

EUROPEAN COURT OF HUMAN RIGHTS – GUARDIAN OF THE PROTECTION AND STRENGTHENING OF MIGRATION RIGHTS

Irina MOROIANU ZLĂTESCU*
Alina Mihaela GRIGORESCU**

Abstract:

One of the most complex phenomena evolving worldwide is migration. The dynamics of migration are reshaping societies and policies around the world. It influences states - origin, transit and destination alike - in all its profound components: political, economic, social, cultural, etc.

Migration, part of the transnational revolution with its extensive and shrewd motivations, themselves of a political, social, economic and/or cultural nature, interrelated and often inseparable, is shaping a global architecture of national and international institutions and rules designed to manage this dramatic phenomenon, with its variable and unpredictable dimensions and implications. Over the last 10 years, migration has played an important role in the political transformation of Europe. Migration in Europe is not a recent phenomenon. What is new, however, are its forms and directions.

This paper seeks to uncover these forms and directions, as well as the ECHR response to these new challenges.

Key words: *migration, human rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, execution of judgments*

JEL Classification: [K 33, K37, K38]

1. Introduction

"Throughout time, the mobility of individuals has caused multiple changes in the human society as a whole." (Moroianu-Zlătescu, Bucur, Zlătescu, 2019, p. 9) This complex phenomenon known under the generic name of migration is influenced, evidently, by various political, economic, legal, social and cultural factors from the origin country, but also from the destination country. It is largely generated by wars, economic challenges and so on and so forth, but, "especially in this period, also by climate changes." (Moroianu-Zlătescu, Bucur, 2019, p. 190; Moroianu-Zlătescu, 2015, p. 7 and the following)

* Professor PhD National University of Political Studies and Public Administration, Bucharest, Titular Member of the International Academy of Comparative Law (IACL), Titular Member of the Romanian Academy of Legal Sciences (ASJR), Vice-president of l'Institut International de Droit d'Expression et Inspiration Francaises, Member of the Council of the European Law Institute - Vienna

** PhD. Student - National University of Political Studies and Public Administration, Bucharest (NUPSPA)

It can be observed that, recently, the notion of "mobility" is used more and more even by some rapporteurs of the United Nations Organisation on migration challenges instead of the term "migration", because mobility is considered a more fluid term than migration, which has started to create more and more fear at global level, in a time when humanity faces with the severe challenge of migrants¹. This is happening due to armed conflicts, as well as due to the occurrence of new armed conflicts in areas which were considered stable not so long ago. In this respect, even the European continent can be mentioned, where the conflict in recent years between Ukraine and Russia has raised multiple challenges with regard to migration and even the use, for the first time, of European legal tools. But the European continent has been facing a migration related crisis since 2015, if we take into account the fact that the International Migration Organisation indicated that, in that year, 500,000 individuals entered Europe, most of them in Italy and Greece². The movement of population towards Europe complicates the separation limit, for example, between the individuals who requested asylum and those who need a form of protection, on the one hand, and economic migrants, on the other hand, Europe currently facing a mixt migration phenomenon.

The alternation of ascending and descending flows of migration, the combination between legal and illegal makes the introduction of proper political measures, the implementation of prevention measures, as well as the performance of accurate and real statistics extremely difficult, in the European Union, as well as in the European Council.

Taking into account the fact that we are celebrating 70 years from the entry into force, on 3 September 1953, of the most important tool of the European Council, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred by us as the "Convention"), we aim to prove by examples from the case law of the European Court of Human Rights (ECHR), a mechanism tasked to supervise the observance of human rights by states, in the relationship with individuals or with groups of individuals, but also

¹ *migrant* – Until this date, there is no agreed definition at international level regarding the term "migrant". Nevertheless, we may consider that the "migrant" is an individual who moves from a place, region or a country to another; In this paper, we will use the notions of asylum applicant, refugee and migrant (emigrant, immigrant) legal migrant and illegal migrant. We remind you of the fact that the asylum applicant is the individual (aliens or stateless) who has manifested his/her desire to be admitted on the territory of another state as a refugee, while waiting for the judgment on the settlement of the application lodged with the competent authorities from that state. If the phenomenon is caused as a result of severe violations of human rights based on the criteria set in the UN Convention of 1951 relating to the Status of Refugees, amended in 1967, he/she is a refugee. Depending on the reason for their movement, illegal migrants are individuals that run from armed conflicts or who are members of a minority, usually an ethnic minority, and who are subject to discriminating treatments or they may be vulnerable individuals with regard to the economic aspect. If we refer to the European continent, these migrants attempt to reach central and western European countries or they stop in transit states, or they move to neighbouring countries.

