physical or mental; iii) corporal punishment; and iv) mutilation …'

10 | Art. 4 sec. 2 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict, Protocol II, reads as follows: 'Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment …'

11 | Art. 12. sec. 2 of the International Covenant of Economic, Social and Cultural Rights, reads as follows: 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:… (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases…'

12 | General Comment of the Committee on Economic, Social and Cultural Rights No. 14, The Right to the Highest Attainable Standard of Health, 2000.

the sick population was overburdening the healthcare systems of many countries, and Slovakia was no exception. The government was facing a challenge they had never encountered before. Measures had to be taken to stop the spread of the virus by detecting the infected people before the infection spread to public spaces. The measures had to be quick and efficient. According to the authors, the pandemic led to many tardy as well as hasty decisions. On the one hand, international organisations, such as the World Health Organization or the European Union, were tardy and failed to provide quick measures when the situation demanded it. On the other hand, countries were hasty in taking decisions without a proper estimation of whether the measures would be effective.

A general rule for any medical intervention is that it must be carried out only with the concerned person's free and informed consent. The claimant argues that this consent was missing during the first rounds of testing. However, it must be mentioned that the citizens of Slovakia went to the testing centres and got themselves tested voluntarily, with no public body exercising any coercive measures. Additionally, in restricting the movement of those who did not get tested, the government had to consider the aim of the tests as well as make certain exceptions. The aim was to stop the spread of the virus and exceptions were provided for those who were medically disabled and had a certificate from their doctor (e.g. oncological patients, autists, or people who had issues related to their nose).[13]

3. Crimes against humanity

When moving to establishing the treaty of the ICC, the complaint argued that mass testing was in fact a violation of Rome Statute Art. 7 para. 1 secs. f) and h). Art. 7 is devoted to the statutory elements of the crime of torture, representing the commission of explicit criminal and individual acts in a widespread and systematic attack against a civilian population. Therefore, for a certain action to fall under the scope of crimes against humanity, it has to fulfil some statutory elements: 1) the act itself has to be part of an attack, which is a course of conduct including perpetration of acts of violence, not just accidental violence; 2) the object of the attack has to be the civilian population; 3) the attack has to be widespread or systematic, which implies that an applied policy underlies the act; 4) a casual nexus must be established between the act and attack, which would lead to the conclusion that the offender is aware of the link, although it is not necessary for the offender to know all the specificities of the attack; and 5) the act itself has to be intentional.[14]

13 | Zverejnili informácie k plošnému testovaniu. Presné pokyny, výnimky a postup (+ zoznam opatrení), eng. They have published information on extensive testing. Exact instructions, exceptions and procedure (+ list of measures) [Online]. Available at: https://www.tyzden.sk/politika/68374/zverejnili-detaily-plosneho-testovania-presne-pokyny-vynimky-a-postup--zoznam-opatreni/ (Accessed: 22 July 2023).
14 | Bartkó and Sántha, 2022, pp. 307–308.

In the complaint, it was argued that mass testing should be considered an act of torture. The right to health is closely related to and dependent on the realisation of other human rights, such as prohibition of involuntary human experimentation and prohibition of torture. The prohibition itself is included in international humanitarian law as well as international human rights law. Many binding international documents stipulate the prohibition of torture.[15] Prohibition has undoubtedly evolved into a *jus cogens* norm, which enjoys a special high position in the international hierarchy of norms.[16] Thus, the international society demands the most profound protection of the values of human dignity and wellbeing of an individual, by prohibiting torture. The jurisprudence has in the matter evolved significantly. The development in human rights has proven that the definition of torture accepted before international tribunals after the World War II has over time changed in a way, that it tends to be more broad and inclusive. Mental pain, such as trauma from losing a family member or being threatened, became sufficient grounds to satisfy the mandatory aspects of the crime of torture. However, the practice of states sadly does not follow the trends of broadening the framework of protection.[17] The complaint argued that the act of testing breached this peremptory norm, which is defined in the Rome Statute in its Art. 7. sec. 2 e) in the following manner:

> 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

The definition stipulates those elements that the ICC considers as the preconditions for the fulfilment of the factual essence of the crime of torture. The act have to be done intentionally and during the offender's control over the victim. The act itself is mentioned as an act of causing severe pain or suffering, and, as explicitly stated in the articles, that the term includes physical as well as mental attacks. The Rome Statute is generally vague regarding the specific acts and methods of torture. The pain as well as suffering must be cruel, but the article does not exactly distinguish the intensity of pain from other forms of ill-treatment. However, the most striking fact is the absence of a reference to the purpose and goal of such an action.[18] The Preparatory Commission for the ICC in connection with torture also explicitly confirmed that the ICC does not require proof of a specific purpose for the purposes of fulfilling the concept of torture. Although the Preparatory Commission based its definition on the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Convention against Torture, by omitting the purpose, it reflected the international customary law with regard to international humanitarian law.[19]

15 | Derby, 1999, p. 705.
16 | Case of *Prosecutor v Furundžija* (ICTY No. IT-95-17/1-T), Judgment. 10 December 1998. para. 152.
17 | Schabas, 2005-2006, p. 363.
18 | See Dörmann, 2003.
19 | Report of the Preparatory Commission for the International Criminal Court on the finalised draft text of the Elements of Crimes. Art. 7(1)(f), 2000, p. 12.

The first core element when dealing with possible situations of torture is the act itself, which has to be violent and inflict severe pain or suffering, physical or mental. However, in relation to the COVID-19 testing, no criminal complaints were filed by individuals; nor did the prosecutor file any claims. Further, no ombudsman nor any non-governmental human rights organisation reported about any alleged ill-treatment. The act of testing for detecting the virus infection was conducted similarly in many countries and nowhere was it observed as causing severe physical or mental pain.[20]

In relation to the nature of the act, the subjective element of the crime of torture has to be analysed as well. In every case, the perpetrator has to be aware of the criminal act that is perpetrated on the victim. In the pertinent case, it is cumbersome to apply this factor, since the act of testing was on the one hand part of an intentional measure, and on the other its intent was not to inflict suffering or pain on the alleged victims but to prevent the possibility of future suffering and pain resulting from the spread of the virus. In this sense, one cannot conclude that the situation of mass testing was aimed to intentionally cause pain.

Furthermore, when analysing cases of torture, victims are always vulnerable. There are several cases connected to people in police custody, prisons, medical institutions, or in similar situations, where they are in a vulnerable position with no possibilities to escape the authority.[21] Although many known cases connected to indirect mental suffering caused by different situations (e.g. forced disappearance of a family member) can be cited,[22] the claim at hand is not mentioning indirect mental suffering as a form of torture during the mass testing. On this basis, one cannot conclude testing was conducted on people in a vulnerable position from which they had no option to escape.

The complaint also argued that the mass testing should be considered as persecution of the untested population against the tested one. According to the Elements of Crimes, six obligatory parts constitute an act of persecution. Persecution means deprivation of the fundamental rights of the targeted persons owing to the identity of a group with common political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law.[23] Additionally, the conduct must be perpetrated as part of a widespread or systematic attack against civilians. The text of the definition sets the requirement of discrimination, nevertheless it raises questions whether the discriminatory nature has to be applied to the attack itself or it constitutes an additional element of the crime.[24]

20 | See Joined Greek Case: *Denmark v Greece* (ECHR Application No. 3321/67), *Norway v Greece* (ECHR Application No. 3322/67), *Sweden v Greece* (ECHR Application No. 3323/67), *Netherlands v Greece* (ECHR Application No. 3344/67), Report of the Sub-Commission, 5 November 1969.
21 | Numerous cases connected to torture when dealing with refugees and the principle of non-refoulment exist. However, in the present case, it is not connected to the issue at hand.
22 | *Kurt v Turkey* (ECHR Application No. 24276/94). Judgment, 25 May 1998.
23 | Report of the Preparatory Commission for the International Criminal Court on the finalised draft text of the Elements of Crimes, Art. 7(1)(f), 2000, p. 15.
24 | Chesterman, 2000, p. 326.

The list of reasons for persecution is non-exhaustive. The Rome Statute left room for customary international law to finalise the grounds of the prohibited acts, when it included 'other grounds that are universally recognised as impermissible under international law'. The relevant situation can therefore, at the first glance, reach for this justification under the term 'other grounds' as a reason for the acts. Although, the mentioned grounds can be interpreted rather broadly, it is more than questionable whether the grounds based on testing would suffice for the requirement of the elements of the crime.[25]

One of the obligatory parts of the crime is the causal link between the act and the introduced policy of the authority. Nonetheless, the creators knew that the notion of persecution is a vague term itself, with the potential to far outweigh the desired focus on the criminal aspect of the time.[26] Thus, the requirement of the causal link was established to emphasise the criminal element of the crime of persecution. Hence, the crime must be committed in connection with any enumerated act in Art. 7 or in connection with any other crime declared as prohibited in Art. 5 of the Rome Statute.[27] The complaint explicitly mentions the nexus in this relation to the crime of torture. Yet, based on the analysis above, the statutory aspects of the crime of torture were not satisfied.

Seemingly, some of the aspects of the article related to the persecution are in the case of mass testing fulfilled. Nevertheless, it would be far-fetched to consider all differentiation as constituting grounds for discrimination, not to mention establishing the crime of persecution. For instance, during the pandemic, many countries established rules for crossing their borders, which enhanced the necessity to provide either proof of a negative test or a vaccination certificate. Similarly, free movement even within countries was regularly restricted; only those who tested negative or were vaccinated could travel. The reason for this, the protection of public health, is based on the government's aim to stop the spread of the virus. All these cases could be therefore (mis)understood as the persecution of the non-tested or non-vaccinated by those tested and vaccinated, respectively. Overall, the health measures established on the right to life, prevailed over freedom of movement.

The ICC should prosecute crimes of most serious concern to the international community committed on grounds of language, colour, social origin, property, birth, as well as mental or physical disability, economic or age-related reasons of discrimination if they otherwise amount to crimes of persecution. The differential treatment of people, being possibly subjects spreading a virus in an emergency situation such as the pandemic, can hardly qualify as a crime of persecution of the untested population.[28]

Therefore, when analysing the case of mass testing and the mentioned elements of the crimes against humanity, we come across several issues. As indicated in the beginning of this section, the crimes against humanity have five

25 | Boot and Hall, 1999, p. 150.
26 | Robinson, 1999, p. 54.
27 | Witschel and Ruckert, 2001, p. 95.
28 | See Chella, 2004, p. 159; Boot, 2002, p. 521.

elements which must be fulfilled to constitute a crime. The first element is the course of a conduct including the perpetration of acts of violence. In this case the complaint is based on acts allegedly being acts of torture and allegedly being acts of persecution. The analysis proves that the obligatory aspects of the crime of torture were not satisfied. Further, when examining the notion of persecution, the view of the authors' is that neither the act of persecution was sufficiently satisfied in the situation of mass testing. Although all the other elements of the crime against humanity are satisfied (civilian population, widespread and systematic measure, causal nexus, and intention) in the relevant situation, the first and foremost element is lacking. Therefore, in the present case of mass testing, there is no possibility to speak about action which constitute crimes against humanity.

4. War Crimes

On reading the complaint regarding the alleged violation of the Nuremberg Code by the Government of the Slovak Republic in conducting mass testing of its population, one might be surprised at calling it a crime against humanity and as persecution, more so when it is called a war crime. This section aims to analyse this aspect of the complaint filed.

War crime as a concept has been known since time immemorial. The first known records of laws and customs governing warfare can be traced to ancient times.[29] Over time, a set of standards was developed and specified through national codes,[30] until finally, thanks to one person in particular (Henri Dunant), it has been standardised at the international level.[31] Since then, international humanitarian law has developed gradually, also called 'international law of armed conflicts', which is fundamental to the concept of war crimes, since the *sine qua non* of the definition of a war crime is the existence of an armed conflict and a connection with it. In relation to the present complaint, it is important to understand this concept of war crime interlinked with armed conflicts.

By the end of the 19th century, and especially at the beginning of the 20th century, international treaties were adopted hat regulated the means and methods of conducting wars were adopted. Therefore, when preparing the Charter of the Nuremberg Tribunal after World War II, there were no concerns about this tribunal conflicting with the principle of *nullum crimen sine lege,* and Art. 6 letter b) of the Nuremberg Charter was adopted without controversies. Coming back to the complaint filed with the ICC, it is remarkable that ill-treatment mentioned in the Nuremberg Charter could be considered closest to the alleged perpetration

29 | Cryer et al., 2010, p. 267.
30 | E.g. Lieber code.
31 | Regarding the role of Henri Dunant and his experience with the suffering of soldiers after the Solferino battle in 1859, see e.g. Ondřej et al., 2010, pp. 96 et subq.

submitted by the Order of the Law Fellowship.[32] In the Nuremberg judgment, the International Military Tribunal stated that war crimes resulting from violation of the so-called Hague Law, that is, from the adjustment of means and methods of warfare, specifically from Arts. 46, 50, 52, and 56 of the Hague Convention from 1907 and arts. 2, 3, 4, 46, and 51 of the Geneva Convention of 1929, are a criminal offense.[33]

Despite this clearly defined concept of war crimes, it was problematic for states to use the term 'war crimes' as per the Geneva Conventions of 1949, which regulates the protection of victims of war, the so-called Geneva law.[34] Instead of the concept of war crimes, the concept of grave breaches of the Geneva Conventions was introduced, and only in 1977 in the Additional Protocol I to the Geneva Conventions was an explicit provision adopted on the basis of which grave breaches are considered war crimes.[35]

The concept of war crime was understood differently from the point of view of the development of the doctrine of international law.[36] On the one hand, the existence of armed conflict has always been an inherent element of war crimes. On the other hand, the other features depend on whether the term war crime meant only a grave breach of the Geneva Conventions of 1949 or any violation of international humanitarian law. Nevertheless, the second understanding did not find support in the acts of states, and currently, only specified serious violations of international humanitarian law are considered war crimes.[37] These undoubtedly include grave breaches of the Geneva Conventions, the estimation of which is concluded in each of the Geneva Conventions of 1949. In every one of these conventions, grave breaches include intentional killing, torture or inhuman treatment, and intentional infliction of great suffering or serious injury.

The development of concept of war crimes after the Nuremberg Charter and judgment was reflected in the ICTY Statute, namely, the fact that a split appeared in international humanitarian law emphasising the difference between customary international humanitarian law and international humanitarian treaty law.[38]

32 | According to Art. 6 letter b) of the Nuremberg Charter, the following violations of laws or customs of war are considered war crimes. Such violations shall include, but are not limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder, or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

33 | International Criminal Tribunal, *United States of America, Republic of France, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics v. Göring et al.*, 1 October 1946. Judgment available online at: https://www.legal-tools.org/doc/f21343/pdf/ (Accessed: 19 July 2023), hereinafter Nuremberg Judgment, p. 253.

34 | The Nuremberg Charter was based on the so-called Hague Law, which regulates methods and means of warfare, and the Geneva Conventions, which regulate the so-called Geneva law, i.e., protection of victims of war. See also Schabas, 2011, p. 123.

35 | Art. 85 sec. 5 of the Additional Protocol I of 1977.

36 | See also Solis, 2010, pp. 301 et seq.

37 | Cassese, 2008, pp. 84–85.

38 | This distinction, more strictly than in other areas of international law, was sought to be diminished by the Study of the International Committee of the Red Cross concerning customary international humanitarian law, which focused on national codes and activities

The Statute of this tribunal regulates war crimes in its arts. 2 and 3, distinguishing between treaty and customary international humanitarian law. Art. 2 of the ICTY Statute is based on grave breaches of the Geneva Conventions of 1949 and conducts investigation and prosecution of wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian, taking civilians as hostages for the ICTY's jurisdiction *ratione materiae*. Art. 3 of the ICTY Statute adds 'violations of the laws and customs of war' to these crimes, that is, customary international humanitarian law.

In connection with the regulation of war crimes, it is important to state that international humanitarian law applies for all armed conflicts regardless of whether it is international, that is, occurring between two or more states, or non-international, that is, occurring on the territory of one state. However, this division of conflicts is important, because a different set of norms of international humanitarian law apply for international conflicts and another set to non-international. Moreover, real situations are not so easily defined, and determining the dividing line between international and non-international conflicts can be a complicated task.[39] Due to the rich history of international conflicts, the legal norms regulating these conflicts are much more sophisticated and more detailed than the norms regulating non-international conflicts. Until recently, non-international armed conflicts were regulated by national law, and international law began to deal with them only after World War II.[40]

Moreover, it is important to point out that no contractual definition of an armed conflict is found. However, according to the generally accepted definition of an armed conflict, which was adopted in the ICTY decision,[41] an armed conflict is said to have occurred when, first, armed violence was used and second, its time aspect. In addition to the long-term perspective, other circumstances must also be considered when involving the armed forces of several states. If two states are common parties to a conflict, the opposite party of which is an armed opposition group to the state or states, it is a non-international armed conflict. However, if it

of armed forces of individual states and resulted in a list of principles and norms that, according to the study, already have a customary character. For further information see: International Committee of the Red Cross: Study on customary international humanitarian law: all language versions of the summary article and list of rules [Online]. Available at: https://www.icrc.org/en/doc/resources/documents/misc/customary-law-translations.htm (Accessed: 19 July 2023).

39 | Dinstein, 2010, p. 26.

40 | The situation during the Nuremberg process was specific since it was clearly determined that the prosecution of the top perpetrators of war crimes during the World War concerned an international conflict, i.e., a conflict among states.

41 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Tadić*, IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 70.

were a state that is a party to Additional Protocol I, and it is a national liberation movement, it would be an international armed conflict, and this Protocol and the Geneva Conventions of 1949 would apply.

The qualification of non-international armed conflicts and the determination of the legal norms applicable during their duration are even more complicated. The Geneva Conventions of 1949 deal with non-international armed conflicts in only one article, common Art. 3 of the Geneva Conventions from 1949 according to which, each of the parties to the conflict shall at least treat persons *hors de combat* humanely and non-discriminatorily. This positively determined obligation is concretised in a negative way. In relation to these persons, the common Art. 3 of the Geneva Conventions does not list specific measures, but prohibited actions, namely, (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment, and (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

Since the Geneva Conventions of 1949 apply only during international armed conflicts, the very concept of grave breaches of the Geneva Conventions would not be possible to establish in non-international armed conflicts. This was also the initial position within the case-law of the ICTY.[42] However, a few years later, the Appeals Chamber of the same judicial body decided that to maintain a legal distinction between the two legal regimes and their legal consequences in relation to similar acts because of differences in the nature of the conflict would ignore the very purpose of the Geneva Conventions.[43] Theodor Meron, ICTY president at the time, added that there was no moral justification and indeed no compelling legal case for treating perpetrators of horrors in domestic conflicts more leniently than those who committed those horrors during international armed conflicts.[44]

International humanitarian law does not specify who determines whether it is a non-international armed conflict. This is one of the peculiarities of international law; it lacks a central decision-making body. However, in its decision, the ICTY states that the intensity of the conflict and its organisation are qualifying prerequisites that help to determine whether common Art. 3 Geneva Conventions is applicable.[45] The common Art. 3 of the 1949 Geneva Conventions is thus applied in the event of a conflict involving organised elements on the one hand from the state and on the other hand from anti-government warring groups or between warring groups, and it is not a matter of short-term and isolated acts of violence.

According to the wording of Art. 1 of Additional Protocol II, this protocol develops and complements common Art. 3 Geneva Conventions. However, this Protocol

42 | Ibid., para. 84.
43 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Delacić* et al., IT-96-21-A, judgment, Appeals Chamber, 20 February 2001, para. 172.
44 | Compare Meron, 1995, p. 561.
45 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Tadić*, IT-94-1-T, judgment, Chamber, 7 May 1997, para. 562.

applies only to those armed conflicts that occur between armed forces and dissident armed forces, not between different armed groups. Another limitation is the control of a part of the state's territory, which allows armed groups to conduct sustained and coordinated military operations. Common Art. 3 of the Geneva Conventions also requires organisation but does not establish the necessity of control over the territory.[46] However, the positive aspect of Additional Protocol II is the explicit exclusion of its application vis-à-vis internal disturbances and tensions, such as rebellions, isolated and sporadic acts of violence, and other acts of a similar nature, which are not considered armed conflicts.[47]

It is submitted that a war crime is said be committed only if involves an armed conflict, that is, when armed violence takes place for a longer period, a situation that certainly did not occur during mass testing. This qualifying assumption of the connection between the criminal proceedings and the armed conflict was decisively interpreted by the ICTY in the *Kunarać* case, which, among other things, explained that this connection is not related to the specific place of the actual fighting but to the territory under the control of the parties to the conflict.[48] The ICTY also pointed out that an armed conflict need not have been the cause of the commission of the act itself, but the existence of an armed conflict must at least play a substantial role in the perpetrator's ability to commit the crime, his decision to commit it, the way by which it was committed, or the purpose for which it was committed. Therefore, if it is possible to prove that the perpetrator acted in furtherance of or under the guise of the armed conflict, and it would be sufficient to conclude that his actions were closely connected with the armed conflict.[49]

Art. 8 of the Rome Statute that has also been referred to in the analysed complaint is based on the experience with the above-mentioned decisions of the ICTY. Despite its complexity (it is the longest Art. of the Rome Statute), it did not connect and bridge the division of war crimes based on whether they were committed during an international or non-international armed conflict and on whether they were governed by international customary or international treaty law. Art. 8 of the Rome Statute thus divides prosecution of war crimes into four categories: the first category lists grave breaches of the Geneva Conventions of 1949, the second group consists of other serious violations of laws and customs applicable during international armed conflict, the third group regulates serious violations of common Art. 3 of the Geneva Conventions of 1949, and the fourth category lists other serious violations of laws and customs applicable in non-international armed conflicts. In relation to war crimes and the Rome Statute, it is necessary to recognise that the Rome Statute, as the first international treaty, has established the applicability of the concept of war crimes even during a non-international armed conflict. However, the existence of an armed

46 | In relation to the issue of control, the International Court of Justice applied the so-called effective control concept (see e.g. his decision in the Case of Military and Paramilitary Activities in and against Nicaragua), the International Criminal Tribunal for the Ex-Yugoslavia, so-called overall control (see e.g. his decision in the Tadić case).
47 | Compare Art. 1 of Additional Protocol II.
48 | International Criminal Tribunal for Ex-Yugoslavia, *Prosecutor v Kunarać* et al., IT-96-23/1-A, judgment, Appeals Chamber, 12 June 2002, paras. 57–59.
49 | Ibid.

conflict is inevitable to establish that a war crime has been allegedly committed. This was the biggest surprise on reading the complaint: the complainants have submitted that breaches of the Nuremberg Code shall be also considered as war crimes at least but not limited to Art. 8 para. 2 sec. a(II), a(III) b(XXI) of the Rome Statute,[50] that is, they have selected for their complaint war crimes that might be committed only during an international armed conflict without considering at all whether elements for an international armed conflict have been fulfilled.

Due to the fundamental principle of criminal law, *nullum crimen sine lege*, it was considered necessary during *travaux préparatoires* to adopt Elements of Crimes. Art. 9 of the Rome Statute stipulates that the Elements of Crimes, which must be in accordance with the Statute, assist the ICC in the interpretation and application of arts. 6, 7, and 8 and 8 *bis* of the Statute. In September 2002, a two-third majority of the members of the Assembly of State Parties adopted the Elements of Crimes, and although they are not legally binding for judges, the State Parties included them in the applicable law in the Rome Statute.[51]

The general introduction of the Elements of Crimes reflects the fact that neither the Rome Statute nor the Elements of Crimes define some terms, such as armed conflict, civilian, combatant, etc. These terms are defined in international humanitarian law or in the jurisprudence of ad hoc tribunals. Moreover, in relation to war crimes and the Elements of Crimes, it is necessary to point out its opening provision, according to which legal evaluation of the existence of an armed conflict and its nature is not essential for the investigation and prosecution of a perpetrator of war crimes. The only requirement is the knowledge of the factual circumstances that establish the existence of an armed conflict, as this is inherent in the very qualification of the factual nature of war crimes. The armed conflict must play a substantial role in the offender's decision, in his ability to commit the crime, or in the way the action was ultimately carried out.[52] On the contrary, it is not necessary that armed conflict be seen as the ultimate reason for criminal proceedings, nor that such proceedings need take place in the middle of a battlefield.[53]

To summarise, the elements required by Elements of Crimes to establish a war crime allegedly committed during an international armed conflict, the regulation of which is based on the Geneva Conventions of 1949, are listed as shown:

1. actus reus: wilful killing, *torture* or inhumane treatment, including *biological experiments* (italics added by the authors), wilfully causing great physical or psychological suffering or serious injury, large-scale destruction and appropriation of property carried out without justification by military necessity and unlawfully and arbitrarily, compelling service in hostile forces, intentionally depriving a prisoner of war or other protected person of the right to a fair and proper trial, unlawful deportation or transfer, or unlawful restraint, taking hostages,

50 | Complaint of the Order of the Law Fellowship, 2021, para 3.7.

51 | See Art. 21 of the Rome Statute.

52 | ICC, *Prosecutor v Lubanga*, ICC-01/04-01/06, 29 January 2007, para. 287; ICC, *Prosecutor v Katanga* et al., ICC-01/04-01/07, 30 September 2008, para. 380.

53 | Ibid.

2. the relevant person/persons or property are protected under one or more Geneva Conventions from 1949,
3. the perpetrator is aware of the factual circumstances that establish that protected status (this note also includes knowledge of nationality, but in this context, it is sufficient if the perpetrator knew that the victim belonged to the other side of the conflict),
4. and again: the act is conducted in the context of and is associated with an international armed conflict, and finally
5. the perpetrator is aware of factual circumstances that establish the existence of an armed conflict.

In the case of the COVID-19 pandemic, No. 4 does not apply. Even though mass testing was a novelty and not accepted by the entire population, it does not satisfy the conditions of an armed conflict as indicated by the International Criminal Tribunal for the Former Yugoslavia in the Tadić case. Although this act was repeated several times, it does not include the use of armed violence as one of the preconditions to prove a war crime.

5. Conclusion

This article aimed to analyse the complaint submitted by the Order of the Law Fellowship represented by prominent Slovak lawyers in the matter of allegedly committed crimes against humanity and war crimes by the Government of the Slovak Republic when it introduced mass testing of the population during the COVID-19 pandemic and to point out why the reasonable basis in relation to persecution of both of these crimes under international law was lacking ground although violation of the Nuremberg Code was put forward.

The article began by explaining the applicable law based on Art. 21 of the Rome Statute which obliges ICC judges to apply the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence first, and only in the second place, where appropriate, applicable treaties and principles and rules of international law, including the established principles of the international law of armed conflict. Analysis of the Nuremberg Code, which is a non-legally binding document, is therefore not an appropriate basis for a decision of the International Criminal Court. As for the crimes against humanity, it has been submitted that although most elements of crimes against humanity have been fulfilled, the element requiring perpetration of acts of violence (specifically in case of alleged torture and persecution) has not been satisfied in the case of mass testing. To conclude alleged perpetration of a war crimes, it has been pointed out through an analysis of the development of this concept and related issues that the *sine qua non* condition of establishing perpetration of a war crime is the existence of an armed conflict, which is a missing element in the case of the mass testing in Slovakia during the COVID-19 pandemic, and thus the grounds for a war crime or a crime against humanity are not justified.

Bibliography

Bartkó, R., Sántha, F. (2022) 'International Criminal Law and International Crimes' in Váradi-Csema, E. (eds.) *Criminal Legal Studies. European Challenges and Central European Responses in the Criminal Science of the 21st Century.* Miskolc-Budapest: CEA Publishing, pp. 299–334; https://doi.org/10.54171/2022.evcs.cls_10.

Boot, M. (2002) *Genocide, Crimes Against humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: genocide, crimes against humanity, war crimes*. Antwerpen: Intersentia.

Boot, M., Hall, C. K. (1999) 'Persecution' in Triffterer, O. (eds.) *Commentary on the Rome Stature of the International Criminal Court: Observers' Notes, Article by Article*. Baden-Baden: Nomos.

Cassese, A. (2008) *International Criminal Law.* Oxford: Oxford University Press.

Chella, J. (2004) *Persecution: A crime against humanity in the Rome Stature of the International Criminal Court.* University of Bond: LL.M Dissertation [Online]. Available at : https://pure.bond.edu.au/ws/portalfiles/portal/24840745/fulltext_6_.pdf (Accessed: 5 July 2023).

Chesterman, S. (2000) 'An Altogether Different Order: Defining the Elements of Crimes Against Humanity', *Duke Journal of Comparative and International Law*, 10(2), pp. 307–344.

Cryer, R., Friman, H., Robinson, D., Wilmshurst, E. (2010) *An Introduction to International Criminal Law and Procedure.* Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511760808.

Derby, D. (1999) 'Torture' in Bassiouni, C. M. (eds.) *International Criminal Law. Vol. I., II.* 2nd edn. New York: Transnational Publishers, p. 705.

Dinstein, Y. (2010) *The Conduct of Hostilities Under the Law of International Armed Conflict.* Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511845246.

Dörmann, K. (2003) 'War Crimes under the Rome Statute of the International Criminal Court, with Special Focus on the Negotiations on the Elements of Crimes', *Max Planck Yearbook of United Nations Law Online*, 7(1), pp. 341–407; https://doi.org/10.1163/187574103X00077.

Meron, T. (1995) 'International Criminalization of Internal Atrocities', *American Journal of International Law*, 89(3), pp. 554–577; https://doi.org/10.2307/2204173.

Ondřej, J., Šturma, P., Bílková, V., Jílek, D. (2010) *Mezinárodní humanitární právo.* Praha: C. H. Beck.

Protivládny protest (2020) Actuality.sk, 17 November [Online]. Available at: https://www.aktuality.sk/fotogaleria/863798/protesty-demonstracia-bratislava-17-november-fico-kotleba-harabin-pokuta/2/ (Accessed: 22 July 2023).

Robinson, D. (1999) 'Defining "Crimes Against humanity" at the Rome Conference', *American Journal of International Law*, 93(1), pp. 43–57; https://doi.org/10.2307/2997955.

Schabas, W. A. (2005-2006) 'The Crime of Torture and the International Criminal Tribunals', *Case Western Reserve Journal of International Law,* 37(349), pp. 349–464.

Schabas, W. A. (2011) *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511975035.

Solis, G. D. (2010) *The Law of Armed Conflict. International Humanitarian Law in War*. New York: Cambridge University Press; https://doi.org/10.1017/CBO9780511757839.

Struhárňanská, E. (2022) 'Sedemnásty november: Protest zvolal Kotleba, Fico a možno aj lekárski odborári', *Standard*, 16 November [Online]. Available at: https://standard.sk/277435/sedemnasty-november-protest-zvolal-kotleba-fico-a-mozno-aj-lekarski-odborari/ (Accessed: 22 July 2023).

Witschel, G., Rückert, W. (2001) 'Article 7(1)(h)–Crime Against Humanity of Persecution' in Lee, R. S, Friman, H. (eds.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. Ardsley, NY: Transnational, pp. 94–108.

Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2000/4. 2000.

Complaint of the Order of the law Fellowship, 12 April 2021.

Report of the Preparatory Commission for the International Criminal Court on the Finalized draft text of the Elements of Crimes. UN doc. PCNICC/2000/1/Add.2, Art. 7(1)(f), 2.11.2000

Zverejnili informácie k plošnému testovaniu. Presné pokyny, výnimky a postup (+ zoznam opatrení) (2023) 27 October [Online]. Available at: https://www.tyzden.sk/politika/68374/zverejnili-detaily-plosneho-testovania-presne-pokyny-vynimky-a-postup--zoznam-opatreni/ (Accessed: 22 July 2023).

Legal documents

Treaties

Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

Fourth Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts. Protocol I of 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict. Protocol II of 8 June 1977.

International Covenant on Economic, Social and Cultural Rights. 16 December 1966. UN. 1967.

Case-law

European Court of Human Rights. Joined Greek Case: Denmark v Greece. Application n. 3321/67. Case of Norway v Greece. Application n. 3322/67. Case of Sweden v Greece. Application n. 3323/67. Case of Netherlands v Greece. Application n. 3344/67. 1969.

European Court of Human Rights. Case of Kurt v Turkey. Application n. 24276/94. 1998.

International Military Tribunal, United States of America, Republic of France, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics v. Göring et al., 1 October 1946.

