



# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

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**The EU Charter of Fundamental Rights provisions in  
relation to asylum and immigration**

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# **The Charter of Fundamental Rights of the European Union: Provisions relating to Asylum and Immigration**

# Topics to be covered

1. Background
2. Legal character
3. Place in Irish constitutional order
4. Purpose & Effect
5. Relationship with ECHR
6. Substantive provisions relating to Asylum & Immigration
7. Horizontal clauses

# 1. Background

- Fundamental rights recognised as an ‘integral part’ of the (unwritten) general principles of Community law
- Gradual incorporation of human rights principles into Treaties
- ‘Convention’ convened
- Bill of Rights / ‘Constitution for Europe’ / Constitutional Treaty
- Lisbon Treaty agreed December 2007; entered into force 1 December

## 2. Legal Character of the Charter

- Art. 6 TEU: the Charter “*shall have the same legal value as the Treaties*”
- Binding on Member States as a primary source of EU law

# 3. Place in the Irish Constitutional Order

- Primacy of EU law (... *Costa v. ENEL*, C-6/64 ...)
  - Art. 29 of the Constitution;
  - Section 2, *European Communities Act 1972*, as amended
  - Charter is binding on the State and is part of domestic law
- Contrast with ECHR:
  - “insofar as is possible, subject to the rules of law relating to such interpretation and application” (s. 2, 2003 Act)
  - “subject to any statutory provision ... or rule of law” (s. 3, 2003 Act)

## 4. Purpose and Effect of the Charter

- Art. 51(2): does not extend the field of application of Union law, or establish any new power or task for the Union, or modify any existing power or task
- Primarily used as an interpretative aide
- Secondary law must be interpreted, as far as possible, in compliance with the Charter and any provisions which cannot be so interpreted must be set aside (see *N*, C-601/15 PPU, 15 February 2016)
- Domestic courts and tribunals may (and sometimes must) dis-apply or disregard non-conforming provisions

## 5. (Symbiotic?) Relationship with ECHR

- Preamble reaffirms the rights as they result from the constitutional traditions and international obligations common to the Member States, **the ECHR**, the Social Charters adopted by the Union and by the CoE, and **the caselaw of the ECtHR** and CJEU
- Art. 52(3) of the Charter: insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights “*shall be the same*” as those laid down by the ECHR, though this does not prevent Union law from providing “*more extensive protection*”
- Art. 6(3) TEU: Fundamental rights as guaranteed by the ECHR ... shall constitute general principles of the Union’s law



# 6. A Whistle-stop Tour

Title I: Dignity

Title II: Freedoms

Title III: Equality

Title IV: Solidarity

Title V: Citizens' Rights

Title VI: Justice

Title VII: General Provisions

# The 'Explanations'

Preamble: *“the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”*

Art. 52(7): *“The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”*

# Article 1: Human Dignity

*Human dignity is inviolable. It must be respected and protected.*

Explanations: “none of the rights laid down in this Charter may be used to harm the dignity of another person”.

Selected cases:

*Jawo (C-163/17), 19th March 2019*

*Zubair Haqbin (C-233/18, 12th November 2019)*

## Articles 2 & 4: Right to Life; Prohibition of Torture, Inhuman or Degrading Treatment

*Art. 2: Everyone has the right to life. No one shall be condemned to the death penalty, or executed.*

*Art. 4: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

*Explanations: Art. 2 of the Charter corresponds with Art. 2 ECHR and Art 1 of Protocol No. 6 to the ECHR. Art. 4 of the Charter corresponds with Art. 3 ECHR. Same meaning and scope.*

# A few cases: Art. 4 of the Charter

- *N.S.; M.E. & Ors* (C-411/10 & C-493/10)
- *C.K & Ors* (C-578/16 PPU)
- *Jawo* (C-163/17)
- *Ibrahim & Ors* (C-297/17 +)

## Article 7: Respect for Private and Family Life

*Everyone has the right to respect for his/her private and family life, home and communications.*

*Explanations: Corresponds with Art. 8 ECHR. Same meaning and scope. Same limitations apply.*

*Note: “Correspondence” has been replaced with “communications” to take account of developments in technology.*

## Article 10: Freedom of thought, conscience, religion

- 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom of change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observation.*
- 2. The **right to conscientious objection** is recognised, in accordance with the national laws governing the exercise of this right.*

*Explanations: Para. 1 corresponds with Art. 9 ECHR; same meaning and scope; same limitations apply. Para. 2 corresponds with national constitutional traditions and to development of national legislation on this issue.*

## Article 18: Right to Asylum

*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention ... and the Protocol ... and in accordance with the TEU and the TFEU.*

*Explanations: based on Art. 78 TFEU (ex-Art. 63 TEC), which requires the Union to respect the Geneva Convention.*

*Note Protocols (No. 21) on the position of the UK and Ireland with respect to the AFSJ, which determines the extent to which the UK and Ireland implement Union law in this area and the extent to which the Article is applicable.*



## **Article 19: Protection in the event of removal, expulsion or exclusion**

- 1. 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, inhuman or degrading treatment or punishment.*

*Explanations:* *Para. 1 is based on Art. 4 of Protocol No. 4 to the ECHR. Para. 2 incorporates the caselaw of the ECtHR on Art. 3 ECHR.*

## Art. 41: Right to Good Administration

- Every person has the right to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union
  - This includes (a) the right to be heard, before any individual measure is taken which would affect him / her adversely; (b) the right to have access to his/her file ...; the obligation of the administration to give reasons for its decisions
- 
- See e.g. *M.M. (No. 1)*, C-277/11; *M.M. (No. 2)*, C-560/14

## Article 47: Right to an Effective Remedy and a Fair Trial

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Explanations: *First para. is based on Art. 13 ECHR but the protection afforded by Union law is more extensive (but see caveat re Judicial Review). Second para. corresponds with Art. 6(1) ECHR. Third para. corresponds with caselaw of ECtHR.*

## Selected Art. 47 cases

- *H.I.D. & B.A. v Refugee Applications Commissioner* (C-175/11, 31st January 2013)
- *Commission v. Hungary* (C-821/19, 16th November 2021)

# Title VII: General Provisions

## *“The Horizontal Clauses”*

- Art. 51 - Field of Application
- Art. 52 - Scope and Interpretation
- Art. 53 - Level of protection (the ‘limitation clause’)
- Art. 54 - Abuse of rights

# Art. 51(1)

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity **and to the Member States only when they are implementing Union law.**

They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

# ‘... when they are implementing Union law ...’

- “*all situations governed by Union law*”: *Fransson*, C-617/10
- all national legislation that “*falls within the scope of application of Union law*”: *Fransson*
- See e.g. *Kremzow* (C-299/95) - insufficient connection with Community law; not connected in any way with any of the situations contemplated by the Treaty provisions; did not fall within the field of application of Community law

# When is the State NOT implementing Union law?

- *Mallak v. Minister* [2012] 3 I.R. 297
- *Smith v. Minister* [2012] IEHC 113; [2013] IESC 4
- *Lofinmakin v. Minister* [2013] 4 IR 274
- *K.I. v. Minister* [2014] IEHC 83
- *P.O. v. Minister* [2015] 3 I.R. 164
- *Bakare v. Minister* [2016] IECA 292
- *N.H.V. v. Minister* [2016] IECA 86; [2017] IESC 35
- *X.P. v. Minister* [2018] IECA 112; *A.P. v. Minister* [2019] IESC 47
- *E.O. & Ors v. The Minister* [2020] IECA 246
- *O v. Minister* [2022] IEHC 617



Useful sources:

FRA Website: <https://fra.europa.eu/en>

FRA Handbook: *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance*, 2018

FRA *Handbook on European law relating to asylum, borders and immigration*, 2020 edition

EASO / EUAA Practical Guides and Judicial Publications



# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

**Hilkka Becker**

**The European Union legal system regulating asylum  
and immigration: instruments and case law**


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# EU Primary Law – Asylum

## Article 78(1) Treaty on the Functioning of the European Union (TFEU):

The Union shall develop a **common policy on asylum, subsidiary protection and temporary protection** with a view to offering appropriate status to any *third-country national* requiring international protection and ensuring compliance with the principle of non-refoulement.

This policy must be **in accordance with the Geneva Convention** of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

# Article 78(2) TFEU

2. (...), the European Parliament and the Council, (...), shall adopt measures for a **Common European Asylum System** comprising:

- (a) a **uniform status of asylum** for nationals of third countries, **valid throughout the Union**;
- (b) a **uniform status of subsidiary protection** for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a **common system of temporary protection** for displaced persons in the event of a massive inflow;
- (d) **common procedures** for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (...)

# EU Primary Law – **Asylum** (*contd.*)

## Article 6 Treaty on the European Union (TEU)

1. makes the **EU Charter binding on Member States** as part of the primary law of the EU
2. mandate for the EU to accede to the European Convention on Human Rights (ECHR)
3. ‘fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’

**Article 18 Charter of Fundamental Rights of the EU (EU Charter):** *‘[t]he right to asylum shall be guaranteed with due respect for the rules of the [Refugee Convention] in accordance with the [TEU] and the [TFEU] [...]’* ⇒ **EU Charter binding not only on the EU institutions but also on Member States when they are implementing EU law (Art. 51(1))**

# Other Relevant **EU Charter Provisions**

## **Article 1 – Human dignity**

⇒ cited by the CJEU in *A, B, and C* which concerned methods for assessing the credibility of the declared sexual orientation of an applicant ⇒ C-148/13, 2<sup>nd</sup> December 2014

## **Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment**

⇒ considered by the CJEU in the cases of *NS, ME and others* which concerned the transfer of the applicants to Greece pursuant to the Dublin II Regulation which was considered in breach of Article 4 by reason of the conditions under which asylum applicants in Greece were living and were detained

⇒ C-411/10 and C/493/10, 21<sup>st</sup> December 2011

# Other Relevant EU Charter Provisions

## Art. 19 – Protection in the event of removal, expulsion or extradition

⇒ in *M'Bodj* (C-524/13, 18<sup>th</sup> December 2014), the CJEU noted the **requirement to interpret Article 15(b) QD** (now Article 15(b) QD (recast)) **in a manner consistent with Article 19(2) of the Charter**;

*BUT:*

⇒ as there was **no risk of intentional deprivation of healthcare** in the country of origin, the applicant did not fall within the scope of the Article 15(b) QD and consideration of Article 19(2) of the Charter did not call that interpretation into question.

⇒ see also *MP v Secretary of State for the Home Department*, C-353/16, 24<sup>th</sup> April 2018)



# Best Interests of the Child

## Article 24(2) EU Charter:

**In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**

See: **Recitals 18 and 19 QD(recast)**, the last sentence of **recital 27, recital 38, Article 20(5) and Article 31:**

⇒ There should be no doubt that, in the case of an applicant who is a child, the principle of the best interests of the child must be a **primary consideration when assessing the qualification criteria for international protection**, even when the principle is not expressly mentioned

# Other Relevant **EU Charter Provisions**

## Article 47 – Right to an effective remedy and to a fair trial

- ⇒ *M.M.* (C-277/11, 22<sup>nd</sup> November 2012) concerning the **entitlement** of an applicant, who had been heard in the asylum procedure but who had received a negative decision, **to be heard in subsequent proceedings on an application for subsidiary protection**;
- ⇒ CJEU: the **right of defence** is a **fundamental principle of EU law**; the **right to be heard** in all proceedings is **inherent in that fundamental principle**, as affirmed not only in Articles 47 and 48 CFR, but also in Article 41 thereof.

# EU Secondary Law – Asylum

- **Qualification for International Protection:** 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* (recast)(applicable since 21 December 2013) → *no IRL opt in*
- **Asylum Procedures:** Directive 2013/32/EU of 26 June 2013 on *common procedures for granting and withdrawing international protection* (recast)(applicable since 21 July 2015) → *no IRL opt in*
- **Reception Conditions:** Directive 2013/33/EU of 26 June 2013 laying down *standards for the reception of applicants for international protection* (recast)(applicable since 21 July 2015) → *IRL opt in*

# EU Secondary Law – **Asylum** (contd.)

- **Dublin III:** Regulation (EU) No 604/2013 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)(*applicable since 1 January 2014*)
- **Eurodac:** Regulation (EU) No 603/2013 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)(*applicable since 20 July 2015*)

# 'Temporary Protection'

**Council Directive 2001/55/EC of 20 July 2001 on *minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* → activated by *EU Council Decision EU 2022/382 of 4 March 2022, to provide immediate protection in EU countries for people displaced by the Russian invasion of Ukraine***

- EU-wide measure of 'exceptional character' to provide immediate and temporary protection to persons in a mass influx situation (Art. 2(a))
- no need for individual assessment of qualification for international protection
- beneficiaries entitled to make an application for asylum at any time which, if rejected, shall not affect continuance of that temporary protection (Art. 17 and 19)

# Qualification for International Protection

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* (recast)

⇒ the Refugee Convention ‘constitutes the cornerstone of the international legal regime for the protection of refugees’ and the QD and the QD (recast) aim to guide the authorities of the Member States in the application of the Refugee Convention ‘on the basis of common concepts and criteria’ (see for example: *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, Joined Cases C-443/14 and C-444/14, 1<sup>st</sup> March 2016, para. 29)

# Application for International Protection

**Article 2(h) QD (recast):** “[A] request made by a third-country national or a stateless person for protection from a Member State, **who can be understood to seek *refugee status* or *subsidiary protection status***, and *who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately*”.