² <http://www.iom.int>.

in the case of violating these rights by another Convention signatory state, that this is a live, modern tool, that monitors the evolution of society.

If we refer to the field of migration, we must highlight the fact that the European Court of Human Rights (ECHR) has added new judgments to the ones existing, which represent a very rich case law and, at the same time, a source of law on the matter.

2. Shared responsibility in the field of migration – ECHR case law

The European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") states, in article 1, in conjunction with article 14, that the contracting states acknowledge, for the individuals in their jurisdiction, the rights and freedoms provided by the Convention's text, insofar as migrants have the same rights as the citizens of the host state and there are no differences in treatment based on ethnic origin or the refugee status of an individual. In most judgments where the violation of the Convention was identified (related to: access on the territory of a state, forced return, migrants and asylum applicants' protection³, protection against discrimination, family reunification), the Strasbourg Court concluded that *the attitude of the states on managing the migration flows or on receiving asylum applicants* (considered a vulnerable group who needs consolidated protection), *cannot be circumscribed in any way to the practices incompatible with international law, with the provisions of the Convention or those of additional protocols.*

In order to capture the response of the Strasbourg Court to this sensible challenge of migration, we analyse in the following some of the judgments in the specific cases brought before the paneuropean court, as well as the national response on the execution of these judgments, by virtue of pertaining to the Convention's system.

2.1. Law amendments on the matter of constitutional rights

2.1.1. Ensuring a quick and effective remedy against illegal detention and deportation orders

Case M.A. v. Cyprus⁴ and other 4 repetitive cases⁵ (case group M.A. v. Cyprus)
(group of immigrants detained for deportation)⁶

³ The Convention does not mention the right to asylum, but certain articles may be invoked for the violation of some rights (art. 2 – right to life; art. 3 – prohibiting of torture, inhumane or degrading treatments).

⁴ Application no. 41872/10 – Judgment of 23.07.2013

⁵ *A.H. and J.K. v. Cyprus, H.S. and others v. Cyprus, K.F. v. Cyprus and Mefaalani v. Cyprus*

Court's finding:

- deprivation of liberty – (art. 5 para. (1), para. (4) of the Convention)⁷;
- violation of right to life – art. 2 of the Convention;
- violation of prohibiting of torture – art. 3 of the Convention;
- violation of right to an effective remedy – art. 13⁸ of the Convention;

⁶ The practice of the European Court of Human Rights has been constant. In this respect, we mention, as example, the more recent judgments of the Courts in the cases:

- *Case of M.K. and others v. Poland (Applications no. 40503/17, 42902/17 and 43643/17) – Final judgment on 14/12/2020* - Deportation - The refusal of the border police to receive the asylum application and the summary deportation to a third country, with the risk of return and bad treatments in the origin country - The absence of a proper investigation regarding the reasons of the applicants to request entry on the national territory - The obligation of the state to ensure the applicants' security, especially by authorising them to remain in its jurisdiction until the examination of the international protection application; **The Court's judgment** :- violation of Article 13 of the Convention taken in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4 to the Convention;

- *Case Camara v. Belgium (Application no. 49255/22) - Judgment 18 July 2023* - The refusal of national authorities to execute an immediate executory ordinance by which the state is bound to ensure accommodation and assistance to an international protection applicant - Caring for the applicant only following a temporary measure ordered by the European Court - The difficult situation of the defendant state, taking into account the significant increase of the number of international protection applications and the insufficient capacity to receive applicants - The systematic non-execution by the national authorities of the final court judgments regarding the receiving of international protection applicants; *The Court's judgment*: violation of Article 6 of the Convention;

- *Case of Khokhlov v. Cyprus (Application no. 53114/20)- Judgment of 13 June 2023* - unlawfulness and unjustified duration of detention of the complainant waiting for extradition, contrary to article 5 § 1 of the Convention and to the celerity requirement provided by article 5 § 4 of the Convention. – *The Court's judgment* - violation of Article 5 § 4 of the Convention; violation of Article 5 § 1 of the Convention;

⁷ "Art. 5 - Right to liberty and security

(1) *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

(...)

