



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

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**The EU Charter of fundamental rights provisions in
relation to asylum and immigration**

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STRUCTURE OF THE PRESENTATION

- 1) Preliminary remarks: (a) the right to immigration within the EU legal system; (b) the legal value of the EU Charter; (c) the relationship between the EU Charter and the European Convention of Human Rights.
- 2) EU Charter provisions on immigration and asylum (Articles 18 and 19) and other international sources.
- 3) Wider perspective – Other EU Charter provisions (Articles 1, 4, 7, 24, 41, 47).
- 4) Reports from the EU Commission and the EU Agency for Fundamental Rights.
- 5) Conclusions.

PRELIMINARY REMARKS (I)

- Article 13, paragraph 2, Universal Declaration of Human Rights:

“everyone has the right to leave any country”

- Article 79, paragraph 1, 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”.

PRELIMINARY REMARKS (II)

- Everyone subject to **persecution or serious harm** in his/her own country has **the right to ask for international protection**
- **Article 18 EU Charter** – Right to Asylum
- **Article 19 EU Charter** – Prohibition of collective expulsion and principle of non-refoulement

PRELIMINARY REMARKS (III)

- Article 78 TFEU:

*“the Union shall develop **a common policy on asylum**, subsidiary protection and temporary protection [...] 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**.*

PRELIMINARY REMARKS (IV)

- **Article 6 TEU:**

*“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights [...] which shall have the **same legal value as the Treaties**”*

- **Article 51 EU Charter:**

*“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...] **an to the Member States only when they are implementing Union law [...]**”.*

PRELIMINARY REMARKS (V)

- Article 52, par. 3, EU Charter:

*“[...] this 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 said Convention. [...]”*

Fundamental rights, as guaranteed by the European Convention, constitute part of the Union's law as **general principles**.

ARTICLE 18 EU CHARTER (I)

- Article 18, EU Charter:

*“The right to asylum shall be guaranteed with due respect for the rules of **the Geneva Convention of 28 July 1951** and the **Protocol of 31 January 1967** relating to the status of refugees and in accordance with the **Treaty on European Union** and **the Treaty on the Functioning of the European Union**”.*

ARTICLE 18 EU CHARTER – THE GENEVA CONVENTION(II)

- Milestone of international refugees protection
- **Definition of refugee**, as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

ARTICLE 18 EU CHARTER – THE 1967 PROTOCOL (III)

- The 1951 Convention was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe.
- The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.
- Stronger cooperation with the UNHCR.

ARTICLE 18 EU CHARTER – OTHER EU TREATIES PROVISIONS (IV)

- **Article 67, paragraph 2, TFEU**, the EU shall:
“[...] frame a **common policy** on asylum, immigration and external border control, based on **solidarity** between Member States [...]”
- **Article 77, TFEU**, inter alia:
 - (a) the common policy on visas and other short-stay residence permits;
 - (b) the checks to which persons crossing external borders are subject;
 - (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
 - (d) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

ARTICLE 18 EU CHARTER – OTHER ACTS AND TREATIES (V)

- UN Declaration of Human Rights (1948);
- Convention on the Elimination of All Forms of Racial Discrimination (1965);
- International Covenant on Civil and Political Rights (1966);
- Convention on the Elimination of All Forms of Discrimination against Women (1979);
- UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- Convention on the Rights of the Child (1989);
- Convention on the Rights of Persons with Disabilities (2006).

ARTICLE 19 EU CHARTER – (I)

- Article 19, EU Charter:

*“**Collective expulsions** are prohibited. No one may be removed, expelled or extradited to a State where there is a **serious risk** that he or she would be subjected to the **death penalty, torture or other inhuman or degrading treatment or punishment**”.*

- Prohibition of collective expulsions of aliens (Article 4 of Protocol 4 to the ECHR);
- Principle of non-refoulement.

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (I)

- Article 1 EU Charter – Right to life

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

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (II)

- **Article 4 EU Charter – Prohibition of torture and inhuman or degrading treatment or punishment**

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

This includes rejection at the frontier, interception and indirect refoulement.

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (III)

- **Article 7 EU Charter – Respect for private and family life**

“Everyone has the right to respect for his or her private and family life, home and communication”.

- Family reunification applications

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (IV)

- Article 24 EU Charter – The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may **express their views freely**. Such views shall **be taken into consideration** on matters which concern them in accordance with their **age and maturity**.
2. In all actions relating to children, whether taken by public authorities or private institutions, the **child's best interests** must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a **personal relationship and direct contact with both his or her parents**, unless that is contrary to his or her interests”.

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (V)

- Article 47 EU Charter - Right to an effective remedy and to a fair trial.
 1. 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.
 2. Everyone is entitled to **a fair and public hearing** within a **reasonable time** by **an independent and impartial tribunal previously established by law**.
 3. 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**.

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (VI)

- Article 41 EU Charter - Right to good administration

Every person has the right to have his or her affairs handled **impartially, fairly** and within a **reasonable time** by the **institutions and bodies of the Union**.

This right includes: the **right** of every person **to be heard, before any individual measure** which would affect him or her adversely is **taken**; the right of every person to have **access** to his or her **file**, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the **administration to give reasons for its decisions**.

Every person has the right to have the Community make good any **damage** caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

Every person may **write** to the institutions of the **Union in one of the languages of the Treaties** and must have an answer in the same language.

WIDER PERSPECTIVE - OTHER EU CHARTER PROVISIONS (VII)

- Combining Articles 18, 19, 41 and 47 of the EU Charter...

Key-words:

- Express the reasons, in a reasonable period of time
- Effectively make known their views
- Right to an oral hearing before a court or tribunal - personal interview
- Prompt effective access to their asylum procedures
- The length of asylum procedures
- Stay on the territory of the concerned Member State during the asylum proceedings
- Appeal the outcome of the assessment
- Unreasonable demands on the asylum undermine the effective exercise of these rights

REPORTS ON THE IMPLEMENTATION OF THE EU CHARTER (I)

- **EU Commission Annual Report 2018**

Actions implemented with the support of EU funds should take particular account of the fundamental rights of migrants, refugees and asylum seekers and ensure the full respect of the right to human dignity, the right to asylum, and the rights of those in need of international protection and protection in the event of removal.

REPORTS ON THE IMPLEMENTATION OF THE EU CHARTER (II)

- **EU Commission Annual Report 2018**

Infringement procedure against Bulgaria -> issues related to the accommodation and legal representation of unaccompanied minors, or the identification and support of vulnerable asylum seekers

Infringement against a Hungary -> criminalising any assistance offered by any person on behalf of national, international and non-governmental organizations, to people wishing to apply for asylum or for a residence permit.

REPORTS ON THE IMPLEMENTATION OF THE EU CHARTER (III)

EU Commission Annual Report 2018

National case law quoting the Charter

Finland -> the Supreme Administrative Court -> immigration services cannot require asylum applicants to provide pictures or video recordings of intimate acts in support of their claim of persecution on grounds of sexual orientation, (Article 1 and Article 7).

Czech Republic -> Supreme Administrative Court -> a national provision according to which the refusal to grant a visa cannot be challenged before a Court violates Article 47 of the Charter.

REPORTS ON THE IMPLEMENTATION OF THE EU CHARTER (IV)

- **European Union Agency for Fundamental Rights, Final Bulletin – Asylum and Migration: Progress Achieved and Remaining Challenges - Overview 2015-March 2023**

Measures, as coil-shaped blades or wires giving dangerous electric shocks put the lives of those trying to cross borders at risk and they are not proportionate (Article 2)

Verbal and physical violence, ill treatment, failure to rescue, stripping people of their clothing, stealing their property, forced separation of families and summary expulsion of those seeking asylum (Articles 2 and 4)

REPORTS ON THE IMPLEMENTATION OF THE EU CHARTER (V)

- **European Union Agency for Fundamental Rights, Final Bulletin – Asylum and Migration: Progress Achieved and Remaining Challenges - Overview 2015-March 2023**

Lithuania -> the Court of Justice, on 30 June 2022, clarified that legal provisions banning, during periods of large numbers of arrivals of third-country nationals, asylum applications by individuals, violate EU law. (CJEU, C-72/22)

Italy -> of the 1.379 cases of discrimination reported to the national equality body in 2021, 709 (51 %) were on grounds of racial and ethnic discrimination and 499 of the victims were foreigners

CONCLUSIONS (I)

In 2022, the European Border and Coast Guard Agency (Frontex) detected some 330.000 irregular border crossings at the EU external borders, the highest number since 2016

Between 2014 and the end of February 2023, 26.089 people died or went missing while trying to cross the Mediterranean Sea, on average approximately eight people each day

CONCLUSIONS (II)

“To best address migration challenges, the EU needs long-term planning offering accessible legal pathways, and effective and innovative integration proposals instead of quick fix solutions” (Director of the European Union Agency for Fundamental Rights - Speech on March 2023 - University of Zagreb)

Lawyers play a crucial role in order to ensure respect for human rights. Their knowledge about the guarantees of protection recognised by the EU legal system, as well as their ability to adequately represent these rights before the competent courts and offices can significantly contribute to the development of a better system, where all human beings can fully enjoy their human rights.

I. Structure of the presentation

The topic I have been assigned concerns the provisions of the EU Charter of Fundamental Rights related to immigration and asylum. Dealing with this topic is not an easy task, because it involves many issues on which it is difficult to focus on in a few minutes. Therefore, without pretending to be totally exhaustive, I decided to structure my presentation as follows:

at first, we will start with a few brief preliminary remarks in order to reflect on: (a) the existence of a right to immigration within the EU legal system, (b) the legal value of the EU Charter of Fundamental rights for both the EU and its Member States; (c) and the relationship between the EU Fundamental Charter and the European Convention of Human Rights.

