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Reception of the asylum seekers, their rights and duties in the light of the EU human rights standards

ABSTRACT

For several years now, Europe has been struggling with the migrant crisis. The number of migrants dramatically increased after the outbreak of civil war in Syria. The migration crisis revealed the imperfection and inadequacy of the asylum system in the European Union. The problems with regards to the human rights and freedoms have for years been the subject interest of both the international asylum system and internal systems of EU Member States. Legal standards governing the issues are extraordinarily complex.

The article analyses the legislation and rulings regulating the issues of protecting the rights of foreigners applying for international protection. At the end proposals for legislative improvements de lege ferenda were specified.

Keywords: protection, freedom, foreigner, migration, crisis

1. Introduction

For several years now, Europe has been struggling with the migrant crisis. The number of migrants dramatically increased after the outbreak of civil war in Syria. The migration crisis revealed the imperfection and inadequacy of the asylum system in the European Union. Analysis of the crisis allows for the adoption of the thesis that one of the basic causes thereof is the direction of changes in the aspect of international legal

instruments for the protection of the rights of foreigner applying for international protection. In this aspect, it is key to increase the rights and freedoms of the examined group of foreigners in the scope of reception due to legislative changes and in particular the rulings of the European Court of Human Rights.

The problems with regards to the human rights and freedoms have for years been the subject interest of both the international asylum system and internal systems of EU Member States. Legal standards governing the issues are extraordinarily complex. On the one hand, these are the standards of international law resulting from developing a certain standard of human rights protection, regardless of citizenship, place of stay or legal status[1]. On the other hand, they are the standards of domestic law. The reason is that every state should have the freedom to act in relation to all people staying on its territory. This means that granting certain rights or imposing obligations should be included in own competences of the receiving state and should be regulated by the internal law thereof[2].

Alongside the development of the international human rights protection standards, a system of protecting the rights of foreigners applying for international protection has been developed. With time, the scope of rights granted to foreigners has been significantly expanded. It is acknowledged that the rights and freedoms granted to every human being, naturally apply to foreigners seeking international protection. The direction of changes in the discussed scope leads to obscuring the international legal standards concerning the rights of foreigners with universal human rights protection[3]. Therefore, competencies of states receiving foreigners applying for international protection, to autonomously shape their internal migratory policy is being gradually restricted. In this aspect, particular concerns are raised by the fact that the States are being limited in their capacity to introduce domestic legislation, essential due to the necessity of ensuring state security or that of the effectiveness of the asylum system, due to the risk of such regulations being interpreted as

[1] A. Szklanna, Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 74

[2] J. Gilas, Prawo międzynawowe, Toruń 1999, p. 250

[3] A. Szklanna, op. cit., s. 76

infringing on human rights of foreigners (an example may be the current discussions in the Work Group on Asylum about the Reception Directive in the scope of the principles of restricting social assistance to people creating a hazard).

2. Legislation and rulings

The first act of an international nature regulating the issues of protecting the rights of foreigners applying for international protection is the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948. The Act does not use the term *foreigner applying for international protection*. Nevertheless, the very first sentence of Art. 2 of the Declaration in accordance with which *Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* indicates the rights guaranteed therein may also be exercised by foreigners applying for international protection[4].

Additional acts of international nature that define the minimum foreigner rights protection standards is the Convention concerning refugee status, prepared in Geneva on 28 July 1951 and the protocol thereto, signed on 31 January 1967 in New York. The Convention determines the definition of a refugee and defines their legal status in the country providing protection thereto. The Act does not include provisions relating to the proceedings determining refugee status. Nevertheless, it would seem to constitute a certain framework, based on which the receiving state should develop a system of procedures regarding foreigners applying for international protection.

The international foreigner rights protection system also includes regional mechanisms of protecting these rights. The basic act of regional international law regulating the discussed issue is the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 04 November 1950, as well as the protocols attached thereto.

[4] A. Szklanna, Ochrona prawna cudzoziemca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, Warsaw 2010, p. 78;

The analysis of the presented legal acts indicates that in the context of the rights and freedoms of foreigners, of greatest importance are: the right to life, ban on torture, inhuman and humiliating treatment, right to court, right to freedom, personal and family safety, right to freedom of thought, conscience, religion and beliefs, right of free movement and choosing a place of residence within any state, right to education, as well as the obligation of respecting the non-refoulement principle resting with every state (Art. 33 of the Geneva Convention).