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(...)

(4) *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

⁸ "Art. 13 - Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The case group refers to the detention of Syrian asylum applicants who were arrested following a protest against the asylum policies of the Cyprus Government.

In the judgments delivered, The European Court of Human Rights has found that:

- the complainants have not had a quick, effective and suspensive remedy, under internal law, to appeal the lawfulness of the detention;
- deprivation of liberty without legal grounds;
- the competent authorities did not carry out the diplomatic diligences necessary for deportation;
- refusal to grant asylum, by reasoning that one of the complainants was already considered an illegal immigrant, given that the asylum application was in progress of being settled.

Law and administrative reforms following the delivery of judgments:

In 2015, a constitutional reform took place, by which art. 146 of the Cyprus Constitution was amended. Thus, the institution of the Administrative Court was introduced, with the competence to settle in first instance complaints related to the violation of legal provisions. In these conditions, only the Supreme Constitutional Court has exclusive competence to finally settle a complaint against a judgment of the Administrative Court with exclusive jurisdiction to settle in first instance a complaint according to which a decision, an act or an omission of a body, authority or of an individual who exercises an executive or administrative authority infringes any of the provisions of this Constitution or of any law, or is the result of excess or abuse of power granted to such body, authority or individual.

Ensuring a quick and effective remedy against illegal detention and deportation orders

*Following the delivery of judgments in the previously mentioned cases and the provisions from the Constitution on guaranteeing freedom and security, applicable including and absolutely on the matter of asylum/extradition, by the constitutional reform of 2015, an *Administrative Court* was founded, with competence in settling the appeals formulated against various types of detention orders (which exempted the Supreme Constitutional Court from settling all appeals); also, the specific laws on refugees were amended, which provided, for national courts, short and concrete terms for the settlement of these appeals.*

*In 2018 the *Law on the founding and operation of the Administrative Court for international protection*⁹ was adopted, with exclusive competence to hear and settle in first instance any appeal under the constitutional provisions (art. 146) against any judgment, specific actions or inactions provided by the law, and which has the competence to deliver on any remedy initiated under constitutional*

⁹ <https://asylumineurope.org/reports/country/cyprus/overview-legal-framework/>

provisions (art. 146) against a judgment or a measure issued under the *Law on refugees* or against an omission to act under the *Law on refugees*, related to the granting, withdrawal or restriction of the provisions under the law, an international protection application, including a judgment related to the refugee status and/or subsidiary protection status or the refusal to reopen the examination of an application, the withdrawal of international protection, or a transfer judgment according to art. 27 para. (1) of Regulation (EU) no. 604/2013¹⁰.

The suspensive effect in case of exercising administrative remedies:

In 2017, the *Law on the founding and operation of the Administrative Court*¹¹ was adopted, which stated that, when an individual appeals a deportation order, a return or transfer judgment under the Constitution, the Law on aliens regime or the Law on immigration, the execution of the administrative judgment will be suspended automatically until the settlement of the judgment in first instance, in certain conditions (the individual who appeals the administrative measure invokes the fact that it is contrary to the *non-return principle* provided in an international convention, in the law of the European Union or in the Cyprus law and/or the individual who appeals the administrative measure invokes the fact that it violates article 2¹² and/or 3¹³ of the European Convention of Human Rights and/or article 7¹⁴ and/or 8¹⁵ of the Constitution and/or article 2 and/or 4 of the Charter of Fundamental Rights of the European Union.

2.1.2. Consolidating legal protection within extradition procedures

*Case Soldatenko v. Ukraine*¹⁶
(detention for extradition)

Court's finding:

- deprivation of liberty – (art. 5 para. (1), letter f) of the Convention)¹⁷;

¹⁰ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (reform)

Article 27 – Remedies – "(1) The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal".

¹¹ <https://asylumineurope.org/reports/country/cyprus/overview-legal-framework/>

¹² Right to life

¹³ Prohibition of torture

¹⁴ Right to life

¹⁵ Cyprus Constitution

Art. 8 – "No one shall be subjected to torture or to inhuman or degrading treatment or punishment in all circumstances".

