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EUROPEAN ASYLUM DEVELOPMENT IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Master thesis

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List of abbreviations

Court of Justice of the European Union – CJEU.

European Convention on Human Rights - ECHR.

1951 Geneva Convention relating to the status of refugees – Geneva Convention.

European Court of Human Rights – ECtHR.

Charter of Fundamental Rights of the European Union – Charter.

Common European Asylum System – CEAS.

Treaty on the Functioning of the European Union – TFEU.

Treaty on European Union – TEU.

International humanitarian law – IHL.

UN Refugee Agency – UNHCR.

European Council on Refugees and Exiles – ECRE.

International Organization for Migration – IOM.

European Asylum Support Office – EASO.

Non-governmental organisations - NGO.

INTRODUCTION

In XXth century the EU asylum law was mostly influenced by the international documents – 1951 Geneva Convention relating to the status of refugees and 1967 protocol and EU legislative acts related to asylum and migration. However, for a long time no regional or international judicial review was foreseen to protect right to asylum directly – Geneva Convention does not create judicial body for individual complaints, European Convention on Human Rights (ECHR) does not contain direct provisions on asylum, and that's why complaints have to be based on other provisions of ECHR. The application of these acts (especially EU legislative acts) was an exclusive right of domestic courts for a long time. Lisbon treaty (2009) created an opportunity for all domestic courts of all the levels to ask for preliminary ruling from CJEU in asylum cases. Before, only supreme national courts had an opportunity to do that. This change gave a possibility for one more institution – Court of Justice of European Union (CJEU) – to take a more active role in EU asylum law interpretation. Preliminary ruling procedure is a tool for domestic courts, of EU Member States, to get support from CJEU on interpretation of particular provisions of EU legislative acts.

In order to reveal the influence made by CJEU decisions for EU asylum development, will be analyzed jurisprudence of this Court, in this research. Due to the limited scope of the work only key cases, which highlight the most significant problems related to the development of European asylum law in CJEU case law, will be studied in detail. However, common patterns of the cases will be revealed.

EU accession to ECHR, which creates more links between CJEU and European Court to Human Rights (ECtHR), is another important development embodied in the Lisbon treaty. In this research will be analyzed the approach exercised by the CJEU towards the ECHR and its jurisprudence in asylum cases till the accession, as no obligation to use it is envisaged for now. Analysis of the recent case law will reflect emerging trends and tensions. Furthermore, a broader view towards the impact of international human rights instrument on the EU asylum law will be studied (e.g. Charter of Fundamental Rights of the European Union).

Both areas of EU asylum law application will be researched – CJEU rulings and application in domestic level – in order to reveal the development of EU asylum law and the role of CJEU jurisprudence in this development.

Academic relevance of the topic. EU Member States always sought for a greater legal harmony in the asylum law. It was done through legislative instruments mostly. An enforcement

of the Lisbon treaty in 2009, allowed an effective interpretation of the European asylum legislation. During the validity of Lisbon treaty, the amount of decisions and number of applications for preliminary rulings significantly increased. Before 2009 only 3 complaints were lodged, while since 2009 till April 2014 there were 21[1] asylum related decisions issued by the CJEU. These numbers show that the role of CJEU in asylum development gained more importance. The importance is influenced by the aim of CJEU – to ensure the proper application and uniform interpretation of European Community law in all the Member States[2]. The analysis of the EU asylum law development through CJEU jurisprudence is a new topic of research so only few aspects were previously discussed by the scholars. It is a result of low number of judgments issued by this Court in the past.

EU instruments are recent and new for domestic courts. Furthermore, EU legislative acts are drafted differently from the national law.[3] The most recent changes, in EU asylum law, were approved in June, 2013. European Parliament approved the recast versions of the Dublin regulation, Reception conditions directive and Asylum procedure directive. The new asylum rules, which have already been agreed by Parliament and Council representatives and backed by national governments, should be transposed to national legislation in the second half of 2015.[4] This brings out why preliminary ruling procedure is so important for domestic courts. It is not only the tool for harmonization of EU asylum system; it also supports the national courts. In case asylum related provision is complicated and confusing the national court has an interest to use preliminary ruling procedure in order to get explanation and make a decision, which would be based on CJEU ruling. According to the Article 267 paragraph 3 of the Treaty on the Functioning of the European Union (TFEU) obligation to use preliminary ruling procedure arises for national court 'against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court'.[5] The provision clarifies that not only an interest exists, but also an obligation for the supreme domestic courts to use preliminary ruling procedure. Furthermore, the 1951 Geneva Convention can be considered as a part of the

[1] List of Judgments of Court of Justice of European Union from 2009 to April 2014 concerning asylum policy; accessed 11th May 2014, available at: http://curia.europa.eu<...>

[2] Case Cilfit v Ministry of health; Case 283/81, Judgment of the European Court of Justice of 6 October 1982; accessed 04th June 2013, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61981CJ0283:EN:HTML

[3] Errera Roger, 'A new supranational court for refugee and asylum law: the court of Justice of the European Union a commentary of its recent case law' pp. 4; accessed 03rd July 2013, available at: http://rogererrera.fr/droit_etrangers/docs/Errera_Bled_2011.pdf

[4] Press release of the European Parliament 'Parliament give green light to the new European asylum system'; accessed 20th August 2013, available at: http://www.europarl.europa.eu/news/en/pressroom/content/20130607IPR11389/html/Parliament-gives-green-light-to-the-new-European-asylum-system

[5] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [*Official Journal C 115, 09 May 2008*]; Art. 267; accessed 04th June 2013, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF

Common European Asylum System (CEAS[6]), as it is 'based on the full and inclusive application'[7] of the Convention. Because of laconic nature of the Convention, EU asylum related legal acts give guidance on key concepts and provisions of refugee law. National courts, by using preliminary ruling procedure also, get clarification of the provisions of the Geneva Convention, in the context of the Union legislation.

Novelty. This research will analyze whether and to which extent asylum law is influenced by the CJEU jurisprudence. It will highlight relevant trends, which can be distinguished only now, cause of little use of preliminary ruling procedure till the Lisbon treaty entered into force. Unfortunately, up to the recent times only a few scholars' analyzed the impact of CJEU asylum jurisprudence in the light of particular asylum judgment or international agreement (e.g. ECHR, EU Charter). However, not much attention had been given to the impact on the EU asylum developments in general. This research will analyze the influence not only on EU asylum law, but also on national asylum systems, which seems to be forgotten. This work is novel as it will uncover common emerging problems and general influence on the EU asylum law, in the light of general overview of asylum related jurisprudence.

Utility of the topic. This research provides the analysis of existing CJEU asylum jurisprudence and highlights the problematic aspects of the research object. Furthermore, this work suggests possible solutions and improvement of the national and European asylum systems, in order to reach higher development level.

Problems of the research. CJEU asylum jurisprudence influences EU asylum law generally and each EU national asylum system separately. However, CJEU judgments seem to be vague and lack clarifications regarding the set standards. Following problems will be scrutinized: 1) whether the CJEU asylum jurisprudence enhances the protection level of the asylum seekers in the EU? 2) ability of national asylum authorities and domestic courts to apply the CJEU asylum jurisprudence in national level and the effect on the development on national asylum systems.

Hypothesis. Although CJEU case law has potential to an effective contribution on development of the EU asylum law, the jurisprudence of the Court does not lead to the

[6] Common European Asylum System creation was aimed to deal with number of problems in asylum field which emerged because of significant differences in national asylum systems of Member States. In order to reach the goal the harmonisation of national asylum systems was started on the basis of binding legislation. This system consists of three directives and one regulation, which reduce differences among national asylum systems of Member States and their practice. EU legislation sets out common standards in order to ensure equal treatment of asylum seekers in the territory of EU.
Accessed 06th May 2014, available at: http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html

[7] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [*Official Journal of the European union L 337/9, 20 December 2011*]; recital 4; accessed 26th March 2014, available at: lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF

strengthened protection of asylum seekers. Furthermore, it only has partial impact on the practice of the domestic courts in EU Member States.

Research object, objectives and goals.

The object of this research is the CJEU case law and its impact on EU and national asylum law developments - emerging trends and tensions, which can be deduced from the analysis of the jurisprudence of the Court of Justice of European Union. The main **goal** is to examine to which extent the CJEU jurisprudence contributes to the EU asylum law developments and asylum systems in the EU Member States. Few **tasks** are raised:

1) discuss the key cases, main patterns of CJEU decisions and problems arising out of it;
2) determine relation of the CJEU and the ECHR and its impact for EU asylum law development;
3) determine how CJEU relies on the Charter of Fundamental Rights of the European Union (Charter) in asylum related case law;
4) determine links between recast version of asylum *acquis* and CJEU jurisprudence;
5) assess application of CJEU decisions in the Member States – in relevant cases, legislation or in other ways;
6) assess the influence of CJEU asylum related jurisprudence in Lithuania.

Objective of this research – after conducting analysis of the CJEU asylum jurisprudence ant is reflection in the EU and national asylum systems, to find out the extent of influence and its significance.

Subject - problems concerning the rulings of CJEU jurisprudence related to asylum law. Main problematic issues for this research will be discussed in two areas: 1) analysis of CJEU ruling in order to reflect an impact, contribution to the EU asylum development and CJEU relation with ECHR and the Charter; 2) the practice of EU Member States – implementation of the CJEU rulings at national level: changes in case law or national legislation developed as a result of CJEU jurisprudence.

The research is divided in order to get deeper understanding of influence on EU asylum development, which resulted from the CJEU jurisprudence.

Sources of the research.

In order to achieve the goal of this research few categories of sources will be used:

- Documents, legislation and case law of International public law and the European Union;
- Reports of non-governmental organizations , other studies and reports dealing with the particular area;
- Publications of public International Law and European Law scholars'.

The most important sources, in this research, are the case law of CJEU and related opinions of Advocates-General, which usually gives a broader interpretation.

There are few scholars, who analyze particularly the impact of CJEU jurisprudence on EU asylum development - it was done by Roger Errera, who published articles on few first cases decided by the CJEU (Elgafaji case, Abdulla case) and CJEU role in asylum field. More recent researches are published by Lyra Jakulevičienė, Vladimiras Siniovas, Boštjan Zalar and Hugo Storey.

Other important sources are information presented by non-governmental organizations (NGO), like the UN Refugee Agency (UNHCR) and European Council on Refugees and Exiles (ECRE).

Methods of the research.

These methods of the research were invoked for the achievement of goal: historical, logical-analytical, systematic analysis, comparative, descriptive statistical. The analysis of legal documents and scientific literature will be used.

Historical method will be used to reveal the changing importance of CJEU role, changing scope of competence and how it influenced the EU asylum law, its development.

Logical-analytical method, as Systematic analysis will be used to discover common patterns in CJEU case law, analysis of jurisprudence and changes of EU asylum law after decisions was made in EU Member States.

Differences or similarities of application of CJEU case law in EU Member States will be covered by comparative analysis. It will help to show problematic issues in area of national asylum systems, derived due to the application or interpretation of the CJEU decisions. Also I will discuss whether domestic courts make references in their decisions to CJEU jurisprudence.

Statistical method will disclose importance of preliminary ruling institute, the role of the CJEU, the most active EU Member States.

Structure. Master thesis will be divided into 3 chapters.

The first chapter will introduce the legal background of EU asylum law and will analyze changing importance of the CJEU role in the EU asylum law development. Evolutions of CJEU and changes after Lisbon treaty will be defined. This chapter is important for understanding the role of CJEU in asylum law interpretation and preliminary ruling procedure, the importance of it. Situation after Lisbon treaty will be reflected.

The second chapter will consider the influence of the CJEU jurisprudence on the EU asylum law. The relation with ECHR and its jurisprudence will be defined separately. Furthermore, common tendencies and problems will be revealed and assessed.

The third chapter will assess how domestic courts of the EU Member States apply the CJEU case law, and will reveal main arising problems. Moreover, will show whether harmonization of EU asylum law through CJEU jurisprudence is effective and whether CJEU jurisprudence influences not only national jurisprudence, but other fields of national asylum system. Impact on Lithuanian asylum system will be analyzed separately.

1. Changing importance of the CJEU jurisprudence, for the development of the European asylum law

1.1 International interpretation of refugee law, till the expansion of CJEU competence

Till the single European Union market creation each European Member State had a responsibility to ensure right to asylum and competence to define legislation related to asylum law (criteria, procedures, conditions...). The only requirement was the compliance with 1951 Geneva Convention. 'During the preparatory works of the 1951 Geneva Convention no one thought of creating an international court or a body composed of experts in charge of overseeing its implementation by State Parties, on the model of the monitoring systems included later on in the UN human rights conventions adopted from the mid-1960s and on'.[8] According to the Article 38 of the 1951 Convention, a dispute between parties to this Convention, which cannot be settled, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.[9] This provision establishes the dispute settlement procedure in case of disagreement between contracting States, but none of the provisions create right for the refugee to refer questions, related to interpretation or application of the Convention, to an international court. An individual petition right was not established. After 1951 Geneva Convention entered into force and became binding instrument for contracting States, no international or regional body for hearing individual cases was created. National courts had to apply and interpret provisions of Geneva Convention on their own. Accordingly, no harmonized practice on application of the Convention was created among the national asylum systems of contracting States.

Another international instrument, European Convention on Human rights does not have any provisions which directly mention the asylum or refugees. Few articles of the Convention are related to aliens (Article 16; Protocol 4 Article 4; Protocol 7 Article 1).[10] These provisions establish rules related to expulsion of aliens (safeguards) and restriction of political activities. However, ECHR provisions make indirect impact on the refugee law and its development. According to the European Court of Human Rights jurisprudence, asylum cases are decided under other provisions of the ECHR, like: Article 3 (prohibition of torture) - which can be considered as primary in asylum cases, because of its frequent use; Articles 4 (Prohibition of slavery and forced labour); Article 5 (Right to liberty and security); Article 6 (Right to a fair

[8] Supra note 3, pp. 2.
[9] 1951 Geneva Convention Relating to the Status of Refugees; accessed 04th June 2013, available at: http://www.unhcr.org/3b66c2aa10.html
[10] European Convention on Human Rights; accessed 04th June 2013, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

trial); Article 9 (Freedom of thought, conscience and religion); Article 13 (Right to an effective remedy)[11]. The application of these provisions had a significant impact for the development of the asylum law in Europe. ECtHR became the first European regional body which had a jurisdiction to decide on asylum cases. The complaint, related to asylum, has to fulfil general admissibility criteria. However, no right to asylum is established in the Convention and other grounds (obligation to rely on particular provision of the Convention) have to be found. Accordingly, the requirements restrict competence of ECtHR in asylum field and related subsidiary provisions have to be used.

1.2 Limited development of the CJEU competence in the field of asylum law

'When the Rome Treaty creating the European Economic Community was drafted and finally signed in 1957 no one imagined that asylum, together with immigration, would ever be a part of the competence of the Community'.[12] Only by the Treaty of Maastricht (entered into force in 1993), which established European Union and contained the Declaration on asylum, for the Council of EU was allowed to adopt measures related to asylum regulation. Asylum policy was recognized as a 'matter of common interest', for the first time. However, during the time of validity of the Maastricht treaty, asylum related measures were adopted only 2 times, but these joint positions lacked the binding force. 'Apart from the lack of effectiveness, the absence of democratic and judicial review was felt as another shortcoming of the Maastricht system.'[13]

The way to develop asylum law in EU started with the Schengen Agreement in 1985 and was incorporated into the Amsterdam treaty (1997). An abolishment of external borders required to create procedural system for the border control, including rules related to the asylum system. The Schengen implementation Agreement set out the framework for adopting measures compensating for the abolition of internal border control, such as measures against illegal entry and harmonisation of rules on visas[14], which also contained provisions on asylum. After the Agreement, another instrument, which directly regulated examination of asylum applications - The Dublin Convention (1990) was concluded between all the Member States of EEC.

[11] European Convention on Human Rights: Art. 4 - M. v. the United Kingdom, application no. 16081/08, decision of 1 December 2009 (struck out of the list); accessed 04th June 2013, available at: http://www.refworld.org/docid/48a54bc02.html; Art. 5 - Stoichkov v. Bulgaria, application no. 9808/02, judgment 24 March 2005; accessed 04th June 2013, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68625#{"itemid":["001-68625"]} ; Art. 6 - Soering v. the United Kingdom, application no. 14038/88, judgment of 7 July 1989; accessed 04th June 2013, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#{"itemid":["001-57619"]}; Art. 9 - Ülke v. Turkey, application no. 39437/98, judgment of 24 January 2006; Art. 13 - *Jabari v Turkey* (2000); accessed 04th June 2013, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=ECHR&type=&coi=TUR&docid=4964bd752&skip=0.

[12] *Supra* note 3, pp. 3.

[13] Battjes H., 'European Asylum Law and International Law', Leiden: Kroninklijke Brill NV, 2006, pp. 29.

[14] *Supra* note 3, pp. 27.

Provisions of the Convention, for a first time, imposed duties on the contracting States (EU Member States), it were binding rules. Convention restricted 'asylum shopping'– according to these rules only one Member State examines asylum application – opportunity to lodge application only in the Member State of first entry[15], or where the applicant for asylum is in possession of the valid residence permit[16], or where the applicant for asylum has a member of his family who has been recognized as having refugee status in a Member State.[17] These developments were first steps towards regulation in asylum law field. However, no competence for the Court of Justice of European Union was given in the asylum field.