The legal acts indicated above, constituted a framework to create the European asylum system specifying e.g. the minimum standards for accepting foreigners applying for international protection. It should be emphasized that agreeing on common minimum standards of handling foreigners applying for international protection turned out to be an extremely difficult task. Member State reception systems differ in terms of the quality of reception standards granted to foreigners. The main reason is the fact that every Member State faces a different economic situation, as well as traditions and geographical location. Full harmonization of foreigner reception systems is not possible, in particular with regards to the amount of financial assistance, which if standardized, would result in a better treatment of people applying for international protection than their own citizens.

The standards of foreigner reception constitute an answer to the needs of foreigners applying for international protection. Differences in reception systems of Member States will result in a situation where states with lower reception standards will experience the effect of a transit state. Based on these discussions, a question arises whether a state has from the very beginning been perceived as a safe place in the scope of protecting the most important first generation rights? The reason is that foreigners leave these states, heading to states with better social conditions. The solution to the indicated phenomenon is a mechanism of diverting foreigners back to the state responsible for examining the application for international protection, established by way of the Regulation of the European Parliament and of the Council (EU) No. 604/2013 of 26 June 2013 on 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. As a rule, that state is the first Member State, the borders of which have been first crossed by a foreigner applying for protection.

The general framework of rights and obligations of third state nationals applying for protection, in the scope of reception, is indicated by Directive of the European Parliament and of the Council 2013/33/EU of 26 June 2013[5]. The Act is an expression of efforts for a full recognition of the rights and freedoms of foreigners, with a simultaneous restriction of the competences of receiving states in the scope of a possible limitation thereof to strictly limited, exceptional situations.

The foreigner reception system in place in Poland is regulated by the Act of 13 June 2003 on granting protection to foreigners in the Republic of Poland. This Act determines the standards of receiving the nationals of third states applying for international protection. The developed standards of treatment of the examined group of foreigners are not only the effect of implementing EU regulations in the Polish legal system, but also of the development of international legal instruments in the scope of human rights protection, and, first and foremost, the effect of long-term actions constituting an answer to the changing global migration situation. Among the human rights of most importance in the scope of receiving foreigners applying for international protection, we should indicate the ban on inhuman or humiliating treatment, right to education and freedom of movement and selection of a place of residence within a given Member State, as well as the right to private and family life. The Polish reception system acknowledges the human rights indicated above, however, maintaining the balance between their implementation and protection of safety and public order (one of the conditions of which is to provide efficiency of the procedure of granting international protection).

In the Polish reception system, foreigners applying for the provision of international protection have decent life conditions guaranteed. They are entitled to use social assistance starting from the date of their submission of the application for provision of the international protection, they benefit from education and care in public nursery schools, primary schools and lower-level secondary schools on the same terms as the Polish citizens. The

[5] OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU

right to family life is abode, understood as, first of all, the right to maintain family bonds and preserve family privacy, a particular expression of which is the possibility of having a cash benefits to cover own accommodation costs on the territory of Poland, inter alia, when it is necessary in order to protect and maintain the bonds of the foreign family[6].

Foreign nationals applying for the provision of international protection have the right to freedom and free movement and to choose a place of residence on the territory of the Republic of Poland. However, in the Polish reception system these rights have some restrictions. In the first place it should be indicated that foreign nationals are obliged within 2 days from the submission of the application to appear at the centre for foreigners, unless they indicated in the application the address at which they will be residing. In the event of any breach of the obligation the procedure for the provision of the international protection will be remitted. In addition, Polish reception system has also accepted the possibility to oblige an indicated group of foreign nationals to reside in a designated place or to report in a specified time intervals to the indicated authority (the so-called detention alternative). In certain situations the right accepts the possibility of application of detention, the farthest possible restrictions of the above indicated rights [7].

It seems, in the context of issues concerning the rights and freedoms of foreign nationals applying for the provision of international protection, the most important role is played by the jurisprudence of the European Court

[6] OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013

[7] The premise for application of one of means restricting the rights and freedoms of foreign nationals is, in particular:
a) the need for collecting, with the participation of the foreigner, the information being the basis for an application for the provision of the international protection,
b) existence of the risk of escape of the foreign national,
c) the need to perform the decision on obligation of the foreign national
d) considerations of state defence or security or protection of security and public order.
It should be emphasized, however, that a detention measure is not applicable to four groups of foreign nationals. The first group includes people in the case of which placing in guarded institution would cause a hazard to the life or health of foreign nationals, the second group includes people whose mental and physical condition may justify a presumption that they were victims of violence, the third and fourth group are unattended minors and the disabled.

of Human Rights. The decisions of the Court determining directions of the interpretation of the above indicated regulations affect application of the regulations of the Reception Directive and the mechanism of sending the foreign nationals back to the first entry country on the basis of Dublin III Regulation. The Court oftentimes referred in their decisions to the issues related to the rights of the foreign nationals.