Secondly, we will focus on the specific EU Charter provisions relating to immigration and asylum and on the other international sources to which these provisions refer. In this perspective, we will analyse (a) Articles 18 and 19 of the Charter, (b) the Geneva Convention of 1951, (c) the Protocol of 31 January 1967 relating to the status of refugees, (d) as well as other provisions of the EU Treaties related to this topic.

After that, we will take into account a wider perspective, considering also other EU Charter provisions that represent important sources in order to ensure a full implementation of the rights guaranteed to immigrants, as Articles 1, 4, 7, 24, 41 and 47 of the EU Charter.

Before arriving to the conclusions we will say a few words regarding two reports, the first drawn up by the EU Commission and the second by the European Union Agency for Fundamental Rights, with the aim of understanding – under an institutional perspective – how the Charter has been implemented by the EU and its Member States.

At the end, we will try to draw some conclusions, also taking into account the current situation in the Mediterranean, which impose us a deeper reflection about the effective respect of fundamental rights of migrants.

Maybe, what is often considered an emergency is, instead, a structural phenomenon that challenges our ability to transpose into practice those fundamental rights that our legal system recognises to all human beings.

II. Preliminary remarks

We must start from a crucial point: while, according to Article 13, paragraph 2, of the Universal Declaration of Human Rights, “*everyone has the right to leave any country*”, a parallel right to immigration does not exist, neither in international law nor in the EU Law. Indeed, the Charter does not recognise a right to immigration. Within the Treaty framework, Article 79, paragraph 1, of the Treaty on the Functioning of the European Union (hereinafter TFEU) clarifies that: “*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*”.

According to this provision, the Union has an obligation (*shall*) to orientate its common immigration policy to specific objectives: (a) efficient management of migration flows; (b) fair treatment of third-country nationals residing legally in Member States; (c) prevention of illegal immigration and trafficking in human beings; (d) enhanced measures to combat illegal immigration and trafficking in human beings.

Despite this, in the absence of a right to immigration, everyone subject to persecution or serious harm in his/her own country has the right to ask for international protection. As a consequence, no one shall expel or return a refugee against his/her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom. Such a protection is enshrined in **Articles 18 and 19 of the Charter**, which respectively provide for the right to asylum and the principle of non-refoulement. Before entering into the substance, let me add some considerations.

1. Articles 18 has been based on Article 78 of the TFEU¹. According to paragraph 1 of this provision, *the Union shall develop a common policy on asylum, subsidiary protection and temporary protection [...] 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.*

¹Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) – OJ C 303/17, 14.12.2007, p. 8.

Member States, through this Article, conferred to the Union an obligation to develop a common policy, according to some specific international sources, which are binding upon States parties and, among these, all 27 EU Member States. The term “in accordance with” seems to cover both consistency (as absence of contradictions) and coherence (as positive connections among legal sources).

So, basically, both the Union and its Member States are already obliged to respect the principle of non-refoulement, as well as a core of individual and collective rights. In addition, according to the United Nations High Commissioner for Refugees (hereinafter UNHCR), this principle has acquired a normative character and constitutes a rule of international customary law².

2. This brings us to the second point. Indeed, whilst it is true that Member States are bound by international law, these rights are also included within the EU Charter of Fundamental Rights. But, what is the legal value of the Charter? As known, with the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights became a legally binding instrument. Indeed, according to Article 6 of the Treaty: “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights [...] which shall have the same legal value as the Treaties*”, so the Charter is not simply binding, it is part of EU primary law.

Nevertheless, we can say that the main role of the Charter is to reinforce the interpretation of the EU secondary law, as well as of national law, in light of fundamental rights that the Charter protected. Pursuant to Article 51, the Charter is only applicable in situation governed by EU law. So, Member States have to apply the Charter only in implementing EU legislation³.

However, the Charter sets certain standards of protection and EU legislation or national provisions are invalid whether they breach those standards. This asks national judges, first of all to interpret secondary legislation in a manner that it is compatible with the Charter, or, if it is not possible at all, to stand a preliminary reference to the Court of Justice.

²The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31.01.1994.

³Member States implement EU law when they: give effect to EU legislation by adopting national implementing measures; adopt laws on a matter where EU law imposes concrete obligations or allows for its derogation; implement EU provisions when spending money from EU funding programmes.

3. One last preliminary consideration. There is a connection between the EU Charter and the European Convention of Human Rights. Indeed, Article 52, par. 3, which is designed to ensure consistency between the EU Charter and the European Convention, specifies that the Charter contains rights which correspond to those guaranteed by the Convention and the meaning and the scope of these rights shall be the same as those protected under the Convention, although the Union remains free to accord a more extensive protection⁴. In addition, fundamental rights, as guaranteed by the European Convention, constitute part of the Union's law as general principles⁵.

III. The EU Charter provisions on immigration and asylum (Articles 18-19)

III.a- Article 18 of the EU Charter provides that: *“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”*.

Some points to highlight:

- 1) The Charter expressly recognises the right to asylum (which includes the right to access the asylum determination procedure);
- 2) This provision is applicable to both EU and its Member States;
- 3) It does not specify in which way we have to guarantee this right, but it basically makes a reference to other sources and, specifically: (a) the Geneva Convention of 28 July 1951 (b) the Protocol of 31 January 1967 relating to the status of refugees (c) EU Treaties.

Article 18 is based on Article 78 TFEU, which provides that *“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy*

⁴CJEU, C-44/79, *Liselotte Hauv. Land RheinlandPfalz*, 3 December 1979, E.C.R. 3727.

⁵CJEU, C-29/69, *Erich Stauder v. City of Ulm*, 12 November 1969, E.C.R. 419; CJEU, C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, E.C.R. 1125; CJEU, C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*. E.C.R. 491.

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.”

III.a.i - The Geneva Convention - The Geneva Convention, referred to in Article 18 of the EU Charter – and mentioned also in Article 78 TFUE – constitutes the milestone of international refugee protection. The Convention provides a definition of refugee in the Article 1, letter A, paragraph 2, as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

The Convention represents the most comprehensive codification of refugees rights at international level. It is both a status and rights-based instrument and is underpinned by a number of fundamental principles, such as non-discrimination (Article 3) and non-refoulement (Article 33). Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination⁶.

Moreover, it lays down basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment.

Member States, in implementing Union law must act in compliance with the Charter, but where the scope of national legislation falls outside EU law, they still remain obliged to respect the Geneva Convention of 1951.

III.a.ii - The 1967 Protocol - The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage⁷. In addition, inter alia, it provides for a stronger cooperation with the UNHCR “*or any other agency of the United Nations which may succeed it*”. Specifically, States parties “*shall facilitate its duty of supervising the application of the provisions of the present Protocol*” (Article 2, paragraph 1).

⁶Convention and Protocol Relating to the Status of Refugees, Introductory, Note by the Office of the United Nations High Commissioner for Refugees, p. 3, online: <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees>, consulted on 14.09.2023, 21.50.

⁷Ivi, p. 3.

III.a.iii -EU Treaties - Other relevant treaties - Article 18 mentions also EU Treaties. The main Treaty provisions' in the field of immigration and asylum are:

- **Article 67, paragraph 2, TFEU**, according to which the EU shall:

"[...] frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals."

- **Article 77, TFEU**, that addresses:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

- **Article 79, paragraph 3, TFEU** provides that:

"Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States."

- **Article 80, TFEU**, which states that:

"The policies of the Union set out in this Chapter [Title V, Chapter 2 - Policies On Border Checks, Asylum And Immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member State. [...]"

- **Article 83, TFEU**, inter alia, provides for the establishment at EU level of *"minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis"* including as regards trafficking in human beings and sexual exploitation of women and children.

III.a.iv - As seen, Article 78 TFUE imposes compliance also with other relevant Treaties. This formula includes the 1948 UN Declaration of Human Rights, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, and the 2006 Convention on the Rights of Persons with Disabilities.

Member States are parties of these Conventions and they remain liable under international human rights law, if they fail to safeguard against refoulement. In addition, as signatories of the Vienna Convention on the Law of Treaties, Member States are bound by the rule of *pactasuntservanda* (Article 26), which requires them to abide by all international agreements to which they are party. Furthermore, the EU is obliged not to impede Member States' obligations under international law⁸; on the contrary, the EU strongly promotes respect for international law in the wider word (further highlighted in the enlargement and neighbourhood policy framework, where the EU subordinates the admission procedure or a stronger cooperation to the ratification of certain treaties).

The Geneva Convention does not contain any provisions on procedures. However, under the principle of good faith, State parties to the Convention are required to institute a formal procedure, which allows for a fair and effective procedure in order to determine who is entitled to the guarantees of the Convention. Under international law, States are responsible for examining asylum claims made in their jurisdiction⁹.

III.b – Article 19 of the Charter is related to protection accordance in the event of removal, expulsion or extradition, by providing that: “*Collective expulsions are prohibited. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*”.

This Article codifies within the EU Charter the principle of non-refoulement. The concept of “Collective expulsions” includes any measure compelling persons as a group to leave the country, unless the measures are taken on the basis of a reasonable and objective examination of the case of each individual in the group.

⁸S. VELLUTI, *Reforming the Common European Asylum System – Legislative Development and Judicial Activism of the European Courts*, Springer, Heidelberg New York Dordrecht London, 2014, p. 11.

⁹Ivi, p. 12.

Article 19 requires an individualised assessment of the risk of refoulement and, in this context, each person must have the chance to put forward arguments against his/her expulsion. We must consider that migrants usually require visas to enter the Member States' territory. In absence of an explicit EU protection, most people have to cross the border in an irregular manner in order to be in a position to apply for protection.

According to the explanations relating to the Charter¹⁰, paragraph 1 of Article 19 has the same meaning and scope as Article 4 of Protocol 4 to the ECHR, which provides that collective expulsion of aliens is prohibited. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State (see also Article 13 of the Covenant on Civil and Political Rights). Paragraph 2 incorporates the relevant case law from the European Court of Human Rights regarding Article 3 of the ECHR¹¹.