Although asylum related provisions embodied in the Dublin Convention, created the sketch of the European Asylum system, examination of the asylum application was based on the domestic legislation and international obligations. A lot of issues, like examination of request, reception facilities and other procedural rules, were left to the national law and national asylum systems. No regional judicial review was foreseen. Accordingly, EU created regulation on certain issues of asylum within Union. However, all asylums related regulation was interpreted by the domestic courts. EU was not able to exercise any judicial control over obligations of Member States and interpretation in the domestic courts, no harmonization was possible.

The Amsterdam treaty made the first steps regarding the extension of competence of the Court of Justice to the field of asylum. 'An asylum policy was moved 'from intergovernmental co-operation among the Member States into the Community legal order'.[18] Treaty not only included new Title IV 'Visas, asylum, immigration and other policies related to free movement of persons', it also expanded the jurisdiction of the Court of Justice. Article 68 of the Amsterdam treaty established that: 'The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata'.[19] The Council, the Commission and Member States were not the only ones, who were entitled to have a right to request the Court of Justice to give a ruling. Article 68 paragraph 2 mentioned above sets out that the Supreme national court or a tribunal of a Member

[15] CONVENTION determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01) - Dublin Convention, [*Official Journal C 254 , 19/08/1997 P. 0001 – 0012];* Art. 7*;* accessed 04th June 2013, available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0819(01)&model=guichett

[16] Ibid, Art. 5.

[17] Ibid, Art. 4.

[18] *Supra* note 13, pp. 3.

[19] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [*Official Journal C 340, 10 November 1997*]; Art. 68 para 4; accessed 04th June 2013, available at: http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html

State has the right to refer to the Court if certain conditions are met: '<...> where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon'.[20] These provisions had to increase influence of Court of Justice on European asylum law. Provisions not only gave an opportunity to get ruling on the European Union level, it also was the first step to judicial protection of the individuals in this field of law. At that time only a few key provisions already existed and had regulated asylum, e.g. Title IV of the Treaty of Amsterdam. Although asylum related provisions were already applicable, during the time of validity of the Amsterdam Treaty no requests were brought for the ruling before the Court of Justice. The first admissible request was received only on the 1st of January in 2006, from the domestic court concerning the Title IV on immigration or asylum measures; two cases had been ruled as inadmissible.[21] Although possibility to refer questions regarding asylum matters was foreseen, during the validity of the Amsterdam treaty it was not used. Accordingly, it reveals ineffectiveness of the established judicial review system in asylum disputes.

Policy towards judicial review regarding asylum matters was only slightly changed in the Treaty of Nice (2000) - European Parliament got the right to bring a claim to the Court of Justice under the same conditions as the other institutions (Article 230 EC). However, till Lisbon treaty enforcement only few claims, related directly to asylum law, were decided in the CJEU - Case C-133/06 **European Parliament v Council of the European Union**[22] (Annulment procedure), Case C-465/07 **Elgafaji**[23] (interpretation of subsidiary protection provision)), Case C-19/08 **Petrosian**[24] (interpretation Dublin regulation provisions), Cases C-175/08 to C-179/08 **Abdulla and others**[25] (cessation provision). This data shows that the system lacked the

[20] Ibid.
[21] Peers, S. and Rogers, N. eds., 'EU Immigration and Asylum Law: Text and Commentary'. Leiden: Kroninklijke Brill NV, 2006, pp. 73.
[22] Case European Parliament v Council of the European Union; C-540/03; Judgment of the Court of Justice of EU of 27 June 2006; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dc3963436b0145431b8554a98becc830a2.e34KaxiLc3qMb40Rch0SaxuNa3n0?text=&docid=55770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=361154
[23] Case Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie; C-465/07; Judgment of the Court of Justice of EU of 17 February 2009; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=76788&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=325945
[24] Case Migrationsverket v Edgar Petrosian and Others; C-19/08; Judgment of the Court of Justice of EU of 29 January 2009; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=73617&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=327024
[25] Case Salahadin Abdulla and others v Bundesrepublik Deutschland; C-175/08; Judgment of the Court of Justice of EU of 02 March 2010; accessed 26th March 2014, available at:

effectiveness. It could be explained by limitations which existed in the asylum field, on the basis of the Treaty (access and possibility to refer question was foreseen only for certain EU institutions and Supreme domestic court/tribunal).

From the Single European Act (1986) to nowadays asylum policy became more important element of EU policy. For a long time judicial supervision on asylum related case, within level of EU, was not foreseen. Domestic courts were the only ones who developed and interpreted EU asylum legislation. However, asylum law became a part of the Community law and is subjected to the judicial supervision by the European Court of Justice. Although till the Treaty of Nice judicial system gave the possibility to bring asylum related claims to the CJEU, the system and limitations (supreme domestic court requirement) led to ineffective supervision. Till Lisbon treaty only 4 cases related directly to asylum law were decided before the Court. Case law of the CJEU in the asylum law area is still limited. However, recent changes, embodied in the Lisbon treaty, had a significant influence on the situation.

1.3 CJEU – broader competence raises new challenges

The Treaty of Lisbon, which was signed in 2007 and entered into force on 1st of December in 2009, amends the Treaty on European Union (TEU) and the Treaty establishing the European Community treaties (in present time known as the 'Treaty on the Functioning of the European Union') without replacing them. Community aimed to create more effective judicial review. As a result it had an impact on asylum law as well. The changes were made not only within the organization of CJEU, but also towards the jurisdiction of CJEU. The latter changes made a big impact to the scope of interpretation of asylum issues. 'The first time in the history of refugee and asylum law a supra-national court, the CJEU, adjudicates directly on issues relating to this area of law'.[26] Article 267 of TFEU (ex Article 234 TEC) grants 'jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.[27]

According to these new rules national courts or tribunals are allowed to ask for preliminary ruling. Currently not only the higher courts, but also the courts of lower instance also can use preliminary ruling procedure. However, the supreme domestic court or tribunal of the

http://curia.europa.eu/juris/document/document.jsf?text=&docid=75296&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=327772

[26] *Supra* note 3, pp. 4.

[27] *Supra* note 5, Art. 267.

Member State has the obligation to refer for preliminary ruling in case of uncertainties. National court decides whether it is necessary to request for it and whether it can be done at any stage of the court procedure. The ruling of CJEU is binding not only for the national court which asked for preliminary ruling, but also for the domestic courts or tribunals of all Members States, which make the decision on the same issue. CJEU has the right even to add some related and important issues, which were not raised by the court of the State, and contrary - CJEU also has the right not to answer raised questions. However, it is important to mention that preliminary ruling procedure does not evaluate factual background of the case or validity of the legislation of Member State, the main purpose is to give explanation for national courts in resolving unclear issues concerning asylum related EU law.

An important issue related to the application of preliminary ruling procedure is established in Article 252 of TFEU. It is stated in this provision that Advocates-General (AG) makes reasoned submissions on the cases. AG gives assistance to the judges of the Court. CJEU, in the argumentation of many cases, takes into consideration the opinions of the AG. This shows that the Member States which apply the preliminary ruling-judgment given by CJEU should combine it with the opinion of the AG. Usually this opinion, given to the Court, is much broader and more detailed.

All new provisions gave possibility for CJEU 'adjudicate directly on issues relating to this area of law'[28] (asylum law) and in such way 'to ensure the proper application and uniform interpretation of European Community law in all the Member States'[29]. The procedure when domestic court of the first instance (or any other instance) is given right to request for preliminary ruling from international or in this case regional court – CJEU - is unique in asylum law. 'After all, for the first time in history, a supranational judicial body has become entitled to provide a mandatory interpretation of refugee law provisions.'[30] The new CJEU preliminary rulings system is increasingly becoming the governing case law on European asylum law for all domestic courts. It is a unique tool to ensure the proper application and interpretation of EU legislation in all Member States. Decisions made by CJEU have a precedential power for all national courts of the Member States.

Since the enforcement of the Lisbon treaty (in 2009) till April of 2014, CJEU heard and made decisions on 20 cases related to asylum issues (in addition - there was heard 4 more

[28] *Supra* note 3, pp. 4.
[29] *Supra* note 2.
[30] Gábor Gyulai, 'The Luxemburg Court: Conductor for a Disharmonious Orchestra? Mapping the national impact of the four initial asylum-related judgment of the EU Court of Justice'; Budapest: Hungarian Helsinki Committee, 2012; pp. 10; accessed 26th March 2014, available at: http://helsinki.hu/wp-content/uploads/The-Luxemburg-Court-06-04-2012-final.pdf

complaints lodged, before the enforcement), 5[31] cases are pending for preliminary ruling before CJEU. These numbers shows that the amendments of Lisbon treaty gave an effect and increased the amount of applications.

It is important to understand that rulings before and after Lisbon treaty has the same significance. Because of this there will be no distinction between these decision made in this research.

From the creation of EU 24[32] cases related to asylum were decided by the CJEU. 12 out of 27 EU Member States brought complains related to asylum law and the decisions on these cases were made. The most active State now is Germany – 4 complaints decided, 1 case is pending. According to UNHCR Global Trends 2012, at the end of 2012 there were 1,553,300 refugees in Europe and 589,700 of them were in Germany.[33] It is about 38 % of all refugees in Europe. It could be the reason why Germany is so active in asylum related cases – the number of refugees is the biggest in the whole EU. However, UNHCR Mid-Year trends 2013 report reveals that 'in Germany, refugee figures were reduced from 589,700 at the beginning of 2013 to 168,500 by mid-year, due to an alignment of the definitions used to count refugees'[34], but according to the Report Germany remains 'the largest single recipient of new asylum claims during the first half of 2013, with 43,000 asylum applications registered'.[35] The Member State which accepted most refugees is France – 221,869[36] refugees at the mid-off the 2013. In the beginning of 2014, 10 of all CJEU cases were related to Dublin regulation. It is about 40 % of all the claims. The increasing use of preliminary ruling procedure in the asylum field seems significant. It is 200% compared to the quantity of judgments on the past few years; it is mainly due to the extremely limited number of questions previously asked.[37]

An increasing importance of preliminary ruling is affected by unclear regulation. 'Many EU instruments, especially Directives, are not a model of clarity and consistency, due to the conditions of their drafting and the inevitable compromises between the Commission and the Council or among Member States'.[38] Text of asylum related legal acts usually is very abstract

[31] List of Judgments pending in Court of justice of EU (concerning asylum policy); accessed 11th May 2014, available at: http://curia.europa.eu<...>
[32] List of Judgments of Court of Justice of European Union from 2009 to April 2014 concerning asylum policy; accessed 11th May 2014, available at: http://curia.europa.eu<...>
[33] UNHCR, 'Global trends report'. Geneva: United Nations High Commissioner for Refugees, 2013; accessed 26th July 2014, available at: http://www.unhcr.org/51bacb0f9.html
[34] UNHCR, 'Mid-Year trends 2013'. Geneva: United Nations High Commissioner for Refugees, 2013; pp.6; accessed 06th May 2014, available at: http://unhcr.org/52af08d26.html
[35] Ibid, pp.10.
[36] Ibid,.15.
[37] Labayle H. and De Bruycker P., '*THE INFLUENCE OF ECJ AND ECtHR CASE LAW';* Policy Department. Brussels: European Parliament, © European Union, 2012; p. 26; accessed 26th July 2014, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462438/IPOL-LIBE_ET(2012)462438(SUM01)_EN.pdf
[38] *Supra* note 3, pp. 4.

and its interpretation in various Member States differs due to diversity of the national jurisprudence. Moreover, EU legal instruments are very different from national legislation. As a result, it leads to domestic legal uncertainty when national courts interpret EU legislation on their own. The rulings of the Court should prevent future misunderstandings and should ensure unified interpretation and at the same time – equal treatment for asylum seekers in all Member States. However, there is no guarantee that mentioned aims will be achieved. Furthermore, the possibility of future misunderstandings regarding the application of CJEU rulings cannot be excluded.

National courts have the competence to decide whether it is necessary to request the CJEU for its interpretation of provisions, of an asylum related EU instrument. The national court which fails to make a reference in the case where it should be done, can face several types of possible legal consequences: infringement proceedings initiated by the Commission; the CJEU ruling in another case that the national court had been wrong in not making a reference; a higher-up national court ruling that the refusal is invalid under Community law; an action for damages based on EU law can be awarded for a failure to refer (See C-224/01 Kobler [2003] ECR-I-10239); or the failure to refer being considered by the ECtHR to be contrary to Article 6 of the ECHR (See Coeme and others v Belgium [2000], para. 114; case Canela Santiago v Spain [2001]; case John v Germany [2007] - the Court confirmed that the refusal to refer a case to the CJEU for a preliminary ruling under Article 234 could infringe the fairness of proceedings within the meaning of Article 6 of the ECHR, in case it appeared to be arbitrary).[39]

Skeptical opinions about new preliminary ruling system exist. Not all agrees on the benefits of the system. Concerns were voiced about the impact on international jurisprudence. It was pointed out that because there has never been a case taken to the International Court of Justice as provided for by Article 38 of the Geneva Convention, the CJEU 'has become (by default) the first and the only supranational court with jurisdiction to consider matters of refugee law and that as a consequence there is a danger that the CJEU will furnish a 'Eurocentric' rather than an international approach to interpreting of the Geneva Convention, which is a global, not a regional, international treaty'.[40] Concerns are based on the opinion that judges lack of competence in asylum field, especially in the field of international asylum law[41]. Only few judgments were made till 2009 and this is new field for the Court. Furthermore no possibility to

[39] Storey Hugo [forthcoming – working draft], ‚Preliminary references to the Court of Justice of the European Union (CJEU)', September 2010, pp. 6; accessed 04th June 2013, available at: http://www.iarlj.org/general/images/stories/lisbon_sep_2010/storey.pdf

[40] Ibid.

[41] Jakulevičienė L., 'Pirmųjų Europos Sąjungos Teisingumo Teismo sprendimų prieglobsčio bylose pamokos' ['Lessons of the first EU Court of Justice judgments in asylum cases'] in Jurisprudence 2012, Vol.19 No.2, p. 477–505, Dec. 2012; pp. 504; accessed 26th March 2014, available at: https://www3.mruni.eu/ojs/jurisprudence/article/view/45

give observations for third parties interveners was foreseen, as CJEU Statute does not permit third-party intervention. This approach was established in the Case 2/74 Reyners, and applied strict interpretation of Article 23 of the Statute[42]. However, UNHCR can take participation as an interested party, if in national level acted as an intervener, in the light of the judgment in case C-192/99 R v. Secretary of State for the Home Department[43]. Non-governmental organisations (NGO), like UNHCR, are usually active in similar cases in the ECtHR proceedings. Interventions give added value – NGOs can give relevant and urgent evaluation of the particular situation in country of origin, their work allows identify weaknesses of asylum system, etc.

More practical concern was related to delay (after the reference for preliminary ruling case is pending) and cost of the procedures[44]. This issue was raised because some cases were pending for a long time - Case C-31/09 Bolbol took about 17 months (January 2009 - judgment of the Court in June 2010), C-175/08 Abdullah (early 2008 – judgment of the Court in 2 March of 2010). This problem was solved by the Statute of the CJEU in the Article 23(a): '<...> expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure'[45].

Although not all above mentioned concerns are the subject of direct interest of this research, particular issues will be taken into account and analyzed. This research will analyze the most significant asylum related developments, through the jurisprudence of CJEU. The case law of CJEU uncovers that the jurisprudence lacks volume, 'regardless of the progress in judicial protection made by treaty of Lisbon'.[46]

[42] Case Reyners v. Belgium; C-2/74; Judgment of the Court of Justice of EU of 21 June 1974; pp. 644-45; accessed 04th June 2013, available at::
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d6ca834e64284041c8adba98cec3931090.e34KaxiLc3eQc40LaxqMbN4OaNiRe0?text=&docid=88739&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=239945
[43] Case R v. Secretary of State for the Home Department; C-192/99; Judgment of the Court of Justice of EU of 20 February 2001; accessed 04th June 2013, available at::
http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46193&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=60789
[44] *Supra* note 39, pp. 13.
[45] Protocol No. 3 on the Statute of the Court of Justice of the European Union (Official Journal of the European Union C 83/210, 30 of March 2010); accessed 04 June 2013; accessed 04th June 2013, available at::
http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf
[46] *Supra* note 37, pp. 3.

2. CJEU asylum related jurisprudence – lacking in volume

CJEU became more active in the field of asylum only during the recent few years and substantial judgments were made, which had a significant impact on CEAS. In this chapter the most important developments will be revealed, however, related problems which are reflected in the Court's decisions will be raised and discussed.

2.1 Superficial approach – recurrent use of preliminary ruling procedure

The cases, which started asylum jurisprudence, were published in the beginning of 2009 – it was Petrosian case and Elgafaji case. Both of them had a significant impact: on the one hand it was a break after the years of silence (from creation of initial asylum related legal acts) related to the substantive asylum law, on the other hand both cases were first attempts to have harmonized CEAS. The Petrosian case started series of judgments related to Dublin regulation (which was the most controversial document in EU asylum law field), while Elgafaji case revealed the relations with ECHR, reaffirmed the autonomy of EU legal order[47] (which will be analyzed in the next sub-chapter) and gave a broad interpretation on subsidiary protection. Besides, both cases disclosed an initial problem – **vague interpretation on preliminary questions raised by domestic courts**, which requires recurrent preliminary ruling procedure in order to get clarification.