One of the crucial decisions of the European Court of Human Rights with regard to the interpretation of the regulations governing the rights and freedoms of foreign nationals reception is the decision dated 21.01.2011. *M.S.S. v. Belgium and Greece*.[8] The case was concerned with the expulsion to Greece of a person applying for refuge by the Belgian authorities by means of the EU Dublin II Regulation. In this decision the Court noted that Belgium violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, exposing the foreigner to a risk related to shortages of the refuge procedure and bad living conditions, which the foreigner experienced when applying for the provision of the international protection in Greece. The consequence of the indicated decision was the limitation of the use of procedures specified in the Dublin II Regulation towards the foreign nationals, to whom Greek jurisdiction would apply.

Another decision of the European Court of Human Rights, which similarly to the adjudication in the case M.S.S. v. Belgium and Greece, in practice limited Member States' use of the mechanisms ensuring the effectiveness of asylum system, namely Dublin III procedures, is the decision dated 4.11.2014. *Tarakhel v. Switzerland*.[9] In the case concerned, the Court concluded that diverting the people applying for the provision of international protection to Italy as the state responsible for the examination of the application, may interfere with the guarantees set forth in the Article 3 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case in question, similarly to *in M.S.S. v. Belgium and Greece*, the Court pointed, inter alia, to the inappropriate reception conditions prevailing in the

[8] ECtHR – M.S.S. v Belgium and Greece [GC], Application No. 30696/09

[9] Tarakhel v. Switzerland, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/cases,ECHR,5458abfd4.html

country competent for examination of the application for provision of the international protection. In this context, the Court concluded that bad conditions of the reception and accommodation of Tarakhel's family in Italy reached a considerable level of severity, in respect of which returning them to Italy would result in inhumane or humiliating treatment. The consequence of the indicated decision is the limitation of the possibilities of sending the foreign nationals back to Italy.

The aforementioned decision of the European Court of Human Rights indicates a direction of disturbingly extending interpretation of the basic human rights and freedoms. When examining the *M.S.S. v. Belgium and Greece and Tarakhel v. Switzerland cases,* the Court did not take into consideration the extraordinary circumstances in which Greece and Italy found themselves, due to the mass influx of foreign nationals.

However, the Court took a correct position in the adjudication dated 15.12.2016 on *Khlaifia and Others v. Italy*.[10] In this decision the Court noted that although conditions in the centres for foreigners during the time, in which the complainants resided in Italy, they infringed some reception standards, due to difficulties, with which Italy were struggling at that time (related to the mass influx of foreign nationals) it cannot be stated that manner of treating of the appellants violated Article 3 of the Convention.

3. Stance

The Member States should have at their disposal mechanisms enabling provision of efficiency of proceedings related to granting the international protection, which is necessary in order to increase the chances of internal safety of particular countries, and thus the whole European Union. Decision of the Court leading to extended interpretation of the basic rights and freedoms of foreign nationals with regard to the reception system limit the possibility of the use of the Dublin mechanism by the Member States, and thus result in distortion of the asylum system. Decision on the possible violation of the rights and freedoms of foreign nationals with regard to the reception system, should occur through the prism

[10] Khlaifia and Others v. Italy (no. 16483/12)

of the situation of a given Member State. It should be emphasized that reception systems of the Member States should conform to the standards of basic human rights. Nonetheless, their constant increase may result in a situation where the Member States, particularly in the event of mass influx of foreign nationals, will not be able to meet them.

The decisions of the European Court of Human Rights by the means of application of the international law in practice, determine trends of migration policy. Excessive expansion of interpretation of different rights regulated by the European Convention on Human Rights, *in fact* leading to distortions of the primary assumptions of the human rights protection system, with simultaneous limitation of sovereignty of different countries with regard to regulation of their own internal migration situation, leads to dispersion of the European asylum system, and, as a consequence, to its ineffectiveness. In practice, the constantly extended interpretation of the human rights made by the European Court of Human Rights makes it impossible to apply the previously developed asylum system mechanisms, in particular the Dublin Regulation and the Reception Directive. It should be emphasized that both the wording of these regulations itself and, as a principle, their application abides the basic human rights included in the Convention. The problem is not the non-compliance with the regulations of the Convention by particular Member States, but their expanding interpretation forced by the Court, which in particular applies to Article 3, namely the prohibition of torture and inhumane and humiliating treatment.