IV. Wider Perspective - Other EU Charter provisions

IV.a – First provision that must be mentioned is **Article 1 of the Charter**, related to human dignity. According to this Article: *“Human dignity is inviolable. It must be respected and protected”*.

Even though practice has shown as the Court of Justice prefers referring to other Charter provisions', **Article 1** covers an important role, by providing a standard for the implementation of the other Charter provisions', in the sense that no one can be deprived of the protection of the standards provided for by the Charter, even for a temporary period of time.

IV.b -In addition, another relevant provision, often mentioned together with Articles 18 and 19 of the Charter, is **Article 4**. Indeed, this provision enshrines the prohibition of torture and inhuman or degrading treatment or punishment, and it arranges that: *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”*. In this perspective, these articles prohibit Member States from returning an individual to a situation where he/she would be at risk of torture, inhuman or degrading

¹⁰Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) – OJ C 303/17, 14.12.2007, p. 8.

¹¹Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16.09.1963, p. 2.

treatment or punishment. This includes rejection at the frontier, interception and indirect refoulement. There is an obligation on Member States to proactively assess the risk of refoulement, so these Articles must be implemented regardless the individual has expressly applied for asylum.

IV.c—It is not unusual that people who arriving at the EU borders, already have family members in the territory of the country of arrival or of another Member State. In this perspective, a further relevant provision is **Article 7 of the Charter**, which protects the right to respect for family and private life. Indeed, Member States, deciding on family reunification applications, must take into consideration the protection of family life.

IV.d – Additionally, we cannot fail to mention **Article 24 of the Charter**, aimed to protect rights of the child. The second paragraph of this provision enshrines the principle of “child’s best interests”, often taken into account in light of promoting family life.

On the other hand, it is non uncommon the arrival of unaccompanied foreign minors, or persons without IDs, claiming to be minors, in relation to whom it is not possible to determine precisely the age¹². In these cases, Article 24 covers a crucial role in the examination of the minors’ asylum applications. Member States, indeed, are obliged to ensure that unaccompanied minors are granted access to the procedure as soon as possible.

Moreover, according to Article 24 of the Charter, children may express their views freely. Such views shall be taken into consideration on matters concerning them in accordance with their age and maturity. However, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case. The fact that an interview may be harmful to the psychological health of the child should be taken into account¹³

IV.e¹⁴ – Specially in the field of asylum, a crucial role is covered by **Article 47 of the Charter**, related to the right to an effective remedy and to a fair trial. Specifically, Article 47 provides for a protection against any violation of rights under the law of the

¹²The Committee of Ministers of the Council of Europe adopted a new recommendation on age assessment in December 2022. Among a set of nine principles, it includes the principle of presumption of minority for people undergoing age assessment and requires states to implement multidisciplinary and evidence-based age assessment procedures.

¹³CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarragav. Simone Pelz*, 22 December 2010, GU C 63, 26.2.2011, para 64.

¹⁴Information about Articles 41 and 47 of the EU Charter has been sourced from: *The application of the EU Charter of Fundamental Rights to asylum procedural law*, online: <https://ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of-Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf>, consulted on 12.09.2023, 23.00.

Union. This right includes those of a *fair and public hearing within a reasonable time, by an independent and impartial tribunal previously established by law. In addition, everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*

IV.f - Together with Article 47, **Article 41** codifies the general principle of effective judicial protection. **Article 41 of the Charter**, indeed, deals with the right to good administration, that is often highlighted in proceeding related immigrants' right.

The principle of effective legal protection applies to the right to asylum and the prohibition of refoulement. In order for the **right to asylum to be effective**, access to the asylum procedure itself must be effectively protected in EU and national law and in practice¹⁵. But, looking at the Article 41 wording, it is clearly referred only to EU Institutions and, in asylum cases, no direct action is possible. Anyway, this Article, which basically imposes an effective legal protection, reflects a general principle of EU law, so under EU law national authorities remain obliged to guarantee this protection to migrants.

According to the protection afforded by combining Articles 19, 41 and 47 of the Charter, persons intercepted or rescued at the high seas, or persons wishing to enter the territory of a Member State need to be **given an opportunity to express the reasons, in a reasonable period of time**, as to why disembarkation in a third country or why their refusal to enter into the territory would violate the principle of non-refoulement. Persons should be placed in a position in which they may **effectively make known their views**. The interpretation of Article 47 of the Charter is inspired by Article 6 ECHR that provides for a right to a 'fair and public hearing'. According to the standing case law of the ECtHR, the right to a public hearing includes the **right to an oral hearing** before a court or tribunal¹⁶. It is difficult to imagine how this can be possible unless persons are brought to the territory of a Member State to ensure that applicants can effectively make known their position and to allow Member States to carry out a proper assessment. So Member States are under an obligation to ensure that their administrative procedures guarantee prompt effective access to their asylum procedures, as well as their compliance with the right to good

¹⁵CJEU, C-199/11, *Europese Gemeenschap v. Otis NV and Others*, 6 November 2012, E.C.R. 684, para 49 and CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, E.C.R. I-13849, para 60.

¹⁶ECtHR, *Jussila v. Finland*, Appl. no. 73053/01, 23 November 2006, para 40.

administration when adopting any decisions regarding an applicant accessing the asylum procedure.

The length of asylum procedures can have fundamental rights implications when they are overly lengthy or excessively short. Indeed, where asylum procedures take a very long time, leaving the applicant in a state of uncertainty, the right to good administration can be affected. Excessively speedy procedures, on the other hand, may not allow sufficient time for preparation and to seek legal assistance, so they may impede the applicant to substantiate his asylum claim and the authorities to conduct an appropriate examination¹⁷. These issues may impact a person's right to asylum and to an effective remedy, as guaranteed in Articles 18, 19 and 47 of the Charter.

In addition, it is essential that asylum applicants are allowed to **stay on the territory of the concerned Member State** during their asylum proceedings. Indeed, expulsion of an asylum applicant while the court or tribunal have not yet decided on the risk of refoulement may lead to irreparable harm in the country of origin or a third country.

Furthermore, the effective remedy required by Article 47 of the Charter may be rendered inaccessible where **expulsion takes place swiftly** after the rejection of an asylum claim in first instance. Indeed, the protection accorded in these situations by Article 47 of the Charter requires that an applicant is able to **appeal the outcome** of the assessment of the risk of refoulement and the decision to expel, extradite or transfer him/her, before a court or tribunal. In this perspective, Article 47 of the Charter generally requires an oral hearing before the (first instance) court or tribunal assessing the appeal against the rejection of the asylum claim. The **absence of a personal interview** may undermine the effectiveness of the right to asylum and the prohibition of refoulement.

In addition, practices that make **unreasonable demands on the asylum** applicant – as standard of proof too high, authorities' refusal to apply the benefit of the doubt, presumptions that are impossible to rebut – undermine the effective exercise of the rights protected by Article 18 and 19 of the Charter.

V. Reports on the implementation of the EU Charter

¹⁷CJEU, C-69/10, *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, I-07151, para 66.

Since 2010, the European Commission has published an annual report on the application of the Charter in the EU. The EU changed its approach in 2021, deciding to focus every year on a different thematic area¹⁸. However, looking at the last report produced before 2021¹⁹, we can find some interesting information also relating the topic of immigration and asylum. In the 2018 Annual Report²⁰, indeed, the Commission specified that actions implemented with the support of EU funds should take particular account of the fundamental rights of migrants, refugees and asylum seekers and ensure the full respect of the right to human dignity, the right to asylum, and the rights of those in need of international protection and protection in the event of removal. It also took into account some practical cases, as for instance the infringement procedure against Bulgaria that the Commission launched in 2015 because of the incorrect implementation of EU asylum legislation, in relation to different issues as the accommodation and legal representation of unaccompanied minors, or the identification and support of vulnerable asylum seekers²¹. Another example²² is the infringement procedure launched by the Commission against a Hungarian Law criminalising any assistance offered by any person on behalf of national, international and non-governmental organizations to people wishing to apply for asylum or for a residence permit.

Interesting, in this report are also the mentioned national case law quoting the Charter²³. For example, it refers to a case law in Finland²⁴, where the Supreme Administrative Court noted that immigration services cannot require asylum applicants to provide pictures or video recordings of intimate acts in support of their claim of persecution on grounds of sexual orientation, as this would infringe the right to human dignity (Article 1) and the right to private life (Article 7). Moreover, an interesting example is represented by the case of Czech Republic, where the Supreme Administrative Court ruled that a national provision according to which the refusal to grant a visa cannot be challenged before a Court violates Article 47 of the Charter²⁵.

¹⁸The last report of 2022 is focused on the role of civil society and the previous one, of 2021, on the fundamental rights in the digital era.

¹⁹Because of the Covid-19 pandemic, the Commission did not approve any report for the years 2019 and 2020.

²⁰European Commission, 2018 report on the application of the EU Charter of Fundamental Rights, p. 11.

²¹Ivi, p. 13.

²²Ibidem.

²³Ivi, p. 16.

²⁴Finland, Supreme Administrative Court, case 3891/4/17, 13 April 2018.

²⁵Czech Republic, Supreme Administrative Court, case 6 Azs 253/2016 – 49, 4 January 2018.

We cannot fail to mention also the final bulletin produced by the European Union Agency for Fundamental Rights²⁶, which provides an overview from 2015 to March 2023 on progress achieved and remaining challenges on the topic of asylum and migration within the EU. Over the past eight years, the Agency has observed a gradual deterioration in fundamental rights protection at borders. An exception is the treatment of people displaced from Ukraine²⁷.

This report mentions also some extraordinary measures, as coil-shaped blades or wires giving dangerous electric shocks. Such high-security features put the lives of those trying to cross borders irregularly at risk and they are not proportionate when used against people may be forced to cross in the absence of alternative routes to safety²⁸.