Elgafaji case deals with subsidiary protection and the meaning of serious and individual threat by reason of indiscriminate violence. Mixed Shiite-Sunni Muslim couple was forced to flee and applied for subsidiary protection in Netherlands. Dutch authorities rejected application because of the lack of real risk of serious and individual threat (Article 15(c) of the Qualification Directive) in case of returning to Iraq. Through preliminary ruling procedure appellate court asked to clarify: the scope of Article 15(c) of the Directive, in comparison with Article 3 of the ECHR (supplementary or other protection) and the criteria, to determine whether a person is exposed for a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive.[48] CJEU gave a broad interpretation of 'serious and individual threat to [the applicant's] life or person' and developed the 'sliding scale' test: the more the applicant is able to show that he is specifically affected by the reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection[49] and vice versa. However, the Court and AG did

[47] Errera Roger, 'The ECJ and subsidiary protection: reflection on Elgafaji and after ' pp. 8; accessed 03rd July 2013, available at: http://rogererrera.fr/droit_etrangers/docs/Elgafaji_09_final.pdf
[48] *Supra* note 23, para. 26.
[49] Ibid, para. 39.

not give comprehensive answer on the criteria referred in the second question and did not give interpretation of another important element of Article 15(c) of the Directive – 'situations of international or internal armed conflict'. Ambiguities regarding an application of this notion, and at the same time application of Article 15(c), remained. 'From the standpoint of the effective administration of justice, therefore, the minimalist approach of the Elgafaji judgment is rather ineffective'.[50] The result of minimalistic interpretation is Diakite case – after four years Belgium authority asked the CJEU to finally clarify the notion of 'internal armed conflict'. This case concerns Guinean national who was forced to leave country of origin, because of participation in the protest movements against regime and asked for subsidiary protection in Belgium. Application was rejected, an appeal was brought. Mr. Diakite relied on the criteria established by Criminal Tribunal for the Former Yugoslavia in order to prove that conditions to establish 'armed conflict' situation are met, in his case. Domestic court referred to CJEU and asked to determine criteria to identify 'internal armed conflict'. Court ruled, that 'internal armed conflict' concept in asylum law does not meet the standard set by international humanitarian law (IHL). As a consequence, criteria set in the Common Article 3 of the Geneva Conventions and Article 1(1) of Protocol II of 8 June 1977 or Tadic case criteria does not have to be satisfied.[51] Conclusion was based on the AG opinion, which states that IHL and asylum law 'pursue different aims and establish quite distinct protection mechanisms'.[52] In this case Court clearly defined that 'internal armed conflict' exists, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other.[53] However, recurrent preliminary ruling procedure was required, as Court's judgment, which was made in earlier - Elgafaji case, did not covered wider scope of At 15(c) of the Directive.

Recent **Shamso** Abdullahi[54] case (C-394/12) is another consequence of minimalistic approach of the Court. In particular, the referring court explicitly asks for clarification of the holding in N.S. case on how to determine the responsible Member State if the asylum system of the Member State, in which the first irregular entry takes place, shows systemic deficiencies equal to the described in the ECtHR's judgment in case M.S.S. v Belgium and Greece. Although wording of the preliminary question raised by the domestic court was obscure and complicated,

[50] Boštjan Zalar, 'Comments on the Court of Justice of the EU's Developing Case Law on Asylum' in International Journal of Refugee Law Vol. 25 No. 2 pp. 377–381. Oxford: Oxford University Press, 2013; pp. 377

[51] Case Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides; C-285/12; Judgment of the Court of Justice of EU of 30 January 2014; para. 20-21; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=147061&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=335435

[52] Ibid, para. 24.

[53] Ibid, para. 35.

[54] Case Shamso Abdullahi v Bundesasylamt; C-394/12; Judgment of the Court of Justice of EU of 10 December 2013; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=145404&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=151938

AG clarified it in its opinion on the basis of explanations was submitted by Austrian court.[55] **Shamso** Abdullahi case reflects already classical situation – Ms. Abdullahi illegally entered into EU territory through Hungary (initial information indicated Greece, however, exists sufficient evidence that first entrance was through Hungary; Hungary accepted asylum seeker), but was arrested in Austria. In this case similarly like in N.S. case, both possible countries of first entrance (Greece and Hungary) receive a lot of critics towards asylum situation. Austrian court asked to clarify two questions. The first one was regarding determination of the responsible Member State in case of systemic deficiencies in asylum system by preliminary question. The second was whether Member States are obliged to review the determination of the responsible Member State, on the request of asylum seeker, in case criteria in Chapter III of the Dublin Regulation had been miss-applied.[56] This question was raised because in earlier – N.S. case duty for the States to assume responsibility, as it was suggested by AG was not established. CJEU introduced more passive requirement when the Member States 'could not be unaware' that the Procedures and Reception Directives are not being implemented effectively in the destination state so that there are 'systemic deficiencies in the asylum procedure and reception conditions for asylum applicants' resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter.[57] In Abdullahi case Court held that in case Member State agreed to accept an application for asylum, as the Member State of the first entry to the territory of the EU – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[58] Judgment limits the possibility to challenge the transfer which accepted the responsibility over asylum seeker. However, CJEU missed an opportunity to clarify the concept of 'systemic deficiencies' and its application. Court felt no need to answer other questions referred for preliminary ruling, since questions, referred in the case regarding review of the determination of the Member State responsible for asylum, were held to have been well founded[59] and was clarified by the Court. It is another example of minimalistic approach – the possibility of recurrent preliminary ruling procedure grows. As a consequence, it can be expected, that after a while similar question will be raised and Court will

[55] Ibid, para. 66-69.
[56] Ibid, para. 41.
[57] Ippolito F., 'The Contribution of the European Courts to the Common European Asylum System and Its Ongoing Recast Process' in The Maastricht Journal of European and Comparative Law Vol. 20 No. 2 (2013), pp.261-281; pp. 270 accessed 26th March 2014, available at: http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0261.pdf
[58] *Supra* note 54, para. 64.
[59] Ibid, para. 63.

have to deal with it one more time – spend additional time and resources. Furthermore, due to uncertainty the protection level of the asylum seekers will be reduced.

Jurisprudence shows that minimalistic approach, towards the raised preliminary ruling questions, exists since the competence, in asylum cases, was given to CJEU, till recent case law. CJEU is not disposed to change situation. The relation between these cases reflects the necessity to avoid minimalistic interpretation, in order to escape recurrent preliminary ruling questions. On the other hand national courts have also to learn its lessons. Reference for preliminary ruling has to be concrete – as it was done in Diakite case. National court clearly asked whether the concept of 'internal armed conflict', has to be interpreted in the meaning of IHL, 'and, in particular, by reference to Common Article 3 of the four Geneva Conventions'[60]. Court identified problematic issue and concretely asked to clarify relation with IHL. Although it is seen that national courts are not able even to submit clear questions and deeper reading is needed, e.g. Abdullahi case. As R. Errera emphasized - questions referred to CJEU 'should contain a full and precise statement of the facts of the case, of the administrative and judicial decisions taken at the domestic level and of the legal issues before the Court and how they relate to the interpretation of the EU instrument'.[61] The questions should be focused on specific provision or even notion/concept and should be self-contained and self-explanatory.[62] Both - CJEU and domestic courts of Member States, have to deal with this problem. On the one hand CJEU has to change its policy and take into consideration all raised preliminary questions, on the other hand national courts have to submit clear, specific and self-explanatory questions.

Minimalistic approach also is reflected in judgments themselves – Court avoids giving clear and self-explanatory standards. Relevant example is Abdulla case, which concerned Iraqi national, who was recognized as a refugee in Germany. However, because of changed circumstances in the country of origin, cessation procedure was started. During the appeal procedure on revocation decision, domestic court referred questions to CJEU concerning ceased conditions for the application of subsidiary protection or refugee status, in particular - the cessation of refugee status because of changed circumstances, on the basis of which international protection was granted. Court stressed that refugee status ceases to exist when, having regard to a change of circumstances has a significant and non-temporary nature (in the country of origin), the circumstances which justified the person's fear of persecution, no longer exist and that person has no other reason to fear being 'persecuted'.[63] In paragraph 90 of the judgment Court

[60] *Supra* note 51, para. 24.
[61] *Supra* note 3, pp. 7.
[62] *Supra* note 39, pp. 16.
[63] *Supra* note 25, para. 101.

stated that evaluation of risk and changes in situation has to be carried out with 'vigilance and care'. Moreover, CJEU, in the conclusion, gave possibility to prove need of international protection and competent authorities of the Member State have to verify not only past risk of persecution but current situation and possibility of new kind of persecution. Asylum seeker can rely 'on circumstances other than those as a result of which he was recognized as being a refugee'[64]. However, CJEU did not introduce an examination test with concrete criteria and standards, but rather offered a very loose guideline.[65] This judgment 'represents a rather superficial approach in the context of the analyzed concepts (e.g. towards effectiveness of protection provided by the multinational armed forces) and is likely to be incompatible with the latest legislative trends in the EU asylum instruments (e.g. determination of refugee status and subsidiary protection by means of a single procedure) and the recent jurisprudence under the ECHR (e.g. failure to ensure a minimum standard of living may violate the ECHR)'.[66] Court refused to evaluate situation in the country of origin in broader sense, e.g. minimum standard of living. Furthermore, the standard, set by the decision, of assessment on the evaluation of risk is very abstract – 'with vigilance and care'. The Court did not clarify the meaning of the notion the 'vigilance and care', in this case. In the Abdulla case no reference to the ECHR or related jurisprudence was made, although the 'ECtHR had already developed concrete standards in the form of the rigorous[67] scrutiny test for examination of the case and the requirement of an effective legal remedy'.[68] Standards set by ECtHR were not mentioned.

Luxembourg jurisprudence and its superficial approach also affected the proposals on the Recast version of EU asylum legislation. It can be found that certain 'changes were the product of external factors, such as the necessity to comply with case law from the European Court of Human Rights and the European Court of Justice'[69]. The CJEU jurisprudence was used as guidance for interpretation of certain provisions. European Commission stated that 'therefore, in view of the interpretative guidance provided by this (Elgafaji) judgment and of the fact that the relevant provisions were found to be compatible with the ECHR, an amendment of Article 15(c) is not considered necessary'[70]. In particularly, it was explicitly stated, that there are no

[64] Ibid, para. 100.
[65] *Supra* note 50, pp. 378.
[66] *Supra* note 41, pp. 505.
[67] ECtHR in the Jabari case para. 50 established that, 'the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (Prohibition of torture) and the possibility of suspending the implementation of the measure impugned'; accessed 19th May 2014, available at: http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-58900#{"itemid":["001-58900"]}
[68] *Supra* note 50, pp. 378
[69] Ripoll Servent Ariadna and Trauner Florian, 'Do supranational EU institutions make a difference? EU asylum law before and after 'communitarization'' in Journal of European public policy DOI: 10.1080/13501763.2014.906905, 2014; pp. 1-23; pp.; 7; accessed 02nd May 2014, available at: http://www.tandfonline.com/doi/abs/10.1080/13501763.2014.906905#.U2ZGYPmSzoE
[70] Commission of the European Communities, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (COM(2009) 551 final); Brussels, 21 of

need to recast Article 15 (c) of the Qualification Directive. However, superficial approach did not remove ambiguities regarding the application of notion of 'individual threat', no clear standard of threshold was set; besides, clarification of 'armed conflict' notion was avoided. 'The CJEU decision – useful though it is – does not present the advantages described'[71] by the Commission in the proposal. However, no changes were made regarding Article 15 in the Recast Qualification Directive[72]. Elgafaji case became a justification ground to avoid amendments of EU legislative acts, although comprehensive clarification of the Article 15 (c) of the Qualification Directive was not presented in the Luxembourg jurisprudence. Such approach does not ensure higher standard of protection of fundamental human rights, in particularly of asylum seekers, especially regarding provisions derived from the lack of consensus among Member States. The example of relation between Elgafaji case and recast provisions reflect how EU legislative acts are influenced by CJEU jurisprudence. However, 'the practical impact of Elgafaji on the EU legislator was rather a political one, avoiding a difficult compromise in the negotiation process of the recast on such a sensitive point'[73]. As F. Ippolito states 'in some instances the recasting process clearly attempts to ensure a stronger level of legal protection which is largely thanks to the direct or indirect judicial impact of both of the European Courts on its content'[74]. However, as a result of superficial approach in Elgafaji case, the ambiguities unresolved by Luxembourg Court were reflected and remained in the recast asylum legislation.

It is clear that certain judgments issued by CJEU are limited to the particular level of harmonization, in asylum law, which was established by the Directives. It does not justify hopes, that through the CJEU jurisprudence, the protection of European asylum law will reach higher standards.[75] Contrary, abstract criteria which is interpreted by the domestic courts and lack references to already developed standards of ECtHR, shows that, on certain questions, CJEU does not use the possibility to make more significant impact on European asylum law. Diakite case can be identified as a positive example, which established a broader interpretation of concept of the armed conflict comparatively to the notion used in IHL. This judgment creates conditions to get subsidiary protection for a bigger number of people coming from armed conflicts zones. However, such examples are rare and rather exceptional. Even though, Diakite case is recent and there are rising expectations for more significant judgments in recasting process of asylum *acquis*, the superficial interpretation allowed to remain ambiguities in the EU

October 2009; pp.7; accessed 26th March 2014, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF

[71] *Supra* note 57, pp. 265.
[72] *Supra* note 7, recital 4.
[73] *Supra* note 57, pp. 266.
[74] Ibid, pp. 278.
[75] Supra note 41, pp. 500.

secondary legislation. The proposals of the Union's institutions, inspired by the CJEU jurisprudence, became a basis to avoid changes. Superficial approach, which is usually exercised by the Court, results in minimal impact on EU asylum law and its consolidation.

2.2 The use of human rights protection instruments in CJEU jurisprudence – no coherent practice

Asylum related case law is the field where CJEU has a possibility to use and develop the interpretation in asylum law referring to other human rights protection instruments – regional (ECHR; EU Charter) and international (1951 Geneva Convention). Court jurisprudence reveals a tendency to use international agreements to which all the Member States or/and the EU are the parties. This obligation is established in the Article 53 of the Charter, which establishes that the fundamental rights has to be interpreted in accordance with international law and international agreements (to which EU or all Member States are parties). Court successfully uses one of the main asylum related international instruments 1951 Geneva Convention[76]. In Bolbol case and more recent El Kott case, the Court emphasized the importance of the Geneva Convention, which 'constitutes the cornerstone of the international legal regime for the protection of refugees'.[77] Both cases were related to Palestinian refugees and their special status, as according to Article 1D of the Geneva Convention they are entitled to the specific protection, or assistance of the United Nations (UN) agency (UNRWA). Both cases raised questions related directly to the status of refugees in case they are outside the area of agency operation. In the judgments Court relied directly on the 1951 Geneva Convention and related documents of UN, e.g. 'Consolidated Eligibility and Registration Instructions'. Furthermore, AG Sharpston quoted historical background, UNHCR Statements, EU joint positions and number of other international document. The importance of international agreements was emphasized. CJEU showed the capacity to directly rely on it and even interpret in the light of the EU legal order. It is an important step, as EU asylum legislation and its provisions are often a result of compromise between politicians, the interpretation of key concepts of refugee law (which is usually established in the international agreements) and use of it in the judgments ensure that the protection and general principles will never be left behind. The Court is able to solve ambiguities created by legislator and ensure a proper protection for asylum seekers. However, these cases

[76] De Búrca, Gráinne, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013). *New York University Public Law and Legal Theory Working Papers.;* pp. 420-30; pp.428; accessed 29th April 2014, available at: http://lsr.nellco.org/nyu_plltwp/420

[77] See: Case Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal; C-31/09; Judgment of the Court of Justice of EU of 17 June 2010; para. 37; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=82833&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364248; Case Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal; C-364/11; Judgment of the Court of Justice of EU of 19 December 2012; para. 42; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364606

repeatedly confirm superficial approach exercised by the Court – in Bolbol case (2010) and El Kott case (2012) raised the same question: 'Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations<…>?'[78] It was a consequence of Bolbol judgment, which did not clarify this issue and left question open.

Although CJEU established welcomed practice towards the use of the 1951 Geneva Convention, Court does not create coherent practice towards the usage of other regional human rights protection instruments. Main concerns in asylum jurisprudence are related to the EU Charter and ECHR, which are involved in the most asylum cases. Both documents are discussed separately as deeper analysis is required.

2.2.1 Ambiguous role of the Charter in asylum jurisprudence

After Lisbon treaty entered into force the Charter became part of primary law of the EU, as a result of CJEU is bound by it. However, the use of this legal act is not coherent, in asylum cases. **No clear role for the Charter is foreseen** in CJEU asylum related jurisprudence.