**Article 3(1) Asylum Procedures Directive (recast)** defines the **territorial scope** of an application for international protection

⇒ applications must be made ***‘in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’***

# Refugee Status – Definition

Article 2(d) QD (recast) defines the term ‘refugee’ as follows:

‘[...] a **third-country national** who, owing to a **well-founded fear** of being **persecuted** for reasons of **race, religion, nationality, political opinion or membership of a particular social group**, is **outside the country of nationality** and is **unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country**, or a **stateless person**, who, being **outside of the country of former habitual residence** for the **same reasons** as mentioned above, is **unable or, owing to such fear, unwilling to return to it**, and to whom Article 12 does not apply’.

⇒ see term ‘refugee’ in Article 1A(2) of the Refugee Convention



# Article 2(d) – Well-Founded Fear

*Bundesrepublik Deutschland v Y* (C-71/11), *Z* (C-99/11):

- ⇒(...), when assessing whether, in accordance with Article 2(c) (...), an applicant has a well-founded fear of being persecuted, the **competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear**, in the light of his individual situation, **that he will in fact be subject to acts of persecution** (para. 76);
- ⇒That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (*Salahadin Abdulla and Others*, paragraph 90), will be based solely on a **specific evaluation of the facts and circumstances**, in accordance with the rules laid down in particular by Article 4 of the Directive (para. 77).

## Article 2(d) – Well-Founded Fear

*Bundesrepublik Deutschland v Y* (C-71/11), *Z* (C-99/11):

⇒(...), **where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, (...).**

⇒**The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.** (para. 79)

# Significance of Past Persecution

⇒ Article 4(4) of the Qualification Directive (recast):

“The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a ***serious indication of the applicant’s well-founded fear of persecution*** or real risk of suffering serious harm, unless ***there are good reasons to consider that such persecution or serious harm will not be repeated***”.

# Standard of Proof – *Ireland*

*O.N. v Refugee Appeals Tribunal* (17<sup>th</sup> January 2017)

- “There is **no approach which is universally accepted either within the EU or internationally**”.
- “(...) the **principle of equivalence** and the **principle of effectiveness** [as required by *M.M.* and *Danqua*] are both safeguarded by the application of the standard of proof – being the **balance of probabilities – coupled with, where appropriate, the benefit of the doubt**.
- *Until such time as this State might introduce more favourable standards as contemplated by Article 3 of the QD, this is the appropriate standard to apply, (...)*”.

# Art 5 QD(recast) – Protection needs arising *sur place*

<b>Matters specific to the applicant</b>	(i) The type of sur place activity involved
	(ii) The extent of the sur place activity
	(iii) The extent to which the sur place activity is either a continuation of convictions or orientations held in the country of origin or ‘brand new’
	(iv) Issues of political or religious conviction, gender, gender identity, sexual orientation, etc.
<b>Matters specific to the actor of persecution or serious harm</b>	(v) Whether the alleged actor of persecution or serious harm knows about or could learn of the sur place activity
	(vi) Whether the alleged actor of persecution or serious harm will view the sur place activity adversely and whether there is a well-founded fear or real risk that such an actor will, as a consequence, inflict persecution or serious harm upon the applicant
<b>Matters specific to applications with an opportunistic element</b>	(vii) The extent to which the sur place activity is opportunistic
	(viii) The extent to which it will be obvious to the actors of persecution or serious harm that it is opportunistic (and whether, even if it will be, that will matter)

# Acts of Persecution

Art 9(1)/(2) QD (recast): In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

‘(a) be **sufficiently serious** by its **nature or repetition** as to constitute a **severe violation of basic human rights**, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; *i.e. freedom from torture, inhuman or degrading treatment or punishment, from slavery and servitude, and from retroactive criminal liability (Articles 3, 4(1) and 7 ECHR)*; or

(b) be an **accumulation of various measures**, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)’

# Acts of Persecution (Art. 9(1) QD(recast))

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



## CJEU: Y (C-71/11) and Z (C-99/11)

- *‘Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Art 15(2) ECHR, to which Art 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must, in particular, be regarded as constituting persecution’* (para. 57)
- **Decisive element of persecution: ‘significant effect on the person concerned** in order for it to be possible for the acts in question to be regarded as acts of persecution’ (para. 59)
- See also *Fathi v Predsedatel na Darzhavna agentsia za bezhantsite* (Case C-56/17, 4<sup>th</sup> October 2018):  
*“Art 9 is to be interpreted that the prohibition to act against a state religion considered to be criminal in accordance with the national law of the applicant’s country of origin constitute an act of persecution if these acts are in practice punished with imprisonment.”*



# Disproportionate or Discriminatory Prosecution or Punishment

***‘(...), the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive’.***

***‘(...), the term of imprisonment which accompanies a legislative provision which, (...), punishes homosexual acts is capable, in itself of constituting an act of persecution (...), provided that it is actually applied in the country of origin (...).’***

***‘Such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive’.***

*Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12), 7th November 2013, paras. 55-57*

# Art 9(3) and Art 10 QD (recast) – Reasons for Persecution (*Nexus*)

- Article 2(d): ‘(...) race, religion, nationality, political opinion or membership of a particular social group, (...)’
- Article 10(1)(a): ‘*Race*’ includes considerations of *colour*, *descent*, or *membership of a particular ethnic group*;
- Article 10(1)(b): ‘*Religion*’ includes the holding of *theistic*, *non-theistic* and *atheistic beliefs*, the *participation in, or abstention from, formal worship* in *private or in public*, either *alone or in community* with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
- Article 10(1)(c): ‘*Nationality*’ shall *not be confined to citizenship or lack thereof* but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.

# Reasons for Persecution (*Nexus*)

## Article 10(1)(d) QD (recast):

A group shall be considered to form a '*particular social group*' where in particular:

- members of that group *share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
- that *group has a distinct identity* in the relevant country, *because it is perceived as being different by the surrounding society.*

# *Minister voor Immigratie en Asiel v X, Y, and Z v Minister voor Immigratie en Asiel*

*'(...) **the existence of criminal laws**, such as those at issue in each of the cases in the main proceedings, **which specifically target homosexuals**, supports the finding that those persons must be regarded as forming a particular social group'* (para. 49)

*'(...) requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it'. (para. 70)*

(Cases C-199/12, C-200/12 and C-201/12, 7<sup>th</sup> November 2013)

# Attribution of Characteristics

As laid down in Article 10(2) QD (recast), the critical focus must be on the **actions of the persecutor**:

*‘When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is **attributed** to the applicant by the actor of persecution’.*

# Art 6 QD(recast): **Actors of Persecutio**

## **Actors of persecution (or serious harm) include:**

- the **State**;
- **parties or organisations controlling the State** or a substantial part of the territory of the State;
- **non-State actors**, *if* it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are **unable or unwilling to provide protection** against persecution (or serious harm as defined in Article 7).

# Non-State Entities as Actors of Persecution



# Art 7 QD(recast): **Actors of Protection**

⇒ Protection against persecution (or serious harm) can **only** be provided by:

a) the ***State***; or

***b) parties or organisations***, including international organisations, ***controlling the State or a substantial part of the territory of the State***; provided they are willing and able to offer protection in accordance with paragraph 2.



## Actors of Protection (*Contd.*)

- ⇒ Protection against persecution or serious harm must be **effective** and of a **non-temporary** nature.
- ⇒ Such protection is generally provided when the actors mentioned [above] take **reasonable steps to prevent the persecution (or suffering of serious harm)**, inter alia, by operating an **effective legal system for the detection, prosecution and punishment of acts constituting persecution (or serious harm)**, and
- ⇒ when the applicant has **access to such protection**.

# States' (Un)willingness and (In)ability to Protect: *Diverse Scenarios*

	Able	Unable
Willing	<b><i>Scenario 1</i></b>  ⇒ Refusal of international protection	<b><i>Scenario 2</i></b>  ⇒ Grant of international protection
Unwilling	<b><i>Scenario 3</i></b>  ⇒ Grant of international protection	<b><i>Scenario 4</i></b>  ⇒ Grant of international protection

# *Abdulla & ors v Deutschland* (C-175/08)

- ‘(...) the circumstances which demonstrate the **country of origin’s inability or, conversely, its ability to ensure protection** against acts of persecution **constitute a crucial element in the assessment** which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status. (*para. 68*)
- Consequently, **refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person** for one of the five reasons listed in Article 2(c) of the Directive. (...). (*para. 69*)

# *Abdulla & ors v Deutschland*



(...), the **competent authorities**, by reference to Article 7(2) of the Directive, **must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an **effective legal system for the detection, prosecution and punishment of acts constituting persecution** and that the national concerned will have **access** to such protection (...). (para. 70)**

# Article 8 – Internal Protection

**Art. 8(1):** ‘As part of the assessment of the application for international protection, Member States *may* determine that an applicant is not in need of international protection **if in a part of the country of origin**, he or she:

- (a) has **no well-founded fear of being persecuted** or is not at real risk of suffering serious harm; or
- (b) has **access to protection against persecution** or serious harm as defined in Article 7;

and he or she **can safely and legally travel to and gain admittance** to that part of the country

and can **reasonably be expected to settle there**’.

# *Elgafaji v Staatssecretaris van Justitie*

(Case C-465/07)

The CJEU has not yet had an opportunity to directly address Article 8 issues except the *indirect references to internal protection* in the *Elgafaji* case (para. 40):

‘(...) in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the **geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, (...), and**
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower’.



# Subsidiary Protection – Definition

⇒ ‘**person eligible for subsidiary protection**’ (Art 2(f) QD (recast)):

“a third-country national or a stateless person ***who does not qualify as a refugee*** but in respect of whom ***substantial grounds*** have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a ***real risk*** of ***suffering serious harm*** (...), and to whom Article 17(1) and (2) does not apply, and is ***unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country***”.



# Complementarity and Objective of Subsidiary Protection

“(...) , the **subsidiary protection** provided by Directive 2004/83 **is complementary and additional to the protection of refugees enshrined in the Geneva Convention**” (para. 32).

“That interpretation is also consistent with the objectives laid down by Article 78(2)(a) and (b) TFEU, which provide that the European Parliament and the Council of the European Union are to adopt measures for a common European asylum system comprising, inter alia, **‘a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection’**” (para. 33).

(*HN v Minister for Justice, Equality and Law Reform, Ireland*, C-604/12, 8<sup>th</sup> May 2014)

# Complementarity and Objective of Subsidiary Protection

“(…), it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant’s situation” (para.34).

“It is apparent from the foregoing considerations that an application for *subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status*” (para. 35).

(*HN v Minister for Justice, Equality and Law Reform, Ireland*, C-604/12, 8<sup>th</sup> May 2014)



# Art 15 QD(recast) – Serious Harm

- (a) the **death penalty** or **execution**;
- (b) or **torture or inhuman or degrading treatment or punishment** of an applicant in the country of origin;
- (c) 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**

“(…) it must be noted that **the terms ‘death penalty’, ‘execution’ and ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’**, used in **Article 15(a) and (b)** of the Directive, **cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm**. By contrast, the harm defined in **Article 15(c) of the Directive** as consisting of a ‘serious and individual threat to [the applicant’s] life or person’ **covers a more general risk of harm**.

(CJEU, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, 17<sup>th</sup> February 2009, paras. 32/33)



# Art 15(c) QD(recast) – Real Risk

“(…), in the individual assessment of an application for subsidiary protection, (…), the following may be taken into account: (…) the **existence**, if any, **of a serious indication of real risk**, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower” (CJEU, **Elgafaji v Staatssecretaris van Justitie**, C-465/07, 17<sup>th</sup> February 2009, para. 40)

⇒ **Article 4(4) QD (recast)**: The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a **serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm**, (...).

⇒ **X, Y, and ors v Staatssecretaris van Justitie en Veiligheid (NL)** (Case C-125/22 - *pending*): On the issue of individual circumstances and serious harm



# Exclusion from International Protection

From **Refugee Status**:

⇒ **Article 12** Qualification Directive (2011/95/EU) (recast)

⇒ **Articles 1D, 1E and 1F** Refugee Convention (1951)

From **Subsidiary Protection**:

⇒ **Article 17** QD (recast)

# Origin of the Exclusion Clauses

*“Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 **Geneva Convention** constitutes the **cornerstone** of the international legal regime for the **protection of refugees** and that the **provisions of the directive** for determining who qualifies for refugee status and the content of that status were adopted **to guide** the competent authorities of the **Member States** in the **application of that convention** on the basis of common concepts and Criteria”.*

(see: *B & D vs Bundesrepublik Deutschland*, C-57/09 and C-101/09, 9th November 2010, para. 77)

# Rationale for Exclusion

**Article 12(1) QD (recast): subsidiarity of international protection:**

➤ **primacy and priority** to be accorded to **protection provided by country of nationality** or by the **State of former habitual residence**

**Article 12(2) QD (recast): protection and maintenance of the integrity and credibility of refugee status**

➤ denial of refugee status to those who have committed **acts so grave that they render their perpetrators undeserving of international protection**

➤ **refugee framework should not act as a barrier to serious criminals facing justice** (prevention of abuse of refugee status by persons fleeing legitimate prosecution rather than persecution)



# Art 12(1) QD(recast): Exclusion from **Refugee Status**

A third-country national or a stateless person **is excluded** from being a refugee if:

- a) he or she falls within the scope of **Article 1(D) of the Geneva Convention**, relating to **protection or assistance from organs or agencies of the UN other than the UNHCR**. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the UN, those persons shall *ipso facto* be entitled to the benefits of this Directive;
- b) he or she is **recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.**

# Art 12(2) QD(recast): Exclusion from **Refugee Status**

A third-country national or a stateless person ***is excluded*** from being a refugee where there are **serious reasons for considering** that:

- a) he or she has committed a ***crime against peace***, a ***war crime***, or a ***crime against humanity***, (...);
- b) he or she has committed a ***serious non-political crime outside the country of refuge prior to his or her admission as a refugee***, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- c) he or she has been ***guilty of acts contrary to the purposes and principles of the UN*** (...).