Incidents described entail verbal and physical violence, ill treatment, failure to rescue, stripping people of their clothing, stealing their property, forced separation of families and summary expulsion of those seeking asylum. The victims of these violations are sometimes vulnerable people, including unaccompanied children²⁹. In cases involving alleged violations of Article 2 (on the right to life) or Article 4 (on the prohibition of torture or inhuman or degrading treatment or punishment) of the EU Charter, the competent authorities must carry out an effective official investigation. To be effective, an investigation must be prompt, expeditious and capable of leading to the identification and punishment of those responsible.

In addition, this report refers also to certain specific national cases³⁰, for instance the case of Lithuania legislation, in regarding to which the Court of Justice³¹, on 30 June 2022, clarified that legal provisions banning, during periods of large numbers of arrivals of third-country nationals, asylum applications by individuals having entered the country irregularly violate EU law.

It also mentions some statistical data relating proceedings connected to immigrants' rights in certain EU Member States, as the example of Italy, where of the 1.379 cases of discrimination reported to the national equality body in 2021, 709 (51 %) were on

²⁶European Union Agency for Fundamental Rights, Final Bulletin – Asylum and Migration: Progress Achieved and Remaining Challenges - Overview 2015-March 2023, online: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2023-asylum-migration-progress-challenges_en.pdf

²⁷Ivi, p. 9.

²⁸Ivi, pp. 8-9.

²⁹Ivi, p. 10.

³⁰Ivi, p. 17.

³¹CJEU, C-72/22 PPU, *M.A. v. Valstybės sienos apsaugos tarnyba*, 30 June 2022, ECLI:EU:C:2022:505.

grounds of racial and ethnic discrimination and 499 of the victims were foreigners³², or the case of Belgium, where the number of complaints about racial discrimination filed to the national equality body by people of African descent has increased by 20.8 % over the past five years³³.

VI. Conclusions

The current climate has led to an increase of racism and intolerance against ethnic, religious and other minorities across Europe. This affects many fundamental rights under the Charter, including the right to non-discrimination (Article 21), the right to dignity (Article 1), the right to integrity of the person (Article 3) and the right to life (Article 2). Discrimination and hate crime prevent integration. Administrative barriers hinder refugee integration. Obstacles to family reunification impede social inclusion. EU long-term residence status remains underutilised³⁴.

The EU and its Member States must do more. In 2022, the European Border and Coast Guard Agency (Frontex) detected some 330.000 irregular border crossings at the EU external borders, the highest number since 2016³⁵. People continue to die on the way to the EU. Between 2014 and the end of February 2023, 26.089 people died or went missing while trying to cross the Mediterranean Sea, on average approximately eight people each day³⁶. The use of language that focuses on geopolitical considerations and overshadows the humanitarian and human rights aspects of what happens at borders must be discouraged. Safe and legal pathways to seek asylum in Europe would save lives and strongly reduce smugglers activities³⁷.

Serious rights violations at the EU external borders persist and civil society actors working at borders are investigated. The obligation to save lives requires States to deploy the necessary search and rescue capacities and where they cannot do this alone, they should support any legitimate efforts of civil society. In this regard, EU border management standards require that staff have a high degree of specialisation and professionalism, and a

³²European Union Agency for Fundamental Rights, Final Bulletin, cit., p. 30.

³³Ibidem.

³⁴Ivi, p. 5.

³⁵Ivi, p. 8.

³⁶Ivi, p. 9.

³⁷Ivi, p. 5.

diverse skill set. It will be necessary to ensure that all personnel entrusted with border control functions, and particularly those that involve the use of coercive measures, are sufficiently trained on fundamental rights issues³⁸.

As the Director of the European Union Agency for Fundamental Rights suggested during his speech on March 2023 at the University of Zagreb, “To best address migration challenges, the EU needs long-term planning offering accessible legal pathways, and effective and innovative integration proposals instead of quick fix solutions”. In its Action Plan on integration and inclusion 2021–2027³⁹, the European Commission highlighted that integration and inclusion are key for people coming to Europe, for local communities, and for the long-term well-being of European societies and the stability of European economies.

Lawyers play a crucial role in order to ensure respect for human rights. Their knowledge about the guarantees of protection recognised by the EU legal system, as well as their ability to adequately represent these rights before the competent courts and offices can significantly contribute to the development of a better system, where all human beings can fully enjoy their human, civil and social rights.

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

Leonardo Arnau

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

TRALIM 3 Agrigento, 25 September 2023



Co-funded the European Union

TRAINING OF LAWYERS ON EUROPEAN LAW RELATING TO IMMIGRATION AND ASYLUM
SEPTEMBER 25, 2023

**THE COUNCIL OF EUROPE LEGAL SYSTEM REGULATING ASYLUM AND IMMIGRATION:
INSTRUMENTS AND CASE LAW**

Good morning everyone, I would like to thank the President of the Agrigento Bar, Vincenza Gaziano, for the invitation. I am very glad and honoured to be here today for many reasons.

This intervention will shift the focus to asylum and immigration dynamics as conceived by the Council of Europe. I believe it is important to emphasise this feature in order to avoid confusion and overlap with previous interventions and the legal regime on the subject elaborated within the European Union.

For these reasons, it is appropriate to start with some preliminary considerations regarding the peculiarity of the Council of Europe system and the distinction with the European Union context. Indeed, the two systems should not be confused, although they are linked. For instance, the 27 EU Member States are also members of the Council of Europe, which currently has 46 States Parties with the exit of the Russian Federation in March 2022.

Furthermore, as noted before, there is also a link between the ECHR and the Charter of Fundamental Rights of the European Union. Indeed, Article 52(3) of the latter states that “where the Charter contains rights corresponding to those guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those conferred by that Convention”. This article therefore provides for coordination of an interpretative nature, but the fact remains that these are two distinct and separate legal systems.

Having said that, it is worth mentioning the peculiarities of the Council of Europe’s legal asylum and immigration system.

The first feature to be analysed is the lack of an *ad hoc* legal regime. In other words, unlike the European Union, where there are detailed rules in this area, the Council of Europe does not regulate the subject in an organic way. This lack may seem unexpected, however, it should be noted that, at the time of the establishment of the organisation, the main concern was to rebuild a democratic Europe, respecting the fundamental rights of the individual, particularly civil and political rights (also known as “first generation rights”). In this context, the other categories of rights, including social and economic rights (“second generation rights”) or collective rights, of a solidarity character (“third

generation rights”), although not ignored, have been included marginally or incidentally in the various conventional instruments.

However, the lack of precise rules on the treatment of foreigners does not imply the absence of rights and duties for the latter and the member states of the organisation.

My speech will therefore try to identify the legal framework by recognizing the applicable asylum rules in the regional context under consideration.

Firstly, it should be noted that the absence of an ad hoc legal regime implies coordination with the rules of international law.

Basically, it must be emphasised that the State is free to admit foreigners to its territory. It may grant or deny entry, this is a prerogative that falls within the exercise of its sovereign powers. As regards asylum, the State has no obligation to admit the asylum seeker to its territory and, as a matter of principle, it is also free to expel foreigners present.

This state discretion, however, is restricted by certain limits provided for by international law, in particular by agreements/conventional law.

Today, therefore, the freedom to regulate the entry or expulsion of foreigners is no longer absolute as it was in the past, but it must above all take into account the norms concerning human rights.

Let us now see what these limits are in the context of the Council of Europe.

As it is well known, the European Convention for the Protection of Human Rights and Fundamental Freedoms (from now on I will use the term Convention or the acronym “ECHR”) was adopted in the Council in 1950.

It does not specifically address the legal status of (E)aliens, except in a few meagre (Maeggher) provisions. This has not prevented the creation of a body of jurisprudential limits to the sovereign prerogative of contracting states in matters of migration policy. This was done through an evolutionary and theological interpretation of the convention, understood as a 'living instrument', which gave rise to a so-called 'par ricochet', or 'reflex' protection. This protection has mitigated some of the Convention's most criticised shortcomings with regard to aliens.

Moreover, as we shall see, this form of reflex protection allows, on the one hand, to extend “materially” the scope of the ECHR, protecting rights not expressly stated in it; on the other hand it extends "territorially" the guarantees of the convention, protecting their rights against infringements that could be committed by non-Contracting States.

Now, quickly, let's move on to the examination of the rules of the Convention that refer specifically to aliens (Article 4 of Additional Protocol No. 4 on collective expulsions and Article 1 of Additional Protocol No. 7, which provides specific procedural guarantees).

Collective expulsions:

Article 4 of Protocol No. 4 states that collective expulsions of aliens are prohibited. Regarding the scope of the subjective application, the prohibition established by this art. concerns all aliens subject to the jurisdiction of a State party to the Convention, not taking into account the regularity of their stay on the territory of the Country concerned.

It should be noted, however, that all the cases in which the expulsion measure was taken following a reasonable and objective examination of the particular situation of each member of the group do not fall within this category. So, in other words, we can talk about collective expulsion just in the case in which there is not an examination of the specific situation of the group's members.

In this regard, it is useful to highlight that the European Court of Human Rights, the Convention's supervisory court, on several occasions has been called upon to rule on the link between the exercise of jurisdiction and the extraterritorial application of the prohibition on collective expulsions, with particular reference to refoulements at land borders and those in international waters.

This last aspect is interesting to investigate, also because, as you know, the first judgment dealing with the issue involves Italy in the Hirsi Jamaa case.

The case concerned precisely the hypothesis of extraterritorial exercise of jurisdiction (migrants had been intercepted in international waters), which according to the Court commits the responsibility of the State under Article 1 of the Convention. This article states that the Contracting Parties shall grant to any person under their jurisdiction the rights and freedoms recognised by the Convention. The concept of jurisdiction, as the Hirsi Jamaa case has shown clearly, has a very broad scope in the case law of the Court. The State Party, in fact, has the obligation to respect human rights even when it has acted outside the national territory, no matter where and no matter to whom.