Immediately after Lisbon treaty entered into force AG Poiare Maduro in Elgafaji case identified right to asylum as fundamental[79], however the Court 'in its judgment says nothing about asylum as being a fundamental right in the Charter, even though in some judgments before the Charter came into force, the CJEU did make a reference to the provisions in the Charter'.[80] It is worth mentioning that in all asylum judgments there Charter was used, the Court does 'not find the legal grounds for mentioning the Charter within the Charter itself'[81]. The ground is found not on the Article 18 of the Charter itself, but rather in the secondary law. It is also noticeable in recent case law: MA and others v. UK the ground for a Charter is 'recital 15 in the preamble to Regulation No 343/2003'[82]; X, Y and Z case rely on recital 10 of Qualification Directive. On the contrary other rights and freedoms protected by the Charter are based on Charter itself, e.g. MA and others v. UK – the rights of the child are based on Article 24 of the

[78] See: Case Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal; C-31/09; Judgment of the Court of Justice of EU of 17 June 2010; para. 35; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=82833&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364248; Case Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal; C-364/11; Judgment of the Court of Justice of EU of 19 December 2012; para. 41 accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364606

[79] *Supra* note 23, para. 26.

[80] Boštjan Zalar, 'Basic values, judicial dialogues and the rule of law in the light of the Charter of Fundamental Rights of the European Union: judges playing by the rules of the game' in ERA Forum Journal of the Academy of European Law: *scripta iuris europaei*, Vol. 14 No. 3, October 2013; pp. 319-33; pp.322; accessed 26th March 2014, available at: http://link.springer.com/article/10.1007/s12027-013-0312-1

[81] Ibid, pp.320.

[82] Case MA and Others v Secretary of State for the Home Department; C-648/11; Judgment of the Court of Justice of EU of 13 June 2006; para. 05; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=138088&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=369636

Charter itself[83], X, Y and Z case rely on Article 7 of the Charter in order to protect private and family right.[84] Examination of the post-Lisbon asylum related case law reveals that CJEU mainly bases the use of the Article 18 (right to asylum) on the secondary law. It is confusing as Charter itself is primary law of the Community and has supremacy before the secondary one.

Situation became even more confusing after the ruling in the Samba Diouf case. The decision on this case was issued on 2011, concerning Mauritanian national who fled country in order to escape slavery. Luxembourg national authorities examined his application for the international protection under accelerated procedure and rejected it. Mr. Samba Diouf brought actions against the decision. However, during the check of admissibility, domestic court concluded that as an accelerated procedure is used, the decision is not open to an appeal procedure, according to the national legislation. Tribunal decided to refer questions for the preliminary ruling to the CJEU and asked to clarify whether EU asylum legislation preclude national rules, pursuant to which an applicant for asylum does not have a right to appeal authority's decision, under the accelerated procedure.[85] As in this case right to an effective remedy was discussed, AG Crus Villalon, in its opinion, emphasized the importance of Article 47 of the Charter (Right to an effective remedy and to a fair trial) and its relation with Article 39 of the Directive 2005/85 (The right to an effective remedy). Furthermore, the comparison of these provisions was done.[86] However, in the Court's judgment Article 47 of the Charter was mentioned only two times: in the introductory part and in para 49, as an expression of general principle of the EU law. All argumentation was based on the Article 39 of the Directive – secondary EU law. As Boštjan Zalar affirms - 'This is not mere scholasticism or legal pedantry as one can see from examples of disputes over social rights'. Through this judgment the Court gave more importance to the secondary law of the Union and by doing it - more powers were given for the legislators of the EU, than to the judges of the national courts of the Member States. 'With this interpretation, the CJEU hindered any potential positive judicial activism in relation to effective judicial protection, which is one of the paramount components of the rule of law.'[87] National judges are not invited to rely on Charter directly, as the CJEU itself avoids evaluation of the right to an effective remedy, in the asylum cases. Moreover, ECHR standards

[83] Ibid, para. 03.
[84] Case X, Y and Z v Minister voor Immigratie, Integratie en Asiel; Joined Cases C-199/12 to C-201/12; Judgment of the Court of Justice of EU of 13 November 2013; para. 04; accessed 26th March 2014, available at http://curia.europa.eu/juris/document/document.jsf?text&docid=144215&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=330885
[85] Case Brahim Samba Diouf v Ministre du Travail; C-69/10; Judgment of the Court of Justice of EU of 28 July 2011; para. 27; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=108325&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=372253
[86] Ibid, paras. 35-48.
[87] *Supra* note 80, pp.322.

set by its jurisprudence regarding the Article 13 (right to an effective remedy) were not discussed at all, although this particular case has direct links with this ECHR provision.

Similar approach was exercised by CJEU in the K. case. Applicant K. lodged asylum application in Poland and after re-joined family members (daughter in law, who was dependent, because of serious illness) in Austria. Accordingly K. lodged second asylum application in Austria. Transfer order to Poland was issued and K. brought appeal against it. Domestic court made reference for a preliminary ruling to the CJEU, which concerns the interpretation, of Article 15 of the Dublin regulation[88], particularly humanitarian clause, and determination of responsible state under such circumstances. Court held that in circumstances when person, enjoying asylum in a Member State, is dependent (in K. case because of serious illness), on a family member who is an asylum seeker and his/hers asylum application has to be examined in another Member State (under criteria set out in Chapter III of Regulation), the Member State in which those people reside becomes responsible for examination of the asylum application. All argumentation was based on Article 15 of the Dublin regulation. Although certain provisions of the Charter and the ECHR (related to unhuman and degrading treatment; family life) could have been used, CJEU avoided referencing to these documents. All interpretation was based on the EU secondary law – secondary law became the main source. Such broad interpretation of secondary legislation on the one hand enhances the potential of protection, on the other hand creates vulnerable situation – Member States can adjust secondary law by active participation in the legislative procedures and can eliminate or limit protection standards set by CJEU jurisprudence.[89] However, it can be ascertained that the Recast version of Dublin regulation and humanitarian clause is 'partially in line with the recent judgment K. case'[90]. An Article 16 paragraph 2 implies an automatic duty on the Member States to keep families together. This amendment gives a ground for positive expectations, that EU legislation will follow CJEU jurisprudence. However, no guarantees, that recast version of the asylum *acquis* will satisfy standards set by Luxembourg Court, can be provided. It depends on the policy exercised by Member States and/or EU institutions.

In relation to the asylum jurisprudence, CJEU developed ambiguous practice regarding the use of the EU Charter. Jurisprudence allows distinguishing two types of asylum cases: cases

[88] 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 of the European union L 50/1, 25 February 2003*]; recital 4; accessed 26th March 2014, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF

[89] Jakulevičienė L., Siniovas V., 'Protection under the European Convention on Human Rights – Oasis for Asylum Seekers in Europe?' in Jurisprudence 2013, Vol.20 No.3, p. 855-899, November 2013; pp. 886; accessed 26th March 2014, available at: https://www3.mruni.eu/ojs/jurisprudence/article/view/1498

[90] *Supra* note 57, pp. 273.

with reference to the substantive human rights and freedoms (e.g., freedom of religion – Y (C-71/11) & Z (C-99/11) v. Germany) and cases with reference to the EU secondary legislation, which contain rights established by the Charter (in its recital or provisions). In latter situation Charter sets limits to the secondary law and it is the Charter that is at the top of the hierarchy of legal sources in the sense of fundamental law.[91] However, asylum related jurisprudence, particularly related to the right to an effective remedy, reveals that secondary law, which regulates asylum, becomes more important than primary, particularly the Charter, in the preliminary ruling procedure and interpretation process. This approach is not in conformity with the Article 6 of the Treaty of European Union, which states that the Charter has 'the same legal value as the Treaties'.[92] Furthermore, this approach is risky, as secondary acts can be easily changed by the initiative of Member States and/or EU institutions. Accordingly, the change of EU secondary law provisions implies the changes in related CJEU jurisprudence. Stable jurisprudence cannot be ensured – Member State can initiate the change in the secondary law, if judgment is not acceptable, in order to avoid same/similar decision and get more favorable judgment. The reference to the primary law (Charter, general principles) or ECHR provisions (which will become primary after accession) would be substantial ground for stabile and enhanced protection for asylum seekers.

Moreover, CJEU does not use the possibilities of an extensive interpretation of the Charter's provisions, in order to strengthen the protection of asylum seekers and refugees, in its jurisprudence. As Articles 53 and 52 of the Charter state - human rights and freedoms, which are already recognized by international law and by all Member States, including ECHR, will not be restricted or adversely affected. This prompts that CJEU has to follow at least the standard set by the ECtHR, the 1951 Geneva Convention and other related international documents recognized by all Member States. Accordingly, this provision creates the minimum protection standard for asylum seekers as well. As AG in N.S. case argues, '<…> it must therefore be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the guarantees under the ECHR is no less than the protection granted by the ECHR'.[93] CJEU attempts to follow consistency with international documents and use treaties in its judgments frequently – ECHR and its jurisprudence was used in a number of cases, e.g. N.S. case, X, Y and Z case, Elgafaji case. Other international treaties are also followed - 1951 Geneva

[91] *Supra* note 50, pp. 380.
[92] *Supra* note 5.
[93] Case N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice; Joint cases C-411/10 and C-493/10; Opinion of Advocate General Trstenjak of the Court of Justice of EU of 22 September 2011; para. 145; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=109961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375647

Convention, which was already mentioned and identified as cornerstone of the international legal regime for the protection of refugees[94] and influenced an argumentation of the Court.

Although on the basis of Article 52 paragraph 3 of the Charter more extensive protection can be developed, it is up to the CJEU to determine the policy which will be followed. Case law reveals – Court is not disposed to give more extensive protection in the asylum cases. In N.S. case Court did not use the possibility to extend the protection granted by the Charter. This case concerns Afghan national who came to UK through Greece and according to Dublin system had to be transferred to the latter country. Asylum seeker brought an appeal and stated that transfer to Greece can lead to a different outcome in his case and to inhuman or degrading treatment towards an applicant. The national court of UK asked: 'whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR'.[95] CJEU left this question open and stated that an answer does not lead to a different decision than the given to the already answered preliminary questions, although the ruling was not directly related to the relation between ECHR and the Charter.[96] Court was not using the argumentation of the AG Trstenjak in this case. She stressed the necessity of consistency between the Charter and the ECHR. However, AG pointed out that aiming of consistency cannot adversely affect the autonomy of EU law and of the Court of Justice.[97] In its conclusions AG declared that the protection guaranteed by the Charter is no less than the protection granted by the ECHR. The particular significance and high importance are to be attached to that case-law of ECtHR in connection with the interpretation of relevant provisions of the Charter by the CJEU. Approach of AG tended to an affirmative answer to the raised question, as a result it should strengthen the protection given by the Charter. Although such view was not followed by the Court, it was not denied in the judgment. AG opinion and early case law, e.g. Elgafaji case, shows that the degree

[94] Case Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal; C-364/11; Judgment of the Court of Justice of EU of 19 December 2012; para. 42; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=364606

[95] Case N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice; Joint cases C-411/10 and C-493/10; Judgment of the Court of Justice of EU of 21 December 2011; para. 109; accessed 26 March 2014, available from: http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375647

[96] Ibid, para. 109.

[97] *Supra* note 93, para. 144.

of independence of the Court is sufficient to provide real added value for the Charter by pushing the slider below.[98]

CJEU is rather careful in cases where the Charter is used. The Court is not intending to change its policy towards broader interpretation of the Charter in comparison to ECHR. The consequence of ambiguous or minimalistic interpretations of the Charter might be, on the one hand, an 'increase in (un)necessary pending cases before the CJEU concerning the meaning of the Charter, and, on the other hand, an encouragement for the so called 'constitutional pluralism' among those judges who will be discouraged from referring to the preliminary question'.[99] The 'constitutional pluralism' is 'based on the more favorable provision clauses and procedural autonomy, and/or based on respect of the constitutional law of the Member States'[100]. It means that existence of different human right's protection systems and different protection standards, in Member States, is supported. Accordingly, the idea of the harmonized asylum system and the same level of protection of the asylum seekers in the Member States would be hardly implemented. However, the positive side was emphasized by the opinion of AG Maduro, as inter-related human rights protection systems coexist[101]. AG in Elgafaji case states that 'it is important, for each existing protection system, while maintaining its independence, to seek to understand how the other systems interpret and develop those same fundamental rights in order not only to minimize the risk of conflicts, but also to begin a process of informal construction of a European area of protection of fundamental rights'[102] and ascertain that 'the European area thus created will, largely, be the product of the various individual contributions from the different protection systems existing at European level'[103]. It seems that the existence of 'constitutional pluralism' in asylum law is possible and gives positive effect only till harmonization level is low. The higher harmonization level will be reached, the more damaging effects of 'constitutional pluralism' will be appreciable.

The Court of Justice gives more attention for the Charter provisions in recent asylum related case law. An exclusive use of the Charter is noticeable. First of all there are cases which do not fall under the scope of ECHR. Joint MA and others case is one of examples, when CJEU

[98] Labayle M. Henri , Bruycker M. Philippe De , Etude du Pe 'Impact de la jurisprudence de la CEJ de la CEDH en matiere d'asile et d'immigration'; Policy Department. Brussels: European Parliament, © European Union, 2012; pp. 97; accessed 26th March 2014, available at: http://www.emnbelgium.be/sites/default/files/publications/etude_pe_jurisprudence_cjue_et_cedh_asile_et_immigration.pdf
[99] *Supra* note 50, pp. 381.
[100] Ibid.
[101] Ibid.
[102] Case Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie; C-465/07; Opinion of Advocate General Poiares Maduro of the Court of Justice of EU of 09 September 2008; para. 22; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dcf1152888c81a4d3db0c1ca6e7e6647c1.e34KaxiLc3qMb40Rch0SaxuMchr0?text=&docid=67816&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=423686
[103] Ibid, para. 22.

exclusively relied on the Charter. All three unaccompanied children lodged asylum applications in few EU countries; the UK was the last which received applications. Transfer decisions were adopted; however, the legality of the orders was challenged. Court of Appeal (England and Wales) decided to refer question to the CJEU and asked to determine responsible state when unaccompanied children lodge an asylum applications in more than one Member State. In the argumentation the Court directly relied on the Article 24 of the Charter (The rights of the child); Court stated, ' although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003'.[104] Court concluded that in circumstances when unaccompanied children (with no family member present in the territory) lodge applications in a few states, responsible Member State is a state of presence. This conclusion was directly affected by the Charter. The EU Charter was used without any reference to other international documents, as the landmark document for human rights protection in the EU. CJEU had possibility to refer to the Convention on the Rights of the Child according to the Article 53 of the Charter, as all Member States are parties to the Convention. For the first time Court had chosen to rely only on the Charter and emphasized the importance of this document, in asylum related cases.

Asylum related jurisprudence does not determine the role of the Charter. It seems, case law lacks a broader interpretation of Charter's provisions and mainly sticks to the scope of the protection standards provided by ECtHR and its jurisprudence. Although Charter gets more importance in recent asylum related jurisprudence, but this trend is noticeable only in cases, which do not fall under the scope of the ECHR competence. CJEU should rely primarily on the Charter, in order to enhance protection of the asylum seekers and their fundamental rights. Secondary law should be interpreted in the light of the Charter. It has to be pointed out, that although asylum *acquis* is more detailed instrument comparatively to the Charter, the stability in asylum system can be ensured only by the interpretation on the primary law (in this case the Charter) basis. Moreover, the broader interpretation of Charter's provisions in comparison to the ECHR, would give more possibilities to enhance fundamental rights of asylum seekers. Luxembourg Court has to underline independence of the protection provided by the Charter and develop clear policy towards the application of the EU Charter.

[104] *Supra* note 82, para. 59.

2.2.2 The use of ECHR (and its case law) in CJEU jurisprudence – the lack of consistency

ECHR is another instrument of human rights protection, which will be acceded in the future by the EU. It is major step to ensure stronger protection of human rights, including the right to asylum and other related rights and freedoms, in the EU. However, it would be erroneous to believe that till Lisbon treaty CJEU completely exempted the use of the Convention and ECtHR jurisprudence in its case law. CJEU had never done an explicit statement, which would acknowledge ECtHR jurisprudence and the ECHR itself as a binding source of the EU legal order. However, CJEU used it frequently. Court recognized 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures'[105], as no catalogue of fundamental rights existed in EU, the sources were found in 'the constitutional traditions common to the Member States" and in the 'international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories'.[106] All EU Member States were contracting parties to the ECHR and Court used it as a standard of fundamental human rights. Article 6 paragraph 3 of the TEU also establish that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union law'.[107] The Charter also influences this communication between the Courts by Article 52 paragraph 3, which provides that the meaning and scope of rights, contained in the Charter, shall be the same as those laid down in Convention.[108]

Tendency to use ECtHR jurisprudence is revealed in one of the first asylum case - Elgafaji case, the Court refers to Article 3 of the ECHR and related to it jurisprudence:

'In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By

[105] Case Nold II; C-4/73; Judgment of Court of Justice of EU of 14 May 2013; accessed on11 May 2014, consideration 13; accessed 26th March 2014, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88495&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=63982

[106] See also: Case Defrenne - Sabena; C-149/77; Judgment of Court of Justice of EU of 15 June 1978; accessed 26th March 2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61977CJ0149 ;. [Case Hauer - Land Rheinland-Pfalz; C-44/79; Judgment of Court of Justice of EU of 13 December 1979; accessed 26th March 2014, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61979CJ0044&from=EN

[107] *Supra* note 5.