International Criminal Tribunal for Ex-Yugoslavia, Prosecutor v Tadić, IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995.

International Criminal Tribunal for Ex-Yugoslavia, Prosecutor v Delacić et al., IT-96-21-A, judgment, Appeals Chamber, 20 February 2001.

International Criminal Tribunal for Ex-Yugoslavia, Prosecutor v. Tadić, IT-94-1-T, judgment, Senate, 7 May 1997.

International Criminal Tribunal for Ex-Yugoslavia, Prosecutor v. Kunarać et al., IT-96-23/1-A, judgment, Appeals Chamber, 12 June 2002.

International Criminal Court, Prosecutor v. Lubanga, ICC-01/04-01/06, 29 January 2007.

International Criminal Court, Prosecutor v. Katanga et al., ICC-01/04-01/07, 30 September 2008.

ISSUES RELATING TO MIGRATION AND REFUGEES IN THE CONSTITUTION OF THE REPUBLIC OF POLAND AND THE JURISPRUDENCE OF THE CONSTITUTIONAL TRIBUNAL

Aleksandra Syryt[1]

ABSTRACT

Issues relating to migration and refugees are becoming increasingly important worldwide, requiring various kinds of analyses, including legal analyses. Poland is no exception. Owing to its binding international agreements, the country must ensure certain standards for the protection of migrants and refugees. Although primarily established by international law, the national legal framework is also relevant. Certain standards are derived from the Constitution of the Republic of Poland and the jurisprudence of the Constitutional Tribunal. Although the Polish Constitution does not mention migrants as such, and the concept of a refugee appears in the context of the right to obtain this status, based on art. 56 sec. 2, the system's legislator ensures that the interests of these persons are protected. Indeed, migrants and refugees as foreigners are covered by Polish law and its guarantees, including constitutional guarantees. The article analyses how migration and refugee issues are regulated in the Constitution of the Republic of Poland and the jurisprudence of the Constitutional Tribunal. By analysing the constitutional provisions and relevant case laws, this article aims to present the constitutional legal framework in Poland for these issues and examine the extent to which these solutions are appropriate and whether the Polish Constitution requires modifications or amendments in this regard.

Shaping the position of migrants and refugees must comply with constitutional standards, including the general principles of loyalty, proportionality, and equality. Exceptions and limitations may be established by law and must meet the conditions of art. 31 sec. 3 of the Constitution. Differentiating the constitutional position of citizens and foreigners with regard to certain rights, especially those serving the realisation of the principle of the Nation's sovereignty, is justified and cannot be treated as discrimination. This is justified by the functions of the state and its obligations to citizens as expressed in the Constitution.

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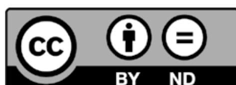

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1. Introduction

Migration has an enormous impact on the societies and economies of both the countries from which migrants originate and the countries to which they migrate. By going beyond the borders of their countries of origin, migrants enter the jurisdiction of other entities, which can be both an opportunity and a risk for them. The process of migration has various spheres of influence, requiring legal regulations that are important in providing for the security, social inclusion, economic development, predictability, and protection of migrants' human rights. Therefore, appropriate legislation would allow for a controlled flow of migrants enabling countries to manage the process effectively.

Legal solutions are intended to guarantee protection of migrants' rights. Migration laws also serve to protect the human rights of migrants. Legal regulations ensure equality to migrants in terms of access to basic rights such as labour rights, healthcare, education, and decent treatment. Therefore, by protecting the rights of migrants, countries can prevent exploitation, discrimination, and human rights violations.

Additionally, legal regulations relating to migration allow for a smooth control of people movement and contribute to security in the host country. They help verify the identity and purpose of migrants' visit to the host country and reduce illegal immigration. Further, adopting appropriate procedures, such as document verification and conducting security surveys, can help minimise risks to national security.

Furthermore, legal regulations concerning migration allow for a better integration of migrants into the host society. Providing for migrants' rights and obligations, such as access to education, healthcare, and employment, can help them build a new life. Adopting such regulations also facilitates adaptation of migrants to the host country and reduces the risk of social tensions arising from cultural differences.

Since migration impacts the economy of both migrants' home and host countries, adopting legal regulations of migration allows for better managing this impact and exploiting the benefits of migration. Regulations on migrant employment, working conditions, wages, and social security contribute to preventing exploitation and maintaining economic stability.

Finally, legal regulations relating to migration provide an opportunity for anticipation and socio-economic planning. Countries can develop migration

policies based on their demographic needs, labour markets, and development goals, thus making it easier to plan for better infrastructure, public service, and social support for migrants.

Since migration involves different states and the international community, it is important to develop and implement uniform standards regarding migration and the protection of migrants, especially forced migrants such as refugees. The appearance of foreign nationals on the territory of a foreign state also requires determining their legal status in the context of rights granted. This is also a constitutional issue as it relates to the distinction between citizens and non-citizens and the extent of protection afforded. These issues are worth analysing from the perspective of constitutional arrangements and legislation developing the constitution and in the context of possible practice.

There is little in the Constitution of the Republic of Poland[2] explicitly addressing these issues, with the result that no established practice has been developed in the jurisprudence of the Constitutional Tribunal regarding standards for migrants and refugees. However, the specific constitutional framework and guarantees for these persons can be derived from the general provisions on the status of the individual in the state and the constitutional position of foreigners.

Therefore, this paper aims to identify the constitutional status of migrants and refugees in Polish law and to analyse to what extent the status in question is considered in the jurisprudence of the Constitutional Tribunal, which adjudicates the hierarchical compatibility of the law.

While reviewing the legislation, case laws, and the literature on the subject, the constitutional basis for framing issues related to migration and migrants, including guidance for the legislator in this regard, will be considered. The study refers only to constitutional issues. Other matters, including international, EU, and administrative law, will be mentioned only to show the normative context of the analysis.

2. Constitutional principles shaping the position of migrants and refugees

The 1997 Constitution RP is established by the sovereign, which is the Nation, as is clear from the preamble and Art. 4 of the Constitution RP. All citizens of the Republic of Poland are the Nation. The Republic itself is a common good of all citizens. The citizen is, therefore, the basic subject of all activities of public authorities, as the state has special obligations towards the citizen. According to the doctrine, the common good is the sum total of those conditions of social life, thanks to which

2 | Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, item 483, as amended (Constitution, Constitution RP).

individuals, families, and other communities can more fully and easily achieve their own perfection.[3]

Commentators on Art. 1 of the Constitution RP point out that the definition of 'all citizens' fits the view of the Republic into the traditional concept of the common good as a state. The common good includes all constitutional values, including those expressed directly in the Constitution RP and those interpreted from it. Therefore, the common good cannot be opposed to other values.[4] Therefore, it should be agreed that the concept of the common good adopted in the Constitution RP defines three areas of constitutional regulations fundamentally important for clarifying the contents of Art. 1: (a) freedoms, rights, and obligations of the individual, (b) functioning of public life institutions, and (c) law-making, which is the basic instrument for implementing constitutional values.[5] Among them, it is important that the common good presupposes the good of the individual, which becomes the goal of the state and the law.[6]

A person with the status of a citizen is part of a collective subject – the sovereign – and he participates in shaping his will, enjoys certain freedoms and rights, has certain duties, and is under the protection of the state.

It should be noted, however, that the growing role of human rights and freedoms, and the belief that they belong to every human individual and are primarily related to the state, has meant that modern constitutions generally guarantee the enjoyment of constitutional rights and freedoms for all people. This is also stated in Art. 37 of the Constitution RP.[7]

Expanding the scope of freedoms and rights to which foreigners are entitled impacts the assessment of a citizen's status as the subject of aspirations of persons wishing to obtain such status. The elimination of numerous previous restrictions and prohibitions concerning foreigners has strengthened their legal position and allows them to arrange their life affairs in Poland without obtaining citizenship. This applies primarily to foreigners who are citizens of the Member States of the European Union, guaranteeing free movement of persons, goods, services, and capital.[8]

The Constitutional Tribunal explains as follows:

> [T]he Constitution, in its entirety, expresses a certain objective system of values, the implementation of which should be facilitated by the interpretation and application of individual constitutional provisions. To define this system of values, the provisions

3 | Bulletin of the Constitutional Committee of the National Assembly, 1995, pp. 90–91.

4 | Zdyb, 2018, pp. 25–26; Zdyb, 2001, pp. 190, 193–195.

5 | Trzciński, 2005, p. 455.

6 | Ibid., p. 454.

7 | Exceptions are also included in the Constitution, which, for example, reserves for citizens the right to participate in a referendum and in the election of the President, deputies, and senators (Art. 62 of the Constitution RP), the right to social security (Art. 67 of the Constitution RP), and right to health care services financed from public funds (Art. 68 sec. 2 of the Constitution RP).

8 | Judgment of the Constitutional Tribunal of 18 January 2012, Kp 5/09, OTK ZU No. 1/A/2012, item 5.

> on the rights and freedoms of the individual, located primarily in Chapter II of the Constitution, play a central role. Among these provisions, the principle of inherent and inalienable human dignity occupies a central place.[9]

The above implies that the common good is to protect the individual, which has a greater scope than protecting just the citizens. Besides Art. 30 of the Constitution RP, the common good also indicates the dignity, justification of individual rights and freedoms, and implementation limits. There is no opposition between the concept of the common good and human dignity. Dignity is closely related to the notion of the common good.[10] This allows for discussion on constitutional guarantees not only for citizens but also for foreigners.

In judgment K 33/12, the Constitutional Tribunal recognised the principle of the common good as one of the fundamental constitutional principles shaping relations between international law and national law. The Tribunal explained,

> The Constitution defines the relations between international law and national law primarily in accordance with the principles of the common good, sovereignty, democracy, the rule of law and the favor of domestic law with international law. On the basis of these principles, it can be concluded that Poland is opening up to the international order. The effect of the transfer of competences is usually a complicated system of dependencies between the state, its authorities and an international organization. Therefore, the conferral of powers should always be assessed from the point of view of the principles shaping constitutional identity.[11]

It is also important in shaping the legal status of foreigners in Poland, including the rights and duties of migrants and refugees.

The Constitutional Tribunal emphasises that the systemic principles contained in Chapter I of the Constitution RP, which are intended to contribute to the achievement of the common good of all citizens, cannot take precedence over the provisions of Chapter II. This means that this body recognised that although the common good is subordinated to all citizens, those areas related to human rights cannot be omitted in implementing public tasks, regardless of citizenship.[12]

The indicated approach aligns with the state's objectives in Art. 5 of the Constitution RP according to which, the Republic of Poland safeguards the independence and inviolability of its territory, ensures human and citizen freedoms and rights

9 | Judgment of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK ZU No. 3/1999, item 38.

10 | Judgment of the Constitutional Tribunal of 30 October 2006, P 10/06, OTK ZU No. 9/A/2006, item 128.

11 | See judgment of the Constitutional Tribunal of 26 June 2013, K 33/12, OTK ZU No. 5/A/2013, item 63. See also, for example, the judgment of the Constitutional Tribunal of 11 March 2015, P 4/14, OTK ZU No. 3/A/2015, item 31 and the Decision of the Constitutional Tribunal of 2 June 2015, P 35/15, OTK ZU No. 6/A/2015, item 85.

12 | Judgment of the Constitutional Tribunal of 29 April 2003, SK 24/02, OTK ZU No. 4/A/2003, item 33. See similarly, S. Wronkowska-Jaśkiewicz in a separate sentence to the Decision of the Constitutional Tribunal of 6 April 2011, SK 21/07, OTK ZU No. 3/A/2011, item 28.

and the security of citizens, safeguards national heritage, and ensures the protection of the environment, guided by the principles of sustainable development. The constitution-maker does not limit its jurisdiction to citizens but guarantees freedoms and human rights to all people who come under the authority of the Republic of Poland. Thus, although the Constitution RP is aimed at the implementation of the common good as the good of the citizens of the Republic of Poland, it does not leave other entities unprotected, considering the universality of human rights, the source of which is dignity (Art. 30 of the Constitution), and Poland is obliged to comply with international law that is binding on it, including the law relating to migration, migrants, and refugees.[13] This is expressed in Art. 37 sec. 1 of the Constitution RP, whereby, 'Whoever is under the authority of the Republic of Poland enjoys the freedoms and rights provided for in the Constitution'.

3. A migrant and a refugee as a subject of constitutional freedoms and rights in Poland

As per Art. 37 sec. 1 of the Constitution RP, the right to enjoy the freedoms and rights provided for in the Constitution for everyone under the authority of the Republic of Poland also includes foreigners. This is based on the principle that every human being, regardless of nationality, is entitled to rights and freedoms that require state protection. Each person is endowed with dignity, which is the source of that person's rights and freedoms. Therefore, the constitutional status of a migrant or refugee has to be related to those provisions of the Constitution RP that apply to natural persons without differentiation between citizenship and foreigners.

Importantly, the legislator recognises that not all rights must be guaranteed to the same extent. It allowed for exceptions to the principle expressed in Art. 37 sec. 1 of the Constitution RP with regard to foreigners. These may be defined by law. Therefore, the universal enjoyment of rights and freedoms is not absolute. It is subjectively limited, which is significant in the context of the migration issues analysed in this study. However, exceptions to the principle of universal use of constitutional rights and freedoms in relation to foreigners have to be specified in the act. The legislator does not have any discretion in determining them. An act limiting the exercise of freedoms and rights guaranteed by the Constitution has to be consistent with the Constitution RP and the values expressed therein, including such rules as the principle of adequacy (Art. 2 of the Constitution RP), principle of proportionality (Art. 31 sec. 3 of the Constitution RP) or principle of equality (Art. 32 of the Constitution of the RP).

Exceptions to the principle of universal exercise of constitutional freedoms and rights referred to in Art. 37 sec. 1 of the Constitution RP are also formulated by the constitution-maker in those provisions wherein he reserves certain rights

13 | More about this commitment in Gałka, 2018, pp. 115–121.

and freedoms exclusively for Polish citizens, or – as in the case of Art. 56 of the Constitution RP – for foreigners. The reference to the law in Art. 37 sec. 2 applies only to those rights and freedoms guaranteed to everyone in the Constitution RP.

To determine the status of migrants in Polish constitutional law, it is necessary to remember that in international law, it is assumed that all persons residing on the territory of a given state are subject to its jurisdiction under the principle of *qui in territorio meo est, etiam meus subditus est*. From this, it follows that the state is entitled to shape the legal status of these persons based on the relevant norms of internal law. International law also accepts the right of a state to differentiate the legal status of persons residing on a state's territory in accordance with the criterion of citizenship. The state exercises jurisdiction over its citizens, irrespective of where they are (personal sovereignty). Foreigners are subject to the state's jurisdiction only when they stay on its territory (territorial sovereignty).

Although in the past, states had much freedom in determining the legal status of foreigners on their territory, recognising it as one of the elements of their sovereignty,[14] this freedom began to be gradually restricted by the creation of minimum standards in international law for the protection of individual rights, which a state should equally guarantee to every person.[15] The concept of minimum standards limited the state's freedom in granting rights to foreigners based on reciprocity, that is, exercising the rights guaranteed to citizens conditional on granting the latter similar rights by the state of which the foreigner is a citizen. It is recognised that certain fundamental rights are vested in every human being anywhere in the world, regardless of their citizenship, which is derived *inter alia* from the universal meaning of the principle of the dignity of the human person.[16] The conviction was that a state cannot make the exercise of these fundamental rights by foreigners dependent on a similar decision of another state.

Presently, the legal status of foreigners in the country of their residence is shaped not only by the domestic laws of that country but also by international laws (mainly bilateral and multilateral agreements). Through bilateral agreements, states determine the legal situation of their citizens in the territory of other states and of citizens of other states in their territory. In multilateral agreements, states establish general regulations regarding the legal status of an individual, the application of which is not dependent on the citizenship of the applicant or the country of residence.[17]

What is important is the obligation to guarantee to the same extent freedoms and rights to own citizens and foreigners residing on the territory of a given state applies primarily to personal rights. Other rights can only be granted by the state

14 | Ehrlich, 1958, p. 603.
15 | Kędzia, 1991, p. 487.
16 | Sokolewicz, 2007, p. 1.
17 | The first international agreements relating to foreigners concerned the protection of religious and national minorities (e.g. peace treaties after World War I). It was only in the Charter of the United Nations that the idea of protecting human rights in a universal dimension was explicitly expressed. Most of the international conventions adopted later obliged the states parties to guarantee the rights and freedoms of these conventions regulated by any person under their jurisdiction, regardless of their nationality.

only to its citizens, especially if the exercise of these rights is related to the exercise of power by the sovereign.[18]

Art. 37 sec. 2 allows for the possibility of the legislator introducing restrictions on the exercise of rights and freedoms by foreigners provided for in the Constitution RP. The condition regarding the statutory form of interference in the sphere of rights and freedoms of this category of beneficiaries of constitutional rights and freedoms formulated in this provision is not the only requirement binding the legislator. Therefore, Art. 37 sec. 2 of the Constitution RP cannot be treated as a *lex specialis* in relation to Art. 31 sec. 3 of the Constitution RP. This means that all other conditions of a substantive nature listed in the latter provision have to be met in the process of legislative interference with constitutional freedoms and rights. Restrictions on the use of constitutional rights and freedoms by foreigners are therefore necessary in a democratic state for its security or public order, the protection of its environment, public health, and morals, or the freedoms and rights of other persons. Nevertheless, these restrictions may not infringe on the essence of freedoms and rights.[19]

The repetition in Art. 37 sec. 2 of the Constitution RP of the formal condition requiring that restrictions be introduced by law does not deprive this provision of its self-existent meaning. It directly foredeems the admissibility of establishing human rights restrictions based on the criterion of nationality.[20] It gives the legislator consent to a different shaping of the legal status of foreigners and Polish citizens. It also excludes the possibility of challenging, in principle, restrictions on constitutional rights and freedoms established according to the criterion of citizenship or its lack thereof.

Furthermore, Art. 37 sec. 2 of the Constitution RP also indicates that restrictions relating to exercising constitutional freedoms and rights by foreigners may be broader than those with respect to Polish citizens. Finally, Art. 37 sec. 2 of the Constitution RP is an exception to the principle of universality of enjoyment of constitutional rights and freedoms. Given this, the article should be interpreted narrowly. In other words, if there is no explicit decision of the legislator with regard to a restriction, a foreigner may exercise the right or freedom in question to the same extent as a Polish citizen. Art. 37 sec. 2 of the Constitution allows for the establishment of exceptions to the principle that anyone under the authority of the Republic of Poland can enjoy the freedoms and rights guaranteed thereby. However, this provision must not be understood as leaving room for arbitrariness of decisions in this extended space. Hence, any norms limiting the scope of enjoyment of rights and freedoms by foreigners must satisfy the premises of Art. 31 sec. 3 of the Constitution RP.[21]

It should be noted that the rights and freedoms reserved in the Constitution RP for Polish citizens do not have to be extended to foreigners by the legislator.

18 | Nita-Światłowska, 2016, sec. 40.
19 | Uziębło, 2007, p. 144.
20 | See judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260.
21 | Garlicki, 2003, p. 18.

However, if the rights and freedoms are granted by law, then they will not have the status of constitutional rights and freedoms. Consequently, the restrictions by the legislator will not have to meet the conditions under Art. 31 sec. 3 of the Constitution RP. Nevertheless, the statutory regulation of rights and freedoms must respect basic constitutional standards, particularly the requirement of equality and prohibition of discrimination. While these rights and freedoms will not be protected by way of a constitutional complaint, one can seek their enforcement by other means of constitutional protection, such as the right to a court, the right to challenge judgments and decisions, the right to compensation or application to an ombudsman, which, according to Art. 208 sec. 1 of the Constitution RP, 'safeguards the freedoms and rights of the human being and the citizen set out in the Constitution and in other normative acts', and therefore – contrary to the name of this body – its competences are not limited to civic issues.[22] The right to public information and voting rights in local elections are examples of constitutional rights extended to foreigners by the legislator.[23]

It is also accepted that rights and freedoms of a political nature closely linked to the relationship of citizenship attaching the individual to the state should not be granted by the legislator to individuals who do not possess citizenship. This is justified by the principle of the sovereignty of the Nation expressed in Art. 4 of the Constitution RP, which, according to the preamble thereof, comprises all citizens of the Republic of Poland. However, this restriction does not apply to local government elections because the bodies elected in these elections do not so much exercise power on behalf of the Nation as a whole but only on behalf of a specific local self-governing community. The latter – pursuant to Art. 16 sec. 1 – comprises 'all the inhabitants of the units of the basic territorial division' and thus all the inhabitants of municipalities, districts, and voivodeships, regardless of citizenship.[24]

Given the foregoing, it must be concluded that the Constitution RP extends its guarantees to everyone under its authority, including migrants and refugees. Human beings with inherent dignity enjoy protection regarding human rights, including those provided by the Constitution. Constitutional protection does not encompass the rights reserved to citizens, especially political rights closely related to the realisation of the principle of sovereignty of the Nation, as well as other rights such as social rights, which, as part of public tasks, are implemented by public authorities for the realisation of the common good. This, however, does not preclude foreigners, including migrants, from being granted rights at the

22 | See examples of the ombudsman's speeches in cases of refugees and migrants: Office of the Commissioner for Human Rights. Cudzoziemcy, uchodźcy, migranci [Online]. Available at: https://bip.brpo.gov.pl/pl/kategoria-tematyczna/cudzoziemcy-uchodzcy-migranci (Accessed: 15 June 2023).

23 | See judgment of the Constitutional Tribunal of 31 May 2004, K 15/04, OTK ZU No. 5/A/2004, item 47.

24 | The Constitutional Tribunal in its judgment of 11 May 2005, K 18/04 (OTK ZU No. 5/A/2005, item 49) stated that membership in a self-governing community is determined by 'the place of residence (centre of life activity), which is the basic type of ties in this type of communities'. The Tribunal therefore confirmed that the right to vote for local government bodies could be extended to EU citizens who are members of a self-governing community.

statutory level. Nevertheless, such rights are not subject to the same protection as constitutional rights. The parliament may also introduce restrictions concerning exercising constitutional freedoms and rights by foreigners. However, these restrictions must meet proportionality requirements and must not be based on discriminatory criteria.

Furthermore, it should be emphasised that foreigners, including migrants and refugees on the territory of the Republic of Poland, enjoy protection guarantees under international law. In fact, one of the main principles of the state system is its observance of international law, which is binding. Under the provisions of the law, the aforementioned subjects may participate in the country's political, social, and economic life. Their status is regulated primarily through the act of 12 December 2013 on foreigners.[25] This act defines the principles and conditions of foreigners' entry into, transit through, stay in, and departure from the territory of the Republic of Poland, the procedures, and the authorities competent in these matters, with the proviso that certain non-citizens are excluded from its regulations because the status of these subjects is determined by other provisions, especially those relating to the EU law.[26] Among the acts directly relating to matters concerning foreigners, the following also apply: Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland[27]; act of 14 July 2006 on the entry into, stay in, and departure from the territory of the Republic of Poland of nationals of the Member States of the European Union and their family members[28]; the act of 20 April 2004 on employment promotion and labour market institutions[29]; and the act of 24 September 2010 on population records.[30] Additionally, the status of foreigners is further specified by implementing provisions (regulations) that concern, for example, the application for granting a foreigner a temporary residence permit, the application for granting a foreigner a permanent residence

25 | Journal of Laws of 2023, item 519, as amended.

26 | The act on foreigners shall not apply to 1) members of diplomatic missions and consular offices of foreign states and other persons treated as such on the basis of laws, agreements, or generally established international customs, provided that they are reciprocal and have documents confirming the performance of their functions entitling them to enter the territory of the Republic of Poland and stay in this territory, with the exception of Arts. 23, 32, 58, 60 to 63, 66(4) and (5), 67 to 74, 78(1), 79(1) and (2), 80, 90 to 92 and 96 and 97 of the act; 2) citizens of the Member States of the European Union, Member States of the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area or the Swiss Confederation and their family members who join or reside with them; 3) family members of citizens of the Republic of Poland within the ambit of Art. 2(4)(b) of the act of 14 July 2006 on entry into the territory of the Republic of Poland, stay, and exit from this territory of citizens of the Member States of the European Union and members of their families (Journal of Laws of 2021, item 1697), who join them or stay with them; 4) citizens of the United Kingdom of Great Britain and Northern Ireland referred to in Art. 10(1)(b) and (d) of the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ. UE L 29, 31.01.2020, p. 7) and their family members, unless otherwise provided by law.

27 | Journal of Laws of 2022, item 1264, as amended.

28 | Journal of Laws of 2021, item 1697.

29 | Journal of Laws of 2023, item 735.

30 | Journal of Laws of 2022, item 1191, as amended.

permit, an invitation template, an application form template for entering an invitation into the register of invitations and the amount of funds that the inviting party should have, the documents issued to foreigners, visas for foreigners and their prolongation, cases in which the entrustment of work to a foreigner on the territory of the Republic of Poland is permissible without requiring a work permit, or the issuance of a work permit to a foreigner.

Of course, in addition to the provisions indicated above, and in other acts, particularly in the field of administrative law, specific provisions are laid down for non-citizens, including those that have to do with the acquisition of real estate by foreigners, the conduct of business activity by such persons, the participation of such persons in hunting, etc.

Standards for shaping the status of foreigners can also be found in the jurisprudence of the Constitutional Tribunal, which rules on the hierarchical compatibility of the law. Specifically, when analysing the principle of a democratic state of law, the Constitutional Tribunal, in its early rulings, pointed to the need for the state to build citizens' trust in the state and the laws it enforces (the principle of loyalty). At one point, it elaborated on this principle, explaining that when examining the compatibility of normative acts with the principle of the individual's trust in the state and in the laws it proposes, it is necessary to determine to what extent the individual's expectation that he will not expose himself to legal consequences that he could not have foreseen when making decisions and taking actions is justified. An individual must always reckon that a change in social or economic conditions may require a change in the existing laws and the immediate implementation of new legal regulations. The Constitutional Tribunal emphasised that the principle of loyalty determines the legal situation not only of citizens but also of foreigners and other private entities under the authority of the Republic of Poland. This is why the term 'principle of the protection of the individual's confidence in the state and the law' seems appropriate.[31] In view of this, it may be considered that the standards of a democratic state of law derived from Art. 2 of the Constitution, including those relating to the protection of an individual, apply in shaping the status of foreigners, including migrants and refugees.

Analysing the issue of protecting personal data and acquiring information about individuals, the Constitutional Tribunal explained that in Art. 51 sec. 2 of the Constitution RP, the legislator explicitly prohibits acquiring information about 'citizens'. This could suggest a possibility for state authorities to obtain, collect, and store information about other entities (e.g. foreigners) to a much wider extent than about citizens, thus leading to unnecessary information in a democratic state. A consequence of this would be differentiating the legal protection of individuals' privacy based on their citizenship status. The Constitutional Tribunal does not exclude such differentiation. Still, it cannot be treated as a principle, and in any case, it cannot lead to arbitrary differentiation of subjects in terms of those constitutional freedoms and rights that the legislator itself has not characterised

31 | See judgment of the Constitution Tribunal of 7 February 2001, K 27/00, OTK ZU No. 2/2001; judgment of the Constitutional Tribunal of 25 June 2002, K 45/01, OTK ZU No. 4/A/2002, item 46.

as civil ones. However, in terms of the contents of Art. 30 and Art. 37 sec. 1 of the Constitution RP, the same standards of interference with constitutional freedoms and rights must be adopted as a general rule, regardless of whether the subject has Polish citizenship.

Indeed, every subject under the authority of the Republic of Poland, i.e. under Polish law, irrespective of citizenship status, may legitimately expect protection against unjustified interference with his or her freedoms and rights. Owing to this, there is a need to establish the same standards for the acquisition, collection, or storage of data by state authorities in the course of investigative activities in relation to all entities under the authority of the Republic of Poland. Exceptions to this rule are allowed in the act relating to foreigners who are subject to Polish law. The Tribunal confirmed that Art. 37 sec. 2 of the Constitution RP cannot be treated as a *lex specialis* excluding the application of Art. 31 sec. 3 of the Constitution, as in that case, foreigners would have no constitutionally guaranteed rights. Any restriction of freedoms or rights not reserved exclusively to citizens must therefore be proportionate within the meaning of Art. 31 sec. 3 of the Constitution and, moreover, must not violate their substance. The consequence of the binding Art. 37 sec. 2 of the Constitution is the possibility of a more flexible interpretation of the individual premises constituting the principle of proportionality, justifying a greater level of interference in the freedoms and rights of foreigners than those of citizens. The wording of the Art. also supports this position. For instance, Art. 51 sec. 2 of the Constitution explicitly insists on the existence of a premise for obtaining, collecting, and storing data on citizens.[32] The above assumption does not exclude the admissibility of a different definition of the premise for obtaining and handling of data in relation to persons not being subject to the Polish law (e.g. data obtained by intelligence services on the activities of foreign entities abroad), although in any case such actions of state authorities must be within the standards of the rule of law. A condition for obtaining information on individuals in confidence is that a procedure is established for the immediate selection and destruction of unnecessary and inadmissible material. This solution prevents state authorities from making unauthorised use of legally collected information and storing it just in case it proves useful for other purposes in the future. The interference with the privacy of individuals will not only be the one-off acquisition of data about an individual, but also any subsequent operation on these data, including storage or secondary use in the course of other proceedings. At the same time, the Constitutional Tribunal does not negate the admissibility of further storage of telecommunications data concerning foreigners under the authority of the Republic of Poland, particularly if there are serious and justified suspicions about their involvement in activities threatening state security, including terrorism and organised crime. This differentiation in the degree of protection is primarily set in Art. 51 sec. 2 and Art. 37 sec. 2 of the Constitution

32 | See judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260; judgment of the Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU No. 7/A/2014, item 80.

RP.[33] The indicated standard is relevant for migrants arriving onto the territory of the Republic of Poland and refugees, and it has to strike a balance between privacy and state security.

Another important issue that should be highlighted is a question of the obligations of persons on the territory of Poland. According to Art. 83 of the Constitution, 'Everyone has the duty to obey the laws of the Republic of Poland, and in light of Art. 84', 'Everyone is obliged to pay public burdens and benefits, including taxes, as defined in the act'.

The fact that foreigners stay in Poland, regardless of the reason for their arrival, does not exclude them from the obligation to comply with Polish law, even if the migration is forced. Further, Art. 84 of the Constitution also establishes the principle of universality of public burdens.[34] Universality implies the obligation of 'everyone' to bear public burdens and benefits, and therefore both natural persons – citizens and foreigners – and legal persons are specified in the act.[35]

When analysing the constitutionality of certain provisions of the act on foreigners, the Constitutional Tribunal referred to the institution of family reunification, which creates favourable conditions for the stabilisation of foreigners coming to Poland for family reunification. This facilitation offers more favourable conditions for obtaining an entry visa and granting of a residence permit for a fixed period in Poland, particularly for a short period of three years of uninterrupted stay in the territory of the Republic of Poland before applying for a settlement permit.

The Constitutional Tribunal explained that the institution of family reunification was introduced into the act on foreigners as part of the process of adaptation to the EU law in line with the resolution of 1 June 1993 on the harmonisation of family reunification. A foreigner benefiting from the right to family reunification is consequently in a more favourable situation than a foreigner arriving in Poland under general rules, who has a mandatory period of at least five years of uninterrupted stay on the territory of the Republic of Poland before applying for a permit to settle. Although the solution is a derogation from the principle of equality, the principle is not absolute. A differentiation may be permissible if it is relevant and proportionate and is justified by the values defending the different treatment. The differentiating criteria adopted in the case of the institution of family reunification correspond to the conditions of differentiation developed in the case law of the Constitutional Tribunal and finds constitutional justification.[36] In Art. 18 of Chapter

33 | Judgment of the Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU No. 7/A/2014, item 80.

34 | Judgment of the Constitutional Tribunal of 11 April 2000, K 15/98, OTK ZU No. 3/2000, item 86.

35 | Działocha, 2003, p. 7.

36 | As part of the equality test, the Constitutional Tribunal examines whether (1) the criterion of differentiation is reasonably related to the purpose and content of a given regulation; (2) the weight of the interest that differentiation is intended to serve is in proportion to the importance of the interests that will be affected by the differentiation; and 3) the criterion of differentiation is related to other values, principles, or constitutional norms justifying different treatment of similar entities (e.g. the judgment of the Constitution Tribunal of 30 October 2019, P 1/18, OTK ZU No. A/2019, item 61.