This is a pivotal feature that should not be neglected.

Let's now move on to the other norm provided for in the convention.

Individual expulsions:

Art. 1 of Protocol No. 7 provides for procedural guarantees relating to aliens who are legally resident in the territory of a Contracting State. According to this article, an alien may only be expelled in

execution of a lawful decision taken in accordance with national law and which must be accessible and cognizable to the addressee.

Having examined the framework of the norms that specifically refer to aliens, it is now necessary to analyse the other limits to state discretion in migration policy derived from case law, in particular the principle of **non-refoulement**. In abstract terms, it provides that refugees should not be returned to a country where they have reason to fear persecution.

First, the undisputed customary nature of the principle must be emphasized. Moreover, it is useful to remind that this principle is expressly enshrined in Article 33 of the 1951 Geneva Refugee Convention.

As concerns the Council of Europe context, we have to say that there is no specific provision on the subject in the ECHR. However, the Strasbourg Court has derived the existence of this principle from the combined interpretation of Articles 2 and 3 of the ECHR. Article 2 guarantees the right to life and Article 3 prohibits torture, inhuman or degrading treatment or punishment.

No individual, therefore, may be turned away to a place where he or she runs a real risk of being subjected to treatment contrary to one of these provisions. Mind you: no individual. The Court, therefore, went beyond the mere assimilation of the principle of non-refoulement. Indeed, it extended the subjective scope of Article 33 of the Geneva Convention, which links this principle exclusively to refugee status.

I think that this passage is pivotal. So let's try to better understand. The non-refoulement principle is a customary law principle provided for in article 33 of the Geneva convention. In the Council of Europe legal system there is no mention of this principle. Nevertheless, the Strasbourg Court introduced it by its case-law. In doing this operation, however, the court has extended the scope of the principle. Art 33 of the Geneva convention, in fact, recognizes the non refoulement principle in relation with aliens who have been granted the refugee status. On the other hand, the Court extends the principle also in the case of aliens/migrants which cannot be considered refugees.

This guideline of the Court (carried out in several cases: Saadi v. Italy; M.A. v. France; Salah Sheekh v. Netherlands; Soering v. United Kingdom; Vilvarajah et al. v. United Kingdom), constitutes an example of the aforementioned "par ricochet" or reflex protection. It also contributed significantly to the evolution of international refugee law by leaning toward the broadest form of human rights protection. In fact, the effect of this orientation has been the extension of the notion of refugees that derives from the Geneva Convention (improperly called **de jure refugees**) to other individuals in

need of complementary international protection (improperly called the **de facto refugees** and who in the EU framework are covered by subsidiary protection).

However, it should be noted here that this extension is not without criticism. Indeed, on the one hand, it includes within the scope of non refoulement even those aliens who do not enjoy refugee status but who, nonetheless, would have well-founded fears of persecution or unjust harm if they were to be rejected. The main problem, however, concerns the effectiveness of protection for such de facto refugees, who would be protected simply by the recognition of the non-refoulement, but they could not enjoy other guarantees in the host country. Such guarantees, in fact, usually derive from a status that should be granted to the non-rejected individuals, so as to allow them, for instance, the enjoyment of civil and political rights. Moreover, it should be added that the Strasbourg Court has repeatedly affirmed the absence, in the relevant regional context, of a genuine right to asylum, leaving the sovereign prerogative of controlling entries into the territory to the states parties.

Action Plan on Asylum and Migration

Having analysed the relevant legal framework and the instruments at the Council of Europe's disposal, I would like to conclude by addressing some application aspects related to the 2021-2025 Action Plan on Asylum and Migration in Europe.

This action plan has been developed based on internal co-ordination with member states and aims to focus on vulnerable persons in the context of migration and asylum in Europe. It includes 4 pillars:

- Pillar 1: Ensuring protection and promoting safeguards by identifying and responding to vulnerability (human rights) assist in building stronger asylum and migration systems based on a foundation of human rights and standards in the area;
- Pillar 2: Ensuring access to law and justice (human rights and the rule of law);
- Pillar 3: Fostering democratic participation and enhancing inclusion (human rights and democracy);
- Pillar 4: Enhancing co-operation between migration and asylum authorities in Council of Europe member states (Transversal Support).

From the examination of these pillars some features can be easily deduced:

- The plan proposes targeted measures and activities to enhance the capacity of member states to identify and address vulnerabilities throughout asylum and migration procedures.

- three of the four pillars are based on the core mandate of the Council of Europe: human rights, democracy and the rule of law.

Furthermore, this plan shows that addressing the challenges in the field of migration and asylum remains a priority for the Council of Europe.

Conclusions

In conclusion, I shall try to summarise the main aspects of my speech. It sought to illustrate the main features of the legal system governing asylum and immigration in the Council of Europe. This organisation did not provide for any specific regulation on the subject. The reason must be found in historical motivations and in the primacy assumed by human rights, which become an international standard of reference for the evaluation of migration policies. It is in this perspective that we must read the activity of the ECHR that over time has played a fundamental role in identifying the limits to state sovereignty in the control of migratory flows. This has developed in particular with regard to the extraterritorial application of the European Convention on Human Rights and the principle of non-refoulement. On this basis, the Member States of the Council of Europe have an obligation to guarantee respect for the rights provided by the European Convention on Human Rights to every individual under their jurisdiction, including migrants. Moreover, they cannot reject migrants who have a well-founded fear of persecution.

Finally, the intervention showed that the system conceived by the ECHR had some shortcomings due to the lack of effective protection of aliens in the host country that it is hoped will soon be overcome.



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

Roberto Majorini

**Migrants and asylum seekers: from landing to
regularization within the national territory**

TRALIM 3 Agrigento, 25 September 2023



Co-funded the European Union

Good morning everyone, and thank you to all the parties that have organized this important conference.

With my presentation, I will attempt to explain broadly the administrative process that migrants go through from the moment of their arrival until their potential regularization in the national territory.

It is necessary, therefore, to make a preliminary distinction between those migrants who have arrived in Italy through regular means and those who arrive with special authorization issued by Italian authorities.

In the latter case, individuals intending to arrive regularly in Italy require a specific visa issued by the Italian embassy in their home country.

The visa, affixed directly to the individual's passport, allows them to enter Italy. However, within eight days of the foreigner's arrival in Italy, they must apply for a residence permit at the competent Police Headquarters (Questura).

The main regular channels include family reunification, visas issued for work through the "decreto flussi" (that is a ministerial decree that determines the quotas of foreigners allowed to enter Italy), visas for religious reasons, and study visas.

Migrants without a visa enter Italy irregularly.

In these cases, Italy is responsible for managing the entire administrative process, from identification to potential reception, in accordance with the Dublin Regulation 604/2013.

The Dublin Regulation establishes criteria for determining which member state is responsible for examining an asylum application.

The general principle underlying the Dublin III Regulation is the same as the old Dublin Convention of 1990 and Dublin II: each asylum application must be examined by only one member state, and the responsibility for examining an application for international protection primarily falls on the state that has played the greatest role in the entry and stay of the applicant in the territory of the member states.

The state identified by the Dublin system as responsible for examining the application will also be the state where the individual must stay once protection is granted.

In the Mediterranean migration flows, Lampedusa serves as the primary landing point, which establishes Italy's jurisdiction to examine international protection requests.

Lampedusa has an "hotspot," the place where the very first reception takes place.

Here, migrants undergo a health screening and are identified. Once identified, individuals subject to previous expulsion orders or definitive convictions, as well as those considered socially dangerous and subject to expulsion orders, will be examined.

Subsequently, unaccompanied minors, potential victims of trafficking, pregnant women, and all considered vulnerable individuals will undergo a specific process and cannot be expelled.

They will all fill out an information document called “foglio notizie” that informs migrants of the possibility to request international protection, where they will provide their personal information and reasons for their arrival and where they write if they intend to request such protection.

Those who do not intend to request international protection, unless there are obstacles as documented health issues or a risk of inhumane and degrading treatment in their home country, will receive a notification of expulsion from the Questore (Police Headquarters).

In this case, the Questura will check with the Interior Minister for the availability of places in repatriation centers, where migrants will be transferred pending identification and deportation to their home country. In cases where there are no available places, an expulsion order will be issued with an invitation to leave the national territory autonomously within seven days of notification.

From the Lampedusa hotspot, unaccompanied foreign minors, trafficking victims, individuals with documented pathologies and international protection applicants will be transferred as quickly as possible and enter the reception system.

Unaccompanied minors will be placed in facilities for unaccompanied foreign minors, where they will have the right to reception until they reach the age of majority.

Trafficking victims will be accommodated in special centers where protection and social reintegration will be guaranteed.

These two categories will have the right to a residence permit with the possibility of continuing to stay in Italy if they meet specific requirements at the expiration of their residence permit, such as having a regular employment contract or being enrolled in school if they intend to continue their studies.

As for asylum seekers and minors, they will be placed in second reception centers, which are part of the SAI (System of Reception and Integration) or CAS (Extraordinary Reception Centers) and should only be activated in extraordinary circumstances due to the lack of space in other centers.

The SAI centers provide a more integration-oriented reception. Asylum seekers receive legal assistance, healthcare and linguistic assistance, while protection beneficiaries have services more aimed at integration and job orientation. If SAI centers run out of space, the extraordinary reception system, namely CAS, will be used, of which we will discuss shortly.

The system is coordinated by the Interior Minister in collaboration with ANCI, the National Association of Italian Municipalities. Local authorities that choose to participate in SAI, can apply for ministerial funds at any time by responding to an open public notice.

The projects must implement the basic principle of integrated reception, which involves establishing a local network (including third-sector organizations, volunteers, as well as other actors) to ensure full integration in the local community through social, educational, employment, and cultural inclusion activities.