# Case-Law relevant to Exclusion

- **Bundesrepublik Deutschland v B** (C-57/09), **D** (C-101/09), 9th November 2010  
⇒ *The fact that a person has been a member of an organisation (which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism) and that that person has actively supported the armed struggle waged by that organisation, **does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations.***
- **Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani** (C-573/14), 31st January 2017  
⇒ *“it is **not a prerequisite** for the ground for exclusion of refugee status (...) **that an applicant** for international protection **should have been convicted** of one of the terrorist offences referred to in Article 1(1) of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism”*
- **A, B, C, D v Minister van Buitenlandse Zaken** (C-158/14), 14th March 2017  
⇒ ***actions by armed forces during periods of armed conflict**, within the meaning of international humanitarian law, **may constitute ‘terrorist acts’ for the purposes of EU law***

# Exclusion from **Subsidiary Protection**

**Article 17 QD (recast)** broadly similar to Article 12 but:

- Article 17(1)(**b**): refers to exclusion for having committed a **serious crime**
  - Encompasses both **non-political and political crimes**
  - **No temporal or territorial restriction**
- Article 17(1)(**d**): **danger to the community or security of the Member State**
  - mirrors Article 33(2) Refugee Convention
- Article 17(2): **identical principles and criteria as Article 12(3)**
- Article 17(3) = individual outside scope Article 17(1)
  - Addresses problem posed by fugitives from justice: '(...) *left his or her country of origin solely in order to avoid sanctions resulting from those crimes*'

# Other Forms of Protection

**Exclusion ⇒ not determinative in respect of whether an excluded person can be removed to his or her country of origin or former habitual residence**

*‘It is important to note that **the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin**’.*

(see: CJEU: *Bundesrepublik Deutschland v B* (C-57/09), *D* (C-101/09), 9th November 2010, para. 77)

A green rectangular sign with rounded corners is tilted upwards. The word "Immigration" is written across the sign in a bold, white, sans-serif font. The sign is supported by two vertical metal poles. The background is a clear blue sky with a few wispy white clouds. The sun is visible in the upper right corner, creating a bright glow and lens flare effect.

**Immigration**

# EU Primary Law - Immigration

## Article 79(1) Treaty on the Functioning of the European Union (TFEU):

“The Union shall develop a **common immigration policy** aimed at ensuring, at all stages, the **efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States**, and the **prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings**”.

# Article 79(2) TFEU

“(…), the European Parliament and the Council, (…), **shall adopt measures** in the following areas:

- a) the ***conditions of entry and residence***, and standards on the issue by MS of long-term visas and residence permits, including those for the purpose of family reunification;
- b) the ***definition of the rights of third-country nationals residing legally*** in a MS, including the conditions governing freedom of movement and of residence in other MS;
- c) ***illegal immigration and unauthorised residence***, including removal and repatriation of persons residing without authorisation;
- d) ***combating trafficking in persons***, in particular women and children.





# Access to the Territory of the EU

- Convention implementing the **1985 Schengen Agreement**, 19 June 1990
- **Visa List Regulation**, Regulation (EU) 2018/1806
- **Visa Code**, Regulation (EC) 810/2009
- **VIS Regulation**, Regulation (EC) No. 767/2008
- **SIS Border Checks Regulation**, Regulation (EU) 2018/1861
- **SIS Returns Regulation**, Regulation (EU) 2018/1860
- **Schengen Borders Code**, Regulation (EU) 2016/399

# *Koushkaki v Bundesrepublik Deutschland*

*“Articles 23(4), 32(1) and 35(6) of the [Visa Code] must be interpreted as meaning that the competent authorities of a Member State **cannot refuse, following the examination of an application for a Uniform visa, to issue such a visa** to an applicant **unless one of the grounds for refusal of a visa listed in those provisions can be applied** to that applicant.*

*Those authorities have a **wide discretion in the examination of that application** so far as concerns the conditions for the application of those provisions and the assessment of the relevant facts, with a view to ascertaining whether one of those grounds for refusal can be applied to the applicant”*

(CJEU, Case C-84/12, 19th December 2013, (para.79))

# Preventing **Unauthorised Entry**

- **Carriers Sanctions Directive (2001/51/EC):**
  - provides for sanctions against those who transport undocumented migrants into the EU.
- **Facilitation Directive (2002/90/EC):**
  - defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches;
  - sanctions must be effective, proportionate and dissuasive (Article 3);
  - MS can decide not to sanction humanitarian assistance, but they are not obliged to do so (Article 1(2)).

# *X. and X. v État Belge* (Case C-638/16 PPU)

- Application for a visa with limited territorial validity (Art 25(1)(a) Visa Code) made at the Belgian embassy in Lebanon
- Application refused as the **intention of the applicants** was to stay beyond 90 days and **apply for international protection** in Belgium

## **CJEU:**

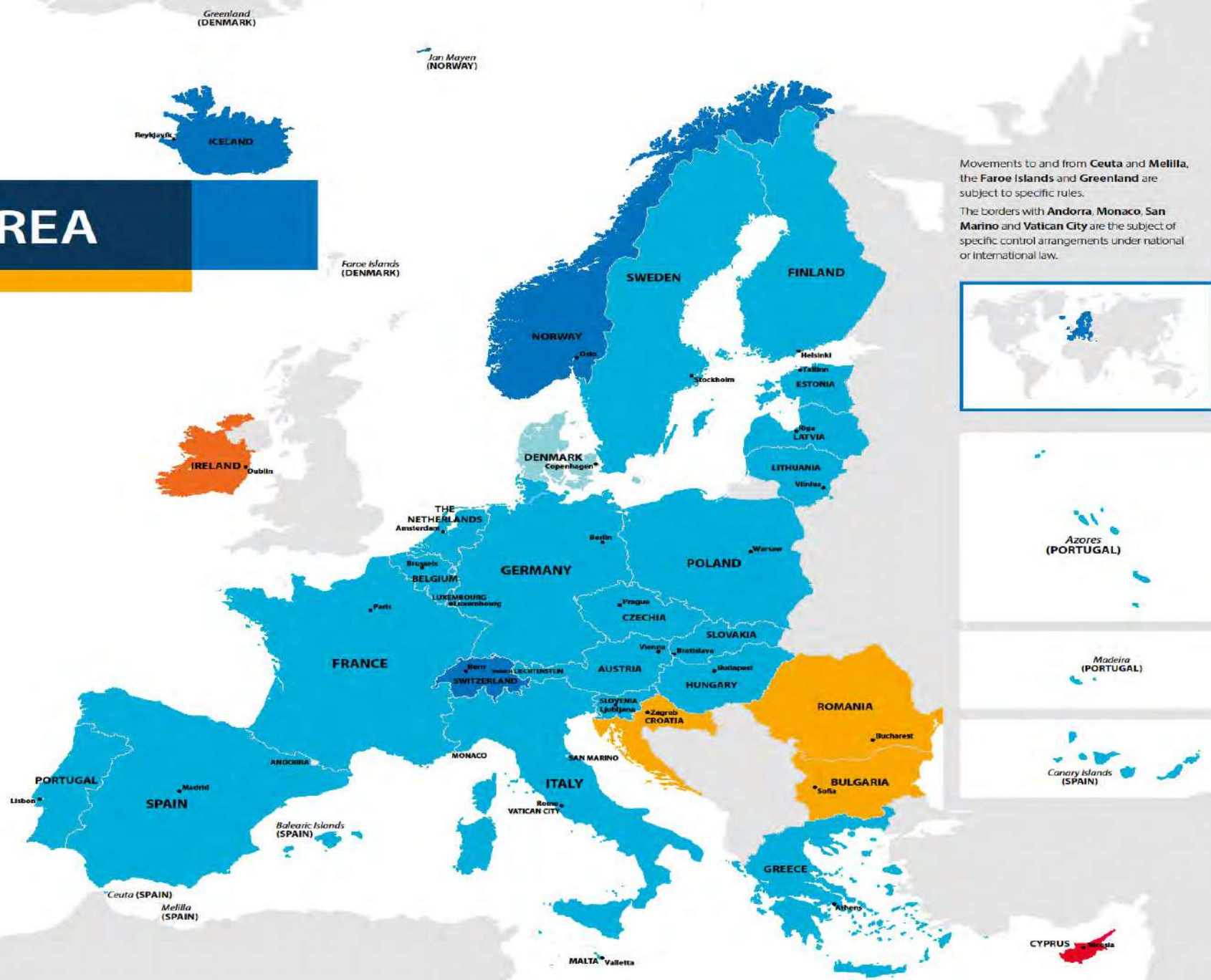
- **request outside the scope of the Visa Code**
- **applications for international protection are to be made in the territory of the EU Member States** (Asylum Procedures Directive (recast) (2013/32/EU))

# Border Checks

- **Art 4 Schengen Borders Code:** *protection of fundamental rights*
- **Art 7(1) Schengen Borders Code:** “Border guards shall, in the performance of their duties, *fully respect human dignity*, in particular in cases involving vulnerable persons”.
- Any measures taken in the performance of their duties shall be *proportionate to the objectives pursued* by such measures.
- While carrying out border checks, *border guards shall not discriminate against persons* on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- *More favourable rules exist for third-country nationals who enjoy free movement rights* (Articles 3 and 8(6)).
- **Evaluation and monitoring mechanism to verify the application of the Schengen acquis:** Council Regulation (EU) 2022/922 of 9 June 2022

# THE SCHENGEN AREA

- **The whole Schengen acquis** applies to the European territories of the following EU Member States: **Belgium, Czechia, Germany, Estonia, Greece, Spain** (including the **Balearic Islands** and the **Canary Islands**), **France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal** (including **Madeira** and the **Azores**), **Slovenia, Slovakia, Finland** and **Sweden**.
- **Denmark** is an EU Member State that applies the whole Schengen acquis as international law, except for the measures determining those third countries whose nationals must have a visa when crossing the external borders of Member States and the measures concerning the introduction of a uniform format for visas.
- **Iceland, Norway** (except Svalbard), **Switzerland and Liechtenstein** are associated States (not EU Member States), which take part in preparing the Schengen acquis acts that are subsequently adopted by the EU institutions. These four countries apply the Schengen acquis acts after their adoption through association agreements.
- **Bulgaria, Romania and Croatia** are EU Member States that apply the whole Schengen acquis, except for the part concerning the absence of internal border controls and visas. These States are connected to the Schengen Information System (SIS); Croatia, although connected to SIS, is not obliged to refuse entry to persons for whom non-admission alerts have been issued and cannot issue such alerts itself. These three Member States are awaiting a Council Decision to set the date by when the whole Schengen acquis (opening of internal borders) is to be applied.
- **Cyprus** is an EU Member State that applies the Schengen acquis except for the part concerning the SIS, the absence of internal border controls and visas. It does not yet have access to the SIS.
- **Ireland** is an EU Member State that is authorised to apply the part of the Schengen acquis concerning police and judicial cooperation in criminal matters. Ireland has not as yet put into effect the part of the Schengen acquis in which it has asked to participate.



Movements to and from **Ceuta and Melilla**, the **Faroe Islands** and **Greenland** are subject to specific rules. The borders with **Andorra, Monaco, San Marino** and **Vatican City** are the subject of specific control arrangements under national or international law.



# Residence in the EU

- **Resident Permits Format Regulation** (EC) No. 1030/2002 (amended by Regulation (EC) No. 380/2008 and Regulation (EU) 2017/1954) → *no opt in from IRL*
- **Long-term Residents Directive** 2003/109/EC (as amended by Directive 2011/51/EU) → *no opt in from IRL*
- **Family Reunification Directive** 2003/86/EC → *no opt in from IRL*
- **Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast)** → *no opt in from IRL*
- **Directive (EU) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ('EU Blue Card')** → *no opt in from IRL*
- **Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State** → *no opt in from IRL*
- **Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers** → *no opt in from IRL*
- **Intra-Corporate Transfer Directive** 2014/66/EU → *no opt in from IRL*

# Students Directive – Entitlements?

*“Article 12 of Directive 2004/114 [now replaced by Directive (EU) 2016/801] must be interpreted as meaning that the **MS concerned is obliged to admit to its territory a third-country national who wishes to stay more than three months in that territory for study purposes**, where that national meets the **conditions for admission exhaustively listed in Articles 6 and 7** of that directive and provided that that MS does not invoke against that person one of the grounds expressly listed by the directive as justification for refusing a residence permit” (see: *Alaya v Deutschland*, Case C-491/13, 10<sup>th</sup> September 2014)*

**Remedies** ⇒ “Member States must provide for an appeal procedure against decisions refusing a visa for the purpose of studies, (...), the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a **judicial appeal** (see: *M.A. v Konsul Rzeczypospolitej Polskiej w N.*, Case C-949/19, 10<sup>th</sup> March 2021)



# *Fahimian v Deutschland* (Case C-544/15)

Art. 6(1)(d) of Directive 2004/114/EC [now replaced by Art 7(6) Directive (EU) 2016/801] is to be interpreted as meaning that:

- The competent national authorities, (...), have a **wide discretion** in ascertaining, **in the light of all the relevant elements** of the situation of that national, **whether he represents a threat, if only potential, to public security**.
- Competent national authorities may refuse to admit (...), for study purposes, a third country national who holds a degree from a university which is the subject of EU restrictive measures (...), if the elements available to those authorities give reason to fear that the knowledge acquired by that person during his research may subsequently be used for purposes contrary to public security.
- It is for the **national court** (...) **to ascertain whether the decision to refuse a visa is based on sufficient grounds and a sufficiently solid factual basis**.