¹⁶ Application no. 2440/07 – Judgment of 23.10.2008

¹⁷ Art. 5 – Right to liberty and security – see above

- violation of prohibiting of torture – art. 3 of the Convention;
- violation of right to an effective remedy – art. 13¹⁸ of the Convention.

The case refers to a citizen from Turkmenistan who left his national territory in 1999, following the issuing by the authorities of an arrest mandate for the offense of bodily injury. As a result of issuing the arrest mandate, the complainant left his origin country and lived in Ukraine.

In January 2007, the complainant was arrested by the Ukrainian authorities following an international arrest warrant. 6 days later he appeared before a Ukrainian court who ordered his arrest until extradition. His solicitor claimed that the complainant was stateless, the Ukrainian Government claimed that the citizen was Turkmen. The complainant appealed the extradition measure. The Turkmen prosecution requested the extradition of the complainant for criminal investigation for the offences of which he was accused, under the Minsk Convention, which was part of the internal law of both states¹⁹. Also, they made assurances that the complainant will not be discriminated and that the complainant's rights under article 3 and 6 of the European Convention will be guaranteed.

Then, in January 2007, the complainant requested again the ordering of a temporary measure (with the application of art. 39 of the ECHR Regulation), and ECHR indicated to the Ukrainian Government that the complainant should not be extradited in Turkmenistan until the Court's examination of his case.

Relevant claims and facts:

- absence of a legal or administrative procedure, sufficiently accessible, precise and predictable according to the Ukrainian law, to avoid arbitrary detention while waiting for the extradition order;
- absence of information regarding the stage of the procedure on extradition, lack of access to the file and lack of legal assistance;
- international organisations reveal that Turkmenistan constantly ignores international treaties on human rights, does not apply their recommendations and does not cooperate with the monitoring bodies. During the investigations, Turkmenistan practices torture to obtain information and, from this viewpoint, the complainant may incur the risk of bad treatment and torture, especially given the fact that he is Russian. The complainant finds that, regardless of the guarantees which the Turkmen Government presents to the Ukrainian Government, the observance of these guarantees cannot be ensured due to the lack of an efficient system of preventing torture.

¹⁸ Art. 13 – *Right to an effective remedy* – see above

¹⁹ The Minsk Convention (1993) on legal assistance on criminal matters, to which Ukraine and Turkmenistan are part of, states that an individual may be detained for extradition based on a request formulated by one of the contracting states.

The Court found that, in order for article 5 para. (1) letter f and art. 5 para. (4) of the Convention not to be violated, the detention for extradition must be made "*according to a procedure provided by the law*"²⁰, and the Ukrainian law did not provide sufficient legal provisions - not in the Criminal Procedure Code, nor in another law - which would contain, even by reference, a sufficiently accessible procedure, precise and predictable in its application to avoid the risk of arbitrary detention for extradition.

Legal and administrative reforms following the delivery of judgments that led to the consolidation of legal protection within extradition procedures:

Following the finding by ECHR of the violation of articles 3, 5 and 13, but also in line with the constitutional guarantees according to which any wronged individual²¹ is entitled to appeal the actions, inactions or judgments of the state's authorities, a new legal framework was introduced, which regulates extradition and detention for extradition, by *amendments made to the Criminal Procedure Code* (made in 2010 and in 2012), which included a series of guarantees on legal control, as well as the right to compensation for illegal detention. The new remedies introduced by the law have a suspensive effect if one individual claims, there is a risk of bad treatment in the case of extradition to a third country. In the same manner, the suspensive effect in the procedures regarding refugee status was introduced by a law adopted in 2011. The individuals who request refugee status, "subsidiary or temporary protection" (Moroianu-Zlătescu, Bucur-Ioan, 2022, p.13) cannot be expelled during the examination procedures.

2.2. Amendments in the legal practice of the Constitutional Courts

2.2.1. Protection against expulsion / deportation

*Case Ahmed v. Austria*²²

Court's finding

– violation of art. 3 of the Convention (the deportation of a Somali citizen from Austria would expose him to the imminent danger of being subject to treatment contrary to art. 3 of the Convention, due to the absence of a public institution that can protect him in the context of civil war for the control of Somalia, in case of deportation);

The case refers to a Somali citizen who would have incurred the risk of deportation from the Austrian territory, if the deportation judgment would have

²⁰ Para.110, 111, 112 of the Court's judgment

²¹ Including stateless and aliens

²² *Application No. 25964/94*

been implemented, the complainant would have been subject to a treatment contrary to art. 3 of the European Convention, in the state where he would have been deported. The Somali citizen left Somalia in 1990 for fear of an execution and ended up in Austria, where he applied for the refugee status.