In the accommodations, refugees and subsidiary protection beneficiaries can stay for six months, extendable for another six months, during which they are assisted in finding independent accommodation.

The migrant reception system in Italy, as conceived, has been insufficient to meet the reception needs of the hundreds of thousands of asylum seekers who arrived in Italy.

Therefore, CAS (Centers for Extraordinary Reception) were introduced as temporary structures to be opened in cases where "significant and close arrivals of applicants" cannot be accommodated through the regular system.

Unlike SAI projects, managed by nonprofit organizations on behalf of municipalities, CAS can be run by both for-profit and nonprofit organizations directly commissioned by prefectures. Each territorial prefecture publishes periodic tender notices for the allocation of places in CAS facilities.

CAS continues to host 68% of the people in the migrant reception system in Italy, indicating that the transition from extraordinary to regular reception is still ongoing.

Now, let's return to what happens after the formalization of the asylum application and entry into the reception system.

After formalizing their application for international protection, migrants will appear before the Territorial Commission where they will undergo a specific interview procedure regarding the reasons that led them to leave their home country.

The Commission will assess whether the requirements for recognizing international protection are met, or alternatively, special protection which, after the last legislative intervention, has undergone changes and will be further discussed in the seminar to be held in Lampedusa.

International protection applicants will then be issued a residence permit valid for six months, which will be extended until the administrative process for their application is concluded. This process will either result in the granting of a residence permit valid for one or five years, depending on the title, or a rejection order, which, unless appealed before the judicial authority, will lead to the loss of the right to reception.

The hearing before the Territorial Commission, therefore, plays a crucial role in determining the fate of migrants regarding their right to stay in the national territory.

Indeed, except for cases where the foreigner comes from a country with an internal armed conflict that automatically confers the right to a form of protection and, therefore, to a residence permit, the issue arises for those migrants from so-called safe third countries who must demonstrate, as far as possible, the reasons that should lead to a form of protection.

A refugee, in fact, is someone who has a reasonable fear of persecution upon return. To establish a well-founded fear of persecution, both the subjective (fear) and objective (reasonableness) components must be present.

Fear, by its very nature, is directed towards the future; therefore, it is not necessary for a refugee to have already experienced persecution in the past. A person might have managed to avoid persecution until the moment of their escape but still have a reasonable fear of experiencing it in the future, especially when others from their social or family environment have already been victims, or when it is clear that individuals in their same subjective situation are recurrently targeted in their home country.

Similarly, a person may have indeed suffered persecution in the past but not fear experiencing it again in the future.

This can occur, for example, when the past persecutions are remote in time and no longer have any connection to the present, as the situation in the home country has radically changed.

However, having suffered past persecutions makes the fear of experiencing them again in the future well-founded, unless clear indications to the contrary emerge from the specific circumstances. A serious indication of the well-founded fear of future persecution can be drawn not only from past persecutions but also from direct past threats of persecution.

This rule applies, also, to the recognition of subsidiary protection (relationship between the fear of future harm and the serious harm suffered or threatened in the past).

The assessment of the well-founded fear cannot be made without adequate knowledge of the general conditions in the applicant's country of origin, with particular reference to the applicant's area of origin.

For the recognition of refugee status, acts of persecution, , must alternatively: a) be sufficiently serious, by their nature or frequency, to constitute a serious violation of fundamental human rights, ; b) consist of a combination of various measures, including violations of human rights,

. Acts of persecution may include, among other things: a) acts of physical or psychological violence, including sexual violence; b) legislative, administrative, police, or judicial measures that are discriminatory by nature or implemented in a discriminatory manner; c) disproportionate or discriminatory judicial or penal actions; d) refusal to provide access to legal remedies and the consequent imposition of a disproportionate or discriminatory penalty; e) judicial or penal actions resulting from refusal to perform military service in a conflict, when this may involve the commission of crimes, offenses, judicial or penal actions that are disproportionate or discriminatory and result in serious violations of fundamental human rights due to refusal to perform military service for reasons of conscience, religion, politics, or ethnic or national origin; f) acts specifically directed against a gender or against children.

In the case that the requirements for the recognition of international protection are not recognized, the Commission is required to assess the conditions for recognizing special protection.

Over the years, this form of protection has been recognized in Italy, even if under different names (it was previously called humanitarian protection).

The conditions to obtain this permission include, in addition to the risk of inhumane and degrading treatment, the right to a private and family life and social integration in the Italian territory.

Many asylum seekers in Italy have managed to study and find employment thanks to the Italian reception systems.

Now let's go back to what happens in the Commission when examining asylum applications.

The positions of migrants deemed vulnerable, such as unaccompanied foreign minors, pregnant women, or victims of violence, and those coming from countries with an armed conflict, should be given priority consideration.

Similarly, international protection applicants from so-called safe countries who will follow the accelerated procedure, will have priority.

These individuals will have a greater burden of proving the potential persecution or violation of human rights that they can risk to suffer if they will return to their home country.

Except for asylum seekers following the accelerated procedure, all others have the right to reception even in case of a negative decision by the Territorial Commission, until the conclusion of the trial in front the ordinary court if they intend to appeal the Commission's decision.

Therefore, asylum seekers who will have the opportunity to regularize their status in Italy are those who receive an acceptance decision from the Territorial Commission or those whose appeal is granted in court.

It should be noted that the residence permit issued will allow them to stay and work only in Italy.

If, through the renewal of the residence permit, the foreigner can demonstrate a stay of at least five years in Italy, in addition to other requirements including income to sustain themselves, they can apply for a long-term residence permit that allows them to work and settle in other Schengen countries as well.

So, who are the migrants who, after arriving in Italy and entering reception, have the right to regularize their status?

In addition to asylum seekers whose applications are accepted, residence permits will be granted to minors up to the age of eighteen with the possibility to convert their residence permit upon expiration.

Then, individuals with documented pathologies requiring urgent and essential medical treatment in their home country will obtain a residence permit for medical treatment.

Pregnant women will receive a residence permit until their child reaches six months of age.

Victims of human trafficking will also be eligible for a residence permit, as provided by Article 18 of the consolidated immigration law.

Human trafficking is not only considered a crime but also a serious violation of human rights. It involves the recruitment, transportation, transfer, harboring, or receipt of individuals through threats, the use of force, or other forms of coercion for the purpose of exploitation in various contexts, including sexual and labor exploitation, enslavement, and organ harvesting.

Unfortunately, recognizing a trafficking victim is not easy, and often, it takes months for the victim to be able to tell their story and report what has happened to them.

A foreign national who is a victim of violence or severe exploitation will be granted a residence permit if their safety is at risk due to their attempts to escape the control of a criminal organization or because of their statements made during criminal proceedings against their exploiters.

In this case, the trafficking victim is accommodated in specialized facilities that facilitate social reintegration, and they will be granted a residence permit with the possibility of converting it into a work permit.

Another category that can regularize their status in Italy and has had a significant increase in recent years consists of parents with minors.

In this case, it will be the Juvenile Court, upon submission of a specific request, that authorizes the family unit's stay in Italy for a period of two years.

The Juvenile Court can authorize the entry or stay of a family member of a foreign minor who is in Italian territory if there are serious reasons related to their psychophysical development, taking into account the age and health conditions of the minor. This can be done even in derogation from other provisions of the Immigration Consolidation Act.

The "serious reasons" specified by the regulation to authorize the issuance of this residence permit have been evaluated by the High Court on multiple occasions. To safeguard the best interests of the child, the Court has recognized the existence of serious reasons only due to the very young age of the child, considering the serious disruption to their psychophysical balance that would result from the separation or absence of one of the parents.

With this permit of residence, migrants have the freedom of movement within the territory of the Italian State, can choose their place of residence anywhere, and are also authorized to move freely for short stays in countries within the so-called Schengen Area that have adhered to the Schengen Agreement's implementing Convention, for a maximum of three months.

As you can see, there are several categories of migrants who, once in Italy, have the opportunity to regularize their status, even if with complex administrative and judicial processes that require lengthy timeframes.

These categories represent only a very small percentage compared to those who come to Italy in search of a better future and are forced to return to their home country or remain irregular in the territory.

I hope I have been clear, although in a concise manner, in outlining the migrant's journey from the moment of arrival to their potential regularization in Italian territory.

Thank you all for your attention



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

Leonardo Marino

Criminal process and asylum seekers: case studies

TRALIM 3 Agrigento, 25 September 2023



Co-funded the European Union

Criminal process and asylum seekers: case studies

My field of expertise is criminal law, in particular, migration law. In recent years I have been involved in several trials that regard the sea rescue of migrants and, more recently, some court cases involving NGOs involved in search and rescue activities in the Mediterranean.

The illegal alien is the latest "enemy" to come under the focus of the punitive system, given that this widespread use of criminal sanctions is a phenomenon of the new millennium.

In this short period of time, however, "the illegal immigrant," in the language often used by the media, has become the main target, the "public enemy number one", to be held up in the court of public opinion as the decisive factor in that "feeling of insecurity" that has dominated public debate in recent years under the governments of both the right and the left in Italy and the rest of the world.

Repression comes in several forms, influenced by the decisions of the Supreme Courts, both national and European, which have left an important mark in defining the features of the system.

A constant feature of the system of fighting illegal immigration has been to place a series of other coercive instruments of an administrative nature alongside the criminal sanction against irregular migrants. A key feature of this is the detention of migrants awaiting repatriation, which in reality has never worked, as the number of repatriations is very low despite the agreements made by our country, even with semi-dictatorial states, most recently the agreement made by the E.U. with the President of Tunisia, Kaïs Saïed, at the instigation of our president Meloni.

In our system, based on individual assessment (Legislative Decree 251/2007 Art. 12), refugee status is not granted when there are reasonable grounds to believe that the foreigner constitutes a danger to the security of the state and when he or she has been convicted by a final judgment for a series of serious crimes (devastation, looting, civil war, mafia-type

association, in Italy or abroad, massacre, murder or attempted murder, robbery, extortion).