[108] *Charter* of Fundamental Rights of the *European* Union [*Official Journal C 364/1, 18/12/2000];* accessed 26th March 2014, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.'[109]

Case reveals 'convergence between Article 3 of the ECHR and Article 15(b) of EU Qualification Directive'.[110] Besides, the judgment admits the ECHR and its jurisprudence as a significant source of interpretation of human rights – a part of general principle of Community law. Such tenet opens broad possibilities for ECtHR jurisprudence to join the CEAS and participate in the shaping an implementation of EU asylum *acquis*.[111] However, AG in N.S. case opinion, paragraph 146, stated that 'it should be borne in mind in this connection that the judgments of the ECtHR essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the ECtHR as a source of interpretation with full validity in connection with the application of the Charter'. 'This finding, admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with the result that it must be taken into consideration in interpreting the Charter'[112]. It seems to me, that AG approach emphasizes ECHR and related jurisprudence are not binding source for the CJEU, though significant influence in CJEU asylum jurisprudence directly is notable, in most cases.

Moreover, N.S. case is the one which shows how CJEU not only refers to ECtHR jurisprudence, but in particular circumstances it mirrors the judgment. In the conclusion of N.S. case judgment M.S.S. case approach, issued by ECtHR, was followed closely. The Court in paragraphs 88-90 of N.S. judgment explicitly refers to M.S.S. judgment and emphasizes the importance of regular and unanimous reports of international non-governmental organisations – it was ruled that States have to rely on reports in the assessment of situation of asylum seekers in other Member States. The Court agreed with evaluation of Greece situation made by ECtHR: 'The extent of the infringement of fundamental rights described in that (M.S.S.) judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.' It seems, that the CJEU succeeded in averting potential clash between two European Courts, by following the ECtHR's jurisprudence in M.S.S. case and as a result harmonizing obligations of the Member

[109] *Supra* note 23, para. 28.
[110] *Supra* note 50, pp. 377.
[111] *Supra* note 89, pp. 884.
[112] Editors Brems E., Gerards J., 'Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights', New York: Cambridge University Press 2013, pp. 249

States' under EU law and the ECHR in the N.S. case. The N.S. case is a welcomed practice how two courts should act in case their competences overlap. The main aim is to avoid legal uncertainty – both Courts should at least follow the same minimum standard of human rights protection. It seems that by this judgment CJEU showed willingness to avoid open clashes and intention to assure homogeneous case law.

Although ECHR is recognized as the source and CJEU is willing to have harmonized system of human rights protection of two European courts, the autonomy of the EU law[113] in the first – Elgafaji case is emphasized. The Court stressed importance of ECHR and indicated compliance of the Article 15(b) of the Directive to Article 3 of the ECHR. By contrast, the Article 15(c) of the Directive was understood as different from Article 3 of the ECHR. Court stated that 'the interpretation of Article 15(c) of the Directive must be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR'.[114] Court reformulated question and excluded direct link to ECHR. AG Poiares Maduro reaffirms this approach and states that community provisions have to be interpreted independently and cannot therefore vary according to and/or be dependent on developments in the case-law of the ECtHR.[115] Although Article 3 of the Convention was excluded from the question referred for preliminary ruling, CJEU mentioned it in the judgment, in order to reaffirm the compatibility of the Article 15 and the ECHR provisions. It can be seen that the Court followed the opinion of AG Maduro, who highlighted that 'question cannot be inferred from Article 3 of the ECHR but must be sought principally through the prism of Article 15(c) of the Directive'[116]. Jurisprudence reaffirmed that 'the autonomous character of the EU legal order remains a fundamental principle'.[117]

Such actions show that CJEU respects the rules and rights contained in the Convention. Nevertheless, Court retains control over the way and the extent in which it implements them.[118] Jurisprudence shows, that the use of ECHR does not restrict the scope of autonomous character of EU legal order. As Craig and de Burca states, Luxembourg Court 'allowed to continue to assert the autonomy and supremacy of EU law, while avoiding the charge of having judicially incorporated international agreements into EU law without Member State consent'[119].

[113] *Supra* note 47, pp.8.
[114] *Supra* note 23, para. 28.
[115] *Supra* note 102, para. 19.
[116] Ibid, para. 19.
[117] *Supra* note 3, pp. 8.
[118] Lenart J., ''Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms' in Merkourios Utrecht Journal of International and European law, Vol. 28 Issue 75, pp. 04-19; Utrecht: Igitur, Utrecht Publishing & Archiving Services, 2012; pp. 10.
[119] Paul Craig and Grainne de Burca, 'EU Law: Text, Cases, and Materials'; Oxford: Oxford University Press, 2011; pp. 367

Furthermore, CJEU is not consistent in application of ECHR. Judgment in Petrosian case, delivered a month before Elgafaji case, does not contain any provisions related to human rights. In this case Swedish court asked to clarify the counting of 6 month period for a transfer: when this period starts and the suspensive effect of appeal against removal. This case concerns Petrosian family who applied for asylum in Sweden, although before application was lodged in France. Sweden requested France to take back the family; France answered the request after the term established in the Dublin Regulation. Transfer decision was adopted; however, Petrosian family appealed it because of procedural error. In this case CJEU applied formal approach and used only secondary EU legal acts. Nor the ECHR, nor the Charter were used in this case. However, Court gave a wide discretion for the Member State to decide on the suspensive effect depending on the procedural rules applicable in the country. More recent judgment of the CJEU – Arslan case, which can be named as controversial, confirms that CJEU continues its inconsistency. Arslan case concerns the detention of asylum seekers. CJEU ruled that 'an asylum seeker has the right to remain in the territory of the Member State responsible for examining his application at least until his application has been rejected at first instance and cannot therefore be considered to be 'illegally staying'.[120] However, the detention is allowed in case an asylum seeker intends to abuse the procedure and apply for international protection in order to delay or even jeopardize the return procedure. Arslan case is criticized because ECHR and its Article 5 'Right to liberty and security' were not even discussed in the CJEU judgment.[121] Although CJEU in its previous case law, concerning detention, proved the ability to maintain ECHR standards without referencing it (Kadzoev case), Arslan case reflects a different situation. In Kadzoev case, CJEU did not apply ECHR, but was able to establish safeguards and emphasized that if 'the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose'[122]. However, because of vague provisions of first generation asylum *acquis*[123], in Arslan case, Court did not use ECHR and did not establish safeguards regarding national detention grounds. CJEU stated that grounds have to be 'in full compliance with their obligations arising from both, international law and European

[120] Case Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie; C-534/11; Judgment of the Court of Justice of EU of 30 May 2013; para. 48; accessed 27 March 2014, available from: http://curia.europa.eu/juris/document/document.jsf?text=&docid=137831&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=334328

[121] *Supra* note 89, pp. 887.

[122] Case Said Shamilovich Kadzoev (Huchbarov) v. Bulgaria; C-357/09; Judgment of the Court of Justice of EU of 30 November 2009; para. 71; accessed 11th May 2014, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5e0faa4787a4d4720aae8e0f2deecec0b.e34KaxiLc3qMb40Rch0SaxuNb3z0?text=&docid=72526&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=29219

[123] *Supra* note 89, pp. 887.

Union law, the grounds on which an asylum seeker may be detained or kept in detention'[124]. No clear standards were set concerning the right to liberty and security. However, CJEU factually formulated national detention ground[125] according to which, in case it appears that 'after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return.'[126]. Furthermore, CJEU did not make any check regarding compliance with ECHR provisions. It seems that Arslan case reflects harmful practice and it is a result of the exclusion of ECHR application. In another recent Samba Diouf case, which is directly related with the right to an effective remedy, the ECHR and its case law, was not mentioned, no references were made.

In recent case law CJEU started to rely on the Charter exclusively. However, this asylum related case law does not fall directly under the scope of ECHR. Although it is not a trend in ECHR related cases, it will be seen only in future whether the Charter will gain more importance in CJEU asylum related jurisprudence in comparison to the ECHR and its developed protection. Recent case law reveals that CJEU avoids using ECHR even in cases which fall under the regulation of ECHR. Already mentioned K. case, which concerns unhuman and degrading treatment and family life – is special because neither the Charter nor Convention were used for argumentation. However, it is not a common practice. It seems that this practice is prejudicial and can lead to the different protection standards of asylum seekers under CJEU and ECtHR jurisprudence.

Lack of coherent practice in the CJEU asylum cases cannot be justified. CJEU is in much better position in comparison to ECtHR. Court of Justice has two regional documents in its competence - ECHR and the Charter, which can be used in jurisprudence, in order to clarify asylum legislation and its provisions. Furthermore, Charter gives direct right to asylum, accordingly Court has jurisdiction over the right to asylum emerging from this provision. CJEU does not have conditions to deal with individual case; however, this reason cannot prevent a more coherent practice on use of human rights protection instruments. On the contrary, Court should give a stronger protection and oblige Member States to follow regional human rights protection standards. Cathryn Costello says that the EU general principles (in more recent case law the Charter and provisions of ECHR) were not 'enforced in the asylum cases because of the

[124] *Supra* note 120, para. 56.
[125] *Supra* note 89, pp. 887.
[126] *Supra* note 120, para. 63.

strategic interests of litigants who bring the cases to the CJEU – governments of Member States'.[127]

ECHR is significant document used in CJEU asylum related jurisprudence. It seems that Luxembourg Court is prepared to use ECHR, and, although EU is not a member of ECHR, yet, the silent dialogue with ECtHR already exists. However, Court is not consistent in use of the Convention. No clear standard is set – in some cases Convention is used and argumentation is directly built on its provisions[128], while in other case Court completely disregards related provisions of ECHR and its jurisprudence. It is expected that CJEU will aim to maintain the autonomous character of EU legal order, but this purpose cannot affect the dialogue with the ECtHR and development of the protection standards of asylum seekers.

De Jesus Butler and O. De Schutter argue that, 'the CJEU does ensure that the EU legislator respects human rights, but it does little to protect human rights".[129] Such conclusion can be made, as Luxembourg Court aims to use regional and international agreements in order to provide protection for asylum seekers; however, Court avoids giving clear standards and because of not very effective system, misses an opportunity to deal with the key contentious asylum related issues (e.g. N.S. case and Dublin system). CJEU has to find the right balance between the use of the Charter and the Convention and to accept more responsibility, as the first Court, which has direct competence in asylum cases. The jurisprudence would have more impact on EU asylum developments, in case the Court would give broader interpretation of the Charter and would apply primary EU law as a ground.

CJEU asylum case law interprets complicated provisions, which resulted from the compromises. Concepts developed by the Court give clarification of certain notions, the application of which is complicated. CJEU in its jurisprudence developed few important concepts. Standards set in Elgafaji and Diakite cases regarding subsidiary protection (Article 15 (c) of the Qualification Directive) create a developed concept and cover both - 'sliding scale' test

[127] Costello C., Research paper: 'The European asylum procedures directive in legal context', *New Issues in Refugee Research,* No. 134. Oxford: Worcester College, 2006; pp. 21; accessed 26th March 2014, available at: http://www.unhcr.org/4552f1cc2.html

[128] See: Case N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice; Joint cases C-411/10 and C-493/10; Judgment of the Court of Justice of EU of 21 December 2011; para. 109; accessed 26 March 2014, available from: http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=375647; Case Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie; C-465/07; Judgment of the Court of Justice of EU of 17 February 2009; available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=76788&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=325945

[129] Israel de Jesús Butler and Olivier de Schutter, 'Binding the EU to International Human Rights' in Yearbook of European Law Vol. 27; pp. 277-296; pp.282; Oxford: Oxford University Press, 2009.

and notion of 'armed conflict'. Furthermore, CJEU went for a broader (it can be called more liberal) interpretation, which creates conditions to get subsidiary protection for more people. However, In Abdulla case (concerning cessation) Court acted contrary and assessed situation in the country of origin narrowly (e.g. no consideration regarding minimum standard of living). Such approach does not give added value for the decision and does not enhance protection level of asylum seekers. Another important notion of 'responsible state' rising from Dublin regulation also lacks clarity. Since the first N.S. case concerning state responsibility, CJEU does not set clear criteria which establish state responsibility. CJEU stated that responsibility rises in case Member State 'could not be unaware of systemic deficiencies', but constant questions concerning this concept show that domestic courts do not comprehend set standard. Furthermore, CJEU jurisprudence reveals inconsistency towards set standards and is reflected in cases Kadzoev and Arslan. Both cases concern detention, but in Kadzoev case Court established safeguards, while in Arslan case Court did not. It reveals that CJEU lacks consistency in order to develop clear and precise detention standards. However, CJEU successfully enhances protection level of Palestinian refugees (e.g. Bolbol, El Kott cases) and ensures their protection in case they are outside the area of the UNRWA operation. Court shows the ability to rely on international documents and to interpret it in the light of the EU legislation. Furthermore, Court develops positive protection standards for unaccompanied minors in MA case and explicitly states that priority has to be given to the child's best interests. It shows that the CJEU aims to create more favourable conditions for vulnerable asylum seekers.

CJEU asylum jurisprudence lacks volume in order to have more significant impact on the development of the EU asylum system. Court exercises superficial approach and sets vague standards. The result of that is the need of recurrent preliminary ruling procedure. The impact on EU asylum law development is rather limited and does not justify the hopes of growing protection level of asylum seekers. Nevertheless, recent case law (e.g. Diakite case) has potential to influence asylum law significantly, as broader interpretation is promoted. Furthermore, CJEU successfully uses international documents in its asylum related judgments, especially the 1951 Geneva Convention, which is indicated as cornerstone of the EU asylum law. The Charter and ECHR are not used so consistently. The role of the EU Charter is not clearly described and the secondary asylum legislation becomes more important in comparison to the Charter. EU Charter is used exclusively, but only in cases which do not fall under scope of the ECHR. In other cases Court sticks to the standards set by ECtHR. CJEU shows willingness to cooperate with ECtHR in asylum jurisprudence (e.g. M.S.S. and N.S. cases). Nevertheless, the avoidance to use ECHR provisions does not create a clear standard regarding the interpretation of common notions (e.g. Samba Diouf case and right to an effective remedy; or K. case and ECHR provisions related to

unhuman and degrading treatment and family life). The practice of CJEU does not create stability in asylum system. CJEU aims to maintain its independence and it can create the basis for the CJEU to create real added value and to develop EU asylum law.

3. Impact of CJEU jurisprudence on asylum law development in EU Member States

CJEU asylum related jurisprudence is aimed to clarify the EU asylum legislation. It is complicated work, as many provisions are the result of political consensus. Consequently, set legislative standards are vague. However, it has to be emphasized that CJEU does not rule on the case itself. Luxembourg Court gives an interpretation on the specific preliminary ruling question (related to certain provision). The decision has to be applied by domestic courts in particular case. Preliminary ruling judgments are binding not only for domestic courts which referred for preliminary ruling to the CJEU; the decision is binding for all courts and tribunals in all EU Member States.[130] This model can be called vertical, as Court of Justice of EU 'is entitled to provide mandatory guidance regarding the interpretation of asylum-related provisions in the EU law, in response to 'references for preliminary rulings' submitted by national courts'.[131] The main aim of the system is harmonisation. 'A number of crucial areas remain untouched by the harmonisation process, and even where clear joint standards exist, diverging practices often prevail.'[132] The problems rise because national courts, from different Member States (even from different legal traditions), have to apply asylum related jurisprudence, which reflects superficial approach of the CJEU, and is not coherent about use of international/regional agreements. Furthermore, 'significant discrepancies and differences between Member States' asylum law and policy still exist, and it has yet to be effectively realized'[133].

This chapter will analyze few aspects. First of all it, will study how domestic courts apply CJEU's asylum related jurisprudence. It will reflect whether national courts are coherent in application and if CJEU asylum related jurisprudence is clear enough in order to reach similar level of protection for asylum seekers in all the Union. Secondly, it will analyze whether asylum system of Member State was affected by the CJEU jurisprudence. However, the effect on system itself is not a quick process. Accordingly, only effect of the first cases can be seen. Particular interest will be given to the analysis of practice set by Lithuanian national courts (Supreme Administrative Court of Lithuania and district courts) and effect on Lithuanian asylum system.

3.1 Limited influence on national asylum systems

The most significant impact can be seen on the jurisprudence of Member States domestic courts, as these institutions are directly bound to follow CJEU case law. As Cecilia

[130] Storey Hugo [forthcoming – working draft], ‚Preliminary references to the Court of Justice of the European Union (CJEU)', September 2010, pp. 4; accessed 04th June 2013, available at: http://www.iarlj.org/general/images/stories/lisbon_sep_2010/storey.pdf
[131] *Supra* note 30, pp. 09.
[132] Ibid.
[133] *Supra* note 57, pp. 261.