# Long-Term Residence – Conditions?

***Commission v the Netherlands***, CJEU, Case C-508/10, 26<sup>th</sup> April 2012:

- Principal purpose of the Directive: “(...) **integration of third-country nationals who are settled on a long-term basis in the MS**
- *MS may make the issue of the residence permits (...) subject to the payment of charges and that, in fixing the amount of those charges, they enjoy a **margin of discretion**.*
- *However, the **discretion granted to MS (...) in that respect is not unlimited**. They **may not apply national rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness** (see, to that effect, Case C-61/11 PPU El Dridi [2011] ECR I-3015, para 55)”.*

See also: ***CGIL, INCA v Presidenza del Consiglio dei Ministri***, C-309/14, 2nd September 2015)



# Family Reunification – Discretion?

**Article 4(1) of Directive 2003/86/EC** provides that: “The MS **shall** authorise the entry and residence, (...), of the following family members:

- (a) the **sponsor's spouse**;
- (b) the **minor children of the sponsor and of his/her spouse, (...)**;
- (c) the **minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. (...)**;
- (d) the **minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. (...)**”.

**BUT: subject to conditions** “pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16”

# Family Reunification – Discretion!

## Article 4(2) Directive 2003/86/EC:

Member States **may**, (...), authorise the entry and residence, (...), of the following family members:

- (a) **first-degree relatives in the direct ascending line** of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
- (b) **adult unmarried children** of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

## Article 4(3) Directive 2003/86/EC:

Member States **may**, (...), authorise the entry and residence, (...), of

- the **unmarried partner**, being a third country national, with whom the sponsor is in a **duly attested stable long-term relationship**, or of
- a third country national who is bound to the sponsor by a **registered partnership** (...), and of
- the **unmarried minor children**, including adopted children, as well as the **adult unmarried children** who are objectively unable to provide for their own needs on account of their state of health

# Article 7(1) and (2)

- a) **accommodation** regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the MS concerned;
- b) **sickness insurance** in respect of all risks normally covered for its own nationals in the MS concerned for himself/herself and the members of his/her family;
- c) **stable and regular resources** which are sufficient to maintain himself/herself and the members of his/her family, **without recourse to the social assistance system of the MS concerned**. (...).

MS *may* require third country nationals to comply with **integration measures**, in accordance with national law. With regard to the refugees and/or family members of refugees (...) integration measures (...) may only be applied once the persons concerned have been granted family reunification.

# *Chakroun v Minister van Buitenlandse Zaken*

**Article 4(1) of Directive 2003/86/EC** “imposes precise positive obligations, with corresponding clearly defined individual rights, on the MS, since it **requires them**, in the cases determined by the Directive, **to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation** (Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 60)”.

“However, that provision is **subject to compliance with the conditions referred to, in particular, in Chapter IV of the Directive**. Article 7(1)(c) of the Directive forms part of those conditions and allows MS to require evidence that the sponsor has **stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the MS concerned**. That provision also states that MS are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members”.

(CJEU, Case C-578/08, 4<sup>th</sup> March 2010, paras. 41/42)

# *Chakroun v Minister van Buitenlandse Zaken*

- “Since **authorisation of family reunification is the general rule**, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly.
- (...), **the margin for manoeuvre which the MS are recognised as having must not be used by them in a manner which would undermine the objective of the Directive**, which is to promote family reunification, and the effectiveness thereof.
- **The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter**. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. (...)”.

(See: C-578/08, 4<sup>th</sup> March 2010, paras. 43/44)



# *Chakroun v Minister van Buitenlandse Zaken*

**Article 2(d) of Directive 2003/86/EC** defines family reunification without drawing any distinction based on the time of marriage of the spouses, since it states that that reunification must be understood as meaning the entry into and residence in the host MS by family members of a third-country national residing lawfully in that MS in order to preserve the family unit, ***‘whether the family relationship arose before or after the resident’s entry’***.

⇒ Only Article 9(2) of the Directive, which applies to refugees, provides that ***‘MS may confine the application of [the provisions of Chapter V of the Directive] to refugees whose family relationships predate their entry’***. (...).”

(See: C-578/08, 4<sup>th</sup> March 2010, paras. 43/44)

# Reunification of Parents with a **Minor Refugee**

Joined Cases *Bundesrepublik Deutschland v SW* (C-273/20), *BL*, *BC* (C-355/20), 1st August 2022:

(...), the fact that that **refugee is still a minor on the date of the decision on the application for entry and residence for the purpose of family reunification submitted by the sponsor's parents does not constitute a 'condition'**, within the meaning of **Art. 16(1)(a)**, failure to comply with which allows the MS to reject such an application.

(...), those provisions, (...), must be interpreted as **precluding national legislation under which, (...), the right of residence of the parents concerned comes to an end as soon as the child reaches the age of majority.**

# Reunification of Parents with a **Minor Refugee**

Joined Cases C-273/20 and C-355/20

Art. 16(1)(b) must be interpreted as meaning that, **in order to find that there is a real family relationship**, (...), where that child attained his or her majority before the decision on the application for entry and residence for the purpose of family reunification, submitted by that parent, was adopted, **a first-degree relationship in the direct ascending line is not sufficient on its own**.

(...), **it is not necessary for the child sponsor and the parent concerned to cohabit in a single household or to live under the same roof** in order for that parent to qualify for family reunification. **Occasional visits**, in so far as they are possible, **and regular contact of any kind may be sufficient** to consider that those persons are reconstructing personal and emotional relationships and to establish the existence of a real family relationship. Furthermore, **nor can the child sponsor and the parent concerned be required to support each other financially**.

⇒ see also: *Bundesrepublik Deutschland v XC* (Case C-279/20), 1st August 2022

# Family Reunification – Age Requirements

Article 4(5) Directive 2003/86/EC: ***“In order to **ensure better integration** and to **prevent forced marriages** MS may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her”.***

***“(...) that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged”.***

(See: *Marjan Noorzia v Bundesministerin für Inneres* (C-338/13, 17th July 2014, para. 19)

# *X v Belgische Staat* (Case C-230/21)

**Married refugee minor = ‘unaccompanied minor’?  
right to family reunification with her ascendant relative?**

*CJEU: “Art 7 of the Charter recognises the right to respect for private or family life. That provision of the Charter must, next, be read in conjunction with the obligation to take account of the **child’s best interests**, enshrined in **Art. 24(2) of the Charter**, that provision also applying to decisions which are not necessarily addressed to that minor but have significant consequences for him or her”.*

**⇒ Art 10(3) Family Reunification Directive must be interpreted as meaning that an unaccompanied refugee minor residing in a MS does not have to be unmarried in order to acquire the status of sponsor for the purposes of family reunification with his or her first-degree relatives in the direct ascending line.**

# Autonomous Residence Permit

## Article 15 Directive 2003/86/EC:

- Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority **shall** be entitled, upon application, if required, to an **autonomous residence permit**, independent of that of the sponsor.
- MS **may limit** the granting of the residence permit (...) to the spouse or unmarried partner in cases of **breakdown of the family relationship**.
- MS **may** issue an autonomous residence permit to **adult children** and to **relatives in the direct ascending** line to whom Article 4(2) applies.

# Art 15 – Discretion

- In the event of *widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line*, an *autonomous residence permit **may** be issued*, upon application, if required, to persons who have entered by virtue of family reunification.
- Member States ***shall*** lay down provisions ensuring the granting of an autonomous residence permit in the event of *particularly difficult circumstances*.





# Irregular Migration & Return

- **Employer Sanctions Directive 2009/52/EC**
- **Return Directive 2008/115/EC**
- **Facilitation Directive 2002/90/EC**
- **Carrier Sanctions Directive 2001/51/EC**



# Return Directive – General Principles

*Z. Zh. v Staatssecretaris voor Veiligheid en Justitie* (C-554/13, 11th June 2015, paras. 47/48):

“In accordance with **Article 79(2) TFEU**, the objective of Directive 2008/115 is, as is apparent from recitals 2 and 11 in the preamble thereto, to **establish an effective removal and repatriation policy**, based on **common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity** (see judgment in *Mahdi*, C-146/14, para. 38)”.

“(…) in the **EU context** and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the EU, those **requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each MS without any control by the institutions of the EU** (see, by analogy, judgment in *Gaydarov*, C-430/10, para. 32)”.

# Return Directive – Definition of ‘illegal stay’

**‘illegal stay’** = the presence on the territory of a MS, of a third-country national who **does not fulfil**, or **no longer fulfils** the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that MS (see Art 3(2))

It follows from that definition that **any third-country national who is present on the territory of a MS without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally**, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. (...).”

(See: *Affum v Préfet du Pas-de-Calais & anor*, C-47/15, 7<sup>th</sup> June 2016, para. 48)

# Return Directive – Detention

*“Directive 2008/115 must be interpreted as **precluding legislation** of a MS **which permits a third country national** in respect of whom the return procedure established by that directive has not yet been completed **to be imprisoned merely on account of illegal entry across an internal border, resulting in an illegal stay.***

*That interpretation also applies where the national concerned may be taken back by another MS pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive”.*

⇒ ***Affum v Préfet du Pas-de-Calais & anor***, C-47/15, 7<sup>th</sup> June 2016, para. 93

# Return Directive – Detention

“Article 15(1) of Directive 2008/115/EC (...), must be interpreted as **not permitting a Member State to order the detention** of an illegally staying third-country national **solely on the basis of a general criterion based on the risk that the effective enforcement of the removal would be compromised**, without satisfying one of the **specific grounds for detention** provided for and clearly defined by the legislation implementing that provision in national law.”

⇒ *I. L. v Politsei- ja Piirivalveamet*, CJEU, Case C-241/21, 6<sup>th</sup> October 2022

# Return Directive – Voluntary Departure

**Article 7(1):** A return decision shall provide for an appropriate *period for voluntary departure of between seven and thirty days*, (...).

**Article 7(2):** MS *shall*, where necessary, *extend the period for voluntary departure* by an appropriate period, *taking into account the specific circumstances of the individual case*, such as the **length of stay**, the existence of **children attending school** and the existence of **other family and social links**.

**Article 7(3):** Certain *obligations aimed at avoiding the risk of absconding*, such as **regular reporting** to the authorities, deposit of an **adequate financial guarantee**, **submission of documents** or the **obligation to stay at a certain place** may be imposed for the duration of the period for voluntary departure.

# Voluntary Departure – shorter period

Article 7(4): ***“If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, MS may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days”.***

⇒ ***it is only in particular circumstances, such as where there is a risk to public policy, that MS may grant a period shorter than seven days for voluntary departure or even refrain from granting such a period*** (see, to that effect, judgment in *El Dridi*, C-61/11, para 37). (...), to be able to rely on the derogation provided for in that provision on the ground that there is a risk to public policy, a ***MS must be able to prove that the person concerned in fact constitutes such a risk***

***Z. Zh. v Staatssecretaris voor Veiligheid en Justitie*** (C-554/13, 11th June 2015)

# 'Closing the Circle' – *Non-Refoulement*

Article 5 of Directive 2008/115 requires that: ***“When implementing this Directive, Member States shall take due account of:***

***(a) the best interests of the child;***

***(b) family life;***

***(c) the state of health of the third-country national concerned,***

***and respect the principle of non-refoulement”.***



## *VT v Centre public d'action sociale de Liège*

Art 5 and Art 13 must be interpreted as **precluding national legislation which does not confer automatic suspensory effect** on an action brought by a third country national against a return decision, (...), concerning him, after the withdrawal by the competent authority of his refugee status (...), and, correlatively, does not confer on that third country national a provisional right to reside and to have his basic needs taken care of until a decision on that action is taken, **in the exceptional case where that national, who is affected by a serious illness, may, as a result of that decision being enforced, be exposed to a serious risk of grave and irreversible deterioration in his state of health.**

In this context, the national court, hearing a dispute the outcome of which is linked to the possible suspension of the effects of the return decision, must hold that the action brought against that decision has **automatic suspensory effect, where that action contains arguments, that do not appear to be manifestly unfounded, seeking to establish that the enforcement of that decision would expose the third country national to a serious risk of grave and irreversible deterioration in his state of health.**

⇒ CJEU, Case C-641/20, 5<sup>th</sup> May 2021 (Order)

# *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*

Para. 63: “Articles 5 and 13 of Directive 2008/115, (...), are to be interpreted as ***precluding national legislation*** which:

- does not endow with ***suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a MS***, where the enforcement of that decision may expose that third country national to a **serious risk of grave and irreversible deterioration in his state of health**, and
- does not make **provision**, in so far as possible, ***for the basic needs of such a third country national to be met***, in order to ensure that that person may in fact avail himself of **emergency health care and essential treatment of illness during the period in which that MS is required to postpone removal** of the third country national following the lodging of the appeal.

⇒ CJEU(GC), Case C-562/13, 18<sup>th</sup> December 2014



THANK YOU  
QUESTIONS?





# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

**Aoife McMahon**

**The Council of Europe legal system regulating  
asylum and immigration: instruments and case law**

**Dublin, 9 March 2023**



Co-funded the European Union



“The Council of Europe legal system regulating asylum and immigration: instruments and case law”

**OVERVIEW**

- Overview of the CoE
- Early Treaties in this area
- Convention for the Prevention of Torture
- Convention on Action against Trafficking in Human Beings
- ECHR
- European Social Charter





## Overview of the Council of Europe

- 46 member states
- 3 objectives – human rights, democracy, rule of law
- ECHR – EctHR
- European Social Charter – European Committee of Social Rights
- 226 Treaties





## Early Treaties in the areas of asylum and immigration

- **European Agreement on Regulations governing the Movement of Persons between Member States of the CoE 1957 (CETS 25)**
- **European Agreement on the Abolition of Visas for Refugees 1959 (CETS 31)**
- **European Convention on the Legal Status of Migrant Workers 1977 (CETS 93)**
- **European Agreement on Transfer of Responsibility for Refugees 1980 (CETS 107)**





## Early Treaties in the areas of asylum and immigration

- Soft enforcement through thematic and country reports of the Commissioner for Human Rights
- Ireland has NOT signed or ratified CETS 25, 93, 107.
- CETS 31 – Ireland ratified in 1969 – suspended on 19/07/2022 for an initial period of one year.







## Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987

- CETS 126 – treatment of persons deprived of their liberty
- Monitoring by European Committee for the prevention of torture and inhuman and degrading treatment (CPT)
- Reports used to challenge Dublin III transfers (Greek transfer case – *M.S.S. v. Belgium and Greece* (App. no. 30696/09))
- Relevant for asylum claims of nationals of non-EU contracting states (eg Georgia, Albania, Moldova, Ukraine)





## **Convention on Action against Trafficking in Human Beings 2005**

- **CETS 197**
- **Prevention of trafficking**
- **Protection of human rights of victims**
- **Effective investigation & Prosecution**
- **Promotion of international cooperation**





## Convention on Action against Trafficking in Human Beings 2005

- National or transnational
- Specific monitoring mechanism – reports of Group of experts on action against trafficking in human beings (GRETA)
- 11th General report 2021 – Focus on online and technology facilitated trafficking in human beings – important in identification of victims and prosecution of traffickers





## European Convention on Human Rights 1950 – article 3

### “Absolute protection”

- *Saadi v. Italy* [GC] app. no. 37201/06
- *YY v. Minister for Justice* [2017] IEHC 176





## ECHR – article 3

### **“Minimum level of severity” – serious ill health**

- *Paposhvili v. Belgium* (app. no. 41738/10)
- *Savran v. Denmark* [GC] no. 57467/15, 7 December 2021
- *DE v. MJE* [2018] IESC 16





## ECHR – article 3

**“Degrading” is relative – related to dignity**

- *Khan v. France* (Application no. 12267/16) 28 February 2019





## ECHR – article 4

**Positive obligation on states to take operational measures to protect victims or potential victims**

- *A.I. v. Italy*, no. 70896/17, 1 April 2021
- *N.Ç. v. Turkey*, no. 40591/11, 9 February 2021





## ECHR – article 4

### **Positive obligation to investigate trafficking offences**

- *Zoletic and Others v. Azerbaijan*, no. 20116/12, 7 October 2021
- *P v. GNIB* [2015] IEHC 222







## ECHR – article 5

**One form of permissible detention: 5(1)(f) “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”**

- *A. and Others v. the United Kingdom*, [GC], no. 3455/05
- *Al Husin v. Bosnia and Herzegovina (no. 2)*, no. 10112/16
- *Komissarov v. the Czech Republic*, no. 20611/17





## ECHR – article 8

### **Broad themes in the caselaw on article 8 ECHR:**

- **Fact specific – importance of the proportionality assessment under article 8(2)**
- **Private / family life**
- **Criminality / no criminality**
- **Settled /precarious immigration status**
- **Expulsion / regularisation**





## ECHR – article 8

### **Settled migrants – “very serious reason” to justify expulsion**

- *Üner v. the Netherlands* [GC] no. 46410/99

- *Levakovic v. Denmark*, no. 7841/14, 23 October 2018





## ECHR – article 8

### **Precarious immigration status – “exceptional circumstances” for entitlement to remain**

- *Alleleh and Others v. Norway*, no. 569/20, 23 June 2022
- *Jeunesse v. the Netherlands* [GC] no. 12738/10
- *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99
- *Pormes v. the Netherlands*, no. 25402/14, 28 July 2020
- *BAC v. Greece*, no. 11981/15, 13 October 2016





## ECHR – article 8

### Importance of proportionality assessment

- *M.M. v. Switzerland*, no. 59006/18, 8 December 2020
- *MK (Albania) v. Minister for Justice* [2022] IESC 48
- *T.C.E. v. Germany*, no. 58681/12
- *Khachatryan and Konovalova v. Russian*, no. 28895/14, 13 July 2021





## ECHR – article 8

### **Duration of exclusion order important factor**

- *Savran v. Denmark* [GC] no. 57467/15, 7 December 2021
- *Sivsiivadze v. Minister for Justice and Equality* [2015] IESC 53





## ECHR – article 9

**Expulsion designed to repress the exercise of right to religious freedom**

- *Corley and Others v. Russia*, nos. 292/06 and 43490/06, 23 November 2021

**International protection – must establish fear of persecution for religious belief**

- *Z. and T. v. the United Kingdom* (dec.), no. 27034/05





## ECHR – article 10

**Refusal of permission to journalist to visit a reception centre  
accommodation asylum seekers**

- *Szurovecz v. Hungary* no. 15428/16, 8 October 2019

**Relevant to “state protection” in international protection claims**

- *Teslenko and Others v. Russia*, nos. 49588/12 and 3 others, 5 April 2022







## ECHR – article 14 / Protocol 12, article 1

### “Other status”

- *Hode and Abdi v. the United Kingdom*, no. 22341/09
- *Bah v. the United Kingdom*, no. 56328/07
- *Ponomaryovi v. Bulgaria*, no. 5335/05
- *Anakomba Yula v. Belgium*, no. 45413/07





## ECHR – article 14 / Protocol 12, article 1

### **Discriminatory treatment of non-nationals**

- *Pajić v. Croatia*, no. 68453/13, 23 February 2016
- *Taddeucci and McCall v. Italy*, no. 51362/09, 30 June 2016
- *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016





## European Social Charter 1961

### Overview

- guarantees fundamental **social and economic rights** as a counterpart to the ECHR (**civil and political rights**).
- guarantees a broad range of human rights related to employment, housing, health, education, social protection and welfare.





## European Social Charter 1961

### **Collective complaints**

- additional Protocol of 1995 providing for a system of collective complaints
- certain national or international NGOs may submit complaints
- Ireland ratified this Protocol on 4 November 2000





## European Social Charter 1961

### Relationship to EU law

- **Confédération générale du travail (CGT) v. France, Complaint No. 55/2009, Decision on the merits of 23 June 2010, paras. 34-41**





## European Social Charter 1961

### Cases on the merits against Ireland

- **World Organisation against Torture (OMCT) v. Ireland, Complaint No.18/2003**
- **European Organisation of Military Associations and Trade Unions (EUROMIL) v. Ireland, Complaint No. 164/2018**
- **European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014**
- **European Confederation of Police (EuroCOP) v. Ireland, Complaint No. 83/2012**
- **Irish Congress of Trade Unions v. Ireland, Complaint No. 123/2016**
- **Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland, Complaint No. 89/2013**
- **International Federation for Human Rights (FIDH) v. Ireland, Complaint No. 110/2014**





## European Social Charter 1961

### **Personal scope:**

The Charter generally applies to non-nationals “only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”.

### **Exceptions:**

Article 11 (right to protection of health)

Article 31 (right to housing)





## European Social Charter 1961

### Article 11 (right to protection of health)

- *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018
- *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011
- *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003







## European Social Charter 1961

### Article 31 (right to housing)

- *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012
- *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, decision on the merits of 26 January 2021





# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

**Julia Hull**

**Legal assistance to immigrants and asylum seekers**

**Dublin, 9 March 2023**



Co-funded the European Union

# Legal assistance to immigrants and asylum seekers on the ground

- Civil Legal Aid
  - International Protection and associated appeals/Permission to remain
  - Victims of Human Trafficking
  - Reception Conditions Directive
  - General Immigration Matters
  - Deportation Orders
  - Judicial Review
- Criminal Legal Aid
  - Immigration Offences
- Supports from NGO's / Irish Refugee Council
- Review of Civil Legal Aid

# Legal assistance to immigrants and asylum seekers on the ground

Numbers seeking International Protection

2018 – 2020 10,030

2021 -2649

2022- 13651

2020 – Catherine Day Report /White Paper to end Direct Provision

2021 Regularisation of Long Term Undocumented Migrants Scheme

2022/2023 Temporary Protection Directive – Ukraine

Accommodation

# Legal assistance to immigrants and asylum seekers on the ground

## International Protection Act 2015

- Single Procedure - (Refugee status/Subsidiary Protection/Recommendation on Permission to Remain)
- Application –s 13(1)
- Inadmissibility /Dublin Regulation – Appeal s21
- Questionnaire -s 15(5)
- Personal Interview- s35(1)
- Decision -s39
- Appeal -s41
- Permission to Remain Application - s49 /Refoulement –s50
- Deportation Order – s51
- Subsequent Applications – s22
- Revocation –s52

# Legal assistance to immigrants and asylum seekers on the ground

Specific cases

Unaccompanied minors / age disputed minors section 14 IPA 2015

Safe Countries of Origin

Vulnerability assessments section 8(1) IPA 2015

Medico –Legal Reports

Medical Assessments

Victims of Human Trafficking

# Legal assistance to immigrants and asylum seekers on the ground

- Inadmissability decisions –S 21 ECJ Case Law / ECHR
- Dublin Regulation – humanitarian submissions Article 17(1) of the Dublin III Regulation
- Dublin Regulation appeal

**S.I. No. 62/2018 - European Union (Dublin System) Regulations 2018**  
REGULATION (EU) No 604/2013

# Legal assistance to immigrants and asylum seekers on the ground

## Obligations on Applicant's

### S 15(5)

An application for international protection shall be made in the prescribed form and shall include—

- (a) all details of the grounds for the application, and
- (b) all information that would, in the event that *section 49, 50, 56 or 57* were to apply (PTR, Refoulement, Family Reunification) to the applicant, be relevant to the decision of the Minister under the section concerned.

### S 27

(1) It shall be the duty of an applicant—

- (a) to submit as soon as reasonably practicable all the information needed to substantiate his or her application,
- (b) to co-operate in the examination of his or her application and in the determination of his or her appeal in relation to that application, if any, and
- (c) to comply with all of the other obligations under *Parts 3 to 6* of an applicant in relation to his or her application.

(2) The information referred to in *subsection (1)* consists of statements by the applicant, and all documentation at his or her disposal, regarding the elements, referred to in *section 28(3)*, of his or her application



# Legal assistance to immigrants and asylum seekers on the ground

## **Failure by applicant to cooperate s38**

- (1) Not attending for an interview – 3 working days to provide an explanation
- (2) Left the state/ not notified of a change of address /not complied with any conditions relating to residence – 10 working days to provide an explanation

Subsequent Applications for IP – permission from the Minister plus appeal (s22)

# Legal assistance to immigrants and asylum seekers on the ground

Pre/ Post Questionnaire Advice

Pre Interview Advice / Pre Interview submissions

Post Interview submissions

Documentary evidence

Translations

Medical referrals for reports

Country of Origin information – Refugee Documentation Centre  
/ECOI.net

# Legal assistance to immigrants and asylum seekers on the ground

## Interpreters

- Applicants and decision-makers entirely reliant on interpreters
- Errors in interpretation can have serious consequences
- Accelerated procedures
- completing the questionnaire

# Legal assistance to immigrants and asylum seekers on the ground

Decision from IPO

Decision – refugee status/subsidiary protection s39

Recommendation – Permission to Remain s49(4)

Negative decision re refugee status /subsidiary protection

- Lodge appeal to IPAT within relevant time limit

# Legal assistance to immigrants and asylum seekers on the ground

## Appeals

- Substantive Appeals – 15 working days
- Other appeals– 10 working days
- Notice of Appeal –
  - Legal Submissions
  - addressing credibility issues
  - Country of Origin Information
  - Witnesses
  - Redacted decisions
- Late appeals
- Signing the form
- Remote hearings
- Oral Hearings/ Hearing on paper only

# Legal assistance to immigrants and asylum seekers on the ground

## Positive decisions

- Refugee /Subsidiary Protection Declaration – s47
- Refugee Status / Subsidiary Protection
  - Stamp 4 visa 3 years
  - Family reunification
- Application for Citizenship –
  - Refugee status backdated to date of application – 3 years residency
  - Subsidiary Protection – 5 years
- Applications on behalf of children – unaccompanied minors

# Legal assistance to immigrants and asylum seekers on the ground

- Negative decisions –
- Update the PTR (5 working days) (Art 8 ECHR /Refoulement issues)
- Deportation Orders – change in circs
- Delays in system

# Legal assistance to immigrants and asylum seekers on the ground

- Negative decisions –
- PTR Review -refoulement issues s 50
- Deportation Orders



# Legal assistance to immigrants and asylum seekers on the ground

- Other types of permission

Parent of an EU Citizen Child

Partner /Spouse of EU Citizen (freedom of movement)

Permission granted under regularisation scheme and PTR application under s 49

# Legal assistance to immigrants and asylum seekers on the ground

- Judicial Review – Asylum list in the High Court –

Hct Practice direction HC81

# Legal assistance to immigrants and asylum seekers on the ground

## Sources of Information

Refugee Documentation Centre

ECOI. NET

Ref World

IPO /IPAT/INIS websites

IPAT decisions database

Courts.ie -High Court decisions

EASO



# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

**Tomasz Rogala**

**Temporary protection for persons fleeing Ukraine in  
Poland**

**Dublin, 9 March 2023**



Co-funded the European Union

## Agenda

1. Introduction – war in Ukraine, timeline, basic migration facts
2. EU Temporary protection framework
  1. scope of beneficiaries
  2. direct effect?
3. Legal instruments of temporary protection in Poland
  1. scope of beneficiaries
  2. automatic vs constitutive acquisition
4. Rights under temporary protection
  1. Entry
  2. Residence
  3. Access to labour market
  4. Social rights
5. Challenges
  1. Relocating within the EU
  2. Extending legal status past expiry of temporary protection
  3. Other