In 1992, he received refugee status under the Geneva Convention²³.

The Federal Office for Refugees in Graz ordered the withdrawal of the refugee status in July 1994, under the provisions of the *Law on the right to asylum*²⁴, as a result of a court judgment delivered by the Regional Court of Graz in 1993, by which the applicant was sentenced to a custodial sentence of two years and a half for a robbery attempt. According to the law, an individual loses his refugee status if they commit an "*especially severe offence*" according to art. 33 para. (2) of the Geneva Convention. On the other hand, the *Austrian Law on aliens*²⁵ provides that an *especially severe offence* represents any offence for which the custodial sentence is higher than five years (according to the law, the robbery attempt is punished with imprisonment up to ten years).

The judgment was appealed before the Administrative Court, a court which removed it in February 1995²⁶, finding that the complainant did not represent a danger for the Austrian society. The judgment suspended the deportation procedure for a period of 1 year with possibility of renewal. Nevertheless, the minister of internal affairs reordered the withdrawal of the refugee status of the complainant in April 1995 on the grounds that the complainant was a danger to society, his behaviour being subject to an aggression tendency. The administrative court maintained this judgment.

On 20 March 1997, the complainant was authorised to stay on the Austrian territory, but the Austrian authorities did not issue an official stay visa to the complainant, in the period between 17 December 1996 – 15 March 1998, until the date of his suicide, 15 March 1998.

Procedure before the Court

The European Commission for Human Rights (Commission) registered the complainant's complaint in 1994, it being declared admissible on the grounds that, in case of a potential deportation, the complainant would have been subjected to a treatment contrary to art. 3 of the Convention.

On 15 December 1994, the Commission, by its chairman, indicated to the Austrian Government that the complainant should not be deported until the judging of the case, in the interest of the parties and of the procedure itself. At the same

²³ By granting the refugee status according to the definition from the Geneva Convention, on 15 May 1992, the Austrian authorities admitted the existence of the risk of being subject to a treatment contrary to art. 3 of the European Convention on Human Rights.

²⁴ Article 5 para. (1) section 3

²⁵ Section 37 para. (4)

²⁶ The administrative court found that the complainant did not represent a danger to society, with respect to the meaning provided by art. 33 para. (2) of the Geneva Convention.

time, in the beginning of 1995, the Commission forwarded this case to the European Court of Human Rights. The Court found that, given the absolute nature of art. 3 of the Convention, an absolute nature that cannot be invalidated by the complainant's criminal sentence, the deportation procedure must be suspended. At the same time, the claimed severity of the offence that an individual committed is not sufficient and relevant to justify their life endangerment. If the deportation judgment applies, Austria would violate the provisions of art. 3 of the Convention, because the complainant would continue to face the real danger of being subject to torture or inhuman or degrading treatments, which violate art. 3 of the Convention.

The Court's judgment became definitive on 17 December 1996. The Ministers Committee, which supervises the execution of ECHR judgments, invited Austria, under the obligations undertaken by virtue of article 4 of the Convention, to inform about the measures taken to cease the violation, to remedy its consequences, as well as to prevent any similar violations of the Convention.

Law reform

Judgment Ahmed v. Austria had, as immediate effect, the granting by the Austrian courts and authorities of effective protection for individuals who risked being subjected, in this country and in other states with similar situations, to a treatment contrary to art. 3 of the Convention (by the Austrian Constitutional Court's delivery of the judgment of 27 November 1997 (no. B266/97) and the judgment of the Supreme Administrative Court of 8 June 2000 (no. 99/20/0223-9)).