In 2018 (d.l.113/2018 art.7, conv. in l. 132/2018), in one of the many security packages that have always raised the penalties for crimes involving foreigners, the crimes that in the event of a final conviction result in the denial and revocation of international protection were expanded to include the hypotheses of criminal acts deemed to be of particular social alarm, such as resistance to a public official, serious bodily harm, serious or very serious bodily harm to a public official on public order duty, female genital mutilation, aggravated theft by carrying a weapon or narcotics and burglaries.

An application for international protection may be suspended when the applicant is undergoing criminal proceedings for one of the offenses that in the event of a final conviction would result in the denial of asylum.

In judicial practice, among the most common crimes in our appellate court district involving foreigners is the crime of aiding and abetting illegal immigration.

We need to differentiate between cases in which those being investigated are the rescuers of the shipwrecked, such as fishermen, often from Tunisia, who are put on trial for having provided assistance, or the recent cases involving NGOs, such as Carola Rackete's Seawatch case, in which I was personally involved, and those actual cases of illegal disembarkation of migrants that occur in Lampedusa, where as a rule the boat crew (the so-called "scafisti", or people smugglers) are placed under investigation.

The relevant fact is that a jurisprudential trend has been established that values grounds of justification, particularly those provided by the performance of a duty and the state of necessity.

In judicial practice, for each irregular landing, a criminal investigation is opened for the crime referred to in Article 12 of the Consolidated Immigration Act, recorded under the title "Provisions against illegal immigration", which punishes in its non-aggravated form: "...anyone who, in violation of the provisions of the Consolidated Immigration Act, promotes,

2

directs, organizes, finances or carries out the transportation of foreigners into the territory of the State or performs other acts aimed at illegally procuring their entry into the territory of the State."

Many defendants who were potential asylum seekers have also been put on trial, and from the evidence gathered and presented at these trials, it has been shown that the drivers of the boats came from Libyan detention camps where they were forced to remain in a state similar to imprisonment, characterized specifically by a lack of food, restrictions on freedom of movement and movement outside the facility in which they were located, and the constant threats and assaults to which the defendants themselves were subjected by the Libyan organization.

The most common charge made against defendants accused of the crime of aiding and abetting illegal immigration is that of driving the boat or holding the compass. I have even followed the case of a Syrian national who was remanded in custody in prison for one year only for having passed a Thuraya, a satellite phone, to the driver of a boat overloaded with people, only to be found not guilty and acquitted of all charges.

3

Many defendants in the course of the trials have stated that they had been forced, under threat from the Libyans, to drive the boat, and these statements were corroborated by the shipwrecked migrants or passengers who in fact reconstructed the details of the voyage, exonerating the drivers.

The witnesses examined in numerous trials recognized the defendants as those who had in some way taken on a role during the navigation and described in detail the regime of imprisonment or privations of liberty in force in the camps where they were held until embarkation. They spoke of how migrants housed in the camps were recruited and assigned the task of piloting the vessel, of the coerciveness and dramatic conditions of the embarkation. In addition, the various witnesses reported that the boats on which the migrants were crammed were "escorted" into the open sea by other Libyan vessels and spoke of the threats made so that they would not turn around. In some cases, Libyans personally delivered the boats to the open sea

before transferring the passengers to other support boats. In a number of cases, it emerged that none of the defendants had been noticed having a confidential relationship with the armed Libyans or had received favorable treatment from them, and that none of the defendants had in any case assumed violent or threatening attitudes toward their "fellow travelers." Instead, they all shared the danger of the unsafe crossing undertaken.

Other migrants also reported being eyewitnesses to violence or threats against those who had been recruited summarily at the last moment to pilot the vessel or to give assistance to the helmsman (Fofana Ebrina and others, Palermo court ruling no.5602/18; Makuerial + 1, court of Agrigento, second chamber, ruling no.1867/2022).

In many trials in recent years, it has been clearly established that the defendants in this serious crime contributed, from an "objective" point of view, to the transportation of illegal aliens into the territory of the state. Indeed, it is not disputed that they placed themselves at the helm of these boats or helped during navigation to maintain the preestablished route.

However, thanks in part to the intervention and excellent work of many good colleagues, it has been excluded beyond doubt that the defendants were part of the organization that ran the migrant smuggling operation and indeed in several cases it has emerged that "the crew" was identified and selected by the organizers of the crossing only at the time of departure or only a few days before.

In the political chaos that characterizes Libya today, human trafficking is one business among many. Reports from humanitarian organizations, nongovernmental organizations and institutional bodies at various levels have highlighted the dramatic phenomenon of human rights violations perpetrated by various armed gangs operating on the Libyan coast.

It is also certain that the management of departures from Libyan shores to Europe is taking place in an oppressive atmosphere of threats and violence.

It must therefore be supposed that both the departure and the selection of the improvised crews from among the migrants took place in many cases in a heavy climate of generalized terror in

4

which specific threats and acts of violence were made to force the defendants to take on some role during the crossing.

It was precisely this use of "improvised crews" that constituted a novelty in the phenomenon of migrant trafficking, a reversal of the "modus operandi" of the Libyan organizations.

As a result of all these elements that I have summarized, the charges were held to be absent of liability because of the state of necessity in which the defendants acted, given the awareness of the danger of serious personal injury, and the proportionality of the conduct with respect to all the elements characterizing the fact.

The jurisprudence on the matter has therefore held that none of the migrants, and therefore not even the defendants recruited among them, although they wanted to leave Libya and had paid for it, could have known or even foreseen that the crossing would be carried out by one of them and not by the so-called "scafisti" or "people smugglers", or at any rate by people with some navigational skills.

It is clear, therefore, that once the sea route has been taken, under extreme sailing conditions - at night, sailing by sight and with precarious instruments, aboard dilapidated dinghies overloaded with people, thousands of miles from the coast - the crossing continues in a state of permanent danger, aggravated by the fact that it has been entrusted to individuals who are completely clueless and lack any navigational skill.

In these cases, the various competent courts have acquitted the defendants, recognizing the exculpatory nature of the state of necessity and holding that the criminal responsibility for transporting and procuring illegal entry into the territory of the state of non-EU citizens rescued in international waters falls entirely on unidentified individuals who are part of the trafficking organizations present on the Libyan coast.

Now I would like to address some cases of potential asylum seekers who were convicted of the crime of aiding and abetting illegal immigration and were subsequently granted international protection.

The first case involves a Gambian boy (G.P.) arrested in Ragusa in 2016 soon after landing and released from prison after he was allowed to plea bargain a sentence of two years' imprisonment, with the benefit of a conditional suspension of the penalty.

It is one of those cases in which the various court-appointed lawyers proceeded with plea bargains that, in many cases, also involved innocent defendants who were forced to drive the boat.

In this specific case, this person had fled Gambia because he was a homosexual, and therefore, was entitled to international protection but unable to obtain it due to a criminal conviction.

After much complex litigation, the Court of Appeals in Caltanissetta (G.P./Min. Interior, Judgment No. 415/2018 RG, Court of Appeals of Caltanissetta, Civ. Sec., dated 01.04.2020) granted humanitarian protection.

Specifically, the Court held that after having verified the applicant's personal condition, there existed the prerequisites for granting humanitarian protection, taking into account that, as stated by the Supreme Court, "on the subject of granting a residence permit for humanitarian reasons, the applicant's condition of 'vulnerability' must be verified on a case-by-case basis, subsequent to an individual assessment of his private life in Italy compared with the personal situation experienced prior to departure and to which he would be exposed in the event of repatriation" (Supreme Court Sec. 1, Judgment No. 13079 of 15/05/2019).

6

In this case, the Court of Appeal in Caltanissetta found that the assessment of the subjective and objective situation of the applicant verified that his plausible reasons for emigrating were determined by specific conditions of prejudice. Moreover, in the face of this intrinsic vulnerability, it appears that the applicant had nonetheless made a considerable effort to integrate in the country of destination and in particular in the territory where he resided.

From the documentation produced during the trial (the role of the defense lawyers is crucial here), it emerged that the protection seeker had profitably completed a literacy course and was well integrated in the world of work.

With regard to the criminal conviction that the applicant had received, the Court held that the criminal case involving the protection seeker, which had ended with a sentence of two years' imprisonment, conditionally suspended, could not be considered an obstacle to the granting of humanitarian protection.

The right to a residence permit for humanitarian reasons presupposes the existence of atypical situations that regard the vulnerability of the foreigner. In accordance with international or constitutional obligations, a permit should be awarded if, as a result of repatriation, there is the risk of the applicant being placed in a social, political and environmental context likely to constitute a significant and effective impairment to his or her fundamental rights. It follows that even when the applicant has committed a serious crime outside the national territory (Art. 10, par. 2(b) and 16, par. 1(b), Legislative Decree No. 251 of 2007), if there is the risk that, in the event of their return to their country of origin, the seeker will be subjected to torture or inhuman or degrading treatment, according to the principles affirmed by Article 3 of the ECHR, this must be taken into account by the international protection judge.

7

Therefore, the Court of Appeals in Caltanissetta concluded that there existed serious humanitarian grounds for granting a residence permit for humanitarian reasons, in the manner and in accordance with current legislation.

A few months ago, some excellent colleagues applied for and obtained the extinction of the crime, and now the Ghanaian gentleman will be able to reapply for the recognition of international protection because the impediment no longer exists.

The second case concerns a Senegalese boy (B.A.) who was also charged under the provisions against illegal immigration. He was acquitted in first instance because of insufficient evidence by the court in Ragusa, and was granted subsidiary protection by the court in Catania.

Thus, in this case, there was not a conviction but a complicated and lengthy trial that actually prevented the potential applicant from making the application for protection.