## 1. War in Ukraine – timeline, basic migration facts

<b>24 February 2022</b>	Russian invasion on Ukraine
<b>24-28 February 2022</b>	355 thousand Ukrainian nationals enter Poland
<b>1 March – 31 March 2022</b>	further 2 million Ukrainian nationals enter Poland
<b>4 March 2022</b>	adoption of 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 Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection;
<b>12 March 2022</b>	adoption of Polish Act on Assistance to Citizens of Ukraine in Connection with Armed Conflict in this Country's Territory (with retroactive legal force as of 24 February 2022).
<b>Ukrainian population in Poland pre-24 February 2022</b>	approx. 1.5 milion
<b>Total traffic on PL-UKR border Feb 2022 - Feb 2023</b>	10.137 milion in, 8.232 milion out (according to data published by Polish border guard)
<b>Ukrainian population in Poland in March 2023</b>	approx. 2.3 milion
<b>Ukrainian refugees in Poland on 28 February 2023</b>	1,563,386 (according to data on <a href="https://data.unhcr.org/en/situations/ukraine">https://data.unhcr.org/en/situations/ukraine</a> )

## 2. EU Temporary protection framework

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (hereinafter: „Temporary Protection Directive”)
- 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 Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (hereinafter: „ Council Implementing Decision”)

Not to be confused with international protection (refugee status and subsidiary protection) – governed e.g. by:

- Directive 2011/95/EU of 13 December 2011 on standards for the qualification (...)
- Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing (...)
- Directive 2013/33/EU of 26 June 2013 laying down standards for the reception (...)
- Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application (...) (Dublin 3 regulation)

## 2. EU Temporary protection framework - scope of beneficiaries

### **Main scope – article 2 of the Council Implementing Decision**

1. This Decision applies to the following categories of persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date:

- (a) Ukrainian nationals residing in Ukraine before 24 February 2022;
- (b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,
- (c) family members of the persons referred to in points (a) and (b).

### **Extended scope – article 7 of the Council Implementing Decision**

1. Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin. They shall notify the Council and the Commission immediately.



#TRALIM3



## 2. EU Temporary protection framework – direct effect?

### Temporary Protection Directive

#### Article 5

1. The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority (...).

(...)

3. The Council Decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States, in accordance with the provisions of this Directive.

#### CHAPTER III Obligations of the Member States towards persons enjoying temporary protection

Article 8 Sec. 1. The Member States shall adopt the necessary measures to provide persons enjoying temporary protection with (...)

Article 9 The Member States shall provide persons enjoying temporary protection with (...)

Article 12 The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to (...)



#TRALIM3

### 3. Polish legal instruments of temporary protection

1. Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (hereinafter „**Temporary Protection Act**”) – narrow scope
2. Act of 12 March 2022 on Assistance to Citizens of Ukraine in Connection with Armed Conflict in this Country’s Territory (in force retroactively as of 24 February 2022; hereinafter „**Ukrainian special bill**”) – broad scope

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

#### **1. Temporary Protection Act (of 13 June 2003) – same scope as Council Implementing Decision**

##### Article 107

1. Temporary protection shall be granted on the basis and within the limits specified in the decision of the Council of the European Union, for the period specified each time in this decision.

2. The Council of Ministers, by way of a regulation, may grant temporary protection to foreigners not covered by the decision of the Council of the European Union, forced to leave the country or geographical area to which this decision applies due to the occurrence of the events referred to in Art. 106 sec. 1. *[Tomasz- no such regulation has been adopted]*

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

## 2. Ukrainian special bill (of 12 March 2022) – eligibility conditions

### Article 1

1. This Act lays down specific rules for legalizing the stay of **(1)** Ukrainian citizens who **(2)** came to the territory of the Republic of Poland **(3)** from the territory of Ukraine **(4)** in connection with hostilities conducted in the territory of that state, and (...)

2. Whenever the Act refers to a Ukrainian citizen, it also means **(1b)** a spouse of a citizen of Ukraine who does not have Ukrainian citizenship, provided that he/she came to the territory of the Republic of Poland from the territory of Ukraine in connection with hostilities conducted in the territory of that state and is not a Polish citizen or a citizen of a Member State of the European Union other than the Republic of Poland.

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

## 2. Ukrainian special bill – eligibility conditions

### Article 2

1. If a citizen of Ukraine referred to in Art. 1 sec. 1, **(5)** arrived legally on the territory of the Republic of Poland **(6)** in the period from February 24, 2022, to the date specified in (...) and **(7)** declares his intention to stay on the territory of the Republic of Poland, his stay on this territory is considered legal for the period of 18 months from February 24, 2022 [so, until 23 August 2023]. **(1-7c)** Stay of a child born in the territory of the Republic of Poland from a mother, who is a person specified in the first sentence, during the period concerning the mother is also considered legal.

2. If a Ukrainian citizen **(8d)** holding a Pole's Card, **(1-4)** referred to in Art. 1 sec. 1, **(9d)** left Ukraine in the period from February 24, 2022, and **(6)** then arrived **(5)** legally in the territory of the Republic of Poland until the date specified in (...), and **(7)** declares his intention to stay on the territory of the Republic of Poland, his stay on this territory is considered legal for the period of 18 months from February 24, 2022 [so, until 23 August 2023]. **(1-9e)** To the members of the immediate family of a citizen of Ukraine holding the Pole's Card, referred to in art. 1 sec. 1, the provisions of the Act shall apply accordingly.

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

## 2. Ukrainian special bill – negative eligibility conditions

### Article 2

3. **(10)** The provisions of sec. 1 (...) do not apply to citizens of Ukraine:

1) having:

- a) permanent residence permit,
- b) residence permit for a long-term resident of the European Union,
- c) temporary residence permit,
- d) refugee status,
- e) subsidiary protection,

(...)

2) who:

- a) have submitted applications for international protection in the Republic of Poland or on behalf of whom such applications have been submitted,

(...)



#TRALIM3

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

## 2. Ukrainian special bill – precedence over the Temporary Protection Act



#### Article 2

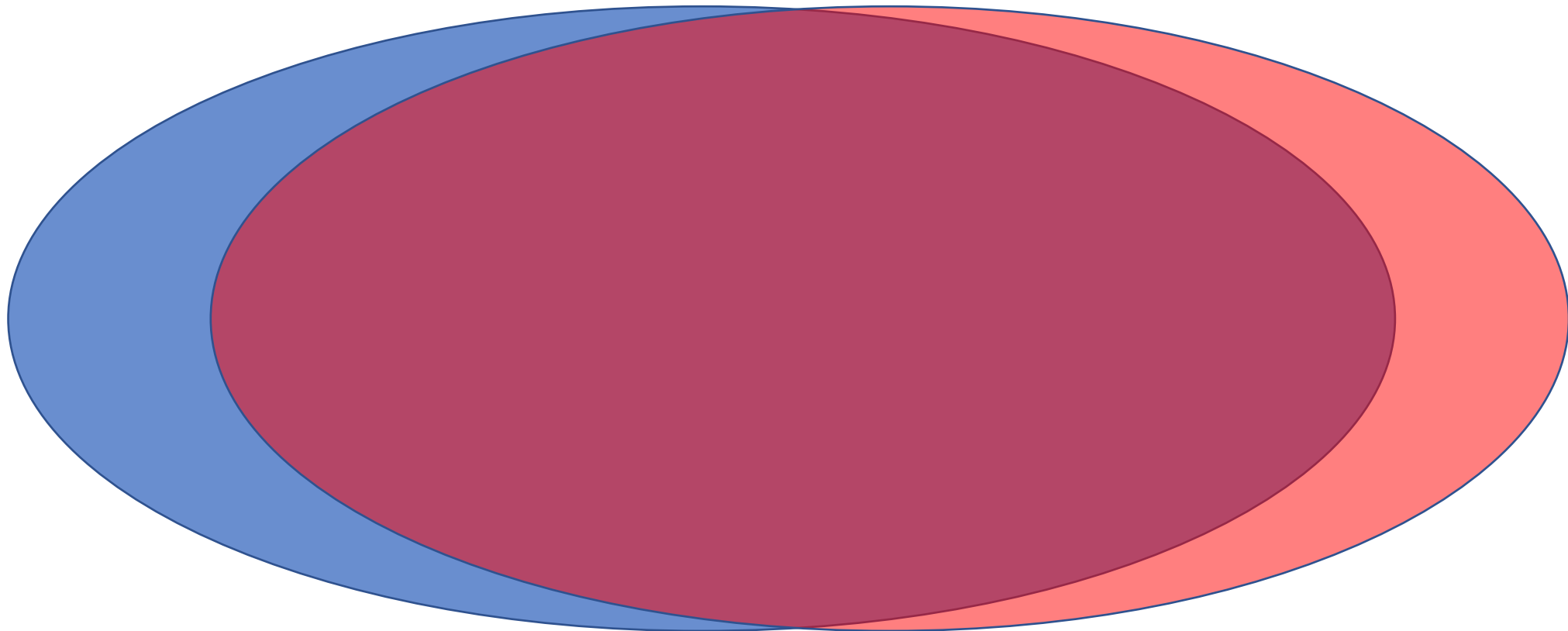
6. A citizen of Ukraine referred to in Sec. 1 shall be deemed to be a person enjoying temporary protection in the Republic of Poland within the meaning of (...) the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.

(...)

8. Temporary protection enjoyed by a citizen of Ukraine referred to in Sec. 1, shall not be governed by the provisions of Chapter 3, Section III of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (...).

### 3. Polish legal instruments of temporary protection - scope of beneficiaries

- Beneficiaries of **Temporary Protection Act**, within main scope of Council Implementing Decision
- Beneficiaries of **Ukrainian Special Bill**, within main scope of Council Implementing Decision
- Beneficiaries of **Ukrainian Special Bill**, outside main scope of Council Implementing Decision





### 3. Polish legal instruments of temporary protection – acquiring beneficiary status

#### **1. Ukrainian special bill**

Article 2 - automatic acquisition of beneficiary status

Article 4 – declaratory registration required within 30 days

1. A citizen of Ukraine whose stay on the territory of the Republic of Poland is considered legal pursuant to Art. 2 Sec. 1, shall be assigned a PESEL number on the basis of an application submitted to any executive body of the municipality in the territory of the Republic of Poland (...).

(...)

2. A Ukrainian citizen shall submit the application referred to in Sec. 1 in person at the seat of the executive body of the commune within 30 days [originally – 60 days, then 90 days] from the date of arrival on the territory of the Republic of Poland.

### 3. Polish legal instruments of temporary protection – acquiring beneficiary status

## 2. Temporary Protection Act

Article 110 - automatic acquisition of beneficiary status; declaratory certificate available

5. Upon request, the Head of the Office shall issue a person enjoying temporary protection with a certificate confirming the use of temporary protection.

6. The certificate referred to in Sec. 5 is valid until the expiry of the period for which temporary protection is granted in accordance with the decision of the Council of the European Union (...). In the case of extending this period on the basis of the provisions of European Union law, the period of validity of the certificate shall be extended by law.

#### 4. Rights under temporary protection

##### **Temporary Protection Directive**

- 1) Right to enter / right to receive entry visa, if necessary (Article 8 Sec. 3)
- 2) Right of residence (Article 8 Sec. 1)
- 3) Access to the labour market (Article 12)
- 4) Social rights
  - Accommodation (Article 13 Sec. 1)
  - Social welfare assistance (Article 13 Sec. 2)
  - Medical care (Article 13 Sec. 2)
  - Assistance to persons with special needs (e.g. unaccompanied minors, victims of violence; Article 13 Sec. 4)
  - Access to education for children (Article 14)



#### 4. Rights under temporary protection – Polish legal instruments

##### 1) Right to enter / right to receive entry visa under **Ukrainian Special Bill / Temporary Protection Act**

###### 1. Possibility to apply for visa for the purposes of temporary protection

– extremely rare in practice

###### 2. Visa-free entry for Ukrainian nationals holding biometric passports (Article 6 Sec. 1 of Regulation (EU) 2016/399 of 9 March 2016 [Schengen Borders Code], and Regulation (EU) 2018/1806 of 14 November 2018 [listing visa-exempt countries])

– common in practice

###### 3. Exceptional entry on humanitarian grounds (Article 6 Sec. 5(c) of Schengen Borders Code and Polish implementing provisions)

– extremely common in practice in the first days after invasion; afterwards rare in practice

##### Article 6 Sec. 5(c) of Schengen Borders Code

(...) third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds (...).

##### Article 32 of Polish Act on Foreigners

1. In the case referred to in Art. 6 sec. 5 lit. c of the Schengen Borders Code, the commanding officer of the Border Guard post (...) may allow a foreigner to enter the territory of the Republic of Poland for a period of stay not longer than 15 days.

#### 4. Rights under temporary protection – Polish legal instruments

##### 1) Right to enter / right to receive entry visa

##### **Ukrainian Special Bill**

Art. 10 - Possibility to obtain an electronic document (so-called diia.pl) which entitles the holder to cross the border multiple times without the need to obtain a visa. Obtained at the same time as registration with municipal office.

##### **Temporary Protection Act**

Art. 110

(...)

7. The certificate referred to in Sec. 5, is the only proof of the use of temporary protection in the Republic of Poland (...) and during the period of its validity, it certifies the holder's right to stay on the territory of the Republic of Poland and entitles him, together with the travel document, to cross the border multiple times without the need to obtain a visa.