Thus, constitutional protection was extended to the individuals whose life or health were at risk of being subject to a treatment contrary to article 3 of ECHR, regardless if the threat is imputable to the state or if it results from the absence of the state's authority, from non-state actors or authorities from a third state. The activity of an individual in a similar situation as the complainant, as dangerous as it could be, cannot justify deportation, when this would lead them being subject to a treatment contrary to the provisions of article 2, 3 of the Convention or of *Protocol 6* to the European Convention, *regarding the abolition of death penalty*. Thus, the Austrian supreme legal bodies have had an important role in preventing new violations similar to the one from the case *Ahmed v. Austria*. This change of optic operated in constitutional practice was codified by the amendments made in 2002²⁷ to article 57²⁸ paragraph (1) of the *Law on aliens* of 1997²⁹. The

²⁷ Published in the Official Journal on 13 August 2002 (BGBl. I/No.126/2002) and entered into force on 1 January 2003.

²⁸ Art. 57 - Prohibiting extradition, deportation and return

(1) (...)

1997, 2002 (2) The return or deportation of aliens to a state is inadmissible if there are justified reasons to believe that their life or liberty would be threatened in this state, due to race, religion, nationality, membership to a certain social group or political opinions (based on art. 33 para. (1) of the United Nations Convention of 1951 relating to the Status of Refugees, Federal Official Journal no. 55/1955, as amended by the Protocol on refugee status, Federal Official Journal no. 78/1974)

amendment led to an extended degree of protection for individuals against deportation, in line with the provisions of art. 3 of the *European Convention on Human Rights*, an article which guarantees individuals with a more extended protection than the one provided in article 33 of the *United Nations Convention of 1951 relating to the Status of Refugees* (sections 40-41 of the judgment in the case *Ahmed v. Austria*).

1997 "(1) Refusal of entry, expulsion or deportation of an alien to another state

is inadmissible if there are justified reasons to believe that they would be in danger to be subjected to inhumane treatments or punishments or death penalty.

2002 "(1) Refusal of entry, expulsion or deportation of an alien to another state are unlawful if they would lead to a violation of Articles 2 and 3 of the *European Convention on Human Rights* or of its Protocol No.6 on the abolition of death penalty".

*Case Diallo v. Czech Republic*³⁰

Court's finding

- violation of art. 3 of the Convention;
- violation of art. 13 of the Convention

The complaint lodged with the Court in May 2007 refers to two citizens who arrived at the airport in Prague from Dakar (Senegal), with transfer in Lisbon and, once arrived at the airport lodged an asylum application. The Court delivered the judgment on 23 June 2011. In this judgment, the Court found the violation of article 13 of the Convention in conjunction with article 3 of the Convention,

1997, 2002 (3) *Aliens who invoke one of the dangers mentioned in paragraph (1) or (2) can be returned or deported only after being heard.*

1997, 2002 (4) *The deportation of aliens to a state where they are threatened according to para. 2, but not according to para. 1, is allowed only if they represent a danger for the security of the Republic, with justified reasons, or if they have been sentenced by an internal court for an especially severe offence and, due to this criminal conduct, they represent a danger to the community (based on art. 33 paragraph (2) of the United Nations Convention of 1951 relating to the Status of Refugees).*

1997, 2002 (5) *The existence of prior conditions provided in para. 4 is established by means of an official judgment.*

1997, 2002 (6) *The deportation of aliens to a state is inadmissible if the deportation is preceded by the taking of temporary measures at the recommendation of the European Commission of Human Rights or at the recommendation of the European Court of Human Rights.*

1997, 2002 (7) *If the return or deportation of aliens the asylum application of whom was rejected according to section 4 of the Law on asylum of 1997 in the third country is proven to be impossible, the Federal Asylum Office is informed, without delay, in this respect."*

²⁹ Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997 FrG) https://www.ris.bka.gv.at/Dokumente/BgblPdf/1997_75_1/1997_75_1.pdf

³⁰ Application no. 20493/07

whereas neither of the national authorities involved in the examination of the complainants' asylum applications did examine the validity of their affirmation according to which there was a real risk of application of bad treatments in their origin country, and they did not have a remedy with automatic suspensive effect on the deportation procedure.

Mr Ibrahima Diallo (“the first applicant”)

Lodged an asylum application on 8 November 2006. He claimed that he participated to a professors' strike in Guinea and, after the strike, the police came to look for him at his home. In the application he specified that, if he would have remained in the country, he would have been detained or even killed. On 15 November 2006, the asylum application was rejected without analysing its merits, according to art. 16 para. (1) letter (e) of the *Czech Law on asylum*, whereas the applicant had come from Portugal, which is considered a safe third party. According to the law, the remedy exercised by the applicant, legal control, did not have a suspensive effect, nor was it approved.