Malmström (member of the European Commission responsible for Home Affairs) stated in her speech regarding establishment of CEAS: 'We must take into account the case law of the European Courts, both in Strasbourg and in Luxembourg and the Charter on Fundamental rights. I know that for Member States, it does sometimes represent a real challenge as practice and legislation must be modified in certain cases. But it is the choice also made by the EU, in particular with the Lisbon Treaty. It is particularly relevant for all matters related to the concepts of effective remedies, non-discrimination and protection against *refoulement'*[134]. Double effect of the CJEU jurisprudence on national jurisprudence and national legislation, is expected by European Commission's member. However, Luxembourg Court frequently gives superficial rulings and does not deal with the substance of the case. As a result the dissenting interpretations are issued, although preliminary ruling procedure is used and domestic courts have to develop national asylum jurisprudence on its basis. The pursued objective is the harmonised practice of the domestic courts across the Union. However, 'harmonisation is ongoing processes'[135] and only analysis of the application of CJEU issued judgments and its influence on national practice reveals related problems.

The first significant case, which touches one of the core matters of asylum law – subsidiary protection, was Elgafaji case. One of the main general impacts of the Elgafaji judgment was the emphasized necessity of more structured and coherent thinking about Article 15 (c) of the Qualification Directive.[136] It seems that this decision touched a number of EU countries and majority of domestic courts applied it in their national jurisprudence. It is noticeable that Netherlands did not grant subsidiary protection for Elgafaji family, although CJEU ruling was in essence favorable. Elgafaji judgment is followed closely - the Belgian appeal instance frequently refers to the Elgafaji decision, even though Belgium did not transpose the term 'individual' in its national legislation.[137] On the one hand, this outcome reflects the importance of the CJEU jurisprudence – case law clarifies the most important notions, which have to be applied, although not established in national legislation. It is a guarantee that Member States will apply the notion. On the other hand, Luxembourg jurisprudence is used as a ground to avoid changes in national legislation itself. The application of notions, regarding asylum seekers

[134] Cecilia Malmström speech 'Establishing the Common European Asylum System by 2012 – an ambitious but feasible target' in Ministerial Conference 'Quality and Efficiency in the Asylum Proces' Brussels, 14 September 2010; European Commission - SPEECH/10/425, 14 September 2010; accessed 26th March 2014, available at: http://europa.eu/rapid/press-release_SPEECH-10-425_en.htm

[135] Bacaian L. E., 'The Protection of Refugees and Their Right to Seek Asylum in the European Union' in Institute Europeen de l'universite de Geneva: Collection Euryopa, Vol. 70. Geneva: Global Studies Institute (GSI), 2011; pp.50

[136] *Supra* note 30, pp. 14.

[137] UN High Commissioner for Refugees, 'Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum Seekers Fleeing Indiscriminate Violence', 27 July 2011; pp. 43, pp. 31; accessed on 11th May 2014, available at: http://www.refworld.org/docid/4e2ee0022.html

protection, in national case law, justifies the absence of asylum related notions, established by EU legislative acts, in the national legislation. The only known change of national legislation, directly impacted by Elgafaji judgments, was done in the Netherlands, 'which actually incorporated Article 15 (c) in its legislation'[138]. Accordingly, it can be concluded that CJEU case law affects national legislation mostly indirectly, through the national jurisprudence.

The most significant decision given by the domestic court related to Elgafaji is issued by the Czech Supreme Administrative Court in case No. 5 Azs 28/2008-68. 'Three-step test' of Article 15(c) of the Qualification Directive was developed: (1) whether the country of origin is in situation of 'international or internal armed conflict'; (2) whether the person concerned is a 'civilian'; and (3) whether the person concerned faces 'serious and individual threat to a life or person by reason of indiscriminate violence'.[139] The Czech Court directly relied on the Elgafaji judgment regarding the first and the third steps of the test. Notion of 'total conflict' and the situation when it does not reach the threshold of a so-called 'total conflict' were developed. Domestic court took an initiative - on the basis of Elgafaji ruling, new notions were clarified, although CJEU avoided to do it. Moreover, identification of 'total conflict' situation was based on the UNHCR reports and ECtHR jurisprudence. The judgment of Czech Court is a role model for other domestic courts. Decision directly applies CJEU judgment. Furthermore, it directly relies on the jurisprudence of ECtHR and its case F.H. v. Sweden[140]. In the light of this case, Court analyzed situation in the country of origin and stated that situation in Iraq does not meet a concept of 'total conflict'.

Furthermore, Elgafaji judgment influenced UK practice and the previous approach to the Article 15(c), exercised by the Court, was rejected. UK courts asked to prove 'special distinguishing features'[141] as a general condition; after Elgafaji this requirement was rejected[142]. Other development influenced by Elgafaji can be revealed through comparison of pre-Elgafaji case - KH (Iraq) case[143], while post-Elgafaji - QD and AH case. KH case reveals that interpretation of the Article 15(c) is based on the International Humanitarian Law (IHL). In this case argumentation was based on Tadič case, Common Article 3 of the Geneva Conventions; the notion of 'indiscriminate violence' is also covered by IHL in KH judgment: 'the concept of 'indiscriminate violence' (affecting a civilian's life or person) within Article 15(c) is best

[138] *Supra* note 30, pp. 14.
[139] Judgement No. 5 Azs 28/2008-68; Czech Republic – Nejvyšší správní soud (Supreme Administrative Court), 13 March 2009; accessed 26th March 2014, available at: http://www.juradmin.eu/docs/CZ01/CZ01000101.pdf
[140] Ibid.
[141] *Supra* note 30, pp. 25.
[142] Ibid.
[143] Case KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023; UK Asylum and Immigration Tribunal; 1 February 2008; accessed 26th March 2014, available at: http://www.refworld.org/publisher,GBR_AIT,,,47ea3e822,0.html

understood as denoting violence which, by virtue of failing to discriminate between military and civilian targets, violates peremptory norms of IHL.'[144] KH case gave a broad interpretation of Article 15(c) regarding 'indiscriminate violence' notion. However, the interpretation of 'individual' in armed conflict situation (regarding Article 15(c) of the Qualification Directive) was given in Adan case. In this case, the House of Lords distinguished between two types of harm: 'harm inherent in the ordinary incidents of civil war (that is, internal armed conflict) and harm involving risks over and above such incidents; however, no requirement of personal threats to an individual, or that they be at greater risk than are others, was foreseen'.[145]

Post-Elgafaji jurisprudence of UK domestic courts was changed significantly. 'The Court of Appeal rejected an IHL reading of Article 15(c) because of differences in the object and purpose of the international refugee law and IHL, preferring instead to regard the Qualification Directive as autonomous, that is, as capable of 'stand[ing] on its two legs''.[146] The 'poor drafting' of Article 15(c) was named as the main reason of problematic interpretation. It is seen that Elgafaji judgment directly influenced and abolished interpretation based on key notions of IHL. Although no direct ruling concerning the use of IHL was given by Luxembourg Court (it was done later in Diakite case), UK court decided to rely on Elgafaji case. Moreover, the Court of Appeal found that the threshold of risk was set too high in KH (Iraq)[147] – the requirement of consistent pattern was rejected. Domestic courts had to change their practice, in order to satisfy the standards set by the CJEU. It is predictable, as domestic courts are directly bound by the CJEU decisions.

French domestic courts were influenced by Elgafaji judgment also. However, the first negative result can be revealed. The CJEU avoided explaining the notion of the 'armed conflict' in the Elgafaji case. As a result French Court even after Elgafaji judgment used IHL for interpretation of the Article 15(c) of the Qualification Directive. In the case Baskarathas[148] Court maintained the relation with IHL and underlined the importance of the IHL. Two contrary interpretations appeared in France and UK. Different views towards the impact and the use of IHL among the domestic courts, in the different Member States, results in superficial approach exercised by the CJEU. As the role of IHL was determined only in later – Diakite case, domestic courts of Member States naturally had different approaches towards notions of 'armed conflict'.

[144] Ibid.
[145] Lambert H., Farrel T., 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' in International Journal of Refugee Law Vol. 22 No. 2 pp. 237–273; Oxford: Oxford University Press, 2010; pp. 243
[146] Ibid, pp. 247.
[147] Ibid, pp. 248.
[148] Case M. Baskarathas; Décision N° 581505; France: Conseil d'Etat; 3 July 2009; accessed 26th March 2014, available at: http://www.unhcr.org/refworld/docid/4a5756cd2.html

The result is contrary to the aim of CJEU jurisprudence – no harmonisation reached, as clarification of the 'armed conflict' notion was avoided. However, French courts adopted the same view towards the threshold of risk, as UK courts.[149] On the one hand, comparison of domestic courts in two Member States reveals that superficial approach is an obstacle for harmonisation; on the other hand standards set by the Court were used coherently. It seems that the national courts are able to apply standards set by the Court of Justice, but it has to be clear and unequivocal jurisprudence.

However, the wider picture has to be analyzed. Research of two Member States does not reveal the real situation. 'Based on the information available, the researcher cannot but affirm the extremely limited administrative guidance available' on the qualification of situation as indiscriminate violence in particular regions, 'as well as the diverging interpretations of this concept by asylum authorities'.[150] Member States evaluate situation and base it on different criteria. Germany can be identified as a state, which has different approach from common practice accepted by the domestic courts of the EU Member States, towards Elgafaji case application. An assessment of the violence level and, therefore, the risk of serious harm posed to civilians appear to have been reduced to a simple arithmetic calculation[151]:

'It is at least an approximate quantitative determination of the total number of civilians living in the area concerned, on the one hand, and on the other hand, the number of acts of indiscriminate violence committed by the parties to the conflict against the life or person of civilians in this region, as well as a general assessment of the number of victims and the severity of the casualties (deaths and injuries) among the civilian population'.[152]

Court also stated that 'even in the case of personal circumstances that increase danger, a high level of indiscriminate violence or a high density of danger to the civilian population must be found in the region in question'.[153]

This practice is affirmed by more recent case law[154] of Germany Federal Administrative Court. An example of application of the test can be found in the jurisprudence of the Higher Administrative Court of Baden-Württemberg:

[149] *Supra* note 146, pp. 248.
[150] *Supra* note 30, pp. 15.
[151] *Supra* note 138, p. 43.
[152] Case BVerwG 10 C 4.09; German Federal Administrative Court; 27 April 2010; para. 33; accessed 26th March 2014, available at: http://www.bverwg.de/informationen/english/decisions/10_c_4_09.php
[153] Ibid.
[154] Case BVerwG 10 C 15.12; German Federal Administrative Court; 27 April 2012; accessed 26th March 2014, available at: http://www.bverwg.de/informationen/english/decisions/10_c_15_12.php;

'Such a high degree of danger that practically every civilian would be subject to a serious individual threat simply because of his or her presence in the affected area, can, however, not be determined for Tameem province, from which the petitioner comes. [...] In Tameem province, with the provincial capital Kirkuk, where a total of between 900 000 and 1 130 000 people live (approx. 750 000 in the capital Kirkuk), there were 99 attacks with a total of 288 deaths in 2009, […]. For 900 000 inhabitants, this would be 31.9 deaths per 100 000 inhabitants and/or, if assuming 1 130 000 inhabitants, 25.5 deaths per 100 000 inhabitants. According to these findings, even if an internal or international conflict in Tameem province is presumed, the degree of indiscriminate violence characterizing this conflict cannot be assumed to have reached such a high level that practically every civilian is subject to a serious individual threat simply because of his or her presence in this region.'[155]

Previous attempts to use the 'indiscriminate violence test' on the basis of quantitative assessment were rejected by the domestic courts in the Netherlands, Belgium and the UK.[156] Furthermore, The European Council on Refugees and Exiles states, that 'Member States should not apply an overly technical approach to the nature of the violence that the asylum seeker may face through adopting a narrow interpretation of the term 'indiscriminate violence''[157]. Clearly technical approach exercised by Germany's courts shows how differently the 'sliding scale' test established in CJEU jurisprudence can be applied. CJEU should give clear and well explained interpretations, in order to avoid different approaches towards the same judgment. It seems that complicated notions, given by CJEU, do not influence harmonisation process positively. As a result, harmonization did not reach at least one Member State, in case of assessment of indiscriminate violence. This practice seems leading to the different protection level and standards for the asylum seekers.

Elgafaji case application exercised by the domestic courts reveals few problematic aspects. First of all, superficial approach and only partial interpretation of EU asylum legislation (avoidance to clarify all relevant notions of legal provision) force domestic courts to take an initiative, which leads to the different and even dissenting rulings issued on the same asylum related notions. Secondly, the vague clarification of notions does not lead to the desired result. National courts develop different standards and set different 'test' of evaluation in asylum related jurisprudence. The level of protection of asylum seekers varies depending on the developed standards. As a result, the lack of coherent practice among Member States is noticeable.

[155] *Supra* note 30, pp. 20.
[156] Ibid.
[157] ECRE, 'Comments from the European Council on Refugees and Exiles on the Commission Proposal to Recast the Qualification Directive'; 2010 March; pp. 17; accessed 26th March 2014, available at: http://www.ecre.org/component/downloads/downloads/128.html

'Contrary to the Commission's assessment made in the proposal for a Qualification Directive, the Elgafaji decision has not improved the protection system by preventing national jurisdictions from interpreting the requirement imposed by Article 15 in different ways'.[158]

The influence is found not only in cases related to the interpretation of ambiguous provisions. In B and D case, concerning the automatic exclusion because of the membership in terroristic organization, Germany referred to CJEU question for preliminary ruling regarding grounds of exclusion. CJEU ruled that only membership in terroristic organization cannot constitute automatic exclusion; all individual circumstances have to be taken into account. As it was stated by the AG – an objective and subjective criteria has to be taken into account. This decision mainly influenced Germany itself, as most of Member States do not have similar provision in national legislation. German legislation was not changed; at the time of writing this thesis, Asylum Procedure Act contained exclusion grounds in case of 'committed a serious non-political crime outside the Federal territory before being admitted as a refugee, in particular a brutal act, even if it was supposedly intended to pursue political aims[159]. However, the interpretation of this provision acquired new approach. It can be called an indirect effect. 'As a result of the B and D judgment, the Federal Administrative Court expressly and authoritatively ruled in 2011 that being listed with a terrorist organization or having actively supported the armed struggle of such an organization does not automatically constitute a ground for exclusion'.[160] German courts in its jurisprudence established the requirement of individual assessment according to which individual responsibility has to be found for the acts of breach of international peace[161]. Moreover this judgment inspired Sweden Migration Board to issue guidance document[162]. Guidelines issued by domestic authorities is a welcomed practice, as it gives the landmark for all domestic courts and ensure coherence within the national system. It is noticeable that the CJEU judgments can impact the jurisprudence of only few Member States. Similar situation was with Abdulla case, which clarified cessation clause. This CJEU decision influenced only Member States, which used this clause in practice - Germany, Lithuania and Austria. Besides the mentioned countries it would 'hardly identify any judicial interpretation of what 'significant and non-temporary' changes of circumstances mean'[163]. However, this is a step towards harmonized asylum practice. Limited influence towards the national jurisprudence

[158] *Supra* note 57, pp. 264.
[159] Asylum Procedure Act, version promulgated on 27 July 1993 (Federal Law Gazette I, p. 1361), last amended by Article 3 of the Act to Implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007; Section 3 para. (2) 'Recognition of refugee status; accessed 26th March 2014, available at: http://www.iuscomp.org/gla/statutes/AsylVfG.htm
[160] *Supra* note 30, pp. 40.
[161] Case BVerwG 10 C 2.10; German Federal Administrative Court; 11 March 2011; para. 40; accessed 26th March 2014, available at: http://www.bverwg.de/informationen/english/decisions/10_c_2_10.php
[162] *Supra* note 30, pp. 39.
[163] *Ibid,* pp. 32.

reveals that the CJEU case law does not deal with key issues of refugee law, e.g. principle of *non-refoulement*. The questions referred by the national courts for preliminary ruling usually is related to the specific matter, meanwhile the CJEU does not apply wider interpretation on related key issues.