I of the Constitution RP, the definition of the foundations of the political system of the Republic includes the principle of the protection of marriage and the family. Similarly, Art. 71 of the Constitution obliges state authorities to be particularly concerned about the welfare of the family.[37] This perspective is considered when shaping the legal status of migrants and refugees. Additionally, it is necessary to guarantee the protection of the rights of the child and consider child welfare, in accordance with Art. 72 of the Constitution RP.

The Constitutional Tribunal also analysed the compatibility of the former provisions on the Supreme Administrative Court insofar as they excluded the right to a court in cases concerning the expulsion of a foreigner illegally staying in Poland.[38] On this occasion, the Tribunal explained that an illegal stay on the territory of Poland is primarily associated with failure to comply with the lawful requirements for the border crossing itself, or with the failure to comply with the conditions (time limit) of stay specified by a visa or, in the case of visa-free travel, by an international agreement. The conditions for crossing the border are defined by the legislator. Unless a systemic interpretation of the provisions of the act and the content of international agreements give grounds for a different conclusion, a foreigner may cross the border and stay on the territory of Poland if he holds a valid passport document and a valid visa. Crossing the border in violation of these provisions is an indication of an illegal stay on the territory of Poland. Further, failure to comply with the conditions of stay stipulated by a visa or, in the case of visa-free travel, by an international agreement means that the foreigner's stay is classified as illegal. In such a case, an expulsion procedure may be implemented. However, this is only one of the possible cases wherein this procedure can be used. Notwithstanding this, initiating a procedure in cases aimed at expulsion of foreigners staying legally is also specified in the act. According to the Tribunal, the recognition of a violation of the right to a court depends on understanding the nature of the illegality of the stay in the territory of the Republic of Poland. If one adopts a narrow understanding, then the right to a court may be restricted. The control of access and residence of foreigners on the territory of a particular state is a right of that state, which has a constitutionally defined discretion in this respect. This control should be carried out, *inter alia*, through the application of the relevant border protection legislation and implemented by the relevant border services. The attitude towards the law in force in Poland, as well as the manner of crossing the Polish border (legal or illegal), may provide legitimacy for differentiating between foreigners in terms of a decision on expulsion. Possible shortcomings of the authorities in the application of the law, including decisions on the legality or illegality of a stay in Poland, can be eliminated using the institutions and procedures provided for by the law. The fact that they are 'under the sovereignty of the Republic of Poland' implies an obligation to submit to the Polish law and the legal norms derived therefrom, regardless of their place in the hierarchy of sources of

37 | See judgment of the Constitutional Tribunal of 19 May 2003, K 39/01, OTK ZU No. 5/A/2003, item 40.

38 | Judgment of the Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU No. 7/2000, item 260.

law, as long as such norms comply with the provisions of the Constitution. Such a state of affairs may prejudge not only the exercise of constitutionally protected rights and freedoms, but also the need to comply with exceptions to the rule if constitutionally justified.[39]

Thus, it may be concluded that the status of a migrant as a subject of constitutional freedoms and rights must be analysed in the context of the general guarantees of human rights regulated by the Constitution RP. A migrant can thus exercise those freedoms and rights that the legislature has provided for everyone. Indeed, migrants as foreigners have the same personal dignity as citizens. The rights reserved to citizens in the Constitution can be exercised by citizens only when this is provided for in the acts. Indeed, the constitutional right of citizenship itself does not exclude a statutory extension to foreigners if this is constitutionally justified and consistent with the values contained in the Constitution. However, it should be borne in mind that statutory rights enjoy less protection than constitutional rights,[40]

Finally, one should bear in mind that since Poland complies with its binding international law, migrants are also protected on the territory of Poland by the international law, as referred to in Art. 9 of the Constitution. They may therefore enjoy freedoms and rights under the international law insofar as the Republic is bound by it.

Under 'international law', Art. 9 of the Constitution also includes legal acts belonging to the legal system of the European Union. Today the term 'international law' no longer means the same law that was taught, written about, and applied a hundred years ago. 'Many autonomous regimes with their own name, set of entities, subject scope, axiology, or system of dispute resolution and potential sanctions have emerged from it. They are also international law'.[41] It should be emphasised that the Constitutional Tribunal also defines the EU order as 'autonomous, albeit genetically based on international law'.[42] In the constitutional law literature, the nature of EU law in relation to international law is not clearly explained, but constitutional issues related to these orders are usually analysed jointly, and the context in which the Constitution uses the phrase 'international law' or 'law established by an international organisation' is also referred to as EU law.[43]

The legal consequence of Art. 9 of the Constitution is that the legal system in force on the territory of the Republic of Poland is multi-component; in other words,

39 | Ibid.

40 | Muzyczka, 2013, pp. 55–56.

41 | Muszyński, 2022a, pp. 11–41; Muszyński, 2022b, pp. 34–69.
In the legal doctrine, a dispute is observed between autonomists, who regard EU law as a separate legal system, and internationalists, who claim that the EU law system is part of the general system of international law (see Mik, 2000, pp. 293–295). K. Wójtowicz writes that EU law is a system separate from international law. However, he does not explain how this division is related to the concept of international law referred to in the Constitution RP, Wójtowicz, 2014, pp. 15–36.

42 | See Decision of the Constitutional Tribunal of 19 December 2006, P 37/05, OTK ZU No. 11/A/2006, item 177.

43 | On the problems and specificity of EU law within the meaning of the Constitution of the Republic of Poland, see Wojtyczek, 2014, p. 26.

subsystems of legal regulations from different legislative centres co-apply in Poland.[44]

The state's obligation to observe international law in external relations is based primarily on international law. This means that in external relations, Art. 9 of the Constitution does not create a new obligation. The obligation to act in accordance with international law stems from the principle of good faith and the principle of *pacta sunt servanda*.[45]

Observance of international law in internal relations is more closely related to the principles of constitutional law and other norms of the domestic legal order. Art. 9 of the Constitution plays a special role in the process of interpreting the law, as well as in strengthening the argumentation in the process of justifying decisions, which is clearly noticeable in the jurisprudence of the Constitutional Tribunal. Compliance with the international laws binding on the Republic of Poland implies an obligation to formulate Polish laws in such a way as to consider the understanding of legal institutions that are subject to the regulations of national laws, which exist within international laws.[46] The Constitutional Tribunal also believes that a derivative of the obligation to ensure compliance of legislation with international laws binding on Poland is the obligation to interpret binding legislation in such a way that fullest possible compliance is ensured.[47] The meaning of Art. 9 of the Constitution in internal relations relates to the fact that the obligation to comply with the norms of international laws also applies to acts whose position has not been clearly defined in other provisions of the Constitution. In this case, it is about sources of international laws not listed in Art. 87 of the Constitution RP.[48]

Poland's accession to the EU through the ratification of an international agreement resulted in the state and its bodies being bound by treaties and laws enacted by this international organisation, including the law on migration or refugees.[49] At the same time, it should be borne in mind that the manner of fulfilling international obligations falls within the exclusive competence of the state. Thus, it depends on the state and its political system on how it fulfils its international obligations.[50] For the implementation of the *pacta sunt servanda* principle, what counts is the achievement of a specific effect resulting from the commitments made.

Of particular relevance to the constitutional position of migrants is Art. 56 of the Polish Constitution, according to which,

44 | Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49. See also: Wasilkowski, 1997, p. 15.

45 | Wasilkowski, 2006, p. 12.

46 | Syryt, 2019, pp. 98–100.

47 | See judgment of the Constitutional Tribunal of 28 March 2000, K 27/99, OTK ZU No. 2/2000, item 62.

48 | Czapliński and Wyrozumska, 2004, p. 31.

49 | See more about the legislation in this area: Common European Asylum System [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en (Accessed: 5 August 2023); European Union Agency for Fundamental Rights, 2020; Immigration policy: https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy (Accessed: 5 August 2023).

50 | Muszyński, 2023, p. 32.

> 1. Foreigners may exercise their right of asylum in the Republic of Poland under the terms of act. 2. A foreigner who seeks protection from persecution in the Republic of Poland may be granted a refugee status in accordance with international agreements binding the Republic of Poland.

The legal regulations of refugee status eligibility have been elevated to a constitutional status.

3. Constitutional guarantees for the protection of migrants and refugees

The constitutional legislator has ensured that whoever is under the authority of the Republic of Poland enjoys the freedoms and rights guaranteed by the Constitution RP. The special arrangements for foreigners are set out in Art. 56 of this act. They concern the right to asylum and refugee status, whereby specific rules are laid down by appropriate legislation. These rights may be asserted within the limits of the law, as indicated by Art. 81 of the Polish Constitution.

Although the right to asylum is included in the chapter on human rights, there is no clarity on its scope.[51] The legislator excluded the possibility of protecting the right to asylum through a constitutional complaint, with the result that no practice could develop in this regard in tribunal jurisprudence.[52]

It is worth noting that the Polish Constitution does not define the terms 'asylum' or 'right to asylum'. They are also not specified in the laws, although Art. 3 pt. 1 of the act on foreigners indicates that the term 'asylum' as used in the act refers to asylum as defined in Art. 90 of the act on granting protection to foreigners in the territory of the Republic of Poland. Indeed, this provision sets out the conditions for an asylum application. However, it does not provide a definition of this institution. The literature accepts that asylum is a form of protection granted by a state within its territory to refugees, based on the principle of non-deportation and on their rights of an international character or as recognised by that state.[53]

The literature points out that the right to asylum specified in Art. 56 sec. 1 of the Constitution is the right of a state to grant refuge within its territory to a person prosecuted in its territory for political activity.[54] This position is subject to criticism. Indeed, the current Polish Constitution does not restrict the ability to obtain asylum in the territory of Poland exclusively to persons persecuted for political activities.[55] In view of this, an interpretation is proposed according to which the essence of the right to asylum implies granting refuge to a person without Polish

51 | Banaszak, 2012, p. 339; Florczak, 2003, pp. 36–38.
52 | See Art. 79 sec. 2 of the Constitution RP.
53 | Kuczma, 2014, pp. 283–293; Zdanowicz, 2007, p. 218.
54 | Skrzydło, 2013, p. 67.
55 | Nita-Światłowska, 2016, Legalis.

citizenship in the territory of the Republic of Poland, involving the right to enter and permanently reside within the said territory under the conditions set out in the act, based on regulations arising from binding international agreements. Asylum understood in this way is sometimes referred to in the literature as 'territorial asylum' to distinguish it from 'diplomatic asylum'.[56] By granting asylum to a foreigner, the Republic of Poland assumes sovereign authority over the asylum-seeker and undertakes to grant him a broader scope of protection than that guaranteed to other foreigners.

A foreigner who has been granted the right to asylum in the Republic of Poland may permanently reside in Poland, acquire the right of entry and the right to legally reside in the territory of the Republic of Poland. An asylum-seeker acquires the right to settle in Poland, whereas a person who has been granted refugee status obtains only a limited-time residence permit in Poland.[57]

In Art. 56 sec. 1 of the Constitution RP, when defining the circle of subjects who may benefit from the right to asylum, the legislature uses the term 'foreigners'. If there is no legal definition of the word in the Constitution RP, it is reasonable to refer to the understanding inherent in the study of law and to consider it as the stipulated concept.[58] This concept is however, clarified in the act on foreigners, whereby, Art. 3 point 2 defines a foreigner as a person without Polish citizenship. In view of this, it may be concluded that the right to asylum guaranteed by Art. 56 sec. 1 of the Constitution RP applies to both foreign nationals and stateless persons (apatrides). This definition is in line with the international laws binding Poland. Unlike in the case of refugee status, the Constitution RP does not specify situations in which the legislator may consider protection by granting the right to asylum.[59] As is clear from administrative court case law, granting asylum is one of the prerogatives of the state and is therefore optional even if the conditions formulated in this provision are met. It is a discretionary decision.[60] However, rules relating to the granting of asylum must be laid down by law, which means that no arbitrary action can be taken. The law in question must also implement constitutional principles and values, including those related to the democratic rule of law, the principle of proportionality, and the protection of inherent human dignity. In other words, the legislative definition of the situations to which the legislature attaches access to the right of asylum is subject to assessment through the prism of constitutional guarantees and international obligations binding Poland. Such a law may be subject to assessment regarding its compatibility with the Constitution or international agreements ratified with prior consent by law (Art. 188, points 1 and 2 of the Polish Constitution). The conditions for exercising the right to asylum in the Republic of Poland are set out in the act on granting protection to foreigners in the territory of the Republic of Poland.

56 | Banaszak, 2012, p. 338; Florczak, 2003, p. 31.
57 | Winczorek, 2000, p. 137.
58 | Banaszak, 2012, p. 338.
59 | Płachta, 1998, p. 89.
60 | See e.g. judgment of the Provincial Administrative Court in Warsaw of 29 January 2008, Ref. V SA/WA 2289/07, Legalis.

It should be emphasised that, in view of the provisions conflicting with Art. 91 sec. 2 of the Constitution, provisions of statutory rank enacted to implement Art. 56 sec. 1 of the Polish Constitution are of a subsidiary nature in relation to regulations arising from international agreements binding Poland. They primarily define the national procedure before the authority to obtain asylum status. However, the subsidiarity of statutory solutions is not that they are applicable only if there is no international law regulating the issue in question. They can also be applied when an international agreement binding Poland does not feature a specific regulation on a particular issue or when it does not have the attribute of self-execution.

Art. 56 of the Constitution RP also indicates the possibility for a foreigner to obtain refugee status. Here, the legislator is more specific in outlining the conditions for benefiting from such protection. Art. 56 sec. 2 of the Constitution RP provides that refugee status, under international agreements binding the Republic of Poland, may be obtained by a foreigner who seeks protection from persecution in the Republic of Poland. The possibility of obtaining refugee status is constitutionally guaranteed only to the extent that it arises from an international agreement binding Poland. Protection in terms of refugee status cannot be enforced through a constitutional complaint (Art. 79 sec. 2 of the Constitution RP).

As with asylum, the legislator does not clarify what refugee status involves. In view of this, reference can be made to legal and jurisprudential language and how the institution in question has been framed in legislation.

According to Art. 13 of the act on granting protection to foreigners in the territory of the Republic of Poland, a foreigner is granted refugee status if, as a result of a well-founded fear of persecution in his or her country of origin on account of race, religion, nationality, political beliefs, or membership in a particular social group, he or she cannot or does not wish to avail the protection of that country. Refugee status is also granted to a minor child of a foreigner who has been granted refugee status in the Republic of Poland, born within its territory. In the same provision, the legislator has clarified what constitutes persecution for granting refugee status. According to the legislator persecution must, by its very nature or repetition, constitute a serious violation of human rights, particularly rights whose revocation is inadmissible under Art. 15 repealing the application of the obligations in a state of public emergency, item 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950,[61] or be an accumulation of various acts or omissions, including those constituting violations of human rights, whose impact is as severe as the persecution referred to above.

The Supreme Administrative Court, in its 1 February 2000 ruling, that is, under the former act on foreigners, pointed out that, in specifying the substantive legal prerequisites justifying the refusal to grant refugee status to a foreigner, the act refers to the Geneva Convention and the New York Protocol and does not provide for additional prerequisites here. On the contrary, Art. 56 sec. 2 of the Constitution RP stipulates that the application for refugee status shall be made in accordance with international agreements binding the Republic of Poland. Therefore, it would be unacceptable to interpret regulations of a statutory rank, particularly those

61 | Journal of Laws of 1993, item 284, as amended.

including the provisions of the act on foreigners, in such a way as to make it incompatible with Art. 9 and 91 item 2 of the Constitution RP and with Art. 56 sec. 2 of the Constitution RP, which provides for the possibility of obtaining refugee status 'under the international agreements binding the Republic of Poland'.[62]

Unlike the right of asylum, the decision to grant a foreigner refugee status is not discretionary. If a person fulfils the requirements of the Geneva Convention, he or she may legitimately expect to be granted refugee status. A foreigner who has been granted refugee status may permanently reside in Poland. He or she gains the right of entry and the right of legal residence on the territory of the Republic of Poland. Unlike an asylum-seeker who gains the right to settle in Poland, a person who has been granted refugee status obtains only a residence permit in Poland for a definite period. Granting refugee status does not protect a foreigner from extradition. As explained by the Administrative Court in Warsaw, the prohibition resulting from Art. 604 § 1 point 1 of the Code of Criminal Procedure does not prevent the extradition of a foreigner permanently residing in the territory of the Republic of Poland and benefiting from any form of protection granted to him by the decision of its competent authority, provided for by refugee status, subsidiary protection, or temporary protection. Considering this perspective of the provision, only the right to asylum is relevant.[63]

It should be emphasised that individual guarantees concerning both refugee status and the right of asylum cannot be found in the Constitutional Tribunal case laws but in the case laws of administrative courts and the Supreme Court. They are concerned with the procedures for assigning given statuses and incidental issues, for example, extradition.

Although the protection of constitutional rights and freedoms by means of a constitutional complaint does not concern the rights of refugee status and the right of asylum on the territory of Poland, foreigners, including migrants and refugees, are not deprived of the means to protect their rights. Since they are under the authority of the Republic of Poland and are entitled to certain constitutional freedoms and rights, they are also protected by constitutional means, particularly through the right to a court (Art. 45 sec. 1 and Art. 77 sec. 2 of the Constitution RP), a complaint for damages (Art. 77 sec. 1 of the Constitution RP), the right to appeal (Art. 78 of the Constitution RP), an application to the Commissioner for Human Rights Art. 80 of the Constitution RP), and a constitutional complaint, subject to Art. 79 sec. 2 of the Constitution RP. In this set of measures, the most important is the right to a court. As the Constitutional Tribunal explains, the constitution-maker broadly determines the personal scope of the right to a court. It is granted to every natural person, that is, a Polish citizen, a foreigner, and a stateless person.[64] The material scope of the right to a court is determined by the concept of 'case',

62 | Ref. No. V SA 859/99 (unpublished).

63 | Decision of the Court of Appeal in Warsaw of 26 October 2010, Ref. II AKZ 791/10, KZS 2011, No. 10, item 54.

64 | See e.g. the judgment of the Constitutional Tribunal of 2 June 1998, K 28/97, OTK ZU No. 4/1998, item 50; judgment of the Constitutional Tribunal of 20 September 2006, SK 63/05, OTK ZU No. 8/A/2006, item 108.

understood in the jurisprudence of the Tribunal as an autonomous concept, other than that adopted in individual branches of law because it refers to the basic function of courts, which – in accordance with Art. 175 sec. 1 of the Constitution – is the administration of justice. The Tribunal has consistently advocated a broad understanding of the 'case': it occurs whenever it is necessary to decide on the rights and freedoms of an individual and his or her interests protected by law, both in the event of their violation or threat and in the event of the need to determine them authoritatively.

Therefore, migrants and refugees, within the scope of their constitutional rights, can benefit from the protection offered by the abovementioned measures. Otherwise, the freedoms and rights declared in the Constitution RP cannot be fully implemented.

4. Conclusion

The findings from the above analysis lead to the conclusion that although the Constitution RP does not mention migrants as such, and the concept of refugee appears in the context of the right to obtain this status based on Art. 56 sec. 2, the system's legislator did not leave these persons out of its interest. Indeed, migrants and refugees as foreigners are covered by Polish law and its guarantees, including constitutional guarantees, first because of the general principle expressed in Art. 37 sec. 1 of the Constitution RP that anyone under the authority of the Republic of Poland may exercise constitutional freedoms and rights. Second, the subjects of the constitutional freedoms and rights assured to everyone can be migrants and foreigners by virtue of their personal dignity, which is the source of these rights, regardless of their citizenship. This is why they are guaranteed freedom of movement within the territory of the Republic of Poland and the choice of place of residence and stay. Everyone is free to leave the territory of the Republic of Poland (see Art. 52 sec. 1 and 2 of the Constitution RP). They are also subjects of fundamental rights, especially personal rights. Third, the legislature has provided guarantees for foreigners in the form of a possibility to apply for the right of asylum and refugee status (Art. 56 of the Constitution RP). Foreigners can assert their freedoms and rights through judicial and administrative means. They can also apply to the ombudsman in their cases.

Shaping the position of migrants and refugees must comply with constitutional standards, including the general principles of loyalty, proportionality, and equality. Exceptions and limitations may be established by law and must meet the conditions of Art. 31 sec. 3 of the Constitution RP.

Importantly, it should be borne in mind that differentiating the constitutional position of citizens and foreigners with regard to certain rights, especially those serving the realisation of the principle of the Nation's sovereignty, is justified and cannot be treated as discrimination. This is justified by the functions of the state and its obligations to citizens as expressed in the Constitution RP.

A review of the constitutional provisions on human freedoms and rights makes it possible to conclude that for foreigners too, the guarantees are broad. The legislator considers them when shaping the content of the law on migration and refugees. While it must comply with the binding international laws in doing so, it is careful not to take measures that contradict constitutional principles and values.

Although the catalogue of constitutional freedoms and rights is extensive, in the current form of the Constitution RP, there is no need to modify it to expand the regulations for migrants and refugees. This is regardless of the legislator's assumptions: the legislator is bound by the basic principle that determines the status of every person in the state, namely, the principle of dignity, which is the source of all constitutional freedoms and rights, and public authorities must respect this dignity and assist in its realisation.

It should be emphasised that so far the issue of refugee and migration law has not been the subject of the Constitutional Tribunal's statements. If one looks for references of the Tribunal regarding the matter in question, some standards can be found in cases where the Tribunal referred to the rights of citizens and foreigners in Poland, especially in the context of citizenship. However, these are not matters directly related to migrants or refugees.

The Constitutional Tribunal also did not assess international law (international agreements) concerning migration, migrants, and refugees. Neither has it commented on migration issues in the context of the division of competences between Poland and the EU. Therefore, no position has been taken in this regard.

It should be emphasised that owing to the fact that the Constitutional Tribunal may only examine the compliance of international agreements with the Constitution, the question of the Constitutional Tribunal's statements on EU derivative law is significantly limited. To make an assessment, the initiator of the proceedings would have to indicate that the treaty provides for a specific norm concerning the issue of refugees, migration, and migrants, which is inconsistent with the Constitution. This also limits the Constitutional Tribunal's field of expression. Changes in the field of migration law would have to be introduced in the treaty so that the Constitutional Tribunal could directly adjudicate them.

The Constitutional Tribunal could examine derivative law in the form of a constitutional complaint or a legal question, but the number of formal conditions to be met implies that a given assessment can only be considered hypothetically. In a legal question, the court could ask the Constitutional Tribunal if it had any doubts about whether the EU derivative law on migration that it wants to apply in the case is consistent with the Constitution. So far, no court has asked the Tribunal such questions. As far as constitutional complaint is concerned, the complainant would have to exhaust all legal means and get a final decision of the court or public administration body issued on the basis of EU derivative law (and not every law is directly applicable in a Member State). Additionally, in a constitutional complaint, it would not be possible to question the fact that EU law goes beyond the scope of competences transferred to the EU, because the control model in the case of a constitutional complaint can only be the provisions on constitutional freedoms and rights, with the exception that the right to asylum or to obtain refugee status is excluded from this directory. This was decided by the legislator in 1997.

The indicated subject matter was also not the subject of statements by the Constitutional Tribunal in the context of the limits of European integration and the scope and limits of the transfer of competences of a Member State of the European Union.

It should be noticed that the issue of the limits of the transfer of competences to the EU was the subject of judgments of the Constitutional Tribunal. Regarding the issue of the scope of division of competences between Poland and the EU, the Constitutional Tribunal commented on this subject in general terms (see the judgments of the Constitutional Tribunal Ref. No. K 18/04[65] and Ref. No. K 32/09[66]).

The Constitutional Tribunal indicated as shown:

> The conferral of competences in certain matters must be understood both as a prohibition on conferring all the competences of a given authority, on conferring competences in all matters in a given field, and as a prohibition on conferring competences on the substance of matters determining the remit of a given authority Therefore, it is necessary to precisely define the areas and indicate the scope of competences covered by the transfer. There are no grounds for assuming that in order to meet this requirement, it would be enough to retain, even for the sake of appearances, competences in the competence of constitutional bodies in a few cases. The fears of the applicants expressed at the hearing are not justified. Actions as a result of which the transfer of powers would undermine the sense of existence or functioning of any of the organs of the Republic of Poland would also be in clear conflict with art. 8 sec. 1 of the Constitution.[67]

Moreover, the Constitutional Tribunal is of the opinion that neither Art. 90 sec. 1 nor Art. 91 sec. 3 constitutes a basis for delegating authorisation to an international organisation (or its organ) to enact legal acts or take decisions that would be contrary to the Constitution RP. The regulations indicated here cannot be used to transfer competences to the extent that it would prevent the Republic of Poland from functioning as a sovereign and democratic state.

In the judgment K 32/09, the Constitutional Tribunal added that the presumption of the constitutionality of the EU treaties may be rebutted only after it has been established that no such interpretation of the treaty and of the Constitution exists that would allow stating the compliance of the treaty provisions with the fundamental law. The Constitutional Tribunal cannot fail to consider the context of the effects of its judgment from the point of view of constitutional values and principles, as well as the consequences of the judgment for the sovereignty of the state and its constitutional identity.[68] So far, the Constitutional Tribunal has not linked migration or refugees with constitutional identity. The Tribunal explained

65 | The judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49.
66 | The judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU No. 9/A/2010, item 108.
67 | The judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU No. 5/A/2005, item 49.
68 | The judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU No. 9/A/2010, item 108.

that. regardless of the difficulties associated with establishing a detailed catalogue of non-transferable competences, the matters covered by the complete prohibition of transfer should include provisions specifying the guiding principles of the Constitution and provisions regarding the rights of an individual determining the identity of the state, including the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition of delegating constitutional powers and competences to create competences. The Constitutional Tribunal also spoke about sovereignty and the scope of the integration process. These can be the bases on which this organ could possibly develop in the future instruments for constitutional review of possible treaty provisions that would concern migration and refugees.

Judgment Ref. No. K 3/21 of the Constitutional Tribunal[69] is concerned with the strict issue of EU law encroaching on the core competencies of the constitutional organs of the state in terms of deciding on its system (here: the judiciary). This is an issue different from migration, refugee, and asylum matters. However, these issues do not concern the structure of the state and its bodies, but concern human rights; therefore, if a given issue appeared in the Constitutional Tribunal, additional arguments and measures should be developed to assess the constitutionality of the given solutions. The existing jurisprudence of the Constitutional Tribunal on the limits of the transfer of competences to the EU may prove insufficient in this case.

However, if such cases were brought before it, the sub-constitutional law shaping the situation of these entities, as well as the obligations of the public authority towards them, would have to meet the standards outlined above regarding the constitutional status of an individual in the state, as well as the principle of proportionality and Poland's obligation to comply with international law that is binding on it with respect to the primacy of the Constitution RP according to Art. 8 sec. 1 of this act.

69 | The judgment of the Constitutional Tribunal of 7 October 2021, K 3/21, OTK ZU A/2022, item 65.

Bibliography

Banaszak, B. (2012) *Konstytucja Rzeczypospolitej Polskiej: Komentarz*. Warszawa: C.H.Beck.

Czapliński, W., Wyrozumska, A. (2004) *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa: C.H. Beck.

Działocha, K. (2003) 'Komentarz do art. 84' in Garlicki, L. (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. 3. Warszawa: Wydawnictwo Sejmowe, pp. 1–11.

Ehrlich, L. (1958) *Prawo międzynarodowe*. Wydawnictwo Prawnicze.

European Union Agency for Fundamental Rights (2020) *Handbook on European law relating to asylum, borders and immigration*. 3rd edn. Luxembourg: Publications Office of the European Union.

Florczak, A. (2003) *Uchodźcy w Polsce. Między humanitaryzmem a pragmatyzmem*. Toruń: Wydawnictwo Adam Marszałek.

Gałka, K. (2018) 'Zasada przestrzegania prawa międzynarodowego jako zasada konstytucyjna (art. 9 Konstytucji RP)' in Mik, C., Kułaga, Ł. (eds.) *Polskie prawo stosunków międzynarodowych. Zagadnienia wybrane*. Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", pp. 115–121.

Garlicki, L. (2003) 'Komentarz do art. 31' in Garlicki, L. (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. 3. Warszawa: Wydawnictwo Sejmowe, pp. 1–36.

Kędzia, Z. (1991) 'Prawo cudzoziemca do ochrony przed wydaleniem z kraju legalnego pobytu' in Wieruszewski, R. (ed.) *Prawa człowieka. Model prawny*. Wrocław: Ossolineum, pp. 485–487.

Kuczma, P. (2014) 'Prawo cudzoziemca do ubiegania się o udzielenie azylu terytorialnego' in Jabłoński, M. (ed.) *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*. Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, pp. 283–293.

Mik, C. (2000) *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I*. Warszawa: C.H. Beck.

Muszyński, M. (2022a) 'On the Notion, Concept and Contemporary Role of International Law in historical Perspective', *Kwartalnik Prawa Międzynarodowego*, I(I), pp. 11–41; https://doi.org/10.5604/01.3001.0015.9872.

Muszyński, M. (2022b) 'Konstytucja RP a prawo spór o w pluralistycznym prawnym', *Consilium Iuridicum*, 2022/1-2, pp. 34–69.

Muszyński, M. (2023) 'Konstytucyjne granice bezpośredniego stosowania umowy międzynarodowej przez sądy w Polsce', *Prokuratura i Prawo,* 2023/4, pp. 5–36.

Muzyczka, K. (2013) 'Pojęcie cudzoziemca i jego status prawny w Rzeczypospolitej Polskiej', *Świat Idei i Polityki*, 12(14), pp. 54–74; https://doi.org/10.15804/siip201304.

Płachta, M. (1998) 'Ekstradycja i azyl w Konstytucji z 1997 roku', *Gdańskie Studia Prawnicze*, III(3), pp. 79–98.

Safjan, M., Bosek, L. (eds.) (2016) *Konstytucja RP. Tom I. Komentarz do art. 1–86*. Warszawa: C.H. Beck; Legalis.

Skrzydło, W. (2013) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Warszawa: Wolters Kluwer Polska.

Sokolewicz, W. (2007) 'Komentarz do art. 1' in Garlicki, L. (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. 5. Warszawa: Wydawnictwo Sejmowe, pp. 1–37.

Syryt, A. (2019) *Oddziaływanie prawa międzynarodowego na sądownictwo konstytucyjne w Polsce – perspektywa konstytucyjna*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości.

Trzciński, J. (2005) 'Rzeczpospolita Polska dobrem wspólnym wszystkich obywateli' in Góral, J., Hauser, R., Trzciński, J. (eds.) *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005*. Warszawa: Naczelny Sąd Administracyjny, pp. 452–460.

Uziębło, P. (2007) 'Podstawowe prawa i wolności polityczne cudzoziemców w RP', *Białostockie Studia Prawnicze*, 2007/2, pp. 141–157.

Wasilkowski, A. (1997) 'Prawo krajowe – prawo wspólnotowe – prawo międzynarodowe. Zagadnienia wstępne' in Kruk, M. (ed.) *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*. Warszawa: Wydawnictwo Sejmowe, pp. 7–18.

Wasilkowski, A. (2006) 'Przestrzeganie prawa międzynarodowego (art. 9 konstytucji RP)' in Wójtowicz, K. (ed.) *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*. Warszawa: Wydawnictwo Sejmowe, pp. 9–30.

Winczorek, P. (2000) *Komentarz do Konstytucji Rzeczypospolitej Polskiej*. Warszawa: Liber.

Wojtyczek, K. (2014) 'Rozdział II' in Sarnecki, P. (ed.) *Prawo konstytucyjne RP*. 9th edn. Warszawa: C.H. Beck, Legalis, pp. 8–45.

Wójtowicz, K. (2014) *Constitutional courts and European Union law*. Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Zdanowicz, M. (2007) 'Formy ochrony cudzoziemców w Polsce', *Białostockie Studia Prawnicze*, 2007/2, pp. 217–230.

Zdyb, M. (2001) 'Dobro wspólne w perspektywie art. 1 Konstytucji RP' in Rymarz, F., Jankiewicz, A. (eds.) *Trybunał Konstytucyjny. Księga XV-lecia*. Warszawa: Wydawnictwo BTK, pp. 190–202.