The Police for Aliens Services issued a deportation order on 23 November 2006, for the first complainant, which should have been implemented until 2 December 2006, and it was not. Therefore, the administrative deportation procedure was initiated on 4 December 2006, which also included a hearing procedure, where the asylum applicant declared that he cannot return to his origin country due to the persecutions which he could be subjected to because he was the initiator of a demonstration where several participants were killed. In the procedure, the Police Service requested to the Ministry of Internal Affairs a permit regarding the existence of potential obstacles in the way of deporting the complainant, to which the Ministry responded that he can be deported to Portugal, which was a safe country. It was also found that, after being rejected the asylum application, the complainant remained in the country without a valid visa. After rejecting the appeal lodged by the complainant, in February 2007, and after communicating this judgment on 13 March 2007, on 15 May 2007, without prior notice, the complainant was expelled to Guinea.

Mr Mamadou Dian Diallo (“the second applicant”)

The second complainant came by plane from Dakar (Senegal) with stopover in Lisbon. He was not allowed to embark a plane to Dubai, and then he lodged an asylum application. During his stay in the Czech Republic, he was detained at the centre of receiving asylum applicants from the airport in Prague and at the Velké Přílepy detention centre.

In the procedure of asylum application, he claimed that his father, an active member of an opposing political party, was detained and killed in 2000. After his father's death, the applicant established an opposing political organisation, becoming president and continuing to have the same connections with members of the opposition, at the same time supporting trade unions. In 2006, there was a conflict between the government and trade unions, and the police was looking for him.

In October 2006, the *Department for asylum policy and migration* from within the Ministry of Internal Affairs rejected his asylum application based on article 16 para. (1) letter (e) of the Law on asylum, without examining the case merits, finding that he came from Portugal, a safe third country and, at the same time, the complainant was informed that he had to leave the country until 1 December 2006. The complainant did not comply and lodged a legal control application, requesting the suspension of the administrative judgment, under the *Dublin Regulation*³¹ of the European Union, according to which the Czech Republic was the state which had to process his asylum application and not Portugal. In March 2007, the Prague Regional Court confirmed the administrative judgment of not granting asylum, finding that the complainant came from Portugal, a safe third country and, therefore, the asylum application would have had to be lodged in Portugal. The judgment was communicated to the complainant in May 2007. He was expelled from the Czech Republic before the examination of the legal term, without a prior notice, he did not lodge an appeal as of right.

Procedure before the Court

The applications were lodged before the Court in May 2007.

The Court delivered the judgment on 23 June 2011, and it became final on 28 November 2011. In this judgment, the Court found the violation of article 13³², in conjunction with article 3 of the Convention, recognising that neither of the national authorities involved in the asylum and deportation procedures of the complainants examined the merits and grounds of the existence of a real risk of bad treatment in their origin country. Moreover, they had no remedy with automatic suspensive effect.

The Court removed the application of the second complainant from its dockets by judgment of 26 April 2012, by which it approved the amicable solution which he and the Czech Government have reached.

Law reform

The Constitutional Court delivered a judgment³³ by which it repealed article 171 para. (1) letter c) of *Law no. 326/1999 regarding the stay of aliens on the Czech Republic territory*, i.e. the provision which prevented the complainants to initiate an

³¹*Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national - Official Journal L 050, 25.2.2003*

today in force: *Consolidated text: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("The Dublin III Regulation") - Official Journal L 180, 29.6.2013*

³² see above

³³ ref. Pl. ÚS 26/07

action against administrative deportation judgment. According to article 172 para. (3) of the *Law on the stay of aliens on the Czech Republic territory*, the action against the administrative deportation judgment has a suspensive effect. Aliens who are currently in a similar situation to the one of the complainants of this case have, therefore, the right to initiate an action before an administrative court against the administrative deportation judgment with automatic suspensive effect.

Second, the procedure which the Ministry of Internal Affairs adopted in this case within the asylum procedure, i.e. the application of the concept of "safe third country" to a European Union state is no longer followed by the latter. In similar cases, the ministry proceeds now according to the *Dublin Regulation* and, therefore, it either examines the asylum application on merits, or it is convinced that the other Member State of the European Union competent under the *Dublin Regulation* (except for Greece) will examine the asylum application on merits and, in this case, it will transfer the applicant to that state. Therefore, it is no longer possible for an asylum applicant who came to the Czech Republic from a European Union Member State to be expelled to their country of origin without their asylum application being examined on merits by the Czech authorities or by the authorities of the European Union Member State.