The different approach towards jurisprudence of the Court of Justice is influenced by the lack of communication between national courts of Member States. Dialogue among national judges and the CJEU is essential ground for the functioning asylum system. The same should be applicable for the dialogue between national judges' from different Member States. The Germany's national court in its case law refers to the British case law in general: 'In sum, this approach takes sufficient account of the concern, emphasized in the more recent British case law, with making sufficient allowance for the different objectives of international humanitarian law on the one hand, and international protection under the Qualification Directive, on the other hand, without interpreting the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law, and thus depriving it of any contour and - contrary to the letter of the provision - making it virtually superfluous'[164]. Furthermore, national court gives direct reference to the UK jurisprudence and states that the position matches the recent practice of UK[165]. However, references to the case law of another member States are rare. Moreover, 'it is not done in order to apply a foreign decision as a precedent, although the approach is informed by a belief in judicial comity and the decisions having persuasive value.'[166] Although Germany attempts to use cross-references to the practice of other Member States, its practice is identified as different from common practice in particular asylum areas. It seems to me that the value of trans-national cross-referencing is doubtful. However, the harmonisation of CEAS cannot be reached only through the dialogue between CJEU and national courts. The dialogue among national courts is prerequisite for achieving an objective - parallel harmonisation of practices and procedures[167]. 'A comparative approach by judges therefore appears to be essential for the development of a system that is not only common but is also coherent and built on trust'.[168]

In conclusion, the main influence of the CJEU jurisprudence is identified in the national case law, which is directly affected. Meanwhile, the national legislation avoids any amendments

[164] *Supra* note 153, para. 24.
[165] Ibid, para. 34.
[166] Storey, H., 'It takes two to tango'. Paper for the event of Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union 'Asylum and Immigration Law: the National Judge between National and European Standards'; Brussels, 17 December 2010; pp. 8; accessed 26th March 2014, available at: http://www.aca-europe.eu/seminars/Brussels2010/Paper_Storey.pdf
[167] Ibid, pp. 8.
[168] Lambert H., 'Transnational Judicial Dialogue Harmonization and the Common European Asylum System' in International and Comparative Law Quarterly Vol.58, July 2009, pp. 519–543; pp. 523

on the basis of the CJEU jurisprudence. Examples show that the impact on the domestic asylum jurisprudence is limited. It depends on the clarification of rulings issued by the CJEU and on the relevance of interpreted provision (whether it is used frequently and by majority of the Member States). Problems mentioned in the previous part of this work (superficial interpretation; no coherence in application of international treaties) directly influence the harmonization process of asylum systems in Member States. As Court of Justice is not setting clear standards regarding the protection of asylum seekers, the national courts of Member States develop individual national jurisprudence based on the different approaches towards preliminary rulings issued by the CJEU. As national courts do not take into account case law developed by the courts form other Member States it differs and, in certain cases, significantly. As a result, the superficial preliminary rulings do not create a coherent system of standards regarding the protection of the asylum seekers, which could be similarly (or even equally) applicable by the EU domestic courts.

Except the impact on the jurisprudence of domestic courts the policy regarding asylum is potentially influenced. Policy changes are rare and modest, besides the changes are found mainly in the Member States, which asked for preliminary ruling[169]. The impact of N.S. case, after which Member States suspend transfer of asylum seekers to Greece, can be considered as an exception. In March 2012, Germany, France, the United Kingdom, Austria, the Netherlands, Belgium and Sweden presented a non-paper to the Justice and Home Affairs Council, by which countries called on Greece to improve border controls using available EU funds.[170] N.S. decision forced Member States to check the situation of the asylum seekers in the EU Member States. 'Presumption of trust' among Member States, which implies that all EU States are safe countries for asylum seekers, must be considered to be rebutted[171]. However, 'mutual trust' exists, but it has to be checked whether the Member State satisfies at least minimal protection standards of asylum seekers. Related national legislation was not affected directly (no changes in legislation regarding provision was done); though, Member States had to change their policy regarding the transfer to other Member States. European Asylum Support Office (EASO) in its report points out that suspension of transfer of asylum seekers was applied regarding various Member States: Finland did not transfer vulnerable people (unaccompanied minors, victims of trafficking) to Malta and Italy; Germany increasingly rejects the transfers to Italy[172]. In conclusion, Member State's responsibility for transferred asylum seekers forced to change its view towards the

[169] *Supra* note 30, pp. 43.
[170] European Asylum Support Office (EASO), 'Annual Report on the Situation of Asylum in the European Union 2012'. Luxembourg: Publications Office of the European Union, 2013; pp. 70; accessed 26th March 2014, available at: http://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-Final.pdf
[171] Brouwer E., 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' in Utrecht Law Review Vol. 9, No. 1; January 2013, pp. 135-147; pp. 144; accessed 26th March 2014, available at: https://www.utrechtlawreview.org/index.php/ulr/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-112909
[172] *Supra* note 171, pp. 70.

obligation to ensure protection of the rights of asylum seekers. Member States acquired that asylum seeker has to be equally protected in all Member States, and responsibility, established in the asylum jurisprudence, influenced this understanding directly. N.S. case made a significant influence towards the mutual trust policy exercised in the EU asylum field. After this decision, the protection of human rights (particularly of the asylum seekers) got primary importance in the asylum related policy exercised by the Member States.

Moreover, it is seen that policy changes are influenced by more recent cases. Decision on case Z and Y v. Germany, adopted in 2012 interprets the ground of persecution related to the religion (Article 9 and 10 of the Qualification Directive). Two Pakistani nationals applied for asylum, as the return to the country of origin would expose them to the risk of persecution because of their religion. The application was rejected and an appeal was brought. Domestic courts requested for preliminary ruling and asked whether the violation of freedom to religion constitutes act of persecution and whether the difference between freedom of religion and external manifestation exists. CJEU clarified, that not each interference with freedom of religion constitutes act of persecution, within meaning of the Qualification Directive; the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive[173] - in these circumstances an interference will constitute act of persecution. Court stated that authorities (of Member State) cannot expect that person will refrain for exercising religion in case of return to the country of origin. Following the CJEU decision of 5 September 2012 (Y. and Z. v. Germany), Denmark has changed its practice in cases concerning the change of religion (focus in case religious beliefs were changed in EU Member States and whether they are known in country of origin)[174].Focus of the decision was changed only on whether the change of religious belief can be considered to be fabricated in order to obtain protection and so-called 'forum externum' is protected.[175] Moreover, after this judgment the Ministry of immigration of Netherlands informed that new policy towards Iranian asylum seekers, who belongs to religious minorities, will be adopted according to the CJEU judgment Y and Z v. Germany. It was stated in the adjustments that: 'There will be no longer expected that he or she will abstain from the manifestation or practice of

[173] Case Y and Z v. Bundesrepublik Deutschland; Joined Cases C-71/11 and C-99/11; Judgment of the Court of Justice of EU of 05 September 2012; para. 72; accessed 26th March 2014, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=126364&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=129950
[174] *Supra* note 171, pp. 85.
[175] Ibid.

certain religious acts'[176]. Authorities of Netherlands reacted immediately and a month after judgment was issued - in November, the Parliament was informed about amendments regarding asylum policy towards asylum seekers who belong to the religious minority in Iran and policy was changed.

It seems that the CJEU jurisprudence can be considered as a trigger for the policy adjustment. It is a welcomed practice, as changes in the legislation need time, while change of policy, in order to comply with relevant jurisprudence, is a relatively faster process. By changing policy Member States can react and apply the new standards, established by asylum related case law, more effectively and ensure higher protection standards without changes in legislation. However, asylum policy is affected by a number of factors. As a result, asylum policy cannot be evaluated as a proper way for implementation of CJEU jurisprudence, because of instability and non-binding nature. It seems to me that the asylum policy and its changes completely depend on competent State's institutions.

The analysis reveals that there are two different actors in the Member States, affected by the CJEU asylum related jurisprudence. On the one hand there are domestic courts, which use the CJEU rulings in their jurisprudence; on the other hand there are competent State authorities, which deal with immigration matters (Immigration Boards; Ministries of immigration…). Authorities, as well as domestic courts, should be obliged to follow standards set by CJEU in asylum process (granting asylum/subsidiary protection; transfer; exclusion…). Effect of CJEU asylum jurisprudence is very limited in Member States. Influence on national jurisprudence is predictable and most seen. However, practice among Member States frequently does not reach coherence and the same level of protection of asylum seekers. The most significant and predictable direct influence on national legislation is avoided. National authority is not influenced by the CJEU jurisprudence in its legislative process. Policy changes are tools to have a coherent practice among national institutions. Although it is the tool, which works quickly, the non-binding nature does not ensure proper application of the CJEU jurisprudence. Furthermore, national guidelines can be inspired by asylum jurisprudence; unfortunately, it is a rare practice in the Member States. In conclusion an influence of the CJEU asylum jurisprudence on Member States is very limited and does not create a coherent system of protection of asylum seekers in the EU because of dissenting practices accepted by the States.

[176] Ibid.

3.2 Practice in Lithuania: the result of misinterpretation

Lithuania is a country which can be identified as EU external border state; accordingly, for some refugees/asylum seekers or illegal immigrants it is the state of the first entrance to the EU. Lithuanian domestic courts are not active in use of preliminary ruling procedure regarding asylum law interpretation and had not asked for any preliminary ruling, in asylum related cases, during first ten years of the membership in the EU. As a result, no conclusion can be made regarding the most problematic issues of the asylum law faced in the country by the courts and the ability of domestic courts to formulate questions for preliminary ruling. However, national courts have to apply CJEU jurisprudence frequently.

It is useful to track how domestic courts of a young democratic state are using CJEU jurisprudence and whether the attitude towards it is changing, or not. In Lithuania asylum cases are decided by the administrative district courts and Supreme Administrative Court of Lithuania which act as an appeal instance. The first CJEU case on substance of asylum was Elgafaji case, which was the first for Lithuanian national courts too. Even though the decision of preliminary ruling procedure by Luxembourg court was made in February of 2009 Supreme Administrative Court of Lithuania used Elgafaji case in its ruling only in April 2010. Administrative Court based the ruling[177] on Elgafaji case regarding Chechnya national whose subsidiary protection ceased to exist according to the national legislation. This happened because of numerous travels to the country of origin, which proves that the threat no longer exists. National court clarified provisions of the national legislation concerning subsidiary protection grounds and Elgafaji case was used as a guideline for the interpretation. Court stated that national provisions are the transposition result of the Article 15 of the Qualification directive. Furthermore, in the same judgment national court used Abdulla case and Article 3 of ECHR. More significant ruling was issued on September in 2010, by which Supreme Administrative Court referred to the 'sliding scale's' test and stated that 'the more significant individual treat, the lower level of indiscriminate violence is required in order to get subsidiary protection'[178]. Moreover, by this judgment possibility because of the automatic application of subsidiary protection clause was denied in case of armed conflict in the third country[179]. Accordingly, each application for subsidiary protection has to be assessed individually. National 'judges interviewed by the International Organization for Migration (IOM) also admit that earlier decisions to grant asylum in regards to Chechen nationals were taken automatically, however, having reviewed the practice

[177] Case A^{858} – 737/2010, Supreme Administrative Court of Lithuania, 29 April 2010; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=7698f8b5-4c92-4608-936e-088ae362b78a

[178] Case A^{822}-1273/2010, Supreme Administrative Court of Lithuania, 30 September 2010; accessed 26th March 2014, available at:http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=f4acfcc4-df0e-48e8-8976-23e19681bbd5

[179] Ibid,

of the CJEU in establishing threats of general nature, the courts reacted to these changes in their work and do not apply exemptions in these cases anymore.'[180] The interpretation made by Lithuanian national court regarding CJEU jurisprudence, directly affected national case law related to the subsidiary protection procedure. The Court established new binding requirement – individual assessment, which is not explicitly mentioned in the national asylum legislation. However, such approach towards Elgafaji judgment illustrates a harmful practice, which was created because of misinterpretation of the relevant CJEU judgment. Elgafaji case established 'sliding scale' test and rejected individualization requirement established in the Vilvarajah case by ECtHR. By interpreting Article 15 of the Qualification directive ECtHR relies on the 'special distinguishing features'[181], and CJEU by its 'sliding scale' test requires individual threat only in case the level of indiscriminate violence is low. Supreme Administrative Court of Lithuania required individual factors giving rise to a real risk of serious harm in more general terms.[182] However, increasing individualization in Lithuania was influenced by one more CJEU judgment - the Abdulla case. In order to clarify Article 87 of Alien law, court uses Abdulla judgment and states that assessment concerning new (current) risk of persecution has to be made. Supreme Administrative Court in case No. A858 – 737/2010 emphasized the importance of personal interview in cessation cases. Absence of personal interview, results in unreasonable cessation decision, as relevant circumstances are not considered in details.[183] This national case law decision intends to change practice of asylum authorities and to create binding procedure of interview in case of cessation. As a result, 'personal interview is now usually conducted in cessation cases.'[184] In conclusion, increasing level of individualization emphasize the difficulties faced by domestic courts regarding the interpretation of CJEU judgment. It seems to me, that Lithuanian national court relied on the less progressive approach, instead of using a broader interpretation of Article 15 (c) of the Qualification Directive. As a result it means that Lithuanian asylum system does not corresponds to the standards set by CJEU and does not contributes harmonisation process of EU asylum systems. Although CJEU set 'sliding scale' test, Lithuanian domestic courts were not able to apply it correctly and its interpretation showed incomprehension regarding application of the Article 15 paragraph c of the Qualification directive. Lithuanian courts used this judgment only after a year of publication, when a number

[180] International Organization for Migration (IOM), 'Decision making in asylum cases and appeal process: situation, relevant issues and recommendations for Lithuania', Vilnius: 2013; pp. 50. This research is part of the project 'Improving decision making procedure in asylum cases: appeal level' which is implemented under the action 'Member States capacities to develop, monitor and evaluate their asylum policies, in particular through practical cooperation' under the European Refugee Fund 2011 annual programme;accessed 26th March 2014, available at: http://www.iom.lt/documents/IOM%20study%20EN.pdf
[181] Case Vilvarajah and others v. UK; *Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87*; Judgment of European Court of human rights of 30 October 1991; para 112; accessed 11th May 2014, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57713#{"itemid":["001-57713"]}
[182] *Supra* note 30, pp. 24.
[183] *Supra* note 179.
[184] *Supra* note 30, pp. 31.

of Member States (e.g. UK, France, Czech Republic) had already established practice concerning 'sliding scale' test. However, Lithuanian domestic courts did not use any existing practice regarding Elgafaji decision, in order to get clarification of the judgment. Recent case law shows that understanding of Elgafaji case was not revised. Decision issued on March 10th of 2014, by the Supreme Administrative Court confirms the previous practice and gives references to the previously mentioned national case law regarding Elgafaji interpretation (e.g. case No. A858-737/2010)[185]. Court states that subsidiary protection can be granted because of common situation in the country of origin, which is determined by individual and serious threat of persecution. It shows unwillingness of the national court to the revised practice and does not create a strong national protection system of the asylum seekers.

Implementation of the CJEU asylum related judgments is problematic for Lithuanian national courts. However, more recent judgment of CJEU – e.g. Arslan case regarding detention, does not make their task easier. Detention of asylum seekers became relevant issue in Lithuania in recent years due to the proposed amendments of the law on the Legal Status of Aliens and detention policy exercised by Border Services and Prosecution service towards persons, who crossed the border illegally. Ministry of the interior proposed amendments[186] to the Law on the Legal Status of Aliens concerning new detention ground applicable for all who entered country illegally. According to UNHCR, an offered amendments regarding Alien's law provision, would create a situation of automatic detention. The main reason of such result is that no requirement of individual assessment was established, the detention is automatic after an illegal entry independently from legal status.[187] However, originally proposed amendments were not accepted. After discussions in the Parliament, the formulation was changed and the possibility of an automatic detention was excluded. Moreover, provision followed the practice of CJEU and stated that alien can be detained only in case there is a basis to believe that person will hide in order to abuse the return procedure.[188] The same idea is reflected in Arslan judgment. It seems that Arslan case created a new detention ground, which can be followed by national authorities. Although no direct references were made during the discussions, the bond between the CJEU case and revised amendment of the Alien law can be found. It is seen that Lithuanian legislator used an offer made by CJEU itself in Arslan case. At the same time, State Border Guard Service,

[185] Case A858 – 1335/2014, Supreme Administrative Court of Lithuania, 10 March 2014; accessed 11th May 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=0473881b-955c-4273-b704-0dd668ff52eb
[186] Draft law on amendments of the Law of Republic of Lithuania on legal status of Aliens, No. XIP-4566; accessed 26th March 2014, available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=427333&p_tr2=2
[187] Conclusion of the Main Committee regarding project of amendments of the Law of Republic of Lithuania on legal status of Aliens, No. XIP-4566; 11 September 2013; accessed 26th March 2014, available at:http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=455682
[188] Supra note 188, Art. 8 para. 3.

acting according to the explanatory note[189] issued by Prosecution service, launched a practice according to which after the illegal entry criminal investigation was started immediately and person was detained. Although provision, which allows the detention in case of illegal entry, should not be applicable for asylum seekers, jurisprudence of Lithuanian administrative courts shows that this ground is used.[190] Accordingly, Administrative Court frequently had to decide on appeals related to detention because of illegal entry. In rulings issued by the Court in July[191] Arslan judgment was used only in argumentation of applicant and defendant. The Court does not assess Arslan case, although it directly concerns the substance of case, as the applicants applied for asylum but was detained. The conclusions given by the Supreme Court, in these cases, are short and rely exclusively on the national legislation: 'The main legislative act, which regulates legal status of a foreigner and the asylum, is the Law on Legal Status of Aliens of Republic of Lithuania. In this case the relevant Article 113, which establish detention grounds.'[192] Nor CJEU, nor ECtHR related jurisprudence was used for justification of this decision. All argumentation was based on Article 113 and 115[193] (establish alternative measures to the detention) of the Aliens law. The same approach prevailed in the jurisprudence of district courts, which also did not rely on Arslan case. In September of 2013 Arslan case was used by the Supreme Administrative Court for the first time. It was confirmed that previous practice exercised towards detained asylum seekers is in conformity with the CJEU jurisprudence and there are no basis for changes in national jurisprudence. It was confirmed in number of cases.[194] The first consideration on Arslan case in substance was given in October. Supreme Court directly relied on Arslan case in its argumentation part[195]. Lithuanian Supreme Court needed 6 months in order