Zdyb, M. (2018) 'Podstawowe dylematy realizacji prawa cywilnego w prawie administracyjnym w kontekście stosowania instrumentów administracyjnych (i odwrotnie). Poszukiwanie optymalnego modelu współistnienia obu sfer prawa w perspektywie współczesnych wyzwań, przy uwzględnieniu wybranych dziedzin publicznego (administracyjnego) prawa gospodarczego', *Zeszyty Naukowe KUL,* 61(4), pp. 23–46; https://doi.org/10.31743/zn.2018.61.4.23-46.

THE REPUBLIC OF SLOVENIA'S RETURN PROCEDURES FOR IRREGULAR MIGRANTS AND ASYLUM APPLICANTS IN THEORY AND PRACTICE

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ABSTRACT

This study explores return procedures in Slovenia for irregular migrants and rejected asylum applicants, and how they are interlinked. It outlines the current legal framework in this area and highlights important court decisions that impact the implementation of its provisions.
This study examines the international protection procedure and its outcomes including the recognition of international protection, return under the Dublin regulation or negative decision and issuance of the return decision. It further explains the obligations of the government and foreigners, and restriction of movement. Procedures are presented for vulnerable categories, particularly unaccompanied minors. Further, the identity establishment procedures, obtaining travel documents, and monitoring mechanisms, including procedures regarding voluntary or forced return are discussed.
The obligation to respect human rights is enshrined in all legal instruments, and the principle of non-refoulement[3] does not allow for any derogations, exceptions, or limitations.
Cooperation and collaboration among all stakeholders is essential. Safeguards are crucial in delicate and important procedures. To better regulate migration and related issues, many legal provisions have been changed recently based on court decisions.
Voluntary return is considered the most effective and should be sustainable, dignified, and provide appropriate support for the returnees. Every person undergoing return proceedings should be able to make an informed decision about his or her return and is provided the maximum possible support and assistance for reintegration. Slovenia, and other European Union Member States, should adopt

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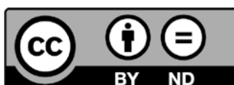
3 | Art. 7 of the 1966 International Convention on Civil and Political Rights, Art. 3 of the 1984 United Nations Convention against Torture and Art. 3 of the European Convention of Human Rights (ECHR) – as interpreted by the European Court of Human Rights.



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a coordinated approach to common practices to promote returns and adopt and implement effective return measures.

KEYWORDS
irregular migrants
rejected asylum seekers
principle of non-refoulement
voluntary return
identity establishment
vulnerable persons

1. Introduction

Migration has been part of human history since its inception. Many waves of immigration have occurred in human history, such as the discovery of new places on land between the 15th and 17th centuries, labour migration in the 19th century, and the wave of immigration after World War II. Immigration has been crucial to the development of many modern countries, shaped labour dynamics worldwide, and was fundamental to the rise of the global economy.[4] Migration may occur owing to economic, social, climatic, academic, professional, and technological causes, which may be voluntary or forced resulting from war, climate change, or inadequate living conditions. With the emergence of the state, immigration became a security issue, leading to increased surveillance and restrictions. Cross-border regulations require various licences, documentation, and control agencies. With new social developments, different views of immigration have emerged, prompting different control mechanisms.[5] Although migration is a widespread social phenomenon with a long history, the concept of international protection is relatively new, which emerged only at the beginning of the 20th century resulting from the European, Balkan, Middle Eastern wars and World War I. International protection continued to develop after World War II, when the need for more comprehensive protection for those left homeless and without a means of livelihood owing to the effects of the war became even more apparent.[6] Moreover, World War II brought a different view of migration as the world realised that it was necessary to define who needed international protection and the meaning of the word refugee; the Geneva Convention was signed in 1951 and entered into force in 1954.[7]

In September 2015, Europe experienced a sharp increase in migration since World War II, primarily resulting from armed conflicts being fought in the Middle East. This dramatic increase in the number of migrants entering the area, which has been referred to more broadly as the ‘European refugee crisis’, has

4 | Bučar-Ručman, 2014.
5 | Mackey and Barnes, 2013.
6 | Jaeger, 2001.
7 | UNHCR.

fragmented society. Part of the population saw incoming foreigners as a looming danger, whereas another part argued that Europe should come to aid migrants or refugees. Consequently, migration has become a political and social issue, placing considerable pressure on countries and migration authorities. The pressure stems from the dual nature of the issue — the desire to create an inclusive asylum system that offers effective protection to those in need and the simultaneous desire of countries to stop the mass migration of people coming from safe third countries,[8] as determined pursuant to Art. 61 of the IPA[9] by the Government of the Republic of Slovenia, and in accordance with the common list of third countries[10] adopted by the Council of the European Union based on Art. 36 of Directive 2005/85/EC. Consequently, a divide has been created in the political sphere, society, and media between refugees and (economic) migrants. Migrants represent individuals immigrating to Europe for better economic prospects. Thus, society attempts to distinguish between refugees who actually need protection and migrants who have immigrated for better prospects.[11] Those who manage to obtain legal status in the Republic of Slovenia (hereinafter Slovenia) or in an European Union (EU) Member State and those who are eventually returned to their country of origin, is essential from an immigration perspective.

The return procedure in Slovenia is strongly linked to international protection procedures because the vast majority of foreigners who enter Slovenia illegally, express their intentions to apply for international protection. In 2021, the police dealt with 10,067 illegal crossings, of which 5,561 foreigners expressed their intention to apply for international protection; 3,998 were returned to foreign security authorities based on international return agreements, and 248 were returned to Slovenia. In 2022, the percentage of applications increased significantly, with 31,447 of 32,024 illegal crossings registered with the police because they expressed the intention to apply for international protection. Of these, 5,301 foreigners applied in 2021 and 6,787 in 2022.

These data demonstrate the increasing intertwining of asylum and return procedures for persons illegally present in Slovenia, including rejected applicants, foreigners who have illegally entered Slovenia or are illegally present in Slovenia for other reasons, such as invalid documents. It is possible to apply for international protection whenever a foreigner encounters the police or other state authorities, which is the easiest way to legalise the status of residence in Slovenia temporarily.

Owing to this interconnectedness, this study further describes in detail the asylum procedures, and the procedure for determining the country responsible for processing the application and possible return to the Member State of origin

8 | A safe third country is a country in which the applicant was present prior to his/her arrival in Slovenia and where he/she actually had the possibility to apply for international protection, but failed to do so without a valid reason.
9 | Decree establishing the list of safe countries of origin (Official Journal of the RS, No. 47/22).
10 | Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Egypt, Gambia, Georgia, Ghana, Kosovo, Morocco, Nepal, Senegal, North Macedonia, Serbia, Tunisia, and Turkey.
11 | van Veldhuizen, 2017.

under Regulation (EC) No. 604/2013,[12] and the procedures for returning illegal immigrants.

2. Legal framework

In accordance with the Treaty of Amsterdam and the Tampere European Council (1999), the EU committed to establish an Asylum and Migration Policy Group to ensure the effective management of migration flows in EU Member States.[13] This led to the Common European Asylum System (CEAS), which established a series of measures and instruments to introduce and develop a common system for international protection. The Temporary Protection Directive, adopted in 2001, required member states to respond jointly to the influx of refugees into the EU. Additionally, CEAS comprises three other directives and one regulation:[14]

1. The Dublin Regulation (EU Regulation 604/2013) determines which Member State is responsible for examining an asylum application;
2. EC Directive 32/2013 on asylum procedures sets common standards on asylum procedures, recognition, and withdrawal of protection;
3. EC Directive 33/2013 on reception conditions sets minimum common standards for living conditions and the conditions of asylum seekers, and ensures access to accommodation, food, employment, and healthcare;
4. EC Directive 95/2011 sets out the conditions to be met by refugees or beneficiaries of subsidiary protection and offers beneficiary rights, such as residence permits, travel documents, access to employment and education, and social and health care.

The entire legal order regulating the field of international protection in Slovenia and in the EU Member States is brought together in the CEAS, which comprises a number of directives and regulations transposed into the Slovenian legal order. These are transposed into Slovenian legislation, particularly in the IPA,[15] which with the help of some sub-statutory acts regulates international protection in Slovenia. Return is regulated by the Foreigners Act,[16] which lays down the conditions and procedures for the entry, departure, and stay of foreigners in Slovenia. This law also reproduces in substance, inter alia:

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 (recast), *OJ L 180, 29.6.2013*.

13 | Polese and Davanzo, 2010, cited in Houlding, 2017.

14 | Gray, 2013, cited in Houlding, 2017.

15 | IPA Official Gazette of the Republic of Slovenia, No. 11/17.

16 | Official Gazette of the Republic of Slovenia, No. 91/21 – officially consolidated text, 95/21 – corrected, 105/22 – ZZNŠPP and 48/23.

1. Council Directive 2008/115/EC[17] of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, including the Common Guidelines on security provisions for collective removals by air, annexed to European Council Decision 2004/573 of 29 April 2004[18].
2. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals[19].
3. Directive 2011/51/EU of the European Parliament and the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection[20].

Migration and return policymaking considers European guidelines and action planning as defined by the renewed EU action plan against migrant smuggling (2021-2025),[21] communication on a more effective return policy in the EU – a renewed action plan,[22] EU strategy on voluntary return and reintegration,[23] the Pact on Migration and Asylum,[24] and other documents which Slovenia, as a member of the EU and the Schengen area, is obliged to respect.

3. Access to the asylum procedure

The EC Directive 32/2013 sets out three stages of access to the asylum procedure, 'expressing an intention' or making, 'registering' and 'lodging'. The three stages are intended to clarify any confusion between the receipt of a complete application (lodging an application) and the basic act of registration (registering), and the fact that a person expresses a wish to lodge an application (expressing an intention or making). Under the IPA, a person who expresses the intention to apply must be registered as an intending applicant and must have an effective opportunity to apply for international protection as soon as possible to obtain the rights that an applicant for international protection enjoys.

All three stages vary across countries; however, some may be combined and performed sequentially by the same authority. In Slovenia, the IPA provides that it is possible to express an intention to any state or local authority, but the police are responsible for registration and the competent authority for the submission of a complete application is the Ministry of Interior (MI), Directorate for Migration.

In practice, the three stages of the access procedure are conducted such that any state or local authority notified of a foreigner's intention to apply for

17 | OJ L 348, 24.12.2008, p. 98.
18 | OJ L 261/5, 6.8.2004, p. 5.
19 | OJ L 149, 2.6.2001, p. 34.
20 | OJ L 132/1, 19.5.2011, p. 1.
21 | COM/2021/591 final.
22 | COM(2017) 200 final.
23 | COM/2021/120 final.
24 | COM(2020) 609 final with annex.

international protection must inform the police. If the police intercept a foreigner before he/she expresses an intention to apply, he/she will only do so with the police. In any case, the police must take foreigners in and conduct the preliminary procedure provided for in Art. 42 of the IPA and inform the competent authority of the expressed intention and registration of the applicant.

An important part of the international protection procedure is the most fundamental procedural guarantee written in the IPA with which every applicant must be provided: procedural information; interpretation and translation of the information; access to the High Commissioner and organisations providing legal counselling; a written decision on the procedure, including a translation of the essential parts in a language that the person understands.

4. Preliminary procedure

Art. 45 of the IPA provides that the Ministry shall prescribe a detailed manner in which the procedures leading up to the acceptance of the application shall be conducted. This is defined in the Rules on the Procedure with Foreigners Expressing the Intention to Apply for International Protection in Slovenia and the Procedure for the Acceptance of an Application for International Protection.[25]

The preliminary procedure is the second stage of the access procedure, in which the police must fill out the registration form, and thus, the foreigners becomes an intending applicant. The registration form contains the applicant's personal data, the reasons for applying for international protection, and the route by which he/she arrived in Slovenia. The police write reports on these actions, which are then handed over to competent authorities.

As provided in the Regulation on the modalities and conditions for guaranteeing the rights of applicants for international protection,[26] the applicants are accommodated according to category: families are in separate rooms, and unaccompanied minors and single women are also in their own rooms or in different facilities to keep them separate from the majority, who are single men. Applicants with mild health problems or infectious diseases are also accommodated in special or isolation rooms. In the reception area, applicants wait for sanitary disinfection and preventive health checks, during which all applicants undergo medical examinations.

The consequences of arbitrary departure before lodging are defined in the regulations and are set out in a declaration signed by each applicant who is accommodated in the reception premises, which means that if the applicant leaves the reception premises before submitting his/her application, he/she will be treated under the Foreigners Act.[27] Accordingly, instead of being accommodated in an

25 | Official Journal of the Republic of Slovenia, No. 173/21 and 131/22.

26 | Official Journal of the Republic of Slovenia, No. 91/21, Regulation on the modalities and conditions for guaranteeing the rights of applicants for international protection.

27 | Official Journal of the Republic of Slovenia, No. 91/21 – Official consolidated text, 95/21 – Amended, 105/22 – ZZNŠPP and 48/23.

asylum centre, he/she will be accommodated in the Centre for Foreigners run by the police, which is a closed-type facility, as opposed to an asylum centre.

5. Provision of information in asylum and return procedures

After the provision of information and dactyloscoping, the applicant is introduced to the international protection procedure in Slovenia in more detail by official personnel and through a short informative film or brochure in a language that the applicant understands. The informative film and brochures are adapted for minor international protection applicants.

Information provision normally occurs at the MI in the offices of the International Protection Procedures Division. When an applicant cannot be present in the premises of the Ministry or attend the interview online, information provision occurs at the Foreigners' Centre in Postojna (when a person is detained), the Student Hall of Residence in Postojna, or in prisons and other correctional facilities in cases where a person is serving a custodial sentence.

An interpreter is present during such information provision so that the applicant can ask the present official for additional explanation/clarifications or any other question regarding the asylum procedure. They are also informed with videos prepared in different languages. During their stay at the Asylum Centre, applicants have access to informative brochures in the language they understand.

Posters and brochures regarding the procedure for granting international protection in Slovenia are also available in the premises of all police stations where third-country nationals or stateless persons are processed or kept. Brochures are available in languages, which are prepared based on information on the most common citizenship of citizens of third countries processed by the police. In all proceedings with foreigners who do not understand Slovene or cannot understand any other language that police officers speak, police officers always use a contract interpreter for the language the foreigners speak and understand.

The authorities provide the person who expressed intention to apply for international protection — upon arrival to the Asylum Centre — with information on further proceedings of the asylum procedure, including information on the procedures as per IPA, the rights and obligations of applicants, potential consequences of disregarding the obligations and non- cooperation with the competent authority, the time limits for the exercise of legal remedies, and information about refugee counsellors and non-governmental organisations working in the field of international protection.

When a person expresses the intention to file a claim to be an unaccompanied minor, he/she and his/her legal representative also receive, in addition to the information above, information regarding a possible age-determination examination assessment, the manner of examination, the possible consequences of the examination results, and/or an unjustified refusal to undergo such an examination, as

stated in Art. 17 of IPA. Information must be provided in a language that the person understands.

Deaf applicants are informed using sign language with the help of an interpreter. If the person expressing the intention to file is illiterate or does not understand the content of the provided information, additional help from an interpreter must be provided in a language that the person understands.

At the applicant's request, all information concerning the procedure for granting international protection should be provided free of charge. Electronic brochures, information on procedures and other aspects of international protection are available online.

Foreigners who ask for international protection are informed of their rights and duties through leaflets prepared and delivered by non-governmental organisations and United Nations High Commissioner for Refugees (UNHCR). Typically, interpreters are engaged.

Police procedures involving persons who apply for international protection are monitored by the UNHCR based on the monitoring agreement between the police and UNHCR.

6. Lodging the application and personal interview

The application process is described in detail in Art. 45 of the MHC-1, which stipulates that the application must be made by each person individually and in his/her own name; in cases of unaccompanied minors, a legal guardian must be present.

An application for a minor younger than 15 years must be submitted by his/her legal representative in his/her presence. Minors older than 15 years and unaccompanied minors must lodge an application in person in the presence of his/her legal representative.

The application primarily contains information on the personal data of the applicant and his/her relatives, travel countries, reasons for lodging, and special needs.

The competent authority, ex officio, establishes the applicant's personal number and temporary residence address and issues him/her with an international protection card, which in many cases is then the applicant's only identification document and allows applicants to move around Slovenia. The accepted application must be entered into registers, as provided in Art. 114 of the IPA.

Upon applying for international protection or lodging, the official provides the applicant an invitation for a personal interview, depending on the availability of officials and the category of the applicant. Vulnerable groups are given priority, as applicants are subject to an accelerated procedure for personal interviews. Art. 37 of the IPA stipulates that the official shall conduct personal interviews in a manner that enables the person to comprehensively present the reasons or personal circumstances in proceedings under this Act. In doing so, it shall consider the personal and other circumstances of the individual, including his/her cultural

background, gender, sexual orientation, identity, and vulnerability. The applicant is required to indicate all facts and circumstances which substantiate his/her fear of persecution or serious harm.

In practice, personal interviews vary widely, and for applicants with economic reasons, they are conducted promptly, as the applicants do not state much and the reasons are such that do not need detailed explanation. However, interviews with some applicants may take more than one day because they have complex stories that need to be further investigated by officials. In personal interviews, the importance of the attached documentation should also be explained, and the applicant should be encouraged to present his/her story in a manner that will enable a decision to be made in the procedure.

7. Eurodac and the Dublin procedure

The EU aims to serve as a unified international protection area. Therefore, the Dublin rules should clearly define the allocation of responsibilities between Member States to process applications for international protection.[28] The Dublin Regulation is transposed in some parts of the IPA, but as it is a Regulation, it is legally binding and must be applied in full by all countries without the need for transposition into national law, contrary to the directives, which must first be transposed into national law. This legislation sets out various grounds on which another Member State may be responsible for processing an application. Relevant grounds include whether the applicant has a family member in the other country, whether he/she has a visa or residence permit, and whether he/she has travelled legally or illegally through the other country or applied for asylum there. Under the Dublin Regulations, countries should reach an agreement on which country is responsible for examining the application, and the applicant must then continue his/her international protection procedures in that country. However, no one should be sent to a country with evidence of human rights violations. The applicant may appeal to an administrative court against the decision of the competent authority to transfer him/her to the Member State responsible. The applicant has the right to await a final decision in the country in which his/her case is pending.

Before accepting an application for international protection, applicants are photographed and dactyloscoped on the premises of the competent authority to implement Regulation 604/2013, which provides for the determination of the competent country for the examination of an individual application for international protection. Fingerprints are sent after the application is lodged to the Eurodac database, where the fingerprints of all applicants for international protection in the EU Member States are stored.

Fingerprints sent to the Eurodac database following an accepted application are stored for 10 years. The Eurodac database stores the fingerprints of all applicants who were 14 years or older on the date of their application and who

28 | Mozetic, 2016.

applied for international protection in the EU Member States and Norway, Iceland, Switzerland, and Liechtenstein. By sending the fingerprints to the database, the competent authority determines whether an applicant has already applied for international protection in another country. If an application has already been made, the process of establishing the Member State responsible for examining the application, known as the Dublin procedure, begins.

Each Member State may decide to process an application lodged by a third-country national or stateless person, even if such processing is not their responsibility, according to the criteria of the Regulation.[29]

By 2022, Slovenia had confirmed responsibility for handling requests in 1,693 cases, representing 65% of all requests for the assumption of responsibility. However, 257 applicants returned to Slovenia, representing 15% of all confirmed cases. However, the implementation of transfers was worse in cases in which Slovenia requested that other Member States assume responsibility for examining an application for international protection. Of the 1,401 requests, only 20 transfers were conducted, as the majority of applicants voluntarily left their accommodation prior to transfer, thus preventing their transfer to the responsible Member State or home country.

8. Restriction of movement of asylum applicants and foreigners with issued return decision

8.1. Asylum applicants

A competent authority may, by a decision based on Art. 84 of the IPA, restrict the movement of an applicant for international protection to the premises of an asylum home. If it is decided that it will not be possible to implement the restriction, the applicant's movement will be restricted to the area of the Centre for Foreigners, which is a closed police facility for foreigners awaiting removal from Slovenia.

This law lists the grounds for restricting movement: to verify or establish the applicant's identity or nationality in cases of manifest doubt; to establish certain facts on which the application for international protection is based, which could not be obtained without the measure imposed, and there is a well-founded risk that the applicant will abscond; where the applicant's movement is restricted because of return proceedings under the Act on the Entry, Stay, and Departure of Foreigners in Slovenia, it may be presumed that the applicant has applied solely to delay or obstruct the execution of the removal; when a threat to the security of the State or the constitutional order of Slovenia is being prevented, or when it is strictly necessary for the protection of personal safety, the security of property or

29 | Art. 17/1 of Regulation 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*.

other comparable reasons of public order; in accordance with Art. 28 of Regulation 604/2013/EU.

Restriction of movement is a sensitive administrative action and requires fast and precise work by the officials of the competent authority and courts, as these procedures are urgent; therefore, the time limits for appeals and decisions are shorter. The measures referred to in paras. 1 and 2 of this Art. Shall be imposed orally on the applicant based on a record, in which the official shall inform the applicant of the reasons for the restriction, and the applicant shall be given the opportunity to comment on these allegations. The applicant shall immediately receive a record of the measure imposed, including the reasons for the measure. The record should be read to the applicant in a language which he/she understands. A written extract of the decision, that is, the decision to restrict movement, shall be issued by the competent authority within 48 hours of the oral pronouncement of the decision at the latest and shall be delivered to the applicant within three working days of the decision being issued, within which time the competent authority shall provide a translation into a language which the applicant understands. The applicant shall have the right to bring an action before an administrative court against the decision within three days of notification. After hearing the applicant verbally, the court decides on the action within three working days.

The new IPA added Art. 84a to Art. 84, which inter alia defines the risk of absconding as circumstances from which it may be reasonably assumed that the applicant will abscond if he/she has previously lodged an application in Slovenia or another EU Member State and has subsequently left it.

In many cases, the restriction of movement is also the only tool available to the Office for Migrant Care and Integration, which is responsible for the accommodation of applicants in the asylum centre and its branches when the police are unable to remove applicants for international protection for safety reasons, as defined in Art. 84(4)(1) of the IPA.

The implementation of the movement restriction was influenced by the decision of the Administrative Court of Slovenia,[30] in which the Court stated that the legislature of Slovenia has not transposed the provision of Art. 8(4) of the Reception Directive 2013/33/EU into the IPA-1, although it has recently intervened in this law and this systemic problem has been evident from the administrative and judicial practice for a long time, and owing to the non-fulfilment of the obligation laid down in the provision of Art. 2(n) of the EU Regulation No. 604/2013, the competent authority has been unable to conduct the detention for a long period of time in accordance with the provisions of Art. 2(n) of the EU Regulation No. 604/2013. However, this does not mean that the provision of Art. 8(4) of Reception Directive 2013/33/EU cannot be applied to detention procedures for applicants for international protection under Regulation (EU) No. 604/2013. Recital 20[31] of the said Regulation provides Member States a certain discretion, which is essentially

30 | Administrative Court of the Republic of Slovenia, Case I U 1731/2021-15.

31 | Which provides, inter alia, that, as regards general guarantees and conditions of detention, where applicable, the provisions of Directive 2013/33/EU should also apply to persons detained under the Regulation.

a responsibility in the sense that it is necessary to consider in each individual case whether a certain guarantee provided for in the provisions of the Reception Directive 2013/33/EU should also be considered in the case of detention under Regulation (EU) No. 604/2004. The Court further explains that the provision of Art. 8(4) of the Reception Directive 2013/33/EU is such a relevant case, since the 'condition' for detention under Art. 28(2) of EU Regulation No. 604/2013 is that the detention measure is proportionate and that 'other less coercive measures' cannot be effectively applied. The judgement explains that the concepts of 'alternatives to detention' and 'less coercive measures' are related but not identical. For example, detention in an Asylum Centre is less coercive than detention in a Foreigners Centre because of the different regimes, although it constitutes deprivation of liberty, whereas alternatives to detention must and, in terms of Art. 8(4) of the Reception Directive 2013/33/EU, constitute restrictions on liberties which do not amount to deprivation of liberty. The Court added that there is also no objective and justifiable basis for the proportionality of the interference with the right to liberty or freedom of the person under Regulation (EU) No. 604/2013 to have substantially different criteria for its application than the proportionality of such interference under Reception Directive 2013/33/EU, since in both cases, the applicant is an applicant for international protection. Moreover, in both cases, the detention may be of the shortest possible duration.[32] The alternatives to the detention regime provided in Art. 8(4) of the Reception Directive 2013/33/EU can undoubtedly serve the objective of the effective implementation of the EU Regulation No. 604/2013 and simultaneously serve to restrict the right to personal liberty in accordance with the principle of proportionality, which is enshrined in primary EU law (Art. 52(1)) of the Charter of Fundamental Rights of the EU in relation to the right enshrined in Art. 6 of the Charter of Fundamental Rights of the EU.

The Court concluded that the primary relevant criteria in the present case are the second[33] and third[34] criteria of refugee status in Art. 84a of the IPA-1 (and, to a limited extent, the criterion of the fifth[35] indent of the same provision. It found that the defendant had correctly applied the 'substantial risk of absconding' standard, since it had reached the conclusion that the applicant was absconding based on the individual statutory criteria and on an individual assessment of all the circumstances taken together.

Based on these and similar judgements, the practice has developed that the applicant must be a flight risk in Slovenia and that it is insufficient that he/she has not waited for the end of the procedure in other EU Member States, which is why

32 | Art. 9(1) Reception Directive 2013/33/EU; Art. 28(3) EU Regulation 604/2013.

33 | 'Circumstances which give rise to the presumption that a person will abscond if he has previously attempted to leave or has left the Republic of Slovenia arbitrarily'.

34 | 'Circumstances which give rise to the presumption that a person will abscond if he has previously lodged an application in another Member State of the European Union and has subsequently left it'.

35 | 'Circumstances giving rise to the conclusion that a person will abscond in a particular case shall be deemed to exist if he/she has given false information in the proceedings or has not cooperated in the proceedings'.

the restriction of movement in the implementation of Dublin procedures is rarely enforced in Slovenia.

8.2. Foreigners with issued return decision

The police[36] are responsible for imposing restrictions on movement to prepare for or conduct removal, surrender, or extradition proceedings; the police order foreigners to be restrained and accommodated in the centre, who are to be removed in accordance with the legal provisions, or returned, surrendered, or extradited to the competent authorities in accordance with an international treaty. For the person to be returned, a procedure must be conducted, as in the case of a return decision based on the Foreigners Act and the General Administrative Procedure Act. The police order the placement of foreigners in or outside the centre and his/her stay under strict police supervision by decision. Foreigners shall have the right to lodge an action against the decision on accommodation and the decision to order a stay under strict police control with the administrative court within three days of the notification of the decision. This action does not ensure enforcement of the decision. The Administrative Court must decide on an action within six days.[37]

Based on the Foreigners Act, the police issue decisions ordering foreigners who are in the process of being removed from the country to be restricted in their movements and accommodated in the Foreigners Centre when they consider that it is not possible to apply more lenient measures (to allow them to reside outside the Centre). An important aspect of the application of foreigner detention is that if the application of less lenient measures is insufficient, then the police are obliged to assess the proportionality of the detention measure in each specific case and are obliged to explain their assessment in a statement of reasons for the decision. The statement of reasons for the decision must include an explanation of the parties' claims and their submissions on the facts, the facts established and the evidence on which they are based, the reasons which were decisive for the assessment of each piece of evidence, a statement of the provisions of the legislation on which the decision is based, the reasons which, considering the facts established, make such a decision necessary, and the reasons why any of the parties' claims have not been upheld. By decision, the police may authorise foreigners to impose an alternative to detention and impose one or more obligations on him/her, the establishment

36 | Fundamental rights are an important topic included in the curricula of basic training for police officers. Simultaneously, regular case studies and refreshment trainings related to fundamental rights are performed at all levels (state, regional, and local). This is necessary because police have the right to intervene in fundamental rights secured by the law. Therefore, appeal, and efficient and credible monitoring of police activities are foreseen in the legal acts and simultaneously implemented through activities of various governmental and non-governmental agencies. Office of the Republic of Slovenia Ombudsman regularly supervises all measures related to rule of law and particularly police measures related to fundamental rights.

37 | Art. 78/3 of the Foreigners Act.

of a place of residence at a specific address, an obligation to report regularly to a police station, and the production of identity documents.[38]

In practice, police decisions are often flawed without a reason for the measure and assessment of the proportionality of the measure imposed. Police often do not indicate their decisions regarding the specific circumstances that make placement measures necessary. The Administrative Court has indicated these shortcomings in its judgements[39] for several years, drawing on the fact that lack of reasoning makes decisions unreviewable. Such unreviewable decisions constitute an absolute fundamental breach of the provisions of the procedure under the General Administrative Procedure Act,[40] that is, that the procedure prior to the administrative act was not in accordance with the rules of the procedure, and that this affected or could have affected the legality or correctness of the decision.

Restrictions on the movement of women, families, children, unaccompanied minors, the elderly, the seriously ill, and other vulnerable persons shall be provided separately in the centre to ensure adequate privacy. The restriction of movement may last only as long as it is necessary to achieve its purpose, but not longer than six months.

As provided for in the Foreigners Act,[41] if foreigners cannot be removed from the country for objective reasons after six months, the police can decide, owing to foreigners' non-cooperation in the removal procedure or delay in obtaining the necessary documentation from third countries, or if the identification procedure is ongoing, to extend the restriction of movement and accommodation in the centre or stay under stricter police supervision for a maximum of six months, provided that the conditions laid down in the law are fulfilled and there are reasonable grounds to expect that foreigners can be removed within that period. The other possibility is that the police impose on the foreigners permission to stay or an alternative to detention, whereby the foreigners shall be obliged to observe the rules of movement outside the area of the centre; otherwise, he/she may be reinstated in the centre. An action against the decision to extend the restriction of movement may be brought before the administrative court, which must decide on an action within eight days. The action shall not remain in the execution of the decision, extending the restriction of movement. In each case, the competent authority shall check every three months whether there remains grounds for restricting movement in the detention centre.

38 | Foreigners Act, Arts. 76/3, 81/2 and 85, Administrative Court Cases I U 1159/2019-12 and I U 459/2018-7.

39 | Administrative Court Cases I U 1159/2019-12, I U 392/2015, I U 151/2015 and I U 459/2018-7.

40 | General Administrative Procedure Act (Official Gazette of the Republic of Slovenia, No. 24/06 – official consolidated text, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE and 3/22 – ZDeb); ZIUOPDVE stands for Act on intervention measures to mitigate the effects of the second wave of the COVID-19 pandemic (Official Gazette of the Republic of Slovenia No. 175/20, 203/20 – ZIUPOPDVE, 15/21 – ZDUOP, 51/21 – ZZVZZ-O, 57/2) and ZDeb stands for Law on de-bureaucratisation (Official Gazette of the Republic of Slovenia, No. 3/22).

41 | Foreigners Act, Arts. 81, 83, 73, 78, 79, 79a.

9. Decision-making in the asylum procedure

In the procedure for recognition of international protection, the competent authority assesses whether the applicant meets the conditions for recognition of international protection in Slovenia, relying on Art. 23 of the IPA, which requires that the information contained in the application, personal interview, the attached documentation, general and specific information on the country of origin, and documentation obtained by the competent authority be verified.

The conditions for granting international protection are decided in a single procedure, as set out in Art. 49 of the IPA, whereby the competent authority first assesses the conditions for granting refugee status and, only if they are not met, the conditions for granting subsidiary protection status. International protection in Slovenia refers to refugee and subsidiary protection status. Refugee status shall be granted to a third-country national who, owing to a well-founded fear of being persecuted for reasons of membership of a particular racial or ethnic group, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or to a stateless person who, owing to a well-founded fear of being persecuted for reasons other than those of his/her country of habitual residence, is outside the State of his/her nationality and is unable or, owing to such fear, is unwilling to return to that State.

Subsidiary protection status shall be granted to a third-country national or stateless person who does not qualify for refugee status if there are substantial grounds for believing that he/she would, on return to the country of origin or, if stateless, to the country of last habitual residence, face a well-founded risk of suffering serious harm, as defined in Art. 28 of the IPA.

In this procedure, the competent authority assesses the existence of any possible grounds for exclusion. If they are present, international protection is not granted to otherwise eligible persons. The grounds for exclusion are set out in Art. 31 of the IPA and are primarily related to the fact that the applicant is a security risk because of the commission of serious crimes or a danger to the security of the state.