#### 4. Rights under temporary protection – Polish legal instruments

##### 2) Right to residence



### **Ukrainian Special Bill**

#### Article 2

1. If a citizen of Ukraine referred to in Art. 1 sec. 1, arrived legally on the territory of the Republic of Poland in the period from February 24, 2022, to the date specified in (...) and declares his intention to stay on the territory of the Republic of Poland, his stay on this territory is considered legal for the period of 18 months from February 24, 2022 [so, until 23 August 2023].

### **Temporary Protection Act**

#### Article 110 (...)

7. The certificate referred to in par. 5, is the only proof of the use of temporary protection in the Republic of Poland (...) and during the period of its validity, it certifies the holder's right to stay on the territory of the Republic of Poland and entitles him, together with the travel document, to cross the border multiple times without the need to obtain a visa.

#### 4. Rights under temporary protection – Polish legal instruments

##### 3) Access to the labour market

##### **Ukrainian Special Bill**

###### Article 22

- Full access to labour market
- Employer must submit online notification to local employment office within 14 days from starting work
- Issues – employment with non-Polish employer

###### Article 23

- Full right to undertake business activity (subject to registration on same terms as Polish citizens)
- Ukrainian national must complete declaratory registration under Special Bill first



#TRALIM3

#### 4. Rights under temporary protection – Polish legal instruments

##### 3) Access to the labour market

##### **Temporary Protection Act**

##### Article 116

- Full access to labour market (no notification required)
- Full right to undertake business activity (subject to registration on same terms as Polish citizens)





#### 4. Rights under temporary protection – Polish legal instruments

##### 4) Social rights under **Ukrainian Special Bill**

###### Article 12

- Free of charge accommodation, food, and basic amenities for the first 120 days after entry, and at reduced charge afterwards (exceptions apply – e.g. pregnant women, minors) – no legal entitlement

###### Article 26, Article 29, Article 33, Article 53

- Legal entitlement to social benefits (e.g. child birth benefit, child benefit, social aid, unemployment benefit)

###### Article 31

– Legal entitlement to one-off benefit of PLN 300 (approx. EUR 60 )

###### Article 37

- Legal entitlement to public health care (with exceptions e.g. sanatorium treatment)

Free of charge education for children aged 6 to 18 (compulsory)

Other – free public transport, free legal aid, free psychological aid may be provided

## 4. Rights under temporary protection – Polish legal instruments

### 4) Social rights under **Temporary Protection Act**

Article 112 – assistance provided at foreign national's request by head of office for foreigners

- medical care, accommodation and meals as far as funds are available, for a period of not less than 2 months, but not longer than for the period of validity of temporary protection
- financial assistance for the purchase of cleaning and personal hygiene products
- assistance in learning Polish language
- teaching aids for children
- financing travel by public transport for the purpose of treatment or vaccination, or in other particularly justified cases.

Free of charge education for children aged 6 to 18 (compulsory)

## 5. Challenges - relocating within the EU

### I. Travelling between EU Member States

#### 1) before issuance of a document confirming temporary protection

- As regards Ukrainian nationals holding biometric passports
  - visa-free movement of 90 days within a rolling 180-day period (article 6 Sec. 1 of Regulation (EU) 2016/399 of 9 March 2016 [Schengen Borders Code], and Regulation (EU) 2018/1806 of 14 November 2018 [listing visa-exempt countries]))
- As regards persons not authorized to visa-free movement:
  - Article 8(3) of Temporary Protection Directive - Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas.

## 5. Challenges - relocating within the EU

### I. Travelling between EU Member States

#### 1) before issuance of a document confirming temporary protection

- As regards persons not authorized to visa-free movement:
  - Article 11 of Temporary Protection Directive - A Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5. Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.
  - Recital 15 of Council Implementing Decision - It is noted that Member States have agreed in a statement that they will not apply Article 11 of Directive 2001/55/EC
  - is this legal travel?

## 5. Challenges - relocating within the EU

### I. Travelling between EU Member States

2) after issuance of a document confirming temporary protection

- Convention implementing the Schengen Agreement of 14 June 1985) – art. 21(1)

Aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Member States (...).



## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation

- Article 11 of Temporary Protection Directive - A Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5. Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.

- Recital 15 of Council Implementing Decision - It is noted that Member States have agreed in a statement that they will not apply Article 11 of Directive 2001/55/EC

#### Article 26 of Temporary Protection Directive

1. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.

2. A Member State shall communicate (...)

3. A Member State shall, at the request of another Member State, provide information (...)

4. Where a transfer is made from one Member State to another, the residence permit in the Member State of departure shall expire and the obligations towards the persons concerned relating to temporary protection in the Member State of departure shall come to an end. The new host Member State shall grant temporary protection to the persons concerned.

## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation



#### Frequently asked questions received on the interpretation of the Temporary Protection Directive and Council Implementing Decision 2022/382 – published by the European Commission

As mentioned in the operational guidelines issued by the Commission on 21 March 2022, a person covered by Council Implementing Decision (EU) 2022/382 has the right to choose the Member State in which they want to enjoy the rights attached to temporary protection as Member States decided to waive the use of Article 11 of the TPD.

A Member State has an obligation to provide for the rights in the TPD for as long as the person falls under the scope, regardless of whether the person was previously registered in another Member State; in fact **a Member State cannot refuse the registration of a person falling under the scope**, thus possibly limiting the access to rights to the person in the MS concerned, **on the grounds that the person is registered in another MS.**

## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation – Polish perspective



**Note published by an NGO The Halina Nieć Legal Aid Center, (HNLAC) in December 2022 – re: Ukrainian Special Bill**

In November 2022 Ministry of Internal Affairs and Administration issued internal guidelines intended for administrative offices responsible for PESEL UKR registration. According to the guidelines the special law should apply to those who can demonstrate a “functional relationship” between arriving to Poland and fleeing Ukraine and therefore those that resided in other state should not benefit from the said law.



## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation – Polish perspective

#### Statement of the Polish Office for Foreigners regarding applicability of Ukrainian Special Bill (dated December 2022)

(...) in the conditions of mass influx (...) the legislator relied on the assumption that the inclusion of the provisions of a special act should be conditioned at least in that the very arrival on the territory of the Republic of Poland (even through territories of other countries) remains in a certain functional relationship with leaving the territory of Ukraine.

(...)

In these circumstances, it seems that the facts of the case involving elements in the form of voluntary residence by a Ukrainian citizen in the territories of other European Union Member States, based on the legal provisions in force in those countries, aimed at implementing the institution of temporary protection (temporary protection), will be outside the scope of Art. 1 sec. 1 of the special act interpreted in the manner specified above (thus taking into account the existence of a certain functional relationship between leaving the territory of Ukraine and arriving on the territory of the Republic of Poland). In such cases, it should be assumed that the stay in other countries was not transitive in relation to arrival on the territory of the Republic of Poland.

## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation – Polish perspective

#### Ukrainian Special Bill – amendment of Article 2(3) governing negative eligibility conditions, in force since 28 January 2023

##### Article 2

1. If a citizen of Ukraine (...) arrived legally on the territory of the Republic of Poland (...), his stay on this territory is considered legal (...).

(...)

3. The provisions of sec. 1 (...) do not apply to citizens of Ukraine:

1) having (...)

2) who (...)

3) who benefit from temporary protection on the territory of a Member State of the European Union other than the Republic of Poland granted due to military operations conducted in the territory of Ukraine.



#TRALIM3

## 5. Challenges - relocating within the EU

### II. Acquiring temporary protection in new EU Member State after relocation – Polish perspective

#### **Decision of the Office for Foreigners of 16 January 2023 denying issuance of certificate confirming use of temporary protection under Temporary Protection Act (case ref. DPU.ZSS.423.2.2022)**

The party requested issuance of the certificate due to the fact that he is a citizen of Ukraine who received temporary protection in Spain.

(...)

First of all, it should be pointed out that a foreigner cannot receive temporary protection in Poland, because according to the information held by the Head of the Office and provided in the course of exchanging information on temporary protection with other Member States, he still has it in Spain.

(...)

Due to the above, temporary protection granted in Spain is valid in Spain. In the opinion of the Head of the Office, a Ukrainian citizen who wants to take advantage of temporary protection in Poland, and thus also from the rights resulting from the above status, should at least inform the Spanish authorities that he no longer wants to use temporary protection in Spain and the support offered to beneficiaries of temporary protection in Spain.

## 5. Challenges - extending legal status past expiry of temporary protection

### I. EU Temporary protection framework – duration of protection

#### Temporary Protection Directive

##### Article 4

1. Without prejudice to Article 6, the duration of temporary protection **(1) shall be one year**. Unless terminated under the terms of Article 6(1)(b), **(2) it may be extended automatically by six monthly periods for a maximum of one year**. [EC operational guidelines – „2 six-monthly”, not „six 1-monthly”]
2. Where reasons for temporary protection persist, **(3) the Council may decide** by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, **to extend that temporary protection by up to one year**.

##### Article 6

1. **(re: 2, 3)** Temporary protection shall come to an end:
  - (a) when the maximum duration has been reached; or
  - (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

## 5. Challenges - extending legal status past expiry of temporary protection

### I. EU Temporary protection framework – duration of protection



<https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/>

This mechanism was initially granted for one year has and has already been extended **until 4 March 2024**. Depending on how the situation in Ukraine evolves it can be extended for another year, until March 2025.

## 5. Challenges - extending legal status past expiry of temporary protection

## II. Polish legal instruments of temporary protection – duration of protection, options for extension



### **Temporary Protection Act – same duration as Council Implementing Decision**

#### Article 107

1. Temporary protection shall be granted on the basis and within the limits specified in the decision of the Council of the European Union, for the period specified each time in this decision.

(...)

5. Upon request, the Head of the Office shall issue a person enjoying temporary protection with a certificate confirming the use of temporary protection.

6. The certificate referred to in Sec. 5 is valid until the expiry of the period for which temporary protection is granted in accordance with the decision of the Council of the European Union (...). In the case of extending this period on the basis of the provisions of European Union law, the period of validity of the certificate shall be extended by law.

## 5. Challenges - extending legal status past expiry of temporary protection

### II. Polish legal instruments of temporary protection – duration of protection, options for extension



#### **Temporary Protection Act** – extension options available:

##### (A) During temporary protection:

- applying for international protection (refugee status, subsidiary protection)
- applying for national visa at a Polish consulate

**No possibility** to apply for temporary residence permit

##### (B) After expiry of temporary protection:

- all of the above,
- remaining in Poland under visa-free movement of 90 days within a rolling 180-day period (article 6 Sec. 1 of Regulation (EU) 2016/399 of 9 March 2016 [Schengen Borders Code], and Regulation (EU) 2018/1806 of 14 November 2018 [listing visa-exempt countries])) + applying for temporary residence permit

## 5. Challenges – extending legal status past expiry of temporary protection

### II. Polish legal instruments of temporary protection – duration of protection, options for extension



#### **Ukrainian special bill** – duration of protection

##### Article 2

1. If a citizen of Ukraine referred to in Art. 1 sec. 1, arrived legally on the territory of the Republic of Poland in the period from February 24, 2022, to the date specified in (...) and declares his intention to stay on the territory of the Republic of Poland, his stay on this territory is considered legal for the period of 18 months from February 24, 2022 [so, until 23 August 2023].



## 5. Challenges – extending legal status past expiry of temporary protection

### II. Polish legal instruments of temporary protection – duration of protection, options for extension



#### **Ukrainian special bill** – options for extension past 23 August 2023:

##### (A) During current period of temporary protection under Special Bill (by 23 August 2023)

- applying for international protection (refugee status, subsidiary protection)
- applying for national visa at a Polish consulate
- Article 42 Sec. 13 – from 1 April 2023 – applying for following types of temporary residence permit:
  - Single Permit for the purpose of work (Directive 2011/98/EU of 13 December 2011)
  - EU Blue Card for the purpose of highly qualified work (Council Directive 2009/50/EC of 25 May 2009)
  - Temporary Residence permit for the purposes of running own business activity

**No possibility** to apply for other temporary residence permit types (e.g. for purpose of studies, for purpose of stay with family)!

## 5. Challenges - extending legal status past expiry of temporary protection

### II. Polish legal instruments of temporary protection – duration of protection, options for extension



#### **2. Ukrainian special bill** – options for extension past 23 August 2023

##### (B) After current period of temporary protection under Special Bill (after 23 August 2023)

- „switching over” to temporary protection under the Temporary Protection Act?
- remaining in Poland under visa-free movement of 90 days within a rolling 180-day period (article 6 Sec. 1 of Regulation (EU) 2016/399 of 9 March 2016 [Schengen Borders Code], and Regulation (EU) 2018/1806 of 14 November 2018 [listing visa-exempt countries])) + applying for temporary residence permit?
- Another extension option yet to be adopted into law?