Of course, it cannot be excluded that in an individual case it may come to a violation of one of the basic human rights. In such a situation also a foreigner must be entitled to a fair trial and finally the right to issue a complaint to the European Court. It is inappropriate, however, to reach, on the basis of the decisions issued in individual cases, a general conclusion that in each subsequent case the same violation will be observed. Such a statement in each case requires an individual analysis. Meanwhile, in cases regarding the application of the Dublin III mechanism since the adjudication in the case M.S.S. v. Belgium and Switzerland, Member States in practice were afraid of transferring foreign nationals to Greece (and also to Italy since the adjudication in the case of Tarakhel), *a priori* acknowledging that any such transfer could therefore be breach of Article

3 of the Convention. Mechanism of sending the foreign nationals back to Greece is being gradually restored. Nonetheless, due to the critical position, inter alia, of the United Nations High Commissioner for Refugees, Member States are still afraid of applying the Dublin mechanism in relation to Greece.

Every rational policy, including the migration policy requires predicting the effects of its decisions. Therefore, it should be considered where an indiscriminate acceptance of the line of judicial decisions of the Court, detached from the extraordinary situation of Europe, struggling today with the migration crisis may lead. It is worth considering, for example, in a situation of mass influx of foreign nationals, the meaning of the necessity of providing "suitable accommodation" referred to in Article 13 of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced people and on measures promoting a balance of efforts between Member States in receiving such people and bearing the consequences thereof[11]. If "suitable accommodation" is interpreted including the current, extensive tendency of judicial decisions of the Court, and not the primary interpretation of the basic rights and freedoms, probably all Member States will be in violation of Article 3 of the Convention. If Member States want to comply with the requirements resulting from the rulings of the Court, it would be necessary to significantly reduce the number of foreign nationals, looking for protection, and let into the EU territory, which would, however, be an obvious breach of the Geneva Convention concerning refugees. Europe, in practice, has no actual possibilities (for instance in terms of accommodation) to fulfil the inflated standards of the Court. Return to the primary interpretation of the basic human rights seems to be the only and fully relevant way to prevent a dilemma as to which provisions of the Convention should be applied first. As a consequence, Member States would regain their right to rational management of a migration situation on their territory, which gives a chance to restore proper operation of the European asylum system.

[11] OJ L.212/12-212/23; 7.8.2001, 2001/55/EC

4. Conclusions

When analysing legal acts governing the rights and freedoms of foreign nationals, and the present migration situation, the following should be assumed:

1. Referring to the basic human rights of an absolute nature, including also Article 3 of the Convention – they must be absolutely observed, however their absolute character does not provide basis for their extensive interpretation. It seems that this is the direction of judicial decisions of the Court. It is legally unjustified, and additionally with regard to the reception of foreign nationals - it is irrational, as it omits special migration circumstances which currently affect Europe. Continuation of such a direction will lead to exacerbation of the current crisis, or emergence of new ones.
2. With regard to other basic human rights - for proper operation of the asylum system, the receiving states should have the possibility to make autonomous decisions with regard to limitation of some of them, within the binding law. This category includes e.g. the right to move freely and inhabit on the territory of the receiving country. Every Member State should have at its disposal broad competences, with regard to determination of the premises for regulation of the said law. Depending on the specific nature of the asylum system of a given state, in particular, due to the necessity to provide security and efficiency of the proceedings for international protection, the state should have freedom to decide as to the selection of suitable detention measures or use of the so-called border procedures. Acknowledgment that exercise of this right is a breach of the Convention will lead to exacerbation of the present migration crisis. The Member States should also have at their disposal the right to effective verification which people are really entitled to enter their territory, before these people cross the border. Such verification, already conducted on the territory of the state after the foreigner crosses the border, is definitely belated and it should be indicated as one of the reasons that may give rise distortions in the asylum system.
3. Referring to mutual relations between the decisions of the Court and binding regulations governing the asylum system - the aforementioned decisions of the Court resulted in creation of a practice of the Member

States, consisting in withdrawal from the analysis of individual cases (to which they are obliged on the basis of the provisions) and assuming a special precedent, which in the enacted law (rather than common law) system is an unacceptable intervention of judicial power in the competencies of the legislative authority.

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