The competent authority may either grant the application for international protection and grant refugee or subsidiary protection status or reject the application as unfounded in ordinary proceedings or as manifestly unfounded in accelerated proceedings, according to Art. 49 of the IPA, which regulates the decision-making of the competent authority.

In the decision-making process of granting international protection, the asylum seeker is the primary source of information on the situation in his/her country, forcing him/her to leave. In this procedure, he/she must credibly demonstrate and explain the circumstances which could be decisive in the substantiation of his/her application. However, sometimes, the applicant's story can be unbelievable for those living in a different world. By collecting information on the country of origin of the applicant for protection, we obtain a clearer picture of the reality

of the situation in his/her country. This information can help to better understand the circumstances surrounding the applicant's departure and the policies, socio-economic conditions, and practices of the authorities.

10. Vulnerable categories in asylum and return procedure

10.1. Unaccompanied minors

According to Art. 16 of the IPA, unaccompanied minors have a legal representative in the procedure for obtaining international protection, who is also representative in the areas of health protection, education, and protection of property rights and benefits and in relation to the exercise of rights in the field of reception, until the enforceability of the decision issued in the international protection procedure.

Art. 18 of the IPA provides that in the case where, when examining an application for international protection, based on the opinion of official persons or persons involved in work with the unaccompanied minor, the age of the unaccompanied minor is in doubt, the competent authority may order an expert opinion for an age assessment.

The expert opinion referred to in the preceding para. shall be prepared by a medical expert who shall, if necessary, consult other relevant experts. In Slovenia, expert opinions are currently issued for the competent authority by the Institute of Forensic Medicine at the Faculty of Medicine in Ljubljana. To issue an expert opinion on the actual age of applicants for international protection, experts require dental X-rays of the individual applicant and X-ray images of both wrists and collarbones, which are obtained by an X-ray or magnetic resonance imaging.

Before the age assessment, each applicant has an interview where he/she can explain his/her age and medical examination before being referred for imaging. The IPA provides that, in case of doubt, the applicant should be considered a minor.

An examination to assess the age of an unaccompanied minor may be conducted only if he/she and his/her legal representative provide written consent. However, the following point of this Art. is relevant: if the unaccompanied minor and his/her legal representative do not consent to the examination for age assessment without a valid reason, the applicant will be considered an adult.

The unaccompanied minor and the family with the minor should be placed in a suitable accommodation for minors in agreement with the guardian of the unaccompanied minor. If this is not possible, the unaccompanied minor and the family with the minor should be placed in a centre. A minor accommodated in a centre shall be given the opportunity to engage in age-appropriate activities, including games and recreational activities, during his/her free time. Nevertheless, it must always be kept in mind that detention must be a measure of last resort and for the shortest appropriate period of time, for separated children and children with their parents or primary caregivers.

In Slovenia, a (pilot) project to accommodate unaccompanied minors was launched in 2016. The MI coordinates the project, and the Ministry of Education, Science, the Ministry of Labour, Family, Social Affairs and Equal Opportunities, and the MI determine the forms and content of professional work with unaccompanied minors. In principle, all unaccompanied minors are accommodated in suitable accommodations, and not in the detention centre.

Unaccompanied minors are the most vulnerable group of migrants and are provided with adequate accommodation, including 24-hour care, as required by their vulnerability. They should also be provided with round-the-clock professional treatment and separate and secure accommodation, which consequently means that the principle of the child's best interests should also be ensured and respected. This increases the adolescent's competence in selecting life options, lifestyles, and a value and normative system that enables him/her to integrate into society, and improves his/her guidance towards taking responsibility for his/her own life.

The Foreigners Act provides special arrangements for victims of human trafficking, illegal employment, and domestic violence residing illegally in Slovenia. The police, at the victim's request or ex officio, issue him/her permission to stay for 90 days to decide whether to participate as a witness in criminal proceedings for the offence of human trafficking. The same arrangement is possible for victims of illegal employment and domestic violence.

During their permitted stay, victims of human trafficking, illegal employment, and domestic violence have the rights guaranteed to foreigners with an authorised temporary stay under the law, and the right to free translation and interpretation. Police and NGOs must inform them of the possibilities and conditions for obtaining a residence permit and, in the case of victims of trafficking, illegal employment, and domestic violence who are unaccompanied minors, make every effort to contact their families at the earliest.

Permission to stay may be refused if the residence in Slovenia of a victim of human trafficking, illegal employment, or domestic violence would pose a threat to public order, security, or the international relations of Slovenia, or if there is suspicion that the victim's residence in the country will be connected with terrorism or other violent acts, illegal intelligence activities, the production of or narcotics trafficking, or the commission of other criminal offences.

11. Voluntary return and reintegration assistance

The Commission adopted the EU Strategy on voluntary return and reintegration[42] in April 2021. This Strategy enhances voluntary returns and reintegration as fundamental instruments of the common EU system. An essential part of this Strategy is working towards an increase in the effectiveness and quality of return counselling. The process to achieve successful voluntary return begins

42 | COM/2021/120 final.

with customised outreach measures and consultation between counsellors and migrants. During the counselling session, the migrant receives timely, up-to-date, and relevant information on their status and the offer to receive voluntary return support. Voluntary return is a more cost-effective process, less problematic when it comes to readmission, and is also preferred by third countries. Moreover, it enables a more dignified return and, when coupled with appropriate support for returnees, may contribute to the development of the country of origin. Migrants, including asylum seekers, must be informed of the option of assisted voluntary return at an early stage and throughout the immigration procedures. Including information on assisted voluntary return in the asylum process was identified as a clear mid-term action in the EU Action Plans on return[43] that call on Member States, with the support of the Commission, to adopt a coherent approach to general practices to incentivise return.[44]

The four stages of return counselling are information and outreach, decision-making, pre-departure preparation, and post-arrival support. Return counsellors in Slovenia play a role in the first three stages, and post-arrival support is provided by reintegration partners in the country of origin. They provide migrants with general information about the options to stay in or be assisted in returning voluntarily to their home countries. They explain the conditions of eligibility and the assistance and benefits available under assisted voluntary return and reintegration programmes. They also focus on identifying and responding appropriately to any vulnerabilities and assessing whether the migrant is able to make an informed decision. When the decision is made to return, counselling becomes specifically tailored to an individual's situation. They organise returns and inform migrants prior to their departure about possible reintegration assistance and how to access it upon arrival in the country of return.

Slovenia is at the beginning of setting up return counselling, as described in the framework. Until April 2022, only one organisation provided return counselling in Slovenia – International Organisation for Migration (IOM). They provided this service for irregular migrants with issued return decisions, and asylum seekers. The cooperation stopped as MI and IOM had not prolonged the agreement and new solution had to be found. Slovenia joined the European Return and Reintegration Network (ERRIN)[45] programme, which was taken over by Frontex. From April 2022, the police, and Centre for Foreigners have been taking an active role in the Frontex Joint Reintegration Services programme and are using the data management system 'RIAT' – Reintegration Assistance Tool.[46]

The possibility of participating in the aforementioned assisted voluntary return programme is promoted to all foreigners in the return procedure accommodated in the Centre for Foreigners. Return counselling is available from June 2023, for persons with issued return decisions in the detention centre, and in

43 | COM(2015) 453 final, COM(2017) 200 final.

44 | COM/2021/120 final.

45 | European Return and Reintegration Network.

46 | Frontex 'Reintegration assistance' [Online]. Available at: https://frontex.europa.eu/return-and-reintegration/reintegration-assistance/ (Accessed: 7 November 2023).

Slovenia. The group of third-country nationals that can benefit from assisted voluntary return and reintegration programmes should be widened, as stated in the EU Strategy, and should cover at least any illegally staying third-country national subject to a return decision, notably those subject to a return decision issued by the Administrative Units. Moreover, measures should be taken to further inform all target groups about the existence and possibility of using such programmes, including illegally staying third-country nationals not yet subject to a return decision and those undergoing procedures to obtain a permit or right to stay.

12. Issuance of return decisions and return procedures

12.1. Issuance of return decisions

The competent authority[47] which issues a decision regarding residence permits and refuses, rejects, or discontinues the procedure sets a deadline of 10 days for voluntary departures, and the same deadline is given to rejected asylum seekers. Other authorities which issue return decisions are the police, in case of an illegal stay, and the MI, after the asylum procedure is completed. The manner in which these procedures are conducted is laid down in the General Administrative Procedure Act[48] and special laws.

A return decision is issued to all foreigners who are illegally staying in Slovenia with the following exceptions: (a) if foreigners are apprehended or intercepted in connection with the irregular crossing of the border and have not subsequently obtained authorisation to stay; (b) if a foreigner is in the process of return or extradition under international treaties; and (c) if a foreigner has been subjected to a minor penalty or a minor sanction of expulsion from the country. If a foreign national is not admitted to the requested country based on an international agreement, a return decision is issued. A return decision shall not be issued even in case of refusal of entry at a border-crossing point.

The return decision imposes an obligation on illegally staying third-country nationals to leave Slovenia, the territory of the Member States of the EU, and the territory of the non-EU Member States which fully apply the Schengen rules. When such a decision is issued, it is accompanied by a pre-prepared translation. The chief elements of return decisions are translated into nine languages: Albanian, English, Arabic, French, Croatian, Chinese, Russian, Serbian, and Turkish. If foreigners do not understand any of the listed languages, written or oral translation is provided.

47 | The administrative unit in whose territory the foreigner resides (Foreigners Act, Art. 54, 55/6).

48 | General Administrative Procedure Act (Official Gazette of the Republic of Slovenia, No. 24/06 – official consolidated text, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE and 3/22 – Zdeb).

With the latest amendments to the Foreigners Act in 2021,[49] Slovenia has edited its chief solutions related to the complex migration crisis, Slovenian language skills, family reunification, sufficient means of subsistence, and Brexit. It has considered the recommendations of the European Commission[50] and regulated a uniform procedure regarding the time limits for voluntary departure and periods of entry bans. Slovenia transposed the provisions of Directive 2008/115/EC into its national legislation in 2011; however, since then, individual shortcomings have emerged in practice, which have been addressed by this amendment. The illegal residence of foreigners in Slovenia has been regulated and clearly defined; and has moved from a two-phase system of issuing acts to a one-phase system under which the police can directly enforce decisions of administrative authority if foreigners do not comply with them. Thus, the return decision sets the time limit for voluntary departure and removal measure. The latter shall be enforced in the event that foreigners fail to comply with the deadline for voluntary departures. As a result of the introduction of the one-step return decision system, the return decision also imposes a measure prohibiting entry, which is not enforced if foreigners have left the territory of the EU Member States or the territory of the state parties to the Convention on the implementation of the Schengen Agreement of 14 June 1985. Uniform action has also been regulated regarding the time limits for voluntary departure and entry bans.

In the process of issuing a return decision, foreigners are entitled to translation assistance when necessary. If a return decision is issued, they have the right to free legal advice, and in proceedings before the courts concerning the decision of the MI, they have the right to free legal aid. The law also provides for cases where foreigners are prohibited from entering the country through a return decision. It defines absurdity, introduces a longer time limit for appeals, and exempts foreigners from paying fees to lodge an appeal or administrative dispute against a return decision issued by the police, or a decision refusing to extend the time limit for voluntary departure. The return decision should be issued in writing on a form which follows the provisions of the General Administrative Procedure Act regarding its form and constituent parts. It shall be served to foreigners personally and a written or oral translation of the chief elements of the return decision shall be provided. As the police no longer issue a specific decision prohibiting the entry of an alien into the country, the data from the final return decision have already been entered into the Schengen Information System – SIS II.

The law introduced a fixed period of 10 days for voluntary departure, which may be extended on request or on the court's own motion for justified reasons, and the burden of proof of the obligation to leave is on foreigners. There are also consequences in the event of non-compliance with the deadline for voluntary

49 | Act on Amendments and Additions to the Foreigners Act (ZTuj-2F), adopted by the National Assembly of the Republic of Slovenia at its session on 30 March 2021, published in the Official Gazette of the Republic of Slovenia No. 57/21.

50 | Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2019 evaluation of Slovenia on the application of the Schengen acquis in the field of the management of the external borders, No. ST 97692020 INIT.

departure.[51] These provisions were introduced to encourage foreigners to leave Slovenia or the territory of the EU Member States or the Contracting States to the Convention of 14 June 1985 implementing the Schengen Agreement. The proposal regulates the removal of a third-country national who has been subjected to an expulsion measure imposed by another EU Member State, and is present in Slovenia.

Regarding the issuance of return decisions in relation to the principle of non-refoulement, the European Court of Justice on 6 July 2023, issued a preliminary ruling[52] on the question whether the provisions of Directive 2008/115, and in particular Arts. 5, 6, 8 and 9 thereof, preclude a national legal situation under which a third-country national is to be subject to, a return decision must be issued against a third-country national whose right to reside as a refugee, which he/she had until that time, is withdrawn by the revocation of his/her asylum status even if it is clear at the time when the return decision is issued that removal is not permanently permissible on grounds of the principle of non-refoulement and that is established in a manner which makes it possible for that decision to become final and enforceable. The Court of Justice held that Art. 5 of Directive 2008/115/EC must be interpreted as precluding the adoption of a return decision with respect to a third-country national, where it is established that his/her removal of the country of intended return is precluded based on the principle of non-refoulement for an indefinite period.

This judgement underlines the importance of the principle of non-refoulement, which is absolute and must be respected by Slovenian decision makers. However, that judgement, which states, in para. 52, that Art. 5 of the Directive must be interpreted as precluding the adoption of a return decision against a third-country national if it is established that his removal to the intended country of return is precluded based on the principle of non-refoulement for an indefinite period of time, raises the question of the correct implementation of the provision in Art. 73(1)(2) of the Foreigners Act relating to the permission to stay. The first para. of Art. 73 of the Foreigners Act provides that foreigners must first be issued with a return decision imposing an obligation to leave the EU Member States and the Schengen area, and only then may foreigners be issued with a decision which allows him/her to stay in Slovenia, as set out in Art. 72 of the Foreigners Act.[53]

51 | One can be refused a visa and a residence permit not issued for family reunification for a period of three years. The issue of a visa and a residence permit not issued for family reunification for a period of three years shall also be refused to an alien who enters Slovenia despite a valid entry ban.
52 | Case C-663/21, OJ C 73/10.
53 | The principle of non-refoulement under this act and in accordance with the principles of customary international law implies the obligation of Slovenia not to remove a foreigner to a country where his/her life or freedom would be threatened because of his/her race, religion, nationality, membership of a particular social group or political opinion, or to a country where he/she would be likely to be subjected to torture or other cruel, inhuman or degrading punishment or treatment.

12.2. Return procedures with unaccompanied minors

When an unaccompanied minor is undergoing a police procedure, the police act in accordance with the provisions of the Protocol on cooperation between social work centres and the Police in providing assistance to unaccompanied foreign minors. In proceedings involving unaccompanied foreign minors, the police immediately inform the competent social work centre, which appoints a guardian for the minor. The guardian shall look after the minor's best interests throughout the procedure. If the minor's best interest is to return to his/her country of origin, a return decision must be issued, as provided for in the Foreigners Act.

The Foreigners Act stipulates that minor foreigners who are not accompanied by parents or legal representatives may not be deported to their country of origin or to a third country which is willing to accept them until reception is ensured. Prior to deporting a foreign minor, it must be ascertained whether the minor will be returned to a family member, nominated guardian, or adequate reception facilities in the country of return. The police may only deport an unaccompanied minor after the special-case guardian, carefully considering all circumstances, has established that this is in the best interest of the unaccompanied minor. In the past two years, no unaccompanied minor has returned to his/her country of origin or to a neighbouring country based on bilateral agreements.

12.3. Establishing identity and obtaining travel documents

Establishing identification and obtaining travel documents are essential steps in the return process. If a person does not possess a valid travel document, it must be obtained through a competent representative of his/her country. In certain cases, a European Return Document (laissez-passer) under Regulation (EU) 2016/1953 can be issued.

The identity is sought and confirmed with the help of foreign diplomatic and consular missions in Slovenia and abroad. In cooperation with countries that do not have their own missions in Slovenia, most cooperation occurs through Slovenian missions in Austria, Hungary, Italy, and Germany. An increasing number of third countries are introducing Return Case Management System (RCMS) identification systems. Slovenia uses RCMS Bangladesh and Pakistan, both of which are actively used and have proven to be useful and effective.

The Police actively use liaison officers, for example, to obtain transit consent, identification documents for foreigners in return procedures, and information on the status of foreigners in EU and third countries. Slovenia has liaison officers in Italy, Austria, Croatia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia. For third countries, European Return Liaison Officers[54] are used.

54 | A specialised liaison officer deployed to third countries for representing European Union return interests by verifying the identity of irregularly staying third-country nationals, capacity building in the field of return, supporting the organisation of joint return operations under coordination of the European Border and Coast Guard Agency (Frontex) and to facilitate the implementation of reintegration and post-arrival assistance. [Online] Available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/european-return-liaison-officer-eur-lo_en (Accessed: 7 November 2023).

The pre-return stage varies in length depending on the individual circumstances of the persons concerned and depends on whether they are in possession of an identification document, a copy of a document, or other documents that can help to speed up the issue of a travel document; whether or not they are participating in the return procedure; which country they come from, as third countries are differently responsive; and so on. These procedures are also conducted for foreigners who have been issued a return decision without a time limit, but whose movement is not restricted for various reasons.

12.4. Return

For foreigners whose identity is known, who are in possession of a valid travel document, and are issued with the return decision, the return operation is organised. Return operations are performed with or without escorts (there are several of the latter) on scheduled flights or as part of joint return operations. Police, Foreigners Centre, which is one of the sectors within the Uniformed Police Directorate of the General Police Directorate, is responsible for organisation of return operations via air and land; in some cases, particularly the simpler ones, return operations by land are also organised by police stations. Returns via the sea are not conducted.

Each case is treated individually. Once all the information about the previous procedures has been gathered and the person has been interviewed, a decision is made on what type of return operation will be organised. Foreigners can decide at any time and, despite having been issued a return decision with an entry ban, can be included in a voluntary return and reintegration programme.

The bilateral or multilateral cooperation agreements Slovenia has with EU Member States, Schengen associated countries and third countries in the field of return and readmission are the following: Austria, Belgium, Luxembourg, the Netherlands, Bulgaria, Croatia, Denmark, Estonia, France, Greece, Italy, Latvia, Lithuania, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, and Serbia. The Slovenian police also agreed with the UNHCR on monitoring border procedures, including access to international protection and respect for fundamental rights.

For return and readmission, Slovenia also applies the readmission agreements concluded by the EU to the following third countries: Hong Kong, Macao, Sri Lanka, Albania, Russia,[55] Ukraine, North Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde, and Belarus, and legally non-binding readmission agreements with Afghanistan, Guinea, Bangladesh, Ethiopia, Gambia, and Ivory Coast.

The agreements most commonly used are those concluded with neighbouring countries to surrender persons for whom a return decision has not yet

55 | This agreement is not in use since September 2021.

been issued (exception to Art. 2(2)).[56] There has been a case in 2020[57] in which the Administrative Court found a violation of the return of a person under an agreement between Slovenia and the Republic of Croatia,[58] when the person was returned to Croatia. The police violated the applicant's right to the prohibition of refoulement under the Charter of Fundamental Rights of the EU regarding protection in the event of removal, expulsion, or extradition, and the right of access to the asylum procedure under Art. 18 of the EU Charter of Fundamental Rights. It was obliged to allow the applicant to enter Slovenia and lodge an application for international protection without delay after the judgement had become final. The acts or omissions which followed in the police proceedings were the manner in which the interview with the applicant was conducted at the time of the imposition of the offence, when the applicant was not dealt with individually in accordance with the prohibition of collective expulsion, so as to enable the police to verify and assess the personal circumstances of the foreigner in a valid and objective manner, or to enable the foreigner to defend himself with arguments against the measure of return or removal from the country; the applicant was not provided the opportunity in the course of those proceedings to be accompanied by an interpreter, to have access to legal assistance in connection with the conduct of the return proceedings and to be informed of the return proceedings in Croatia or of the consequences of those proceedings, and was handed over to Croatia at the end of the proceedings. Ombudsman, as the National Human Rights Institution in Slovenia (NHRI), also intervened in this case with the *amicus curiae* opinion to the Administrative Court of Slovenia regarding a case of chain returns from Slovenia through Croatia to Bosnia and Herzegovina, which he criticised.[59]

Forced removal of foreigners is a repressive measure taken by a State to assert its sovereignty over its territory, ensure respect for its borders, and prevent and sanction illegal immigration and residence, and is therefore in the public interest. The removal of foreigners from a country is an enforcement action resulting from an issued and enforceable decision[60] which means that the police bring such foreigners to the state border and send him/her across the

56 | Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry following Art. 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea, or air of the external border of a Member State and who have not subsequently obtained authorisation or a right to stay in that Member State.

57 | Administrative Court Case I U 1686/2020-126.

58 | Act on the Ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Extradition and Receipt of Persons whose Entry or Residence is Illegal (Official Gazette of the Republic of Slovenia – International Treaties, No. 8/06).

59 | Human rights ombudsman (2021)'In the context of the ENNHRI project, the ombudsman draws up a national report on the human rights situation of migrants at the borders' *Human rights ombudsman*, 31 August [Online]. Available at: https://www.varuh-rs.si/en/news/news/in-the-context-of-the-ennhri-project-the-ombudsman-draws-up-a-national-report-on-the-human-rights-s/ (Accessed: 7 November 2023).

60 | In accordance with para. 3 of Art. 69, Foreigners Act.

border or hand him/her over to the authorities of a third country. Only foreigners who have not left the country within the time limit set for their voluntary return, foreigners who have not been granted an extension of the time limit for their voluntary return, foreigners who have been subject to an entry ban, and foreigners who have been subjected to a secondary sanction of expulsion from the country may be removed[61] from the country. The principle of non-refoulement[62] should be respected.

The top three reasons for failed returns are last-minute asylum application, non-cooperation in identification procedures and lack of personal/travel documents, and poor or close to existing practical cooperation in the framework of non-voluntary returns with some third countries (lack of bilateral agreements). The three most common reasons for conducting forced returns are the risk of absconding, failed handover in accordance with bilateral readmission agreements, and non-compliance with the deadline for voluntary return.

12.5. Monitoring mechanism of forced returns

In Slovenia, monitoring is conducted pursuant to the provisions of Directive 2008/115/EC and the Foreigners Act. The obligation to monitor the removal of foreigners is conducted by a selected NGO or other independent institution during all police activities aimed at removing foreigners from the country, including the pre-departure period, the period of flight or other modes of travel, the transit stops, and the arrival and reception of foreigners in the country of return. The police inform the selected monitoring contractor of the planned removal and decide whether and to what extent to monitor a specific removal. The police shall consider the findings of the selected organisation or institution referred to in the preceding para., which would demonstrate violations of human rights or fundamental freedoms, in the complaints procedure laid down in the law governing the tasks and powers of the police.

Fundamental rights monitoring is an essential tool for fundamental rights protection. Thus, an effective and independent fundamental rights monitoring system has a preventive effect. This reduces the risk of fundamental rights violations and enhances victims' protection. Moreover, it protects the State and its institutions against false accusations of breach of fundamental rights obligations. Monitoring must serve its purpose and provide the basis for action in certain situations. This includes the findings of shortcomings and recommendations for the better implementation of fundamental rights provisions.

61 | In accordance with para. 1 of Art. 69, Foreigners Act.

62 | Not to remove a foreigner to a country where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion, or to a country where he/she would be likely to be subjected to torture or other cruel, inhuman, or degrading punishment or treatment.

13. Conclusion

This study presented the complexity of migration that needs to be regulated, along with return procedures in Slovenia for irregular migrants and rejected asylum applicants, and explained how they are interlinked. Further, all relevant regulations and procedures and case laws, which have an important influence on the development of legislation and area mandatory component of Slovenian law, were presented.

Slovenia has abolished controls on its internal land, sea, and air borders with EU Member States since joining the Schengen area in 2007. The country has internal Schengen borders with all four[63] neighbouring countries since 1 January 2023, when Croatia, as the last EU Member State, joined the Schengen area. Slovenia is bound by common European law, but it is also at the mercy of its own decisions, those of its neighbours, and those of the countries along the Balkan migration route. All these decisions create an area that is increasingly in the public eye and the subject of political struggles, while simultaneously dealing with people who want to create better opportunities in life for themselves and their families.

During the period of mass arrival of migrants in Slovenia from 16 October 2015 to 9 March 2016, a total of 477,791 migrants crossed the country,[64] representing 23% of the total population of Slovenia. Countries to the north of Slovenia also introduced controls at the internal borders of the Schengen area with the aim of restricting the entry of migrants seeking international protection, and certain internal controls introduced at that time remain in place today, such as controls at the border between Austria and Slovenia.

Instability in the countries along the Balkan route and uncertainty about the implementation of the EU-Turkey deal, which prevents many migrants from continuing their journey to Europe, and political developments in the Middle East and Africa, have led to constant concerns regarding international protection in the future.

Since 2015, the EU has been working towards a sufficient migration and asylum policy. These include improving the control of external borders and migration flows; developing an effective, humanitarian, and safe migration policy; negotiating with third countries; reforming the asylum system; saving lives; reducing incentives for irregular migration; providing more legal channels for asylum seekers; providing more effective legal options for legal migrants; and dismantling human smuggling and trafficking networks.

The return procedure in Slovenia is strongly linked to international protection procedures because the vast majority of foreigners who enter Slovenia illegally, express their intentions to apply for international protection. Therefore, this study discussed the procedures for persons who express their intention to apply for international protection in Slovenia and the procedures laid down by foreign legislation. The institution of international protection is often abused, as most

63 | Austria, Italy, Hungary, Croatia.

64 | Sardelić, 2017.

people do not wait for a decision on their application but continue their journey to other Member States.

Slovenian legislation considers and regulates migration-related issues in accordance with the EU standards. Compliance with these standards is reflected in their implementation and, ultimately, judicial tests. One example is that notwithstanding the fact that the provisions of the Return Directive were (imperfectly) transposed into Slovenian national law as early as 2011, the courts, when deciding cases in this area, have directly referred to it and the Return Manual[65] and have considered the relevant case law.

The procedures for the extradition of an applicant for international protection who has already applied for such protection in another EU Member State and is in the process of being transferred under the Dublin Regulation, and the procedures for returning an illegally staying alien who has been issued with a return decision, are described in detail, and the relevant case laws are highlighted. The latest amendments to the law are recent and consider the recommendations made by the European Commission in the last Schengen evaluation and address the shortcomings identified together with Slovenian case law.

Special attention is given to vulnerable categories, particularly unaccompanied minors, whose best interests must always be at the forefront and whose rights are, therefore, specifically defined and protected in Slovenian legislation, both in the International Protection Act and in the Foreigners Act. The latter continues to allow for accommodation in the Centre for Foreigners under specific conditions, however, as an exception and not a normal procedure.

The provisions of the Foreigners Act that voluntary return takes precedence over forced return and that each person is provided the opportunity to make an informed decision on their return to the country of origin are in accordance with EU strategies and guidelines. It is essential that as many people as possible are informed about these options; assistance, financial and in kind, can be decisive for a person's return. Sustained return and reintegration support are of utmost importance.

The most effective return is sustainable, and dignified, and provides appropriate support for the returnees. Every person issued with the return decision should be able to make an informed decision about the return and should get the maximum possible support and assistance for reintegration. A coordinated approach to common practices for promoting voluntary returns and implementing effective return measures should be adopted among all EU Member States.

Cooperation and collaboration among all stakeholders, is essential. Safeguards are crucial in delicate and important procedures. To better regulate migration and related issues, many legal provisions have been changed recently based on court decisions.

The State is obliged to ensure that individuals who are subject to a return decision, leave the territory of the EU countries and the Schengen area or are returned to another Member State under the Dublin Regulation, and therefore have various

65 | European Commission Recommendation No. 2017/2338 of 16 November 2017, OJ 2017 L 339/83.

measures at its disposal. It is realistic to expect that individuals will refuse to return, regardless of the options offered. In these cases, the State may resort to extreme measures such as detention for removal and identification, and persons may be accompanied by staff trained for this purpose when organising return operations. All escorted-return operations are subject to monitoring.

However, not all third countries cooperate in readmitting their nationals, and the procedures for establishing identity and issuing the necessary travel documents can be lengthy. This constitutes an external dimension that must be considered in the implementation and design of migration policies or the concept of integrated border management.

The obligation to respect human rights is enshrined in all legal instruments, and the principle of non-refoulement[66] is a fundamental component of the prohibition of torture and cruel, inhuman, or degrading treatment or punishment, and applies to all persons, regardless of their legal status. These provisions do not allow for any derogations, exceptions, or limitations.

Although Slovenia has defined respect in its legislation, such as the International Protection Act and the Foreigners Act, its implementation has been deficient, as illustrated in the case law art. This principle is absolute and must be respected in all cases. Member States (Case C-633/21) cannot remove, expel, or extradite an alien or an applicant for international protection where there are reasonable grounds for believing that, if returned to the country of origin, he/she would face a well-founded risk of being subjected to torture and inhuman or degrading punishment or treatment, irrespective of the behaviour of the person concerned. The aforementioned judgement raises the question of the correct implementation of the provision in Arts. 73(1) and (2) of the Foreigners Act relating to permission to stay. The first para. of Art. 73 of the Foreigners Act provides that foreigners must first be issued with a return decision imposing an obligation to leave the EU Member States and the Schengen area, and only then may foreigners be issued with a decision which allows him/her to stay in Slovenia, as set out in Art. 72 of the Foreigners Act.

There must be agreement on mechanisms for all these procedures, avenues of redress, and effective protection and return systems. It is essential to preserve accessibility to asylum procedures, dignity, rights, and equality before applying for international protection. The return of those who have been issued with a return decision is linked to the external dimension because these procedures require the cooperation of third countries. Here, it is necessary to continue investing in their development in various areas with the aim of improving the standard of living in the countries of origin.

66 | Art. 7 of the 1966 International Convention on Civil and Political Rights, Art. 3 of the 1984 United Nations Convention against Torture and Art. 3 of the European Convention of Human Rights (ECHR) – as interpreted by the European Court of Human Rights.

Bibliography

Bučar-Ručman, A. (2014) *Migracije in kriminaliteta. Pogled čez meje stereotipov in predsodkov*. Ljubljana: Založba ZRC.

Clayton, G., Firth, G. (2021) *Immigration and asylum law*. Glasgow: Oxford University Press; https://doi.org/10.1093/he/9780198848936.001.0001.

Gray, H. (2013) 'Surveying the Foundations: Article 80 TFEU and the Common European Asylum System', *Liverpool Law Review,* 34, pp. 175–193; https://doi.org/10.1007/s10991-013-9138-8.

Houlding, E. M. (2017) *The Common European Asylum System the (Un)intended consequences of earlier decisions*. Aalborg: Aalborg University [Online]. Available at: https://projekter.aau.dk/projekter/files/260383568/CEAS__the__un_intended_consequences_of_earlier_decisions___CCG_Thesis_Ellen_M._Houlding.pdf (Accessed: 17 November 2023).

Human Rights Ombudsman (2021) 'In the context of the ENNHRI project, the Ombudsman draws up a National Report on the human rights situation of migrants at the borders', *Republic of Slovenia, Human Rights Ombudsman,* 8 August. [Online]. Available at: https://www.varuh-rs.si/en/news/news/in-the-context-of-the-ennhri-project-the-ombudsman-draws-up-a-national-report-on-the-human-rights-s/ (Accessed: 20 November 2023).

Jaeger, G. (2001) 'On the history of the international protection of refugees', *Revue Internationale de la Croix-Rouge/International Review of the Red Cross*, 83(843), pp. 727–738; https://doi.org/10.1017/s1560775500119285.

Mackey, A., Barnes, J. (2013) *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive – Judicial criteria and standards*. Haarlem: International Association of Refugee and Migration Judges [Online]. Available at: https://www.refworld.org/reference/research/iarlj/2013/en/105146 (Accessed: 17 November 2023).

Mozetič, P. (2016) 'Kaznovanje prosilcev za mednarodno zaščito zaradi izbire države azila', *Časopis za kritiko znanosti,* 264(1), pp. 159–180 [Online]. Available at: https://www.ckz.si/arhiv/264%20Balkanska%20pot/10Polona_Mozeti%E8.pdf (Accessed: 17 November 2023).