## 5. Other challenges

1. Opting out of temporary protection regime
2. Missing rules regarding voluntary return

**Thank you for your attention!**



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### Further resources:

- Note published by an NGO The Halina Nieć Legal Aid Center, (HNLAC) in December 2022 (slide 29): <https://www.pomocprawna.org/en/refugees-from-ukraine-access-to-temporary-protection-in-poland-after-moving-from-another-ms>
- Overview of Polish temporary protection framework provided by Polish government: <https://whoiswho.euaa.europa.eu/temporary-protection>
- EU Commission's website on Temporary protection, with links to further information, e.g. Operational guidelines for the implementation of Council implementing Decision 2022/382, and Frequently Asked Questions document on the interpretation of the Temporary Protection Directive: [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en)



# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 3)

**Stella Afxentiou**

**Legal framework on asylum and immigration in  
Cyprus**

**Dublin, 9 March 2023**



Co-funded the European Union

# Cyprus

- Division by the Green Line: entry point of most newly-arrived asylum seekers
- Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol 10 to the Act of Accession (or 'Green Line Regulation')
- In the northern part (non-recognised state) EU law is not applied and there are **no** asylum procedures



# MAIN LEGAL INSTRUMENTS RELATING TO ASYLUM LAW

Refugees Law (6(I)/2000), as amended  
(transposes 3 Directives of CEAS)

Law on the Establishment and Operation of  
International Protection Administrative Court  
2018 (73(I)/2018), as amended [IPAC Law]

Procedural Regulations on the Operation of the  
International Protection Administrative Court  
2019 (3/2019), as amended

Legal Aid Law 2002 (165(I)/2002), as amended



# LEGAL BASIS FOR THE GRANTING OF INTERNATIONAL PROTECTION

## Article 3 of the Refugees Law (REFUGEE STATUS)

*“(1) A person is recognised as a refugee where, owing to a well-founded fear of being persecuted **for reasons of race, religion, nationality or membership of a particular social group or political opinion**, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is not willing to return to it, and to whom section 5 does not apply.*”

## Article 19 of the Refugees Law (SUBSIDIARY PROTECTION STATUS)

*(1) The Head, by way of a decision, recognises the status of subsidiary protection to any applicant **who is not recognised as a refugee** or to any applicant whose application is clearly **not based on any of the grounds of section 3(1)**, but in respect of whom there are substantial reasons to believe that if the person concerned returns to his country of nationality, he will face a real risk of being subjected to **serious harm**, and is unable, or, owing to such risk, is unwilling to avail himself of the protection of that country.”*

# Submitting an asylum application

## Article 11 of the Refugees Law

- At the Aliens and Immigration Unit (AIU) of the Police or at Pournara First Reception Centre for newly-arrived asylum seekers
- Registered within 3 days
- 6 days if the authority receiving the application is not competent to register
- 10 days if there is a large number of simultaneous requests

## Article 7 of the Refugees Law

- Asylum seekers entering irregularly are not subject to punishment solely due to that reason, as long as they present themselves to authorities in good time
- In practice, there have been instances of asylum seekers being arrested for illegal entry and residence immediately upon arrival and before having the chance to formally submit their application.

# REGULAR ASYLUM PROCEDURE

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- Articles 26 and 27 of the Refugees Law → Asylum Service (AS)
- Under the Ministry of Interior
- Article 13 regulates the asylum procedure, the interviewing of applicants and sets out the principles of examining applications.
- AS may recognise refugee status, subsidiary protection status or reject the application.
- 2020 amendment to the law:
  - AS now has the competency to issue a **single** negative and returns decision (7-days voluntary return option).
  - Automatically suspended until time limit for appealing it passes or in the case of appeal, until the Court judgment.

# ACCELERATED PROCEDURE

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- Asylum Service
- Article 12D of the Refugees Law → can examine under this procedure if one of the reasons foreseen in Articles 12A, 12B, 12Bbis, 12Bthird, 12Bfourth, 12Bfifth, exist. Inter alia:
  - Safe country of origin
  - Safe third country
  - Inadmissible application
  - Criteria set out in para. 4 of Article 12D which refer to misleading authorities, presenting false information, acting in bad faith and others.
- Para. 2 of Article 12D → interview can be conducted but Article 13A provides for possibility to omit interview if certain conditions are met and this does not preclude the AS from issuing a decision.

# INTERNATIONAL PROTECTION ADMINISTRATIVE COURT

- Refugee Reviewing Authority abolished.
- Law 73(I)/2018 created the IPAC.
- Article 11 (3)
  - Points of law and fact
  - Full and ex nunc examination (from the present onwards and not at the time of the issuing of the administrative decision)
  - Ratification, annulment or modification of decision under appeal (IP needs examined)
- In order to comply with Article 46(3) of Directive 2013/32/EU and relevant CJEU case-law (e.g. CJEU, Grand Chamber C 585/16, **Alheto**, 25 July 2018)

# Elements of a full examination

- New evidence which has come to light after the adoption of the decision under appeal can be taken into account.
- No need to refer the case back to the determining authority.
- Examine both the evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision.
- Interview the applicant, if necessary (Rules 8 and 11 of Procedural Regulations, Article 11(3) and 11(5) of IPAC Law).

# Free Legal aid

- No free legal aid provision for administrative stage.
- Article 6B of Legal Aid Law (165(I)/2002): *'Legal aid to applicants and beneficiaries of international protection'*
- Para. 2: Applicants whose asylum application was rejected either under the regular or the accelerated procedure are granted legal aid under the following conditions:
- (aa) The free legal aid can only be granted for the first instance judicial process, so there is no legal aid for a second instance appeal before the Supreme Court
- (bb) The IPAC examines, in the frame of a legal aid application of the Applicant, whether the appeal would have 'real chances of success' and either grants it or rejects the application.
- If rejected, the Applicant can still pursue his/her appeal, without any prejudice to its outcome.

# Time limits for appealing before IPAC

- Article 146(3) of the Cypriot Constitution: general time limit for appealing administrative decisions is 75 days
- In 2020, constitutional amendment added *“unless a law explicitly foresees a different deadline for exercising an appeal against a decision or omission.”*
- Article 12A(1) of IPAC Law: 30 days time limit for all decisions of the Asylum Service
- Para. 2: 15 days for certain decisions, inter alia: decision after accelerated procedure, inadmissible application, Dublin Regulation transfer decision, detention order.



# Newly-amended Procedural Regulations

Most notable change:

- Rule 3(e): Simplified (or “fast-track”) procedure in cases where the decision challenged is issued by virtue of the following articles of the Refugees Law (L. 6(I)/2000):
  - **12Bfourth(2)(d)** – concerning subsequent applications that were rejected as inadmissible, because the applicant has not provided/presented new evidence or findings.
  - **12Bthird** – safe country of origin
- Rule 10: simplified procedure for the submission of new documents and/or elements and straight-forward procedure for COI submission.
- Rule 4: Court can examine whether the Applicant has conformed with previous IPAC order regarding payment of court fees; Applicant must submit proof of payment in the case of submission of further appeals and if not, the (further) appeal could be rejected

# IPAC case-law where IP status was granted

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## PALESTINIANS

- 1118/12, **A.B. v. Cyprus Republic, through the Asylum Service**, 5 June 2020
- 1037/20, **M.S.M.S v. Cyprus Republic, through the Asylum Service**, 2 March 2022
- 6034/21 **A.M. v. Cyprus Republic, through the Head of the Asylum Service**, 30 September 2022
- DDP 148/19, **H.T. and L.T. v. Cyprus Republic, through the Refugee Reviewing Authority**, 8 June 2022

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- 1157/17, **F.J. v. Cyprus Republic, through the Asylum Service**, 30 September 2021 (Somalia)
  - 40/20, **A.B.J. v. Cyprus Republic, through the Asylum Service**, 6 December 2021 (Syria)
  - 220/17, **A.H. v. Cyprus Republic, through the Asylum Service**, 31 August 2022 (Somalia)
  - 959/20 **B.S. v. Cyprus Republic, through the Ministry of Interior, Asylum Service**, 9 January 2023 (Iran)

## SUBSIDIARY PROTECTION

- 418/20, **D.M. v. Cyprus Republic, through the Asylum Service**, 30 August 2021

# MINORS

## **Article 9KE of Refugees Law**

“(1) The Social Welfare Services have competence and responsibility for minor applicants.

(2) The best interests of the child are a primary consideration for the Social Welfare Services when implementing the provisions of this Law regarding minors. The Social Welfare Services ensure a standard of living adequate for the minor’s physical, mental, moral and social development.”

# UNACCOMPANIED MINORS

- Article 10 Refugees Law regulates all related matters and procedures
- **Para 1G about age assessment:**

*(a) The Asylum Service may use medical examinations to determine the age of an unaccompanied minor within the framework of the examination of the application where, **following general statements or other relevant indications**, there are doubts concerning the applicant's age. If, following the performance of a medical examination, there are still doubts concerning the age of the applicant, then the applicant shall be assumed a minor.*

*(b) Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result."*

## IPAC caselaw

601/16, **Y.D.M.O. v. Cyprus Republic, through the Asylum Service**, 31 December 2021

698/19 **S.A. v. Cyprus Republic, through the Asylum Service**, 7 July 2020

124/18, **S.M., unaccompanied minor, via the Commissioner for Children's Rights**, 25 August 2021 – not annulled

# DETENTION OF APPLICANTS

## Article 9F of Refugees Law

Unless it is possible in any given case to effectively apply **other less restrictive alternative measures**, and provided that it is deemed **necessary** and following **an individual assessment** of each case, the Minister may issue an order **in writing** to detain an applicant for any of the **following** reasons **only**:

- (a) In order to verify the identity or nationality;
- (b) in order to determine those elements on which the application for international protection is based, which would otherwise be impossible to obtain, especially where there is a risk of the applicant absconding;
- (c) in order to decide, in the context of the procedure, the applicant's right to enter the territory;
- (d) when the applicant is detained in the context of a return procedure pursuant to sections 18PC to 18QI of the Aliens and Immigration Law, in order to prepare the return and/or carry out the removal process, and the Minister substantiates on the basis of objective criteria, including that the person already had the opportunity to access the asylum procedure, that there are reasonable grounds to consider that the person is making an application for international protection merely in order to delay or to frustrate the enforcement of the return decision;
- (e) when the protection of national security or public order so requires;
- (f) pursuant to section 28 of Regulation 604/2013.

# Challenging a detention order before the IPAC

- 15 days time limit
- Para. 6(b) of Article 9F: The first instance judicial proceedings as per paragraph (a) are concluded as soon as possible and the judicial decision is given, unless there are grounds of force majeure, within four (4) weeks from the registration of the recourse. In order to meet the above time limit and notwithstanding any Rules of Procedure, the court trying the case may give relevant directions for an accelerated exchange of pleadings and subsequent oral submissions and/or it may hear the litigants orally instead of written submissions.
- Free legal aid (no chances of success requirement) (Article 6b(7) of Legal Aid Law)

# MAIN LEGAL INSTRUMENTS RELATING TO IMMIGRATION LAW

Aliens and Immigration Law (Cap. 105), as amended

Law on the Establishment and Operation of the Administrative Court 2015 (131(I)/2015)

General Administrative Law Principles Law 1998 (158(I)/1999)

Civil Registry Law 2002 (141(I)/2002)



# IMMIGRATION LAW

- Cap. 105 regulates a very big spectrum of issues relating to third-country nationals (TCN):
  - Employment of TCN (Articles 18PA – 18Σ)
  - Long-term residents (Articles 18D – 18KH)
  - Family reunification (Articles 18KΘ – 18 ΛΗ)
  - Seasonal workers (Articles 18ΦΘ – 18ΩΑ)
  - Intra-corporate transfer of skilled workers (Articles 18ΩΒ – 18bisIE)
  - Sets out a number of relevant offences (e.g. illegal employment of TCN (Article 18PB))
- Civil Registry and Migration Department

# Illegally-residing TCN

- Article 6 – **Prohibited migrants**
- Article 14 – **Deportation orders**
- Articles 18OΔ – 18ΠΘ apply to illegally residing TCN and regulate the procedures of removal and detention.
- Article 18OZ – **Non refoulement, best interests of the child, family life and health situation**
- Article 18OH – **Return decisions:** administrative decision whereby the residency of a TCN is declared illegal and he/she is informed of obligation to return (Article 18OΔ)
- Voluntary return period can be foreseen in return decision, set by the Law to be between 7 – 30 days (Article 18OΘ)
- Article 18Π – **Removal:** if no voluntary period has been set or if the TCN has not conformed with it, a deportation order is issued
- Article 18ΠΣΤ – **Detention:** pending deportation and if less coercive measures cannot be effectively applied (risk of absconding or TCN avoiding/ obstructing return or removal procedure)

# Citizenship by naturalisation

- Article 111 of Civil Registry Law (141(I)/2002): any adult alien can submit an application to the Minister of Interior for citizenship via naturalisation. **If** the Minister **is satisfied** that the criteria set out in Table 3 of the Law are met, a certificate of citizenship is granted.
- Table 3:
  - (a) consecutive residency in RoC during the 12 months immediately preceding application
  - (b) total sum of 4 years residency in the RoC in the 7 years preceding the 12 months mentioned above
  - (c) is of good character, and
  - (d) intends to reside in RoC

# ADMINISTRATIVE COURT

- Established in 2015.
- Examines all appeals on the basis of Article 146 of the Constitution against administrative decisions **not** examined by IPAC, therefore immigration law appeals are examined by the Administrative Court.
- Examination of points of law **only**. Relevant time of examination is when the decision under appeal was adopted by determining authority.
- Annulment of decision under appeal (“it disappears” – Article 57 of General Administrative Law Principles Law) and referred back to the deciding authority for re-examination.

# Appeals against deportation orders

- 2021 amendment to Administrative Court Law introduces Article 11A – **Automatic suspension of the applicability of an administrative decision under appeal:**
  - Para. 1: If a detention order, return decision or removal decision issued on the basis of the Aliens and Migration Law, is appealed, its applicability is automatically suspended until the appeal is examined by the Court **if** the Applicant includes in his/her appeal, a claim regarding the violation of the principle of non-refoulement as foreseen in Cypriot and EU law, and/or claim regarding the violation of Articles 2 and/or 3 of the ECHR, and/or Article 8 of the Constitution and/or Article 2 and/or 4 of EU Charter of Fundamental Rights
  - Para. 2: examined under priority and if a detention order is also appealed, must be examined within 30 days.



# Training of lawyers on EU Asylum and Immigration Law 3 (TRALIM 3)

Thanks for listening.



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