In this case, subsidiary protection was granted because of the applicant's area of origin, namely Marsassoum, in the Casamance region of Senegal.

The Casamance region has been characterized by internal armed conflict which, although considered of low intensity, has been going on for many, many years.

There remains in this region an extremely precarious socio-political situation, one that is still characterized by armed clashes that do not permit to exclude the possibility of a real risk of "serious harm" from violence in case of forced repatriation.

For the sake of completeness, when it awarded international protection, the Court of Catania noted that there was no cause for refusal since the applicant had no criminal record.

I would like to conclude this speech by making my own the words of a great Sicilian lawyer who I had the honor of knowing: "In my opinion, defend is a magical, exciting word that evokes generosity, solidarity and strength of spirit: noble characteristics of man, not uncommon but certainly eternal" (Ettore Randazzo, *Difendere*, Giuffrè Editore, 2017)

8

With regard to this sensitive matter, it is crucial to train lawyers, to better check on and select court-appointed lawyers, to effectively inform defendants about the choice of form of trial, to improve linguistic mediation not only during the trial but also during defense investigations carried out by the lawyer and in the pre-trial phase in prison, by giving fair compensation to interpreters and perhaps creating a special fund that can be accessed by suspects who are not well-off.

Finally, it is necessary to review current migration policies that continue to be profoundly unsuitable.

Lawyer

Leonardo Marino

Case law cited:

Fofana Ebrina+others, Palermo court ruling no.5602/18;
Makuerial+1- court of Agrigento, Sec. II, ruling no.1867/2022;
Civil Cassation, Sec. 1, Judgment No. 13079 of 15/05/2019;
G.P./ Interior Min., Judgment No. 415/2018 RG, Court of Appeal
of Caltanissetta, Sec. Civ, dated 01.04.2020;
B.A./ Interior Min., judgment no.rg. 7890/2019, Court of Catania
dated 19.05.2022



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

Jose Maria Pey Gonzalez

**Legal framework applicable to asylum and
immigration in Spain**

TRALIM 3 Agrigento, 25 September 2023



Co-funded the European Union

SPANISH'S LEGAL FRAMEWORK




- UNION CITIZEN REGIME ⇔ RD 240/2007
- INTERNATIONAL PROTECTION ⇔ L 12/2009 + RD 203/1995
- STATELESS PERSONS ⇔ RD 865/2001
- DISPLACED PERSONS ⇔ RD 1325/2003
- IMMIGRATION REGIME ⇔ L 4/2000 + RD 557/2011

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EU LEGAL FRAMEWORK

- **DIRECTIVE 38/2004 - UE Citizens**
- **DIRECTIVES**
 - 95/2011 – Requirements
 - 32 & 33/2013 – Procedures & Reception
- **DIRECTIVE 55/2001 - DISPLACED**
- **DIRECTIVES**
 - 86/2003 – Family reunification
 - 109/2003 – Long-term resident status
 - 115/2008 - Return

SPANISH'S LEGAL FRAMEWORK

- **UNION CITIZEN REGIME** ⇔ RD 240/2007
- **INTERNATIONAL PROTECTION** ⇔ L 12/2009 + RD 203/1995
- **STATELESS PERSONS** ⇔ RD 865/2001
- **DISPLACED PERSONS** ⇔ RD 1325/2003
- **IMMIGRATION REGIME** ⇔ L 4/2000 + RD 557/2011

THE MAIN ADMINISTRATIVE SITUATIONS FOR FOREIGNERS IN SPAIN

UNION CITIZEN REGIME

- STAY (< 90 d)
- RESIDENCE
 - TEMPORARY (> 90 d)
 - PERMANENT (5 y)

IMMIGRATION REGIME

- STAY (< 90 d)
- RESIDENCE
 - TEMPORARY (> 90 d < 5 y)
 - LONG-TERM (5 y)

IMMIGRANTS IN AN ADMINISTRATIVE SITUATION OF *IRREGULARITY*

- RESIDENCE AUTHORIZATION DUE TO EXCEPTIONAL CIRCUMSTANCES
 - ROOTS IN SPAIN
 - LABOR OR EMPLOYMENT ROOTS ⇔ COLLABORATION
 - SOCIAL ROOTS
 - FAMILY ROOTS
 - ROOTING FOR TRAINING
- RESIDENCE AUTHORIZATION FOR HUMANITARIAN REASONS
- RESIDENCE AUTHORIZATION DUE TO INTERNATIONAL PROTECTION

IMMIGRANTS IN AN ADMINISTRATIVE SITUATION OF *IRREGULARITY*

- **RESIDENCE AUTHORIZATION DUE TO COLLABORATION**
 - WITH POLICE, PROSECUTOR, JUDICIAL OR NATIONAL SECURITY AUTHORITIES.
 - WITH ADMINISTRATIVE AUTHORITIES OR PUBLIC INTEREST.
- **RESIDENCE AUTHORIZATION FOR VICTIMS**
 - OF HUMAN TRAFFICKING
 - OF GENDER OR SEXUAL VIOLENCE

SOCIAL ROOTS

IT'S A TEMPORARY RESIDENCE AUTHORIZATION DUE TO EXCEPTIONAL CIRCUMSTANCES THAT MAY BE GRANTED TO FOREIGN CITIZENS WHO ARE IN SPAIN FOR A MINIMUM PERIOD OF 3 YEARS AND HAVE AN EMPLOYMENT CONTRACT/S AND EITHER HAVE FAMILY TIES IN SPAIN OR ARE SOCIALLY INTEGRATED.

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FAMILY ROOTS

IT'S A TEMPORARY RESIDENCE AUTHORIZATION DUE TO EXCEPTIONAL CIRCUMSTANCES THAT MAY BE GRANTED IN THE FOLLOWING CASES:

- WHEN IT IS A **FATHER/MOTHER OR GUARDIAN OF A MINOR OF SPANISH NATIONALITY, OR IT'S A PERSON WHO PROVIDES SUPPORT TO A SPANISH CITIZEN WITH DISABILITY.**
- IN THE CASE OS THE **SPOUSE OR ACCREDITED DE FACTO PARTNER OF A SPANISH CITIZEN, ANCESTOR OVER 65 YEARS OF AGE OR UNDER THAT AGE DEPENDENT, DESCENDANT UNDER 21 YEARS OF AGE OR OVER THAT AGE DEPENDENT OF SPANISH CITIZEN OR HIS/HER SPOUSE OR PARTNER.**
- IN THE CASE OF **CHILDREM OF A FATHER/MOTHER WHO HAD ORIGINALLY SPANISH NATIONALITY**



LABOR OR EMPLOYMENT ROOTS

IT'S A TEMPORARY RESIDENCE
AUTHORIZATION DUE TO EXCEPTIONAL
CIRCUMSTANCES THAT MAY BE GRANTED TO
FOREIGN CITIZENS WHO ARE **IRREGULARLY** IN
SPAIN AND HAVE HAD RELATIONSHIPS FOR A
MINIMUM OF **6 MONTHS**.

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FOR COLLABORATION WITH ADMINISTRATIVE
AUTHORITIES OR FOR PUBLIC INTEREST.



ROOTING FOR TRAINING

IT'S A TEMPORARY RESIDENCE AUTHORIZATION DUE TO EXCEPTIONAL CIRCUMSTANCES THAT MAY BE GRANTED TO FOREIGN CITIZENS WHO ARE IN SPAIN AND HAVE REMAINED CONTINUOUSLY FOR **2 YEARS, ALLOWING THE OBTAINING OF AN AUTHORIZATION TO CARRY OUT TRAINING, MAKING OBTAINING THE AUTHORIZATION CON-DITIONAL OF RESIDENCE AND WORK UPON PASSING THIS AND PRESENTING AN EMPLOYMENT CONTRACT**



RESIDENCE AUTHORIZATION DUE TO COLLABORATION

**IT'S A TEMPORARY RESIDENCE AUTHORIZATION
DUE TO EXCEPTIONAL CIRCUMSTANCES THAT
MAY BE GRANTED THROUGH COLLABORATION
WITH:**

- **POLICE, PROSECUTOR, JUDICIAL OR NATIONAL SECURITY AUTHORITIES (AGAINST ORGANIZED NETWORKS).**
- **NON-POLICE ADMINISTRATIVE AUTHORITIES AGAINST ORGANIZED NETWORKS.**



INTERNATIONAL PROTECTION

**IT IS A TEMPORARY RESI-
DENCE AUTHORIZATION DUE
TO EXCEPTIONAL
CIRCUMSTANCES THAT MAY BE
GRANTED FOR REASONS OF
*INTERNA-TIONAL PROTECTION***



HUMANITARIAN REASONS

IT'S A TEMPORARY RESIDENCE
AUTHORIZATION FOR EXCEPTIONAL
CIRCUMSTANCES THAT MAY BE
GRANTED FOR **HUMANITARIAN
REASONS.**

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and Immigration 3



VICTIMS

IT'S A RESIDENCE & WORK AUTHORIZATION FOR EXCEPTIONAL CIRCUMSTANCES THAT:

- FOREIGNERS WHO ARE VICTIMS OF HUMAN TRAFFICKING CAN OBTAIN.
- FOREIGN WOMEN WHO ARE VICTIMS OF GENDER OR SEXUAL VIOLENCE WHO ARE IN SPAIN CAN OBTAIN.



INTERNATIONAL MOBILITY

OUR LAW INTEND TO FACILITATE THE ENTRY AND/OR STAY IN SPAIN TO FOREIGNERS FOR ECONOMIC INTEREST:

- ***INVESTORS***
- ***ENTREPRENEURS***
- ***HIGLY QUALIFIED PROFESSIO-NALS***
- ***RESEARCHERS***
- ***WORKERS WHO CARRY OUT INTRA-COMPANY MOVEMENTS WITH THE SAME COMPANY OR GROUPS OF COMPANIES***
- ***TELEWORKERS***

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