Polese, V., D'Avanzo, S. (2010) 'Linguistic and Legal Vagueness in EU Directives Harmonising Protection for Refugees and Displaced Persons' in Frade, C., Giannoni, D. S. (eds.) *Researching Language and the Law*. Bern: Peter Lang Verlag, pp. 89–112; https://www.iris.unina.it/handle/11588/423046.

Sardelić, J. (2017) 'From Temporary Protection to Transit Migration: Responses to Refugee Crises Along the Western Balkan Route', *Robert Schuman Centre for Advanced Studies Research Paper,* 2017/35; https://doi.org/10.2139/ssrn.3005923.

van Veldhuizen, T.S. (2017) *Where I come from and how I got here: assessing credibility in asylum cases.* Maastricht University: Gildeprint Drukkerijen; https://doi.org/10.26481/dis.20170922tsv.

UNHCR Slovenia 'Konvencija o statusu beguncev' [Online]. Available at: https://www.unhcr.org/si/konvencija-o-statusu-beguncev (Accessed: 20 November 2023).

Legal sources

Act on the Ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Extradition and Receipt of Persons whose Entry or Residence is Illegal [Online]. Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4624 (Accessed: 20 November 2023).

Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return-related tasks.

Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – a Renewed Action Plan, COM (2017) 200 final.

Communication from the Commission to the European Parliament and the Council: The EU strategy on voluntary return and reintegration; COM/2021/120 final.

Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A renewed EU action plan against migrant smuggling (2021-2025).

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals.

Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, including the (2004) Common Guidelines on security provisions for collective removals by air, annexed to European Council Decision 2004/573 of 29 April 2004.

Decree establishing the list of safe countries of origin [Online]. Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ODLO2607 (Accessed: 20 November 2023).

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.

Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC in order to extend its scope to beneficiaries of international protection.

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

Draft Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2019 evaluation of Slovenia on the application of the Schengen acquis in the field of management of the external borders – Decision to use the written procedure for the adoption.

Foreigners Act (Official Journal of the Republic of Slovenia, No. 91/21 – Official consolidated text, 95/21 – Amended, 105/22 – ZZNŠPP and 48/23) [Online]. Available at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5761 (Accessed: 20 November 2023).

Iskalnik sodne prakse Case and Decision I U 1686/2020-126 [Online]. Available at: https://www.sodnapraksa.si/?q=I%20U%201686/2020&database (Accessed: 20 November 2023).

Iskalnik sodne prakse Case I U 1159/2019-12 [Online]. Available at: https://www.sodnapraksa.si/?q=id:2015081111442824&database (Accessed: 20 November 2023).

Iskalnik sodne prakse Case I U 459/2018-7 [Online]. Available at: https://www.sodnapraksa.si/?q=id:2015081111429850&database (Accessed: 20 November 2023).

Iskalnik sodne prakse, Case I U 151/2015 [Online]. Available at: https://www.sodnapraksa.si/?q=id:2015081111408029&database (Accessed: 20 November 2023).

Iskalnik sodne prakse, Case I U 1731/2021-15 [Online]. Available at: https://www.sodnapraksa.si/?q=odlo%C4%8Dbe%20&database (Accessed: 20 November 2023).

Iskalnik sodne prakse, Case I U 392/2015 [Online]. Available at: https://www.sodnapraksa.si/?q=id:2015081111408339&database (Accessed: 20 November 2023).

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).

Regulation on the manner of legal representation of unaccompanied minors and the manner of ensuring appropriate accommodation, care and treatment of unaccompanied minors outside the asylum home or its branch', *Official Journal of the RS*, No. 35/17 [Online]. Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=PRAV12671 (Accessed: 20 November 2023).

Regulation on the modalities and conditions for guaranteeing the rights of applicants for international protection, *Uradni list RS,št.* 173/21 [Online]. Available at: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2021-01-3421?sop=2021-01-3421 (Accessed: 20 November 2023).

Regulation on the procedure with an foreigner who expresses the intention to lodge an application for international protection in the Republic of Slovenia and the procedure for accepting an application for international protection, *Official Journal of the Republic of Slovenia*, No. 29/17 [Online]. Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=PRAV12662 (Accessed: 20 November 2023).

Zakon o mednarodni zaščiti [Online]. Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7103 (Accessed: 20 November 2023).

Zakon o splošnem upravnem postopku [Online]. Available at: http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1603# (Accessed: 20 November 2023).

Zakon za zmanjšanje neenakosti in škodljivih posegov politike ter zagotavljanje spoštovanja pravne države [Online]. Available at: Available at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO8584 (Accessed: 20 November 2023).

HUNGARY'S POLICY AND PRACTICE ON ILLEGALLY STAYING MIGRANTS

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ABSTRACT

This study explores Hungary's policies and practices regarding persons illegally present in the country. It introduces Hungary's unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the EU and the various judicial fora where these provisions have been tested. The study indicates that the policy framework was incompatible with EU and international human rights law, simultaneously discussing the Hungarian Constitutional Court's decision regarding the state's obligation in the case of the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration. Moreover, it describes the framework of escorting illegally staying migrants through the Serbian border instead of conducting regular return procedures. In addition to analysing the individual cases and regulatory elements, the study indicates that the results of Hungarian measures in practice and whether it is worthwhile to consider these experiences during the EU migration reform processes should not be overlooked.

KEYWORDS

illegal migration to Hungary
return to Serbia
efficient procedures
effective exercise of EU competence
EU migration reform

1. Introduction

1.1. The special Hungarian context

Although this study aims to elucidate Hungary's policy and practice regarding persons illegally present in the country to establish a basis for comparison with

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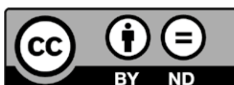

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other countries, it is noteworthy that Hungary has a unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the European Union (EU). Consequently, policy choices are often regulatory attempts to address situations in which previous regulatory frameworks were unable to provide adequate solutions. Newer regulatory ideas have been tested, raising the question of which actions are compatible with the current effective EU framework and which regulatory elements are incompatible with EU law.

Consequently, several court cases have been initiated to test the compatibility of Hungarian measures with EU law and international human rights. The study aims to list these court cases and explain their effect on the development of relevant national measures. In addition to the judgments of the Court of Justice of the EU and the European Court of Human Rights, the Hungarian Constitutional Court had to assess whether the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in the Fundamental Law of Hungary.

Although, based on many court decisions, it may appear that Hungary is purposefully attempting to evade the implementation of EU law, it should be considered that the country is in a special situation, as it simultaneously protects one of the EU's important external border sections and manages the influx of people from Ukraine. Therefore, when analysing individual cases and regulatory elements, the results of the Hungarian measures in practice and whether it is worthwhile to seriously consider these experiences during the EU migration reform processes that have been ongoing since 2016 should not be overlooked. Moreover, this study aims to reveal the practical side of implementing return decisions and initiatives that aim to facilitate them with regard to both voluntary and forced returns.

1.2. Present legal framework

Legal amendments that entered into force on 5 July 2016[2] allowed the Hungarian police to escort illegally entering migrants who were apprehended within 8 km of the Serbian-Hungarian or Croatian-Hungarian border to the external side of the border fence in a summary procedure, without issuing a formal decision or providing the possibility of submitting an application for international protection. The aim was to request law-abiding behaviour from arriving asylum seekers and make them claim asylum rights at the external border of the EU and not to allow the abuse of the legal structure of the EU asylum acquis.[3] Hungary introduced this legal provision in accordance with Article 2(2)a) of the Return Directive, which provides for derogating from the application of the Directive as Member States may decide not to apply this Directive to third-country nationals who are subject

2 | Act XCII of 2016 on amending the laws necessary to implement the broad applicability of the asylum border procedure.

3 | Nevertheless, the number of asylum-seekers that were allowed to enter the transit zones were no more than 15 asylum-seekers per day, those returned therefore had to wait in front of the transit zones, where no infrastructure was available for the asylum-seekers.

to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea, or air of the external border of a Member State and who have subsequently not obtained authorisation or a right to stay in that Member State.

Further amendments entered into force on 28 March 2017[4] stated that when the state of crisis because of mass migration was in effect, irregularly staying migrants found anywhere in Hungary were to be escorted to the external side of the border fence with Serbia. Consequently, this Hungarian provision[5] extended the 8-km zone to the entire territory of Hungary, including migrants who had never even been to Serbia and had entered Hungary through Ukraine or Romania.

On 26 May 2020 the government issued a decree that introduced a new asylum system adopted because of the pandemic, which many referred to as the 'embassy procedure'.[6] The new system was included in the Transitional Act of June 2020.[7] The system was first in place until 31 December 2020 with the possibility of prolongation, and is currently in force until 31 December 2023. According to the new system, those wishing to submit their applications for international protection in Hungary, with the few exceptions noted below, must go through the following steps prior to being able to registering their asylum applications. Foreigners must personally submit a declaration of intent to lodge an asylum application with the Embassy of Hungary in Belgrade or Kyiv.[8] Foreigners who illegally cross Hungary's state border: if they indicate their intention to submit an asylum application to the police, the police will direct them to the Hungarian Embassy in the neighbouring country where they crossed the border.

The declaration of intent submitted to the embassy is then assessed by the asylum authority, during which the authority may interview a foreign national present in person at the embassy in the form of a remote hearing. In case, as a result of the assessment concluded by the authority, the foreigners become eligible for a travel document that entitles its holder to a single entry to Hungary, the asylum authority informs the embassy about this fact within 60 days to issue the travel document. Based on the information provided by the asylum authority, the Embassy of Hungary issues a travel document valid for 30 days, provided that the foreigners do not hold a permit for entry into Hungary. Once they enter Hungary with this travel document, the application for international protection can be submitted within 24 hours, thus, the proceedings are prompt. If the asylum

4 | Act XX of 2017 on the amendment of certain laws related to the tightening of the procedure conducted in the border guarding area.
5 | Section 5(1b) of Act LXXXIX of 2007 on State Border, Section 80/J(3) of Act LXXX of 2007 on Asylum.
6 | Government Decree 233/2020 (V. 26.) on the rules of the asylum procedure during the state of danger declared for the prevention of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens.
7 | Section 267 of Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger.
8 | National Directorate-General for Aliens Policing, 2024.

authority does not support the issuance of travel documents based on the concluded assessment, it informs the foreign national about this via the embassy. Only people belonging to the following categories are not required to go through the process described above:[9] beneficiaries of subsidiary protection who are staying in Hungary; family members of refugees and beneficiaries of subsidiary protection who are staying in Hungary; and those subject to forced measures or punishment affecting personal liberty, except if they have crossed Hungary illegally.[10]

2. Court cases

2.1. Avoiding individual return decisions

2.1.1. CJEU proceedings

On 19 July 2018 the European Commission decided to refer Hungary to the Court of Justice of the European Union (CJEU) for noncompliance of its asylum and return legislation with EU law. In its judgment of 17 December 2020[11] the CJEU found that Hungary's legislation on the rules and practices in the transit zones situated at the Serbian-Hungarian border was contrary to EU law. In particular, the Court identified breaches in the provisions of the Asylum Procedures Directive,[12] the Reception Conditions Directive,[13] and the Return Directive.[14,15] The CJEU's critical conclusions identified four aspects of Hungary's asylum system's non-compliance with EU law. (i) First, in providing applications for international protection from third-country nationals or stateless persons who, arriving from Serbia, wish to access its territory, the international protection procedure may be made only in the transit zones of Röszke and Tompa, while adopting a consistent and generalised administrative practice drastically limiting the number of applicants authorised to enter those transit zones daily. (ii) Second, establishing a system of systematic detention of applicants for international protection in the transit zones of Röszke and Tompa without observing the guarantees provided for in Articles 24(3) and 43

9 | Section 271 (1) of the Transitional Act.

10 | Only one family's declaration of intent was assessed positively in 2020, and in 2021, 8 persons (4 persons in April and 4 in September) were granted a single-entry permit to apply for asylum in Hungary. In 2022, 4 persons were granted a single-entry permit to apply for asylum in Hungary. See Hungarian Helsinki Committee, 2023.

11 | Case C-808/18, *Commission v Hungary*.

12 | 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.

13 | 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.

14 | 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.

15 | In its judgment the CJEU declared that Hungary had failed to fulfil its obligations under Articles 5, 6(1), 12(1) and 13(1) of Directive 2008/115/EC, under Articles 6, 24(3), 43 and 46(5) of Directive 2013/32/EU, and under Articles 8, 9 and 11 of Directive 2013/33/EU.

of the Asylum Procedures Directive (APD) and Articles 8, 9, and 11 of the Reception Conditions Directive.[16] (iii) Third, it allows the removal of all third-country nationals staying illegally in its territory, with the exception of those suspected of having committed a criminal offence, without observing the procedures and safeguards laid down in Articles 5, 6(1), 12(1), and 13(1) of the Return Directive. (iv) Finally, making the exercise by applicants for international protection who fall within the scope of Article 46(5) of the APD of their right to remain in its territory subject to conditions contrary to EU law.

The Commission criticised Hungary for allowing illegally staying third-country nationals who were apprehended in Hungarian territory to be forcibly moved beyond a border fence erected in that territory to a few metres from the Serbian-Hungarian border without observing the procedures and safeguards provided for in those provisions. Moreover, the Commission criticised Hungary for having allowed, pursuant to Article 5(1b) of the Law on State borders, in a crisis situation caused by mass immigration, third-country nationals staying illegally in its territory to be forcibly moved to a strip of land devoid of any infrastructure, between a border fence established in Hungarian territory and the Serbian-Hungarian border proper, without observing the procedures and guarantees defined in the Return Directive. The Commission was of the view that the third-country national, escorted to a narrow strip of Hungarian border territory, where there is no infrastructure available and from which there is no means of travelling to the rest of the Hungarian territory, other than the transit zones of Röszke and Tompa, would, in practice, have no choice other than to leave that territory, considering the long wait required to enter one of those two transit zones, and therefore corresponds to the concept of 'removal' as defined in Article 3(5) of the Return Directive, although the physical transfer may not be completed outside the territory of the Member State concerned. The Commission argued that the removal of illegally staying third-country nationals was conducted without a return decision being issued with respect to them, indiscriminately, without considering the best interests of the child, family life, or the state of health of the person concerned, and without observing the principle of non-refoulement, and, in the absence of a return decision, no legal remedy was available to the person concerned.

Hungary argued that such a substantial, general and protracted derogation from the provisions of the Return Directive could be justified under Article 72 of the Treaty on the Functioning of the European Union (TFEU), as it allows Member States to adopt and apply rules relating to the maintenance of public order and the safeguarding of internal security derogated from the provisions of EU law.[17] Therefore, in a crisis situation, such as that prevailing in Hungary, Article 5(1b) of the Law on State borders can be derogated from the provisions of the Return Directive.

16 | The judgment confirmed the 14 May 2020 conclusions of the CJEU in Joined Cases C-924/19 PPU and C-925/19 PPU, which concerned two asylum-seeking families held in the transit zone in Röszke, at the Hungarian-Serbian border. In these preliminary ruling proceedings, the CJEU concluded that a placement in the transit zone is unlawful detention. Soon after the judgment the Hungarian authorities moved nearly 300 people to open facilities and declared that the transit zones would be closed.

17 | See: Töttős, 2021, pp. 212–232.

The Court found[18] that it was not disputed that Section 5(1b) of the Law on State borders permits the adoption of a measure of forcible deportation beyond the border fence against third-country nationals who are staying illegally in Hungary within the meaning of Article 3(2) of the Return Directive, except where those nationals are suspected of having committed an offence. Further, the Court stated[19] that the safeguards surrounding the intervention of police services proposed by Hungary clearly cannot be regarded as corresponding to the safeguards provided in the Return Directive. Contrary to Hungary's contention, the Court concluded that the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as its removal from that territory.

According to the Court's argument, the safeguards surrounding the return and removal procedures provided in the Return Directive would be deprived of their effectiveness if a Member State could dispense with them, even if it forcibly displaced a third-country national, which is, in practice, equivalent to transporting him or her physically outside its territory. It is concluded that after having been forcibly deported by the Hungarian police to a narrow strip of land, the third-country national has no choice other than to leave Hungary and go to Serbia to be housed and fed, and that the national does not have the effective possibility of entering the two transit zones of Röszke and Tompa to apply for international protection there.

Finally, the Court also rejected[20] Hungary's line of argument, according to which Article 5(1b) of the Law on State borders is justified under Article 72 of the TFEU, read in conjunction with Article 4(2) of the Treaty on European Union (TEU). According to its reasoning, Hungary merely invoked, in a general manner, a risk of threats to public order and national security, without demonstrating the requisite legal standard that was necessary for it to derogate specifically from the Return Directive considering the situation prevailing in its territory on 8 February 2018. More specifically, Article 4(2) of the TEU, Hungary, did not indicate that, considering that situation, effectively safeguarding the essential State functions to which that provision refers, such as that of protecting national security, could not be conducting other than by derogating from the Return Directive.[21]

It becomes extremely visible in this part of the judgment that the concept of illegal entry and stay could have different interpretations in different areas of EU law:[22] Hungary strictly views entries as illegal based on the Schengen acquis, whereas the CJEU views it strictly from the perspective of international protection by stating that those arriving as applicants for international protection cannot be regarded as illegally entering or staying.[23] This divergence in legal interpreta-

18 | Paragraph 244 of Judgment of Case C-808/18.

19 | Paragraphs 254–255 of Judgment of Case C-808/18.

20 | Paragraphs 261–263 of Judgment of Case C-808/18.

21 | The Court used an analogy with judgment of 2 April 2020, *Commission v Poland, Hungary and the Czech Republic* (temporary mechanism for the relocation of applicants for international protection), C 715/17, C 718/17 and C 719/17, EU:C:2020:257, Paragraph 170.

22 | See e.g. Menezes Queiroz, 2018.

23 | Case C-808/18, Judgment of the Court, Paragraph 219.

tions also contributed to the conclusions regarding the lack of a link between the evidence provided and the necessity that should have been demonstrated according to the Court's demand. The Court also added that the provisions of the Return Directive allow Member States to derogate from a number of rules laid down by that directive, if required, for the protection of public order or public or national security.

The consequences of the decision of the CJEU were far reaching, particularly at the end of January, when Frontex, for the first time in the agency's history, decided to suspend its operational activities in Hungary. The agency confirmed its decision to suspend joint operations along the border until Hungary fully complied with the previous month's ruling of the European Court of Justice in connection with the country's asylum and immigration laws. Joint operations may resume immediately once Hungarian authorities comply with the ruling.[24]

Although the Hungarian Government closed the transit zones immediately after the preliminary ruling in May 2020,[25] the Commission considered that Hungary did not take the necessary measures to fully comply with the judgment in the infringement case, particularly regarding the infringement of the relevant provisions of the Asylum Procedures, Reception Conditions, and Return Directives. Consequently, on 9 June 2021 the European Commission sent a letter of formal notice to Hungary for failing to comply with the CJEU ruling.[26] In November 2021, the European Commission decided to refer Hungary to the Court of Justice of the European Union,[27] requesting that the Court order the payment of financial penalties for Hungary's failure to comply with a Court ruling in relation to EU rules on asylum and return; the case is ongoing in mid-2023.[28]

The embassy procedure did not help create compliance with the EU law. The European Commission considered that by adopting these new measures in 2020, following the outbreak of the COVID-19 pandemic, Hungary failed to fulfil its obligations under EU law, particularly the Asylum Procedures Directive.[29] In its judgment on 22 June 2023 the CJEU held that by making it possible for certain third-country nationals or stateless persons present in its territory or at its borders to apply for international protection subject to the prior submission of a declaration of intent at a Hungarian Embassy situated in a third country and to the grant of a travel document enabling them to enter Hungarian territory, Hungary had failed to fulfil its obligations under the directive. The Court found that the condition relating to the prior submission of a declaration of intent is not laid down by the Asylum Procedures Directive and is contrary to its objective of ensuring effective, easy, and rapid access to the procedure for granting international protection. In addition, according to the Court, legislation deprives third-country nationals or stateless persons concerned of the effective enjoyment of their right

24 | About Hungary, 2021.
25 | Hungarian Government, 2020.
26 | Proceedings No. INFR(2015)2201: European Commission, 'June infringements package: key decisions', 9 June 2021.
27 | *Commission v Hungary*, Case C-123/22.
28 | European Commission, 2021.
29 | Case C-823/21, *Commission v Hungary*.

to seek asylum in Hungary, as enshrined in the Charter of Fundamental Rights of the European Union. Second, the Court considered that the restrictions may not be justified by the objective of public health protection and, more specifically, the fight against the spread of COVID-19, as argued by Hungary. The Court's reasoning declared that the Hungarian measures were unsuitable for combating the spread of the pandemic and manifestly disproportionate with regard to the interference with the right of persons seeking international protection to apply for international protection upon their arrival at a Hungarian border.

2.1.2. European Court of Human Rights

During the early years of transit zones at the Hungarian-Serbian border, the ECtHR had the opportunity to examine the Hungarian legal framework. The *Ilias and Ahmed v. Hungary*[30] case concerned two Bangladeshi nationals who transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they entered the transit zone in Röszke and immediately applied for asylum. They were held in the transit zone for 23 days. The admission of applicants to the Hungarian transit zone coincided with the introduction of a new asylum regime in Hungary.[31] Although the judgment of the Grand Chamber reflected a practical and realistic approach to the confinement of 23 days in the transit zone in 2015, by finding that it did not constitute a *de facto* deprivation of liberty, the ECtHR reached negative conclusions regarding the applicants' return to Serbia. The Grand Chamber found that Hungary, opting to use inadmissibility grounds and expelling applicants to Serbia, failed to conduct a thorough assessment of the Serbian asylum system, including the risk of summary removal.[32]

On 8 October 2021 the ECtHR issued a judgment in the first case against Hungary involving collective expulsion (the *Shahzad* case).[33] The case concerns the 'apprehension and escort' measure introduced by the Hungarian State Borders Act, which authorised the Hungarian police to remove foreign nationals staying illegally in Hungary to the external side of the Hungarian border fence (on the border with Serbia) without a need for a formal decision. The applicant, who, together with 11 other migrants, was subjected to such a measure in August 2016, complained that he was part of a collective expulsion in breach of Article 4 of Protocol No. 4 of the Convention. Moreover, he complained that he did not receive an effective remedy at his disposal. Considering the fact that Hungarian authorities removed the applicant without identifying him and examining his situation, and with regard to the above finding that he did not have effective access to means of legal entry, the Court concluded that his removal was of a collective nature.[34] Therefore, the measures conducted by Hungary under domestic regulation were in breach of

30 | *Ilias and Ahmed v. Hungary (GC)*, No. 47287/15, 21 November 2019 *(Ilias and Ahmed GC judgment).*

31 | Act CXL of 2015 on Amending certain laws relating to the management of mass immigration, which entered into force on 15 September 2015.

32 | Töttős, 2020, pp. 169–191.

33 | *Shahzad v. Hungary*, Appl. No. 12625/17, 8 October 2021.

34 | Paragraphs 58–59 and 67 of the Judgment of the ECtHR.

the prohibition of collective expulsions enshrined in Article 4 of Protocol 4 of the Convention.

On 22 September 2022 a similar judgment followed in *H.K. v. Hungary*.[35] Unlike the applicant in the *Shahzad* case, the applicant in this case had in fact been placed on the waiting list outside of the transit zone at the Hungarian-Serbian border; after a few months of waiting in Serbia and a few failed attempts to enter Hungary irregularly, he was admitted to the transit zone where he was able to apply for asylum. However, when the applicant entered Hungary irregularly and was removed, he had no information on whether or when to gain access to the asylum procedure. Thus, the Court considered that the mere fact that he later managed to enter the transit zone did not make his removal compliant with the Convention, and the Court once again concluded that the applicant's removal was of a collective nature. Several other cases of collective removal have already been communicated by the ECHR.[36]

2.1.3. The interpretation of the Hungarian Constitutional Court[37]

On behalf and under the authorisation of the Government, the Minister of Justice submitted a petition to the Constitutional Court seeking an interpretation of Article E (2)[38] and Article XIV (4)[39] of the Fundamental Law because the implementation of the judgment of the CJEU delivered on 17 December 2020 in Case C-808/18 raises a constitutional problem that warrants an interpretation of the Fundamental Law. The Hungarian Government claimed that the implementation of the judgment of the Court of Justice of the European Union in case C-808/18 raised the constitutional problem at issue if Hungary allowed the implementation of an EU legal obligation which may lead to a foreign national illegally staying in Hungary and remaining in the territory of a Member State for an indefinite period of time, thus becoming part of the population of that State. The Constitutional Court had to assess whether the incomplete effectiveness of the joint exercise of

35 | *H.K. v. Hungary*, Appl. No. 18531/17, 22 September 2022.

36 | *H.Q. v. Hungary*, Appl. No. 46084/21; *K.P. v. Hungary*, Appl. No. 82479/17; *F.W. and others v. Hungary*, Appl. No. 44245/20; *S.S. and others v. Hungary*, Appl. 56417/19; *R.N. v. Hungary*, Appl. No. 71/18; *R.D. v. Hungary*, Appl. No. 17695/18, *Arab and Arab v. Hungary*, Appl. No. 60778/19.

37 | Constitutional Court of Hungary, 2021.

38 | 'With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.'

39 | 'Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.'

competences could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in Fundamental Law.

In its petition, the government referred to the quota decision of the Hungarian Constitutional Court,[40] which brought about a breakthrough, as the decisions of the Constitutional Court did not clearly read the place of EU law in the legal system prevailing in Hungary.[41] The Constitutional Court made far-reaching findings regarding the relationship between EU Law and the Constitution.

> Based on an overview of the practice of the supreme courts and constitutional courts of the member states performing constitutional court duties, the Constitutional Court established that, within its competence, based on a petition to this end, in exceptional cases and as an ultima ratio, i.e. while respecting the constitutional dialogue between the member states, it can examine whether as a result of the joint exercise of powers based on Article E) Paragraph (2) of the Basic Law, human dignity, the essential content of other fundamental rights, or the sovereignty of Hungary (including the scope of the powers transferred by it) or its constitutional identity are violated.[42]

When examining the new petition submitted by the Minister of Justice, the Constitutional Court, interpreting the 'Europe Clause' of the Fundamental Law,[43] held[44] that where the exercise of joint competences with the Union is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.

The Constitutional Court further held that where the incomplete effectiveness of the joint exercise of competences resulted in consequences that raised the issue of the violation of the right to identity of persons living in Hungary, the Hungarian State shall be obliged to ensure the protection of this right in the context of its obligation of institutional protection. In this regard, the Constitutional Court indicated that man, as the most elementary constituent of all social communities, particularly the State, is born into a given social environment that can be defined as the traditional social environment of man, particularly through its ethnic, linguistic, cultural, and religious determinants. These circumstances create

40 | 22/2016. (XII. 5.) Decision of the Constitutional Court of Hungary on the interpretation of Article E) Paragraph 2 of the Basic Law.
41 | Várnay, 2019, p. 65.
42 | 22/2016. (XII. 5.) Decision of the Constitutional Court, Paragraph 46.
43 | In its decision, the Constitutional Court observed that the abstract constitutional interpretation cannot be converted into a position applicable to the specific case giving rise to the petition, and therefore, the Constitutional Court only addressed the genuine problems of constitutional interpretation directly derivable from the issue. The Constitutional Court thus interpreted Article E (2) of the Fundamental Law.
44 | Decision number: X/477/2021., Subject of the case: Application of the Minister for Justice for interpretation of Article E (2) and Article XIV (4) of the Fundamental Law (judgment of the Court of Justice of the European Union in Case C-808/18, asylum, exercise of EU powers).

natural ties determined by birth that shape the identity of community members. These natural ties or qualities, which are determined by birth, are considered as circumstances that influence a person's self-determination, which are created by birth or are qualities that are difficult to change. Protection under constitutional law should not be an abstract, static protection of the individual detached from his or her historical and social reality and must consider the dynamic changes in contemporary life. In the Constitutional Court's view, since the State cannot make unreasonable distinctions regarding fundamental rights on the basis of these characteristics, it must also ensure, considering its obligation of institutional protection, that changes to the traditional social environment of the individual can only occur without significant harm to these determining elements of identity.

The Constitutional Court stated that the joint exercise of competences through EU institutions of the European Union may not lead to a lower level of protection of fundamental rights than that required by Fundamental Law. Similarly, the fact that an EU legal norm, binding on all Member States, meets the requirements of the Constitution but is not properly implemented, meaning that the resulting obligations of the binding norm are not or only partially enforced, cannot lead to a lower level of protection of fundamental rights than required by the Constitution. In this context, the Constitutional Court has held that if the joint exercise of competences through the institutions of the European Union is incomplete, Hungary is entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU until such time as the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences.

Finally, the Constitutional Court held that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government and State structure should be part of its constitutional identity. Várnay finds that the sword of constitutional identity has been forged against EU law.[45] Although in Spieker's typology of identity review mechanisms the Hungarian version has been classified as 'revealing a clear tendency towards hard conflict (i.e. between the national courts and the ECJ – E.V) identity review',[46] the Constitutional Court, was not in a position to assess whether the incomplete effectiveness of the joint exercise of competences had been resolved in the specific case. Nor was the Constitutional Court able to take a position on whether the government's argument that the CJEU judgment could lead to foreign nationals becoming part of Hungary's population was correct. The Constitutional Court found that the above was a matter to be judged by the body applying the law, and not by the Constitutional Court.[47]

Nevertheless, a judge of the Budapest-Capital Regional Court (Fővárosi Törvényszék) initiated an individual norm control procedure before the Hungarian

45 | Várnay, 2022, p. 81.

46 | Spieker, 2020.

47 | However, the Constitutional Court stressed that the abstract interpretation of the Fundamental Law cannot be aimed at reviewing the judgment of the CJEU, nor does the Constitutional Court's procedure in the present case, by its very nature, extend to the review of the primacy of EU law.

Constitutional Court[48] with regard to the Section 5(1b) of Act LXXXIX of 2007 on the state border and also requested an investigation into the conflict of the contested provision with an international treaty. The initiative was taken during an administrative legal proceeding in the case of a complaint against a police measure. Based on the challenged provision, during a crisis situation caused by mass immigration, Hungary's police may arrest foreigners who are illegally staying in Hungary and escort them through the nearest gate of the border fence. The plaintiff, who is an Afghan citizen, entered the Schengen area with a valid visa in 2018. His legal stay in Hungary ended in 2019, and his asylum application submitted in 2021 was rejected by the authorities without a substantive examination. The police then transported the plaintiff to the Hungarian-Serbian border and escorted him through the gate of the border guard facility.

The judge of the Budapest-Capital Regional Court filed an individual norm control appeal with the Constitutional Court, expressing its opinion that the disputed provision was unconstitutional in both form and content. First, the court refers to the fact that the act of escorting in practice is equal to deportation without a formal decision and without the police, considering the individual circumstances of the foreigners, as it provides no right to foreigners to submit an asylum application in Hungary. This situation creates the possibility of group deportation, contrary to Article XIV of the Fundamental Law of Hungary. Second, the judge highlighted that the plaintiff deported to a location with no infrastructure and had to enter Serbia by violating Serbian legislation, which, according to the court's opinion, violates human dignity and can be evaluated as inhumane and humiliating treatment. Third, the Court determined the challenged provision to be substantively unconstitutional, as the measure in question did not provide an effective legal remedy.

In the present case, considering the complaint against police action and its subject matter, the Constitutional Court did not find it justified that there was a direct connection between the individual case on which it was based and the requested norm control. Therefore, the Constitutional Court found that the motion — both in relation to the unconstitutionality and violation of the international treaty — was in fact extending beyond the scope of the authorisation of individual norm control, as it was aimed at conducting the abstract subsequent norm control of the disputed provision.[49]

2.2. Procedural questions before the regular courts

Although the *GM* case[50] raised the interpretation of the Asylum Procedure Directive, it is important from the perspective of expulsion as it resulted in the withdrawal of refugee status in the given case, which could have led to expulsion if the principle of non-refoulement had not been applied.

48 | Decision number III/01701/2022 [Online]. Available at: http://public.mkab.hu/dev/dontesek.nsf/0/4B0458270B9ABCABC1258892005B05E6?OpenDocument (Accessed: 18 October 2023).

49 | Order of the Constitutional Court 3206/2023. (V. 5.) on the rejection of a judicial initiative.

50 | *GM v Országos Idegenrendészeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ*, Case C-159/21, ECLI:EU:C:2022:708.