3. Conclusions

Although the *control of migration* is a *classical expression of national sovereignty*, the decision being left in the intergovernmental scope for a long period of time, the great challenges which humanity faces today – organised crime, drug traffic, contraband, terrorism, illegal immigration, phenomena which ignore national frontiers - have made the Member States rethink their policy on migration, gradually assigning their competences in this field to European structures and mutual cooperation mechanisms, for the purpose of drafting mutual cross-border policies and a more efficient management of imminent challenges specific to the field of migration. The phenomenon may be reversible and shared.

Already having an impressive extent, the migration phenomenon risks to become even larger, provided that, in the future, migration will be affected by: economic globalisation; more and more perfected technology for telecommunications and transport; increase of migrating pressure based on the deepening of the gaps between rich and poor countries; highlighting of social, political and religious differences between countries; appearance of new areas of political instability, civil and armed conflicts; the progressive degrading of the environment; the demand for work force in the societies with aged population.

In conclusion, from the analysis of the case law examples which this article has treated, we find that, although the states have autonomy within the limits imposed by internal law on policies regarding asylum, return, extradition or deportation procedures applicable to migrants, the European Court of Human Rights has constantly found, in its case law, that national interests are not superior

and do not prevail against guaranteeing the protection of the life of the individual risking to be deported. Thus, the claimed severity of the offence which an individual has committed is not sufficient and relevant to justify putting their life in danger and cannot justify deportation, when this deportation would lead to a treatment contrary to the provisions of article 2, 3 of the Convention or of *Protocol 6* to the European Convention, *regarding the abolition of death penalty*.

Representing, at the same time, an opportunity and a threat, migration will continue to offer advantages, but also disadvantages, to the origin countries, destination countries and transit countries, drawing a new and dynamic logic of action at national and international level with profound consequences for the future of European states and others.

Bibliography:

1. Moroianu Zlătescu, I., 2014, *Migration and Law*, Bucharest: Institutul Român pentru Drepturile Omului.
2. Moroianu Zlătescu, I., Bucur, A., *Evoluția migrației și a reglementărilor în domeniu cu specială referire la România (The evolution of migration and of regulations in the field with special reference to Romania)*, Anghel, I. M., coord., 2019, *De la înfăptuirea Marii Uniri la integrarea României în Uniunea Europeană (From the Great Union to the integration of Romania in the European Union)*, Bucharest: Universul Juridic.
3. Moroianu Zlătescu, I., Bucur-Ioan, A., 2022, *Challenges in the field of migration and asylum and the role of public administration in the current context*, "Law Study", supplement, Valahia University: Bibliotheca.
4. Moroianu Zlătescu, I., Bucur, A., Zlătescu, P. E., 2019, *Migrants, asylum seekers and refugees in a globalised world*, Bucharest: Editura Universitară & Universul Academic.
5. Moroianu Zlătescu, I., Marinică, E., 2017, *Dreptul Uniunii Europene (European Union Law)*, Bucharest: Editura Universitară.

International acts

1. 1951 Convention Relating to the Status of Refugees - 28 July 1951.
2. Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national - *Official Journal L 050, 25.2.2003*.
3. *Convention for the Protection of Human Rights and Fundamental Freedoms*.
4. EU Charter of Fundamental Rights - *Official Journal C 326, 26.10.2012*.

Case-law

1. *Case of A.H. against Cyprus and 3 other cases* (A.H. and J.K. v. Cyprus - Applications No. 41903/10, 41911/10; H.S. and others v. Cyprus – Application No. 41753/10, K.F. v. Cyprus - Applications 41858/10 and Mefaalani v. Cyprus - Application No. 3473/11 75381/11).
2. *Case Ahmed v. Austria* – Application No. 25964/94.
3. *Case Diallo v. Czech Republic* - Application No. 20493/07.
4. *Case M.A. v Cyprus* - Application No. 41872/10.
5. *Case Soldatenko v. Ukraine* - Application No. 2440/07.
6. Guide on the case-law of the European Convention on Human Rights Immigration Updated on 31 August 2022.