By decision of 15 July 2019, the Directorate-General withdrew GM's refugee status and refused to grant him subsidiary protection status while applying the principle of non-refoulement to GM. That decision was taken on the basis of a non-reasoned opinion issued by the Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary) and by the Terrorelhárítási Központ (Counter-terrorism Centre, Hungary) (together, 'the specialist bodies'), in which those two authorities concluded that GM's stay constitutes a danger to national security. GM filed an action before the court to challenge that decision, which was uncertain, as to whether Hungarian legislation on access to classified information was compatible with the relevant EU law. Although the person concerned or his or her representative admittedly has the right to submit a request for access to confidential information concerning that person, they cannot use the confidential information in the context of administrative or judicial proceedings. Moreover, the Hungarian court was uncertain about the compatibility with EU law of the rule laid down by Hungarian law that the asylum authority is required to rely on a non-reasoned opinion given by specialist bodies and cannot itself examine the application of the ground for exclusion in the case before it, with the result that it can provide reasons for its own decision only by referring to that non-reasoned opinion. In these circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

In case C-159/21, the CJEU interpreted Article 23(1) of the Directive and stated that it precludes national legislation which provides that although the person concerned or his or her legal adviser can access that information, they are not provided even with the substance of the grounds on which such decisions are based and cannot, in any event, be used for the purposes of administrative procedures or judicial proceedings.[51] The CJEU also concluded that contrary to EU law,[52] the determining authority is systematically required where bodies entrusted with specialist functions linked to national security have found, by way of a non-reasoned opinion, that a person constituted a danger to that security, to refuse to grant that person subsidiary protection, or to withdraw international protection previously granted to that person based on that opinion.[53]

Another case raised the question of the range of factors to be evaluated and the need to compare the specialised authority's opinion, without which no administrative decision can be made regarding a particular procedure. It concerned the case of a third-country national family member of a Hungarian citizen, whose application for permanent residence was rejected by the Hungarian immigration police authority, as he had been awarded a prison sentence for the offence

51 | Paragraph 60 of Judgment C-159/21.

52 | Article 4(1) and (2), Article 10(2) and (3), Article 11(2) and Article 45(3) of Directive 2013/32, read in conjunction with Article 14(4)(a) and Article 17(1)(d) of Directive 2011/95/EU 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.

53 | Paragraph 86 of Judgment in C-159/2.

of trafficking migrants by assisting in the unauthorised crossing of the border. The Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary), as a specialised authority, found that a person's conduct must be regarded as a real, immediate, and serious threat to national security, which forms the basis of the responsible authority's decision. After court appeal, the questions were referred to the CJEU.[54] The CJEU stated[55] that Article 5 of the Return Directive must be interpreted as precluding that a third-country national, who should have been the addressee of a return decision, is the subject – in a direct extension of the decision which withdrew from him or her, for reasons connected with national security, his or her right of residence in the territory of the Member State concerned – of a decision banning entry into the territory of the European Union, adopted for identical reasons, without consideration being given beforehand to his or her state of health and, where appropriate, his or her family life and the best interests of his or her minor child.

3. Present practice

3.1. Statistical figures

The number of border violators[56] is constantly increasing; in 2022, the authorities caught 269,254 migrants, an average of 738 people per day. In 2021, 122,239 border violators were caught, with an average of 335 people per day. Nevertheless, these data contain three categories: illegal border crossings prevented, persons caught and escorted through gates, and persons arrested with legal proceedings initiated. The number of those in the latter group was 1,150 in 2022, and reached 1,208 by the 28th week of 2023. Last year, 1,924 people were arrested for human smuggling, compared with 1,277 people in the previous year, which indicates a significant increase.

Although in the case of escorting illegally staying foreigners, authorities are not required to conduct a complete return procedure, regular expulsions are ordered and executed.[57] A total of 800 expulsions were ordered by the alien policing authority in 2022, of which Albanian (152) and Turkish (85) nationals stood out. Moreover, 678 expulsions were also ordered by judicial decisions in 2022, primarily for Serbian (165) and Romanian (122) nationals. The distribution of forced returns by nationality also reflects these decisions: 127 Albanian, 11 Serbian, 89 Romanian, and 70 Turkish nationals were deported by alien policing authorities in 2022.

In 2021, the statistics indicated a similar tendency, with one major difference: Before the war in Ukraine, Ukrainians were the top nationality with regard to expulsion orders by both the aliens' policing authority (351) and judicial decisions

54 | *M.D. v Országos Idegenrendészeti Főigazgatóság Budapesti és Pest Megyei Regionális Igazgatósága*, Case C-528/21, ECLI:EU:C:2023:341.
55 | Paragraph 92 of the Judgment in Case C-528/21.
56 | Hungarian Police, 2022.
57 | National Directorate-General for Aliens Policing, 2022.

(84). Furthermore, the alien policing authority issued most of the expulsion decisions (1,120) for Albanian (166), Turkish (74), Kosovar (50), and Serbian (45) nationals, while judicial expulsion decisions (412) were ordered for Serbian (60), Romanian (52), Albanian (29), and Syrian (21) nationals. Forced returns (661) were conducted for Albanian (139), Ukrainian (138), Serbian (72), Romanian (56), and Turkish (31) nationals.

Between 2017 and 2020, a gradual increase in the number of expulsion orders was observed, with Ukrainian nationals being at the top of the list regarding expulsion orders by both the alien policing authority and judicial decisions.

The list of nationalities in cases where forced returns can only be implemented in European countries is visible. However, there is only one exception. In 2020, 19 Iranian nationals were deported from Hungary.[58] Based on the news from that year, this corresponds to the number of Iranian students who were expelled by the alien policing authority because of violations of the health safety rules regarding the COVID-19 pandemic. At the beginning of March 2020, two Iranian students were the first to be diagnosed with the coronavirus in Hungary, and then several university students associated with them were isolated in Saint László Hospital. However, according to the authorities, some people disobeyed the regulations and medical staff. Therefore, police action was taken and criminal proceedings were initiated against all quarantined students who were later found to be asymptomatic. The police initiated the deportation of all foreign university students at the Directorate General of the National Immigration Police, which expelled young people and imposed a three-year entry and residence ban on them. The criminal proceedings against most of the Iranian students who were expelled from Hungary for violating the quarantine rules had been terminated, and the Hungarian authorities had also begun to withdraw their entry ban, which could allow their return to Hungary to complete their studies.

3.2. Readmission willingness

The readmission agreement between the EU and Serbia[59] is the most relevant regarding the readmission of those illegally arriving and staying in Hungary. Article 3(1) of the agreement extends its scope to the readmission of third-country nationals and stateless persons.

> Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the legal conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons: (a) hold, or at the time of entry held, a valid visa or residence permit issued by Serbia; or (b) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Serbia.

58 | Tordai, 2020.
59 | 2007, 'Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation', OJ L 334, 19.12.2007, pp. 46–64.

Nevertheless, since 15 September 2015, Serbia generally does not take back third-country nationals under the readmission agreement except for those who hold valid travel/identity documents and are exempted from Serbian visa requirements.[60] Consequently, the Hungarian authorities escort out of the fence at the Hungarian-Serbian border without officially contacting the Serbian authorities and without the application of the readmission agreement.

Regarding cases handled in regular return procedures, the return of African nationals could prove problematic, as Hungary does not have bilateral initiatives with these countries, considering the geographical distance. Readmission procedures are sometimes unsuccessful owing to the lack of a registration system in Morocco, Algeria, and Tunisia; for example, fingerprint identification is limited. Consequently, recent EU initiatives regarding the external dimension of migration, with the aim of improving returns and readmissions, could also prove beneficial to Hungary.

3.3. Facilitating returns

3.3.1. Liaison officers

Third-country cooperation is essential for successful return and readmission policies, and one of the tools used to foster such cooperation is the use of liaison officers. Frontex operates a network of European Return Liaison Officers (EURLOs), which facilitates local contact and contributes to the successful implementation of returns. The European Return Liaison Officers (EURLO) Network comprises national return liaison officers deployed by EU Member States and Schengen associated countries to a host third country or region to enhance cooperation and support Member States and Frontex in all phases of the return process.[61]

The Hungarian National Directorate General for Alien Policing has no liaison officers dedicated only to return activities, however, Hungary has nine special consular officers deployed in Nigeria, Lebanon, Iraq, Vietnam, Russia, China, Iran, Tunisia, and India who can provide return assistance if required. The deployed experts can help assess the needs and possibilities on the spot, and these national liaison officers sent to third countries provide serious assistance to Hungary in the field of returns; one of their primary tasks is to facilitate the effectiveness of returns to third countries.

60 | Hungarian Helsinki Committee, 2023.

61 | The deploying Member State has a leading role in the EURLO deployment and its administration. On its side, Frontex ensures coordination of the EURLO Network and supports Member States in the deployment process and day-to-day management. The EURLO Network is implemented as part of the overall EU Policy on Return and Readmission. Each EURLO deployment is based on a dedicated Implementation Plan tailored to the identified needs outlining the activities to be undertaken by the EURLO during the return process. Frontex finances and reimburses costs incurred by the deploying Member State throughout the deployment based on a bilateral Grant Agreement. They are also part of the European network of immigration liaison officers (the ILO Network).

3.3.2. Assisting in voluntary[62] and forced returns

The Hungarian Assisted Voluntary Return, Reintegration, and Information Program[63] was implemented by the International Organization for Migration (IOM) in Hungary within a 32-month period until 31 December 2023 with a budget of HUF 323,901,084 (approximately EUR 837,000) financed by the Asylum, Migration and Integration Fund (AMIF). The objective of the programme is to facilitate the safe and dignified return of migrants staying in Hungary to their country of origin, and to advance their return with integration support. The project comprises four components: (1) through various communication channels, the information component ensures that potential beneficiaries as well as the staff of various relevant facilities can obtain up-to-date, easily accessible, and reliable information regarding voluntary return and reintegration support; (2) in the context of the return component, the IOM provides support to 310 beneficiaries to facilitate a safe return to their country of origin, including the organisation of voluntary return home, pre-departure assistance, and the provision of pre-departure cash support; and (3) the reintegration component is intended to facilitate reintegration after returning to the country of origin. In this framework, the IOM provides financial support to 50 volunteer returnees, the primary purpose of which is to promote direct or indirect participation in income-generating activities; (4) the basis of the evaluation component is a reintegration-specific questionnaire, with the help of which the feedback of beneficiaries who received reintegration support after returning to their country of origin is collected. This programme has also become important for third-country nationals who had to flee Ukraine and wished to return to their country of origin. According to the IOM, as of April 2023, 92 persons have received voluntary humanitarian return assistance since the outbreak of the war in Ukraine.[64]

Although Frontex activated Article 46 of the Frontex Regulation against Hungary and suspended its operations at Hungarian borders in early 2021 after a ruling by the EU Court of Justice, the agency continues to conduct return operations from Hungary.[65] Frontex can provide operational and technical support to a requesting EU or Schengen country in different phases of the return process.

4. Conclusion

This study highlighted that Hungary has a unique legal and practical framework resulting from legal amendments aimed at regaining control of the external borders of the EU. Nevertheless, in a relatively low number of cases, Hungary continues to issue and implements return decisions for illegally staying third-country

62 | Magyarországi Támogatott Önkéntes Hazatérési, Reintegrációs és Információs Program [Online]. Available at: https://www.volret.hu/hu/programrol (Accessed: 18 October 2023).

63 | HAVRRIP (AMIF-3.2.1/9-2020-00001; RR.0208).

64 | International Organisation for Migration, 2023.

65 | Agence Europe, 2022.

nationals. These cases prove the existence of real and efficient control over rights by independent tribunals.

However, several crises have affected the migration situation and governance in Hungary in various ways. Regarding regular return procedures, the war in Ukraine resulted in a significant change, as Ukrainian citizens comprised the largest number among those previously expelled; however, since the war, Ukrainian citizens cannot be returned. Nevertheless, the majority of persons found to be illegally staying in Hungary is escorted out of the fence at the Hungarian-Serbian border without undergoing a complete return procedure.

The migration crisis in 2015 had a negative impact on Hungary's asylum system and the execution of expulsion decisions. Regarding the readmission of those illegally arriving and staying in Hungary, the readmission agreement between the EU and Serbia is the most relevant because its scope extends to the readmission of third-country nationals and stateless persons. Nevertheless, since 15 September 2015, Serbia generally does not take back the majority of third-country nationals arriving illegally at the borders of Hungary. Consequently, Hungary aimed to find solutions that prevented masses of migrants from transiting through its territory by misusing the EU asylum framework, which was not designed for such inflows.

Hungary's paradox is that although a Member State must be able to perform enhanced external border protection according to EU rules, the common European asylum system provides loopholes for those arriving illegally that neutralise the efforts of these Member States. Although this contradiction between the Schengen and the asylum acquis needs to be handled at the EU level to not allow the degradation of the efficiency of our actions, and Hungary's experience is undoubtedly a valuable input in such policy discussions, its viewpoint appears to be increasingly isolated. Such complete disregard of a Member State protecting the EU's external borders cannot lead to effective *de lege ferenda* legislation, either.

Thus, Hungary attempted to find an unusual but effective solution in two respects. First, it introduced special sets of rules applicable to particular crisis situations, such as in the case of a crisis caused by mass immigration, and separate rules for pandemic situations. Second, Hungary also wished to tackle this regulatory problem in terms of the relationship between national and EU laws by requesting that the Hungarian Constitutional Court assess whether the incomplete effectiveness of the joint exercise of competences in the field of fighting illegal migration could lead to a violation of Hungary's sovereignty, constitutional identity, or fundamental rights and freedoms (including human dignity) enshrined in the Fundamental Law of Hungary. Regarding the tendency of judicial review, Polgári and Nagy concluded that while some of the lower courts appear to be more open to the influence of the CJEU and the European Court of Human Rights, the Hungarian Constitutional Court turned more sovereign and the government became reluctant to implement critical judgments.[66]

In this context, Hungary raises the 'heretic idea' of diverging from the primary conception of the present EU framework and not allowing asylum applications to

66 | Polgári and Nagy, 2021.

be submitted on the territory of the EU as a primary rule. This approach aims to eliminate the elements that give rise to abuse.

> Although the legal standards currently in force in the EU have their roots in the Geneva Convention, European asylum law has evolved into its current form through the layering of a legal superstructure onto the Convention. As a result, there are considerable differences between what is laid out in the Convention and the implementation carried out by the Common European Asylum System. (…) The Geneva Convention itself cannot be linked to certain overly generous interpretations and that such an outcome was not intended by the framers of the Convention. Rather, supplementary judicial and legislative interpretations, which have accumulated over decades, have caused Europe's asylum system to become more permissive in certain aspects, compared to those of other major democratic jurisdictions.[67]

Šimonák and Scheu attributed this outcome to the jurisprudence of the European Court of Human Rights and the EU's legislative ambition, which is broader than that of the Geneva Convention. The question is whether the decades-long case law, also reflected in court cases Hungary had to face, would allow for a different reaction. However, the situations along the external borders of the EU no longer indicate any version of the 'normal situation' of arrivals of asylum seekers, as atypical situations of mass arrivals and asylum applications by non-eligible persons have become the new normal. The present unfitness of the current asylum and migration acquisition makes the entire EU vulnerable to, among others, situations of instrumentalisation of migration.

67 | Šimonák and Scheu, 2021, p. 11.

Bibliography

About Hungary (2021) *'Frontex hopes it can soon resume border control operations along Hungarian-Serbian border',* 29 January [Online]. Available at: https://abouthungary.hu/news-in-brief/frontex-hopes-it-can-soon-resume-border-control-operations-along-hungarian-serbian-border (Accessed: 23 November 2023).

Agence Europe (2022) 'Frontex defends its operations to return irregular migrants from Hungary', *Agence Europe, Sectoral policies*, 13 July [Online]. Available at: https://agenceurope.eu/en/bulletin/article/12991/9 (Accessed: 23 November 2023).

European Commission (2021) 'June infringements package: key decisions', *European Commission, Infringement decisions*, 9 June [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743 (Accessed: 18 October 2023).

Hungarian Constitutional Court (2021) 'Decision 32/2021 on the joint exercise of powers', *Hungarian Constitutional Court, Recent translations summaries*, 10 December [Online]. Available at: https://hunconcourt.hu/decisions/decision-32-2021-on-the-joint-excercise-of-powers/ (Accessed: 23 November 2023).

Hungarian Government (2020) 'Felszámoljuk a tanzitzónákat', *Hungarian Government*, 21 May [Online]. Available at: https://2015-2019.kormany.hu/hu/miniszterelnokseg/videok/felszamoljuk-a-tranzitzonakat (Accessed: 23 November 2023).

Hungarian Helsinki Committee (2023) 'Country Report: Access to the territory and push backs', *Hungarian Helsinki Committee*, 19 April [Online]. Available at: https://asylumineurope.org/reports/country/hungary/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftn17 (Accessed: 23 November 2023).

Hungarian Police (2022) 'Illegális migráció', *Határinfó adatok* [Online]. Available at: https://www.police.hu/hu/hirek-es-informaciok/hatarinfo/illegalis-migracio-alakulasa?weekly_migration_created%5Bmin%5D=2022-01-01+00%3A00%3A00&weekly_migration_created%5Bmax%5D=2023-01-01+00%3A00%3A00 (Accessed: 18 October 2023).

International Organisation for Migration (2023) *'IOM Snapshot, Ukraine Crisis, Migrant protection and assistance – Hungary'*, April [Online]. Available at: https://hungary.iom.int/sites/g/files/tmzbdl1591/files/documents/2023-04/snapshot-april-2023.pdf (Accessed: 18 October 2023).

National Directorate-General for Aliens Policing (2022) *'AZ OIF statisztikai kiadványfüzete, 22'*, 3 July [Online]. Available at: http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=177&Itemid=1232&lang=hu (Accessed: 18 October 2023).

National Directorate-General for Aliens Policing (2024) 'Declaration of Intent for Lodging an Application of Asylum', *National Directorate-General for Aliens Policing* [Online]. Available at: http://www.bmbah.hu/images/sz%C3%A1nd%C3%A9knyilatkozat_angol_4.pdf (Accessed: 18 October 2023).

Polgári, E., Nagy, B. (2021) 'Chapter 6: The chances of observing human rights in an illiberal state: diagnosis of Hungary' in Grote, R., Morales Antoniazzi, M., Paris, D. (eds.) *Research Handbook on Compliance in International Human Rights Law.* Cheltenham: Edward Elgar Publishing, pp. 95–120; https://doi.org/10.4337/9781788971126.00013.

Queiroz, B. M. (2018) *Illegally Staying in the EU: an Analysis of Illegality in EU Migration Law.* Oxford: Hart Publishing, Modern studies in European law.

Šimonák, V., Scheu, H. C. (2021) 'Back to Geneva: Reinterpreting Asylum in the EU', *European View,* 20(2), pp. 237–238; https://doi.org/10.1177/17816858211061792.

Spieker, L.D. (2020) 'Framing and managing constitutional conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts', *Common Market Law Review*, 57(2), pp. 361–398; https://doi.org/10.54648/COLA2020031.

Tordai, K. (2020) 'Prosecution ends against Iranian university students expelled from Hungary', *Daily News Hungary*, 17 July [Online]. Available at: https://dailynewshungary.com/prosecution-ends-against-iranian-university-students-expelled-from-hungary/ (Accessed: 23 November 2023).

Töttős, Á (2020) 'The ECtHR's Grand Chamber Judgment in Ilias and Ahmed Versus Hungary: A Practical and Realistic Approach, Can This Paradigm Shift Lead the Reform of the Common European Asylum System?', *Hungarian Yearbook of International Law and European Law*, 2020/1, pp. 169–191; https://doi.org/10.5553/HYIEL/266627012020008001011.

Töttős, Á. (2021) 'The Possibility of Using Article 72 TFEU as a Conflict-of-Law Rule', *Hungarian Yearbook of International Law and European Law*, 2021/9, pp. 212–232; https://doi.org/10.5553/HYIEL/266627012021009001012.

Várnay, E. (2019) 'Az Alkotmánybíróság és az Európai Bíróság – Együttműködő alkotmánybíráskodás?', *Állam- és Jogtudomány*, 60(2), pp. 63–91.

Várnay, E. (2022) 'The Hungarian sword of constitutional identity', *Hungarian Journal of Legal Studies,* 63(2), pp. 79–106; https://doi.org/10.1556/2052.2022.00380.

Magyarországi Támogatott Önkéntes Hazatérési, Reintegrációs és Információs Program [Online]. Available at: https://www.volret.hu/hu/programrol (Accessed: 18 October 2023).

THEORY AND PRACTICE OF RETURNING IRREGULAR MIGRANTS IN THE CZECH REPUBLIC

Eva Zorková[1]

ABSTRACT

Irregular migration is an extremely dynamic area, and it is difficult to predict its development. At the same time, it is a phenomenon that can fundamentally threaten internal stability and security in destination countries. The central question of the present article is what the authorities in the Czech Republic do with migrants or expelled (rejected) asylum seekers who are irregularly present in the territory of the Czech Republic. Thus, the actual practice of deportation is the central question of this study.

This article focuses on readmission agreements that are binding in the Czech Republic and analysis, the issue of irregular transit migration and its consequences.

Additionally, this article highlights deportation proceedings, starting from the least to the most repressive practices. The least repressive forms of deportation are the the commonly called departure order, the decision on the obligation to leave the territory, and the commonly called voluntary returns. Considering the repressive methods of deportation in the Czech Republic, the most frequently applied form of deportation is based on administrative law and related to detention facilities. Finally, the case law of the Constitutional Court of the Czech Republic is analysed, as it plays a significant role in the field of irregular migration and deportation.

KEYWORDS

irregular migration
readmission agreements
detention facilities
voluntary returns
departure order
Dublin III Regulation

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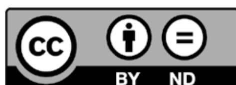

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1. Introduction

Irregular migration is an extremely dynamic area with little possibility of estimating development. It requires a flexible and consistent approach, both in relation to combating irregular migration and the return of foreigners irregularly residing in the territory of the Czech Republic. Thus, irregular migration can fundamentally threaten the internal stability and security of destination countries. Therefore, measures in the field of irregular migration are a fundamental topic addressed within the migration policy of the Czech Republic, and the area of irregular migration falls under the jurisdiction of the Czech Republic's Foreign Police.[2]

The central question of the present article is what the authorities in the Czech Republic do with migrants or expelled (rejected) asylum seekers who are irregularly present in the territory of the Czech Republic. Thus, the actual practice of deportation is the central question of this study. In addition, the closely related practices of the Constitutional Court of the Czech Republic and its most relevant case law within this field are analyse. Please, consider that this article applies only to irregular migrants from third countries, that is, migrants coming to the territory of the Czech Republic from countries outside the Schengen area.

The article will first outline readmission agreements that are currently binding for the Czech Republic, how these readmission agreements are applied, and what their problematic aspects might be. Of course, countries for which the Czech Republic does not have readmission agreements are interesting and will also be mentioned (Chapter 2).

Furthermore, we discuss irregular transit migration and its consequences will be presented. Irregular transit migration represents a significant part of the irregular migration in the Czech Republic, especially because of its geographical location and proximity to the strongest European economies (Chapter 3).

Deportation itself will be analysed gradually, starting from the least repressive practices to the most repressive ones. The first among the least repressive forms of deportation is the so-called departure order, to which a foreign staying irregularly in the territory of the Czech Republic voluntarily submits after it has been decided that he/she must leave the territory of the Czech Republic (Chapter 4).

Voluntary returns can still be considered a non-repressive method of deportation. Non-profit organisations also play an important role (Chapter 5).

The next chapter deals with the repressive methods of deportation. In the Czech Republic, the most frequently applied form of deportation is based on administrative law and relates to the restriction of personal freedom in detention facilities (Chapter 6).

2 | Arts. 163-164 of Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic (hereinafter 'ARF').

This study does not address deportation from the perspective of criminal law. Criminal punishment for deportation is considered the most repressive form of deportation. According to the Czech Criminal Code, this punishment (as a separate punishment or in addition to other punishment/s) is imposed on foreigners who have committed criminal offences in the territory of the Czech Republic, for which the foreigners were finally convicted by a court.[3] As such, deportation from the viewpoint of criminal law does not (usually) concern irregular migrants and does not fall under the definition of irregular migration or fall within the scope of this article.

However, the case law of the Czech Republic's Constitutional Court plays a significant role in the field of irregular migration and deportation. In general, it can be declared that the Czech case law within the field of irregular migration is rich and covers a number of problematic aspects.[4] However, I address only two specific cases (Chapter 7). Those cases had an impact on the interpretation of certain legal provisions of the Act on the residence of foreigners in the territory of the Czech Republic (hereinafter 'ARF'). ARF can be considered the most relevant legislation (together with the Act on Asylum[5]) within the research area and will be further analysed in the present article.

Regarding the sources that will be used in writing this article, I consider it necessary to explain that the Czech Republic suffers from a lack of monographs and professional sources.

Professional publications devoted to general foreign law, migration, and asylum law do exist; however, many were published at least 10 years ago (some even 20 years ago).[6] Therefore, it cannot be claimed that these sources are up-to-date, since the legislation within this area has undergone many changes that have had great consequences and impacted the understanding and rules of (irregular) migration.[7] Therefore, this article will mainly analyse legislative sources – the Czech and EU legislatures–as well as jurisprudence – national, CJEU, and ECHR case law.

3 | Art. 80, paras. 1-3 of Act No. 40/2009 Coll., Criminal Code.

4 | See: Judgement of the Supreme Administrative (2018), case No. 9 Azs 361/2017-33 (administrative deportation of a stateless person), judgement of the Regional Court in Prague (2018), case No. 49 A 3/2018-75 (a purposeful request for international protection), and others.

5 | Act No. 325/1999 Coll., on Asylum.

6 | See: Čižinský, 2012; Vlčková, 2003; Balga, 2012; Kosař, 2010; Pítrová, 2016; Chmelíčková and Votočková, 2016.

7 | The asylum law (Act No. 325/1999 Coll., on Asylum) has been amended many times over the last 20 years, basically it is amended every year. The last amendment is effective since October 2023. The ARF (Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic) is also frequently amended, most recently the Ministry of the Interior on April 2023 submitted a draft of a new act to the external comment procedure, which is to replace the existing act. The general effectiveness of the new act is proposed as of 1 January 2026.

2. Readmission agreements application in the Czech Republic

2.1. General overview

Readmission agreements can be defined as international treaties governing the transfer of persons who reside irregularly in the territory of a certain country to the country of origin or to another state.[8] Currently, readmission agreements are not only negotiated at the EU level but also at the Czech Republic level, leading to the Czech Republic concluding bilateral readmission agreements with 16 countries.[9] In addition to these bilateral agreements, readmission agreements negotiated by the European Union also bind the Czech Republic.[10] The European Union has concluded readmission agreements for 17 countries.[11] The Czech Republic also negotiated bilateral implementation protocols for some of these agreements, which regulated the technical details of the readmission procedure.

The negotiating position of the European Union in relation to third countries is certainly stronger than the position of the Czech Republic itself; thus, negotiations at the union level might be preferable. Interestingly, the Czech Republic has also concluded bilateral agreements with other EU member states.[12] These bilateral agreements remain in force although an increased regime of police and judicial cooperation is applied between EU member states,[13] and some of them were signed and entered into force even after the Czech Republic joined the European Union.

The situation regarding irregular migrants coming from other countries (such as Syria, Afghanistan, Iran, and Morocco) with which readmission agreements do not exist is much more complicated, as there is no legal regulation enabling states of origin to take over their citizens. Countries of origin often do not show a willingness to take an active approach towards taking over their own citizens. Nevertheless, recent success in this area shows that the effort paid off; in 2021, the readmission agreement with Mongolia was concluded, which entered into force after almost ten years of negotiations.[14]

8 | Holá, 2010.

9 | Namely with Armenia, Bulgaria, Croatia, Canada, Kosovo, Hungary, Moldova, Germany, Poland, Austria, Romania, Slovakia, Slovenia, Switzerland, Vietnam and Kazakhstan.

10 | The Czech Republic has been a member state of the European Union since 1 May 2004.

11 | Namely with Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Georgia, Hongkong, Cape Verde, Macao, Macedonia, Moldova, Pakistan, Russia, Serbia, Sri Lanka, Turkey, and Ukraine.

12 | Germany, Poland, Croatia, Hungary, Austria, Slovakia, Slovenia, Bulgaria and Romania.

13 | Arts. 87-89 of the Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012, pp. 47–390*.

14 | Communication of the Ministry of Foreign Affairs No. 9/2021 Coll.

2.2. Problematic aspects of readmission agreements in the Czech Republic

The Czech regulations related to readmission agreements were included in a single article on ARF.[15] Foreigners are not given any special readmission decision against which they can defend themselves (either in a separate proceeding or later in front of an administrative court). Foreigners are issued only detention orders. As some authors have mentioned, there are at least two problematic aspects of the Czech legislation related to this issue.[16]

The first is that Czech legislation deals with the application of the readmission agreement only in relation to detention. Paradoxically, foreigners whose countries of origin and the Czech Republic have concluded a readmission agreement (such as Ukrainians, Russians, and Moldovans) are at a disadvantage compared to those irregularly staying foreigners who come from countries with which the Czech Republic (or the European Union) did not conclude any readmission agreement. Foreigners from a country with which a readmission agreement is not concluded can issue a departure order for irregular entry and stay in the territory of the Czech Republic, but they do not have to be automatically detained for this purpose.[17] In other words, the Foreign Police can issue a departure order for such foreigners but still allow them to travel to their country of origin independently.[18] Although it might be possible to impose a deportation order and permit independent travel even in the case of irregular migrants covered by the readmission agreement, in practice, this usually does not happen.

Processing a return based on a readmission agreement, especially for people without any documents, takes weeks (or even months), and the person's personal freedom must be restricted, as they are forced to stay at the detention facility. At the same time, foreigner detention makes it impossible to carry out the necessary actions before departure, such as packing all belongings or terminating the accommodation contract, not to mention the high financial costs of the entire procedure, which the Czech Republic has to cover.

The second problem is that individual readmission agreements do not contain any procedural guarantees that would ensure the protection of the human rights of the transferred persons. Readmission agreements generally remind us that international obligations in the field of human rights protection are not affected by their applications.[19] The method of ensuring such obligations is no longer specifically addressed by any readmission treaty, and the EU does not pressure the harmonisation of individual national regulations in this direction. An example of the Czech deportation practice also shows that a general reminder of the need to respect the dignity of persons (and other international obligations within the field of human rights protection) may not be sufficient.[20]

15 | Art. 129 of the ARF.
16 | Holá, 2010.
17 | Art. 24 of the ARF.
18 | Ibid. 50 and Art. 118 of the ARF.
19 | In particular the Convention for the Protection of Human Rights and Fundamental Freedoms or the Convention on the Legal Status of Refugees from 1951.
20 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15 (see subchapter 7.2.).

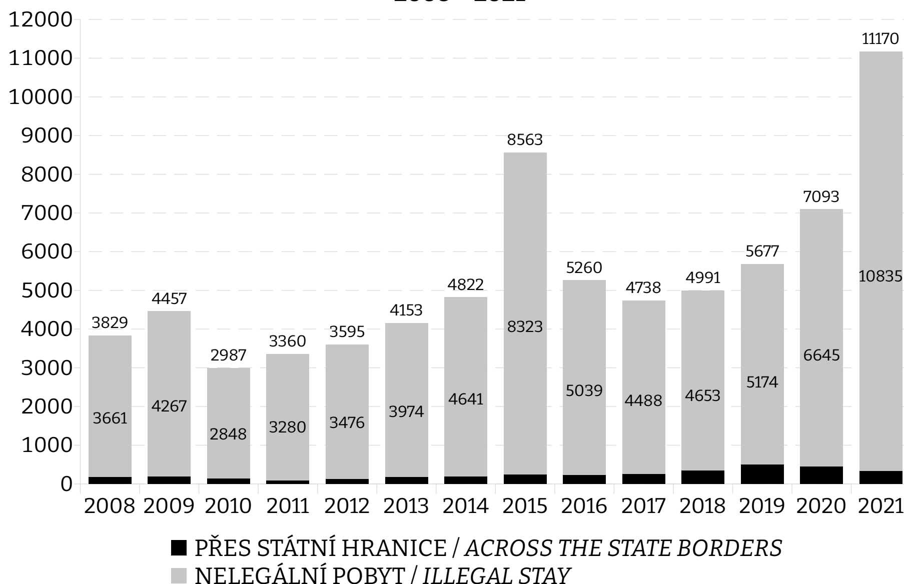
3. Irregular transit migration and its consequences

While unauthorised entry, stay, or even departure from the territory of the Czech Republic must be regarded as irregular migration, the so-called irregular transit migration is defined as transit through the territory of the Czech Republic without the requirements necessary to enter and stay legally. The purpose of irregular transit migration is not to remain in the territory, but to move to another destination country.

The concept of irregular transit migration in the Czech Republic is mainly associated with the arrival of irregular migrants from neighbouring states of the European Union through the state borders of the Czech Republic, that is, through internal Schengen borders.

As previously mentioned, irregular transit migration represents a significant part of irregular migration in the Czech Republic, especially due to its geographical location and proximity to the strongest European economies neighbouring the Czech Republic, such as Germany and Austria.

The highest number of foreigners detected during irregular transit migration was recorded in the 3rd quarter of 2015 (during the so-called great wave of migration, which headed mainly from the Middle East and Africa to Western Europe). Another sharp increase is observed in 2021.



Source: Directorate of the Foreign Police Service of the Ministry of the Interior of the Czech Republic

Monitoring and analysis of irregular transit migration in the territory of the Czech Republic are mainly carried out by the Foreign Police of the Czech Republic and within statistics; irregular transit migration is reported as part of irregular residence. Therefore, it is not easy to look up data reliably. Statistics from the Czech Statistical Office show that the number of irregular migrants in the Czech Republic (from 2008 to 2021) is increasing every year.

Evaluating the development of irregular migration in the Czech Republic from 2008 to 2021, it was evident that the number of irregular migrants increases slightly but steadily. An anomaly occurred during 2015–2021 when there was a large influx of refugees, especially from Middle Eastern states.[21] Nevertheless, the recent numbers of irregular migrants (considering the Russian military aggression that has been ongoing in Ukraine since February 2022) may also be different. However, as far as the number of irregular migrants is concerned, the Czech Republic belongs to countries with low numbers of irregular migrants and cannot be compared with countries such as Germany or Italy, which tend to be 'traditional' destinations for irregular migrants.

The number of migrants caught illegally crossing the border is significantly lower than the number of migrants staying illegally in the Czech Republic. From the results in the table, it can be concluded that a large number of irregular migrants who only pass through the territory of the Czech Republic will not be caught by Czech authorities. Border checks are carried out randomly, but it is impossible to consistently protect every kilometre of the Schengen area.[22]

21 | The migration crisis in 2015 and 2016 caused an influx of millions of refugees to EU countries. Refugees were coming from Syria, Afghanistan and some African countries. Although the standard European asylum policy is based on solidarity between member states and a fair distribution of refugees (Art. 67 of the TFEU), the Central European member states refused to accept refugees, mainly the so-called refugee quotas and relocations. Politicians and the public were mostly against solidarity and acceptance of more refugees. As a result of the increased number of asylum seekers registered in Greece and Italy in 2015, as well as for the general high migratory influx, the Council adopted two Decisions introducing a mechanism to relocate asylum seekers to other Member States (Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, pp. 146–156 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, pp. 80–94). *D*espite the fact that Decisions were binding upon Member States, the Czech, Hungarian and Polish governments decided not to participate in the relocation mechanism. Together with Slovakia, Hungary unsuccessfully challenged the Council Decision at the CJEU. The relocation scheme was also heavily used and 'abused' in the CEE government's domestic discourse on migration. The European Commission referred Czechia, Hungary and Poland to the CJEU for non-compliance with the Council Decision on 7 December 2017. The CJEU delivered its judgment in April 2020. Therein, it established that Czechia, Hungary and Poland had breached the Council Decision by failing to relocate asylum seekers from Italy or Greece (Joined cases C-715/17, C-718/17 and C-719/17, 2 April 2020, ECLI:EU:C:2020:257).

22 | The Czech Statistical Office regularly publishes statistics regarding foreigners and irregular migration [Online]. Available at: https://www.czso.cz/csu/cizinci/2-ciz_nelegalni_migrace (Accessed 15 June 2023).

3.1. Practical consequences of irregular transit migration

The practical consequences of irregular transit migration have the following implications: First, irregular transit migrants are usually detained in the Czech Republic. For those purposes, the majority of readmission agreements also allow the transfer of irregularly staying citizens of third countries (i.e., citizens of a state that is not a party to the readmission agreement at all; the required condition is 'just' the residence of persons in the requested state, but also the mere fact that the person entered the territory of the requesting state from the territory of the requested state).

Second, if an irregular migrant is detained in the Czech Republic and states that or she is coming to the territory of the Czech Republic from another EU member state (where or she also applies for international protection), the Dublin rule will be applied. Based on my personal experience,[23] the Dublin III. Regulations[24] were applied in most cases.[25]

In terms of Czech legislation related to transit, one specific article on the ARF[26] deals with foreign transit to another state, including EU member states. The above-mentioned article states that police shall secure for the necessary time a foreigner who entered or stayed in the territory of the Czech Republic irregularly, for the purpose of handing him over (in accordance with an international agreement negotiated with another EU member state or in accordance with the Dublin III. Regulation).

If it is not possible to complete foreign transit within 48 hours (and in the case of transit by air within 72 hours), the police may issue a decision that is the first step in the proceedings. Appeals and review proceedings were not allowed in these cases.[27] At the same time, the article stipulates the condition that the police will decide to detain a foreigner for the purpose of transit only if there is a serious risk of escape. A serious risk of escape is considered a situation when a foreigner has been staying in the territory of the Czech Republic irregularly, has previously avoided relocation, attempted to escape, or had previously expressed an intention to disobey a final decision on relocation (or such intention is evident from foreigners' behaviour). Serious risk of escape is also considered a situation when a foreigner cannot travel to the state of relocation independently, and at the same time does not have any place of residence in the territory of the Czech Republic. The

23 | I provided regular legal advice in Czech detention facilities during 2018 and 2019 in the position of lawyer, employee of OPU.

24 | EU Regulation No. 604/2013 of 26 June 2013 establishing the criteria and procedures for determining the Member State responsible for assessing an application for international protection submitted by a third-country national or a stateless person in one of Member States (hereinafter 'Dublin III. Regulation').

25 | E.g., in 2022, according to Ministry of the Interior of the Czech Republic (Department for Asylum and Migration Policy) in relation to Dublin transfers from the Czech Republic; the largest number of persons were from Afghanistan (15 persons), Tunisia (13 persons), Syria (12 persons) and Moldova (10 persons).

26 | Art. 129, paras. 1-8 of the ARF.

27 | Art. 129, para. 3 of the ARF.

Constitutional Court also commented on the adequacy of detention and the interpretation of the term 'serious risk of escape' in its decisional practice.[28]

As far as time scope of transits is concerned, according to ARF, the police is obliged to act in such a way that the foreigner's transit to another country is completed as soon as possible from the date of foreigner's arrest.[29]

4. Departure order and decision on the obligation to leave the territory

4.1. Departure order

A departure order is issued to foreigners who stay irregularly in the Czech Republic. This is a document issued by the police, most often during the administrative deportation of foreigners from the Czech Republic.

However, a departure order can be issued by the Ministry of the Interior of the Czech Republic, mainly after the cancellation or expiration of a long-term visa or upon the expiration of various types of residence permits. A departure order entitles a foreigner to temporarily stay in the territory of the Czech Republic for the time necessary to carry out urgent actions and to travel out of the Czech Republic.

In general, the period of temporary stay of foreigners on a departure order may not be longer than 60 days, but the length of stay is determined and indicated in each departure order by the Czech Police or the Ministry of the Interior based on the individual circumstances of each foreigner.

The departure order takes the form of a label marked by the Czech Police or the Ministry of the Interior in the foreigners' travel documents; in justified cases, the departure order may be marked outside of the travel document.

The departure order contains data on the identity of foreigners, number of travel documents, and time at which foreigners are obliged to leave the territory. In cases of protecting the security of the state, public order, or public health, foreigners' departure may be subject to special conditions, such as crossing a particular border point during their departure from the territory of the Czech Republic.[30]

4.2. Decision on the obligation to leave the territory

The decision on the obligation to leave the territory of EU member states was issued by the Czech Police to foreigners over the age of 15 who did not choose the option of voluntary return or did not leave the country within the period specified in the departure order.

In the decision on the obligation to leave the territory of EU member states, the Czech Police specify the period of departure, starting from seven to 60 days.

28 | Judgement of the Constitutional Court of 10 May 2017 No. III. ÚS 3289/14 (see subchapter 7.2.).
29 | Art. 129, para. 8. of the ARF.
30 | Art. 50 of the ARF.

In specific cases, foreigners could request a new (longer) departure time during a set period. If the police comply with this request, a new decision is issued (in accordance with all administrative regulations[31]), and the police set a new time for departure, taking into account the duration of the stated reasons. However, the new period can be set to a maximum of 180 days. In general, if foreigners are already detained in the detention facility, this period starts from the day the detention ends. Simultaneously, the initiated procedure for administrative deportation is also a procedure for the obligation to leave the territory, about which the police must inform foreigners without unnecessary delay.[32]

5. Voluntary returns regime

Irregular migrants can voluntarily leave the Czech Republic in a completely non-repressive manner. In such cases, migrants usually make the journey back home alone, without the escort of police or other state authorities, and without informing their country of origin about their return. Nevertheless, state authorities (Ministry of the Interior of the Czech Republic through the Department of Asylum and Migration Policy and the Administration of Refugee Facilities), international organisations (IOM[33]), and Czech non-profit organisations (SOZE[34], OPU[35], etc.) are involved in the preparation of voluntary returns.

Voluntary returns are the preferred option, which is why the Czech Republic is trying to support it mainly through informational awareness and financial contributions.[36]

The obvious advantage of voluntary returns is their speed, particularly if foreigners have valid travel documents. In such cases, it is possible to implement the return immediately after the completion of all residence matters or after issuing a decision on administrative deportation. The Ministry of the Interior attempts to ensure the fastest connection with the country of origin.

Another advantage is the provision of financial assistance. The Ministry of the Interior will buy a plane ticket to the foreigners' country of origin, which means

31 | Art. 101 of Act No. 500/2004 Coll., Administrative Code.

32 | Art. 50 a, paras. 1-2 of the ARF.

33 | IOM provides assisted voluntary return programs worldwide, in a more or less similar way, but in the Czech Republic IOM became involved in this issue in 2001 by signing the Agreement on Assisted Voluntary Returns with the Czech Ministry of the Interior.

34 | During 2013-2015 SOZE supported the return to the country of origin of young migrants between the ages of 17 and 25. The program targeted asylum seekers, refugees, irregular migrants and migrants. SOZE cooperated its activities with the IOM within the assisted voluntary return programs.

35 | In recent years (2016-2020), OPU implemented several projects helping returnees. As part of these projects, counselling was provided throughout the entire return process. The program was intended for persons from third countries who entered or stayed in the territory of the Czech Republic irregularly and who had been issued a decision on the obligation to leave the territory, administrative deportation or a decision on relocation.

36 | Art. 54a Act No. 283/1991 Coll., Act on Asylum and Art. 123a AFR.

that foreigners can travel even if they do not have enough financial resources to buy the flight ticket.

Voluntary returns are the most dignified form of return because foreigners do not travel back to their country with the assistance of the police or another employee of the state authorities but as ordinary tourists. When using a voluntary return program, there is also the possibility of shortening the stay-ban period.

The number of voluntary returns increased significantly during the COVID-19 pandemic period, as it was used by hundreds of foreigners, mainly from Ukraine and Moldova (according to statistics published by the Ministry of the Interior, these two nationalities use voluntary returns the most).[37]

If irregular migrants do not choose the option of voluntary return, a forced return usually takes place with the assistance of the Czech Republic police. The country to which the foreigners had returned was also informed.

It can be said that irregular migrants and their approach are key players in the success of the voluntary return policy. If they avoid returning, they will not accept the voluntary form or return to the Czech Republic after being returned or deported (in some cases, even repeatedly), and the effectiveness of the voluntary return policy is significantly reduced.

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Number of foreigners with issued decision on administrative deportation	2020	2149	3009	3539	5119	5713	7067	6385	4987
Number of administrative deportations actually implemented	185	175	172	207	460	444	394	729	389

Source: Directorate of Foreign Police Service of the Czech Republic

As can be concluded from the table above, the number of foreigners who issued decisions on administrative deportation was significantly higher than the number of administrative deportations actually implemented. This rule applies to each monitoring year.

Therefore, it can be concluded that the majority of migrants to whom a decision on administrative deportation is issued will voluntarily comply with it and leave the territory of the Czech Republic, either independently or with assistance within the framework of the so-called voluntary return regime. This is advantageous

37 | The Ministry of the Interior of the Czech Republic issues quarterly reports on migration [Online]. Available at: https://www.mvcr.cz/migrace/ (Accessed: 15 June 2023).

for the Czech Republic, especially because the implementation of administrative deportation costs considerable effort and money.

However, foreigners who do not plan to leave the Czech Republic are subject to administrative deportations. Administrative deportation refers to the termination of a foreigner's stay in the territory of the Czech Republic, which is associated with the determination of the period for departure from the territory and the period during which foreigners cannot be allowed to enter the territory of EU member states of the European Union. The period during which foreigners cannot be allowed to enter the territory of EU member states of the European Union is determined by the Czech police within the decision on the administrative deportation of foreigners. In justified cases, the decision can determine a specific border-crossing point for departure from the Czech Republic.[38] For each administrative deportation, the so-called binding opinion of the Ministry of the Interior must also be issued regarding whether deportation is possible. If foreigners' deportation is not possible, they are granted a visa for more than 90 days (the so-called tolerance visa).[39] Another option may be to apply for international protection.

As such, the consequence of the administrative deportation of a foreigner is firstly the determination of the period of the ban on residence (usually for several years) and, above all, the automatic entry of the identification data of the foreigner into the database of undesirable persons (ENO) and the Schengen database (SIS). This significantly interferes with foreigners' rights as it prevents them from staying legally in any EU member state for several years.

6. Restriction of personal freedom in detention facilities

The facilities for the detention of foreigners are primarily used for foreigners who have been issued a decision on administrative deportation or for persons who are about to be transferred to other EU member states. People who had entered and resided in the Czech Republic were also secured at those facilities.

The Czech Republic has three of such facilities. Two of them are intended for men (in Vyšní Lhoty and in Bálková), the third one is intended mainly for women and families with minors (in Bělá-Jezová).

The ARF regulates all conditions for security enforcement.[40] The operation of facilities for the detention of foreigners was ensured by the Administration of Refuge Facilities of the Ministry of the Interior of the Czech Republic. Police mainly provide external security to the facility, whereas the security inside the facility is provided by private security agencies.

Foreigners may not leave a facility without the consent of the police. Detention facilities are divided into those with moderate security modes and those with strict security modes. The section with a moderate security mode can be further

38 | Art. 118 of the ARF.

39 | Art. 33, para. 1 of the ARF.

40 | Title XI, Arts. 124 and the following of the ARF.

divided into subsections (e.g., for families with children and women) into which other foreigners are not allowed to enter.[41]

In the security mode,[42] it is possible to place foreigners who are aggressive, require increased supervision for another serious reason, or repeatedly violate the internal regulations of the facility in a serious manner.

The police will make a record of the placement of foreigners in a section with a strict detention regime, which they will introduce to the foreigners in the language they understand. This record must include instructions regarding the possibility of filing a complaint against the placement of the Ministry of the Interior. It is also possible to contact public defenders of these rights.

If the duration of placement in the strict detention regime exceeds 48 h, the police issue a special decision. If a foreigner believes that the legal conditions for issuing a decision to place him/her in a strict detention regime have not been met, he/she can demand its cancellation by an administrative action filed within 30 days from the date of the issuance of the decision.[43]

Each foreign person can be visited by a lawyer at the facility. Non-governmental and non-profit organisations that focus on foreign issues (e.g., OPU and SOZE[44]) may also provide free legal assistance in the facilities.[45]

Health services are provided to all uninsured foreigners, but only for urgent care. Urgent care for conditions that are immediately life-threatening can lead to sudden death or deepening of the disease, cause permanent disease changes without the prompt provision of health services, cause sudden suffering and pain, and cause a change in the behaviour and actions of the detained person. If such health services cannot be provided directly within a facility, the Ministry of the Interior is obliged to provide them outside the facility.[46]

The police are authorised to conduct a personal search for foreigners and their belongings, not only when the foreigners are placed in the facility but also during their stay.[47]

The aim of the searches is to determine whether foreigners have items that are not allowed to be brought or kept in the facility. A personal search must be conducted by a person of the same sex and must be carried out with respect to human dignity. Inspections of belongings and rooms must also be carefully carried out to maintain the criterion of reasonableness. Searches during which objects were broken or scattered around a room were not permitted. It is possible to complain about police procedures during searches for the police unit that conducted the search. In the case of dissatisfaction with the handling of the complaint, it is possible to contact the superior police department.[48]

41 | Art. 130, para. 3 of the ARF.
42 | Art. 135, paras. 1-5 of the ARF.
43 | Art. 131, para. 2 of the ARF.
44 | More information on non-governmental and non-profit organisations that focus on foreigner issues are available in Chapter 5.
45 | Art. 144, para. 3 of the ARF.
46 | Art. 134, para. 2 of the ARF.
47 | Art. 137, para. 1 of the ARF.
48 | Art. 137, paras. 1-5 of the ARF.

Foreigners have the right to be provided with a bed, chair, and lockable cabinet for storing personal belongings, basic hygiene products, and continuous eight-hour sleep during night rest.[49] Foreigners are allowed to receive and send written messages (i.e., letters) without restrictions. Foreigners are allowed to receive packages of food and personal items once a week.[50]

6.1. Special regime for families with minor children

The fact that foreigners who are placed in the detention facility are accompanied by a minor cannot lead the police to proceed differently than in the case of detaining foreigners who travel alone and shall be placed in detention alone. Different treatments and approaches have led to discrimination against migrants who are not accompanied by minors. However, each patient must be assessed individually.[51]

Families with children or single adults accompanied by minors can only be detained for a maximum of 90 days (compared to the standard period of 180 days).

Joint placement of family members in detention facilities is usually ensured; as mentioned above, there are reserved sections for families with children within the facility.

It should be highlighted that children under the age of 15 years can never be detained; if they have to stay in a detention facility together with their parents, they can freely leave the facility accompanied by another adult. Temporary separation of a family within a facility is permitted only if a family member is placed in a section with a strict security regime.[52]

7. Relevant case law

The decision-making practices of the Czech Republic's Constitutional Court play a significant role in the fields of migration, detention, and deportation. This is why I focus on two specific cases that impact the interpretation of certain legal provisions.

First, the issues of the adequacy of detention, the interpretation of the term 'serious risk of escape' and the detaining of a family with minor children will be analysed (Subchapter 7.1.).[53] Second, the Constitutional Court of the Czech Republic commented on the issue of dilemmas related to legal certainty and the transparency of deportations (Subchapter 7.2.).[54]

49 | Art. 145, para. 1 of the ARF.

50 | Art. 134, para. 1 of the ARF.

51 | See the case law in subchapter 7.1. for more details.

52 | Ibid. Art. 139.

53 | Judgement of the Czech Constitutional Court of 10 May 2017 No. III. ÚS 3289/14.

54 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15.

7.1. Adequacy of detention and defining the term 'serious risk of escape'

The constitutional complaint was filed by a father and his two children, who were three and six years old at the relevant time, respectively, all citizens of Kosovo. According to their testimony, applicants were transferred from Serbia to Hungary, where they were detained in February 2014 and applied for international protection. In March 2014, they travelled by train to Germany, but on the way, they were stopped by the Police of the Czech Republic, and the father was detained according to the ARF for the purpose of extradition back to Hungary.

The decision of the police set the detention period to 60 days, and the justification stated that there was a serious risk of the complainant escaping because of his previous actions. According to the police, a milder coercive measure was out of question and detaining the family was the only possibility. The family was placed in Bělá-Jezová detention facility together, and in May 2014 the applicants were transferred to Hungary, which (according to the Dublin III. Regulation) was responsible for assessing their application for international protection. The patient's family member was detained for a total period of 50 days.

The applicants filed constitutional complaints stating that their fundamental rights had been violated. Taking into account the children's age and the best interest of child, they should not have been detained and placed in Bělá-Jezová detention facility.

The Court concluded that the constitutional complaint was partially justified. The deprivation of applicants' personal freedom actually occurred even though it was clear that the applicant broke the law and left the country in which he applied for international protection without any serious reason. According to the Constitutional Court in this particular situation, any solution was already 'wrong', as the applicant decided that the children have to stay with him in the detention facility, which is understandable in his situation.

The Dublin III Regulation,[55] which governs the mechanism of extradition of foreigners, requires the existence of a 'serious risk of escape' on a case-by-case basis, but the grounds for suspicion of a 'serious risk of escape' must be based on objective criteria defined by law. However, the Czech law did not define the criteria for the existence of a 'serious risk of escape' during the relevant period (from March to May 2014).

The defining features of the existence of a 'serious risk of escape' were later established by an amendment to the ARF with effect from 18 December 2015, to which this decision of the Constitutional Court significantly contributed.

Doubts about whether the absence of objective criteria established by law constituted a sufficient legal basis for security led the Supreme Administrative Court to ask a preliminary question to the Court of Justice of the European Union in a similar case. Therefore, the Constitutional Court waited for the outcome of this proceeding, and in March 2017, the Court of Justice of the European Union issued

55 | EU Regulation No. 604/2013 of 26 June 2013 establishing the criteria and procedures for determining the Member State responsible for assessing an application for international protection submitted by a third-country national or a stateless person in one of Member States (Dublin III. Regulation).

a decision stating that the absence of objective criteria established by law is not a sufficient legal basis for the detention of foreigners.[56]

The Constitutional Court therefore states that the detention of a foreigner with minor children, for the purpose of their return to Hungary in accordance with the Dublin III Regulation, in a situation where the objective criteria of 'serious risk of escape' are not clearly, comprehensibly and definitely defined by law, is contrary to Art. 5, para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[57] which establishes prohibition of unlawful restrictions of personal freedom. In the case of minors, this is contrary to Art. 37, letter b) of the Convention on the Rights of the Child.[58]

Such detention of a parent with minor children is also a violation of the right to family life guaranteed in Art. 8 of the Convention for the Protection of Human and Fundamental Freedoms which establishes the right to respect family and private life. In the case of minor children, it is also a violation of Art. 16 para. 1 of the Convention on the Rights of the Child.

The decision of the Constitutional Court stated that applicants' rights, namely the right to family life, were violated. If interference with the right to family life is permissible, it must have a legal basis that the contested decision lacked (as well as the Czech legislation at the time).

Regarding the length of detention (50 days), although the Constitutional Court does not find the length of detention of children in the Bělá-Jezová detention facility to be optimal, it could in no case confirm the claim of the complainants that they faced the inhumane, cruel or degrading treatment. The case of detained children was closely related to the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which took place in the facility at the time of their detention and was directly mentioned in its report. Although the committee addressed certain criticisms of the detention facility, the report did not indicate any conditions that could be assessed as mistreatment.

7.2. Legal certainty and transparency of deportations

The complainant is a Cameroon citizen. He resided irregularly in the Czech Republic from February 2010 until his deportation in the summer 2014. The police imposed administrative deportation on the applicant for one year and issued a departure order for 30 days to leave the territory of the Czech Republic.

The applicant stayed in the Czech Republic without a valid visa or other authorisation. At the same time, he had no ties in the Czech Republic (apart from his girl), and all his family lived in Cameroon, which is why the police decided to detain him for 30 days for administrative deportation. The applicant was placed in a detention facility in Bělá-Jezová.

56 | 'Al Chodor' (2017) CJEU, case No. C-528/15.
57 | Communication of the Federal Ministry of Foreign Affairs on the negotiation of the Convention on the Protection of Human Rights and Fundamental Freedoms and Protocols connected to this Convention, No. 209/1992 Coll.
58 | Communication of the Federal Ministry of Foreign Affairs on the negotiation of the Convention on the Rights of the Child No. 104/1991 Coll.

In the detention facility, the complainant wanted to take his personal belongings which had been kept outside his room, but he was told by a social worker that his personal belongings were already packed and ready for deportation. On the day of the deportation, four police officers entered the complaint room. The complainant refused to leave the room voluntarily and was undressed. The two intervening police officers were unable to overcome the complainant's resistance; therefore, they used tear gas. The use of gas caused the complainant to become disoriented, and the police managed to handcuff him and remove him from the building. Since the complainant was naked, they covered him with a sheet that he allegedly threw off during the transfer to another detention building. After exiting the medical examination and dressing, the police took him to a car and drove him to the airport in Prague. Complaints were handled at all times.

The Constitutional Court evaluated the case in terms of the prohibition in humans and degrading treatment. Inhumane treatment is one that causes either 'direct bodily harm' or 'intense physical and psychological suffering'.[59] Treatment is considered 'degrading' if it humiliates an individual, does not show sufficient respect for his or her human dignity, or reduces the dignity or causes feelings of fear, anxiety or inferiority capable of breaking the person's moral and physical resistance.[60] Degradation treatment is closely related to the requirement of respect for human dignity, which does not allow public authorities to treat a person as an object.[61]

In addition, the ECHR has consistently judged that persons in detention, or persons against whom members of the security forces are acting, are in a vulnerable position; therefore, any use of physical force that is not necessarily forced by their own behaviour diminishes human dignity and is fundamentally a violation of a person's rights.[62]

Mistreatment must exceed a certain minimum level of seriousness. Assessment of the seriousness of mistreatment is inherently relative; it depends on all circumstances of the case, such as the duration of the treatment, its physical and psychological effects on the victim, and, in some cases, the sex, age, and health of the victim.[63]

The question of whether the treatment was intended to humiliate the victim is another factor that must be considered. However, the intention to be subjected to any form of inhuman or degrading treatment is not a necessary condition.[64]

The Constitutional Court commented on the complainants' individual objections individually:

59 | 'Ireland v. the United Kingdom' (1978) ECHR, case No. 5310/71 and 'Gäfgen v. Germany' (2010) ECHR, case No. 22978/05.
60 | 'M.S.S. v. Belgium and Greece' (2011) ECHR, case No. 30696/09.
61 | 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.
62 | 'Ribitsch v. Austria' (1995) ECHR, case 8896/91 and 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.
63 | 'Ireland v. the United Kingdom' (1978) ECHR, case No. 5310/71.
64 | 'Farbtuhs v. Latvia' (2004) ECHR, case No. 4672/02 and 'V. v. the United Kingdom' (1999) ECHR, case No. 24888/94.

a) Lack of preparation and not informing the complainant about upcoming deportation

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment addressed the issue of the dignified treatment of deported persons in detail within its standards. Any intervention involving the deportation of detained foreigners must always be preceded by measures aimed at helping people organise their return, especially with regard to their families, employment, and psychological support. It is very important that detained foreigners are informed sufficiently in advance about the deportation itself to be able to cope with it psychologically, and to inform those who should know about the deportation and prepare their personal belongings. The constant threat of forced deportation hanging over detainees who have not received prior information about their deportation dates can lead to a state of anxiety that can culminate in aggression and agitation.[65]

b) Use of force and tear gas

In similar cases, any use of physical force that is not strictly necessary as a result of a person's own behaviour reduces human dignity and constitutes a violation of the law in principle.[66] The ECHR recently decided that even a 'mere' slap against a detained person is humiliating treatment, even if the police officer was provoked by the disrespectful behaviour of this person, who was not physically aggressive and did not pose a danger to other persons. At the same time, the Court stated that 'in a democratic society, mistreatment is never an adequate response to the problems faced by public authorities.'[67] Any coercive means must be used only to the extent necessary to achieve a legitimate purpose. In no case must coercive means serve as retaliation or penalty for disobeying police officers' summons. Although members of the escort of deportees are sometimes forced to use force and coercive means to effectively carry out deportation, force and coercive means should be used only to the extent necessary and the legality, reasonableness, and appropriateness of their use should be examined.[68]

c) Use of handcuffs, the way of transporting to the airport and the behaviour at the airport

The use of handcuffs is usually not problematic if it is used in connection with a lawful arrest or detention and is not accompanied by the use of physical force or by exposing the person to the public in a manner that cannot reasonably be considered necessary and reasonable according to the circumstances of each case. In this respect, it is important to determine whether there is reason to believe that a

65 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 57-68.

66 | 'Ribitsch v. Austria' (1995) ECHR, case 8896/91 and 'Kummer v. Czech Republic' (2013) ECHR, case No. 32133/11.

67 | 'Bouyid v Belgium' (2015) ECHR, case No. 23380/09.

68 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 69-77.

person will resist an arrest or want to escape. Therefore, it is necessary to consider the specific circumstances of each case.[69]

8. Conclusion

The Czech Republic, as an EU member state of the European Union, has emphasised the importance of an effective return policy for over two decades, although it has not been able to fully ensure an effective return policy.

Obstacles to an effective return policy are of a legal nature; for example, the absence of readmission agreements, the application of the principle of non-refoulement, or respect for the right to private and family life. Other obstacles may relate to the approach of irregular migrants who are reluctant on the part of irregular migrants to cooperate with the administrative and police authorities of the Czech Republic. Another reason may be the absence of financial and information resources.

In my opinion, the Czech Republic should support the negotiation of readmission agreements (mainly at the level of the European Union) with countries from which a large number of irregular migrants are heading to Europe. The Czech Republic should negotiate bilateral agreements in cases in which pan-European procedures are unlikely.

Furthermore, the Czech Republic should be more active in fulfilling existing readmission agreements and insist on their fulfilment by other states, whether they are states of origin or transit. At the same time, the Czech Republic must be fully ready to accept irregular migrants who cross its territory, typically to Germany or other Western European countries.

However, it must be highlighted that the Czech Republic must consistently ensure compliance with the principle of non-refoulement and the protection of the human rights of irregular migrants. Returning irregular migrants to a country where they would face the threat of serious harm is beyond the scope of this question. On the other hand, returning them to countries of transit, if they are safe, is the most appropriate solution for the Czech Republic. Simultaneously, a country's security needs to be regularly assessed according to its current situation, which may change.

Finally, the most important point is support for the regime of voluntary returns. Adequate financial, material, human, informational, and other resources must be allocated for these returns. In the case of irregular migrants who cannot be returned to any country and who simultaneously have the will to stay in the Czech Republic, the possibility of their gradual integration into Czech society should be considered, and everything should be done to ensure that their integration into the Czech society is successful in the long term.

69 | Judgement of the Czech Constitutional Court of 27 October 2015 No. I ÚS 860/15, paras. 78-81.

Bibliography

Balga, J. (2012) *Azylové právo*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, s.r.o.

Český Statistický Úřad (2023) 'Statistics regarding foreigners and irregular migration', *Czech Statistical Office – Český Statistický Úřad, Cizinci: Nelegální migrace* [Online]. Available at: https://www.czso.cz/csu/cizinci/2-ciz_nelegalni_migrace (Accessed: 15 June 2023).

Čižinský, P. (2012) *Cizinecké právo*. Praha: Linde.

Holá, E. (2010) 'Readmisní smlouvy a jejich použití v České republice', *Migraceonline, Portal pro kritickou diskurzi o migraci,* 3 August [Online]. Available at: https://migraceonline.cz/cz/e-knihovna/readmisni-smlouvy-a-jejich-pouziti-v-ceske-republice (Accessed: 15 June 2023).

Chmelíčková, N., Votočková, V. (2016) *Zákon o azylu. Praktický komentář*. Praha: Wolters Kluwer ČR.

Kosař, M. (2010) *Zákon o azylu. Komentář*. Praha: Wolters Kluwer.

Ministry of the Interior of the Czech Republic (2023) 'Reports on migration published by the Ministry of the Interior of the Czech Republic', *Ministry of the Interior of the Czech Republic* [Online]. Available at: https://www.mvcr.cz/migrace/ (Accessed: 15 June 2023).

Pítrová, L. (ed.) (2016) *Aktuální právní aspekty migrace*. 1st edn. Praha: Leges.

Vlčková, A. (2003) *Zákon o pobytu cizinců na území České republiky a související předpisy (s výkladem)*. ČR. Praha: Eurounion.