[189] Explanatory notes issued by Prosecution Service of the Republic of Lithuania 'DėL BAUDŽIAMOJO KODEKSO 291 STRAIPSNIO 2 DALIES IR BAUDŽIAMOJO PROCESO KODEKSO 212 STRAIPSNIO 8 PUNKTO TAIKYMO' ['the application of Article 291 para. 2 and Article 212 para. 8 of Penal code of the Republic of Lithuania]; No. 17.2-3383, 21 February 2011; accessed 26th March 2014, available at: http://www.prokuraturos.lt/Teisin%C4%97informacija/Ai%C5%A1kinamiejira%C5%A1tai/tabid/477/Default.aspx

[190] Biekša L., Samuchovaitė E., '*Priėmimo sąlygų direktyvos įgyvendinimo Lietuvos teisinėje sistemoje problemos' ['Problems of Implementation of the Reception Conditions' Directive in Lithuanian Legal System'] in Ethnicity studies 2013/1, pp. 19-39;* pp. 25; accessed 26th March 2014, available at: http://www.ces.lt/wp-content/uploads/2013/05/EtSt_Biek%C5%A1a_Samuchovait%C4%97_2013_1.pdf

[191] Case N575-82/2013, Supreme Administrative Court of Lithuania, 09 September 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3ae3ddfb-b62e-43f1-aa9c-5880dc1cd322

[192] See: Case N575-78/2013, Supreme Administrative Court of Lithuania, 26 July 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=cdbbd832-7280-4b36-a1af-a40d7cf64fe2; Case N575-79/2013, Supreme Administrative Court of Lithuania, 26 July 2013; accessed 27th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=5ab48551-81a0-4f3b-b0f8-51ca2d98ebd2

[193] See: Case N575-78/2013, Supreme Administrative Court of Lithuania, 26 July 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=cdbbd832-7280-4b36-a1af-a40d7cf64fe2; Case N575-79/2013, Supreme Administrative Court of Lithuania, 26 July 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=5ab48551-81a0-4f3b-b0f8-51ca2d98ebd2

[194] See: Case N575-91/2013, Supreme Administrative Court of Lithuania, 18 September 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e89ac3ea-c36a-4797-8fa7-e736fb37aaee; Case N575-83/2013, Supreme Administrative Court of Lithuania, 09 September 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3b8bcff5-5619-4f93-927b-b28186e0cc77

[195] See: Case N575-103/2013, Supreme Administrative Court of Lithuania, 28 October 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=02b3d8d5-0414-4f5d-8a20-521b9ed62b43; Case N575-97/2013, Supreme Administrative Court of Lithuania, 07 October 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=dbf950bb-db55-479b-9716-78b1fcd3eea6

to start building its argumentation on CJEU case law. However, an analysis of recent national jurisprudence shows the inconsistent practice. In judgment issued in January, regarding foreigner who entered illegally, was detained and applied for asylum[196] Court did not applied Arslan case, although both parties relied on it in its complaints. In this case was recognized that person could abuse asylum procedure, as he intends to travel to Poland (there his family resides). Although possibilities of abuse of asylum procedures were discussed, Court relied exclusively on the national legislation. Moreover, district courts, which are first instance, do not relied on Arslan case, but built argumentation on national legislation and jurisprudence. No consideration of CJEU jurisprudence related to detention is found. In number of cases[197] Supreme Court partly changed the decisions of first instance and alternative detention measures were adopted. Furthermore, after Arslan judgment was issued by the CJEU, Kadzoev case is no longer used by the Lithuanian Supreme Administrative Court in asylum cases. Although Kadzoev case is used in the argumentation of the parties, national court does not apply it. Court relies exclusively on Arslan case in number of cases[198]. It shows that Lithuanian national courts do not aims to eliminate all rising ambiguities in asylum cases, despite of the possibility to use not only CJEU jurisprudence, but also take a broader view and take into consideration ECHR and its case law. A broader approach would create reliable protection system for asylum seekers in Lithuania.

Lithuanian law contains provisions according to which foreigner can be detained on the ground of national security, public order or health[199]. These provisions exist and are used by Supreme Administrative Court[200], although 'CJEU (in Kadzoev case) stated that the possibility of detaining a person on the grounds of public order and public safety cannot be based on the Return Directive'[201]. Incompatibility with Return Directive and Kadzoev judgment did not influenced national courts. Nor legislation itself, nor national jurisprudence were changed. A similar practice is exercised regarding the grounds of exclusion. Although, B and D case established an 'individual assessment' requirement and prohibits an exclusion of refugee status

[196] Case N[575]-126/2013, Supreme Administrative Court of Lithuania, 02 January 2014; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=1d04ed24-ac20-4dff-8daa-9a622700c609

[197] Case N[575]-102/2013, Supreme Administrative Court of Lithuania, 04 December 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=764a8721-6b9d-479b-96c1-2459cf261900; Case N[575]-79/2013, Supreme Administrative Court of Lithuania, 26 July 2014; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=5ab48551-81a0-4f3b-b0f8-51ca2d98ebd2;

[198] Case N[575]-83/2013, Supreme Administrative Court of Lithuania, 09 September 2013; accessed 11th May 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=3b8bcff5-5619-4f93-927b-b28186e0cc77; Supreme Administrative Court of Lithuania, 18 September 2013; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e89ac3ea-c36a-4797-8fa7-e736fb37aaee

[199] Republic of Lithuania, 'Law on the Legal Status of Aliens'; Article 88 para. 6; accessed 26th March 2014, available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=416015

[200] Case N[17]- 2752/2006, Supreme Administrative Court of Lithuania, 14 December 2006; accessed 26th March 2014, available at: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=40b7ad4c-8d82-40c3-b5b7-71f22a06c2c1

[201] Lithuanian Red Cross Society (LRCS), National policy paper 'Detention of asylum seekers and alternatives to detention in Lithuania'. Vilnius, 2011; pp. 13; accessed 26th March 2014, available at: http://redcross.eu/en/upload/documents/pdf/2012/Migration/Lithuania_Study_on_detention%20pdf.pdf

solely on the ground of 'threat to the national security', Lithuanian law on legal Status of Alien Article 88 paragraph 1.6 states that alien may be refused to grant refugee status 'when the alien's stay in the Republic of Lithuania constitutes a threat to national security, public policy'[202]. It contains all these additional grounds. Luxembourg jurisprudence should serve as a final inspiration for Member States, which has a national security exclusion ground, to modify their problematic legislation[203]. However, no steps were taken by Lithuanian national legislator since 2006, when this provision was adopted. This is not in conformity with the Geneva Convention or the Qualification Directive, particularly in the light of the interpretation given by the EU Court of Justice in B and D case (which did not lead to the modification of these legislative rules).[204]

In conclusion, Lithuanian national asylum system is affected by the CJEU jurisprudence. However, national courts are not using the EU case law immediately and, by using such policy, postpone the application of the developed standards in practice. Moreover, jurisprudence of Supreme Administrative Court reflects misapprehension of the set standards concerning asylum. Misapplication of the CJEU case law does not create a strong national protection system of the asylum seekers. It seems that the implementation problems are faced because of lack of proficiency. Furthermore, national courts are not seeking to amend and develop its jurisprudence by taking a new approach towards its case law, which is based on misapplication of CJEU standards. National courts do not use ECHR provisions in order to clarify CJEU approach. Although it would add value for their decisions and enhance the protection standards. Not only jurisprudence and national courts are influenced, in Lithuania. The national asylum authorities are also affected. An increased individualization, promoted by national case law in the light of CJEU jurisprudence, highlights the influence on these authorities and their work with asylum applications. However, no policy changes were initiated by asylum authorities in the light of the CJEU jurisprudence. Furthermore, no influence on Lithuanian national legislation can be found, although particular provisions require improvement. Overall, influence of CJEU jurisprudence in Lithuanian asylum system is limited and does not influence significant improvements regarding national asylum system. In some cases a significant impact can be seen, but misinterpretation of standards, set by CJEU, influences national asylum system negatively.

[202] *Supra* note 201
[203] *Supra* note 30, pp. 42.
[204] Ibid, pp. 07.

Few influenced fields can be distinguished in Member States. These are national practice, national asylum policy and national legislation which is least affected. Cases, which cover wider applicable concepts, have a more significant impact (e.g. Elgafaji case). However, superficial approach does not prevent dissenting judgments and possible misinterpretations in Member States. Decisions which elaborate asylum law concepts (e.g. Elgafaji and Diakite cases) develop harmonisation process and eliminate differences reappearing in practice (e.g. UK and France regarding notions of 'armed conflict'). Nevertheless, vague asylum concepts (or inconsistent) influence national asylum systems directly and have negative effect not only on harmonisation process, but also on national asylum systems.

CONCLUSIONS

1) The concepts developed by the Court give clarification on certain notions. CJEU in its jurisprudence developed standards set in Elgafaji and Diakite cases regarding subsidiary protection (Article 15 (c) of the Qualification Directive) and elaborated on both - 'sliding scale' test and notion of 'armed conflict'. Furthermore, CJEU went for a broader (it can be called more liberal) interpretation, which creates conditions to get subsidiary protection for more people. CJEU successfully enhanced protection level of Palestinian refugees (e.g. Bolbol, El Kott cases) and unaccompanied minors (MA case). However, In Abdulla case (concerning cessation) Court used narrow approach assessing situation in the country of origin (e.g. minimum standard of living). It does not give added value for the decision and does not enhance protection level of asylum seekers. Furthermore, notion of 'responsible state' (Dublin regulation) lacks clarity, although number of cases were decided (N.S. case, Samso Abdullahi…). Moreover, CJEU jurisprudence reveals the inconsistency concerning set standards (cases Kadzoev and Arslan).

2) CJEU asylum jurisprudence lacks volume in order to have more significant impact towards the development of the EU asylum system. The research reveals two main obstacles for (the) development:

- superficial approach exercised by the CJEU;
- ambiguities regarding the use of regional human rights protection documents (ECHR; EU Charter).

3) Superficial approach results in need of recurrent use of preliminary ruling procedure concerning the same provision, as CJEU does not issue clear and comprehensive standards. Although a number of ambiguities concerning asylum decisions remain in asylum *acquis*, CJEU jurisprudence became a basis to avoid the review of vague asylum provisions (e.g. Elgafaji case). However, recent case law (e.g. Diakite case) gives a basis to wait for more significant asylum judgments.

4) The use of international or/and regional human rights protection instruments is a constant practice in CJEU asylum jurisprudence. However, no consistency is reached.

Application and interpretation of the EU Charter are dependent on the ECHR and its set standards. No broader view towards the rights in the Charter is exercised. Research reveals that secondary EU legislation gains weight before the Charter provisions, in the CJEU asylum jurisprudence. An ambiguous and minimalistic interpretation of the Charter

could increase a number of pending cases before the CJEU concerning the meaning of the Charter in asylum cases; with the result that the 'constitutional pluralism' among national judges is encouraged.

ECHR use is not coherent. Although in N.S. case CJEU used an approach embodied in the ECtHR M.S.S. case, the autonomous character of EU law remains as a fundamental principle. However, recent asylum jurisprudence (e.g. Samba Diouf case) uncovers that CJEU disregards provisions of ECHR. No clear standard is set how and to which extent ECHR and its jurisprudence should be used in asylum case law. CJEU aims to maintain the autonomous character of EU legal order and avoids establishing supremacy of ECHR protection standards.

5) The analysis reveals that there are two different actors in Member States, affected by CJEU asylum related jurisprudence: national courts and asylum authorities. However, the influence of the CJEU asylum jurisprudence on Member States is very limited and does not create a coherent system of protection of asylum seekers in the EU, because of dissenting practices accepted by the States (e.g. UK and France regarding 'armed conflict' notion). Although policy changes inspired by Luxembourg asylum case law are notable (e.g. Z and Y case), the significant influence on national legislation is not found. CJEU jurisprudence influences Lithuanian asylum system - its national courts and asylum authorities, through the national case law. However, jurisprudence of the Supreme Administrative Court reflects misapprehension of set standards concerning asylum and disregarding the ECtHR jurisprudence. It does not create a strong national protection system of the asylum seekers. Furthermore, no directly influenced policy or legislation changes in Lithuania can be identified. More significant impact is seen in national jurisprudence. However, misinterpretation influences asylum system negatively. Overall, influence of CJEU jurisprudence in Lithuanian asylum system is limited and does not influence significant improvements regarding national asylum system.

RECOMMENDATIONS

- National Courts should formulate its questions for preliminary ruling more precise. Questions should be self-explanatory and focus on precise provision or notions. EU level guidelines could be issued, in order to improve quality of the CJEU decisions. Furthermore, Lithuanian national courts should use the support potentially given by the CJEU and use preliminary ruling procedure directly.
- CJEU should set clear standards to which extent and when ECHR and the EU Charter have to be applied in asylum jurisprudence. CJEU has to find the right balance between the use of the Charter and Convention and to accept more responsibility, as a first Court, which has direct competence in asylum cases. Furthermore, in order to enhance protection of asylum seekers and their fundamental rights, CJEU should rely primarily on the Charter. Secondary law should be interpreted in the light of the Charter.
- Harmonisation process has to be improved: Member States has to be encouraged to take into consideration national jurisprudence of other Member States – use cross-references. It would help to avoid dissenting practices among Member states in EU asylum system.
- Lithuanian national legislation should be in conformity with the protection standards of asylum seekers established in the CJEU asylum jurisprudence. The Law on the Legal Status of Aliens of the Republic of Lithuania, Article 88 para. 1.6 should be modified and asylum seeker should not be refused to grant a refugee status or subsidiary protection solely on the ground of 'threat to the national security'. An 'individual assessment' requirement should be established in the law.

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ANNOTATION

In this Master Thesis the influence of the CJEU jurisprudence on the EU asylum development was analyzed. Two main problems, concerning the extent to which the CJEU jurisprudence contributes to the protection level of the asylum seekers and the ability of national asylum authorities and domestic courts to apply the CJEU asylum jurisprudence, were distinguished. This work aims to prove the hypothesis, that CJEU case law has a potential to contribute effectively on the development of the EU asylum law. However, the jurisprudence of the Court does not lead to the enhanced protection of asylum seekers and only partially affects the case law of the domestic courts.

The first chapter of this Master Thesis analyzes the legal background and changing role of the CJEU in the EU asylum law development. It ascertains that evolution of CJEU has influenced the EU asylum law. The second part shows that CJEU jurisprudence lacks volume to have a significant impact on the EU asylum system. The third chapter confirms that case law has only limited influence towards national asylum systems of Member States. Furthermore, it is disclosed that Lithuanian domestic courts face problems concerning the interpretation of the CJEU asylum jurisprudence and misinterprets set standards.

Keywords: asylum seekers; CJEU jurisprudence; EU asylum development; Charter of Fundamental Rights of the European Union; national asylum systems

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ANOTACIJA

Šiame Magistriniame darbe analizuojamas ESTT jurisprudencijos poveikis Europos prieglobsčio teisės vystymuisi. Darbe apibrėžiamos dvi pagrindinės problemos susijusios su Teisingumo Teismo praktikos įtaka siekiant sustiprinti prieglobsčio prašytojų padėtį Europos Sąjungoje ir nacionalinių teismų bei prieglobsčio institucijų gebėjimu taikyti ESTT jurisprudenciją. Šiuo darbu siekiama įrodyti hipotezę, kad ESTT turi potencialą reikšmingai paveikti ES prieglobsčio teisės raidą, tačiau Teisingumo Teismo jurisprudencija nesustiprina prieglobsčio prašytojų apsaugos ir tik dalinai įtakoja nacionalinius teismus.

Pirmasis Magistrinio darbo skyrius analizuoja ES prieglobsčio teisyno vystymąsi ir kintantį Teisingumo Teismo vaidmenį. Atskleidžiama evoliucijos įtaka Europos prieglobsčio teisei. Antrasis skyrius parodo ESTT jurisprudencijos turinio trūkumus, kurie lemia silpnėjantį teismo vaidmenį tobulinant ir stiprinant ES prieglobsčio teisę. Trečiasis skyrius patvirtina, kad ESTT teismo praktikos veikimas valstybėse narėse yra ribotas. Be to, Lietuvos pavyzdys atskleidžia problemas su kuriomis susiduria nacionaliniai teismai, o tiksliau klaidingas Teisingumo Teismo įtvirtintų standardų taikymas bei interpretavimas.

Pagrindiniai žodžiai: prieglobsčio prašytojas; ES Teisingumo Teismo praktika; ES prieglobsčio vystymasis; Europos Sąjungos pagrindinių teisių chartija; nacionalinė prieglobsčio sistema

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SUMMARY

In this Master Thesis the influence of the CJEU jurisprudence on the EU asylum development was analyzed. Since Lisbon treaty entered into force, a number of asylum related judgments, issued by the CJEU, is increasing. This study is relevant as developing jurisprudence reveals new trends and rising problems in European asylum law field. This work is novel, because it analyzes the CJEU asylum related jurisprudence and examines the influence on both – European and national asylum systems. The objective aims are to find out the extent of the influence and its significance. As a result two main problems were distinguished: 1) whether the CJEU asylum jurisprudence enhances the protection level of the asylum seekers in the EU? 2) the ability of national asylum authorities and domestic courts to apply the CJEU asylum jurisprudence in national level and the effect on the development on national asylum systems. Taking into account the recent CJEU jurisprudence and legal framework concerning asylum, following hypothesis was formulated: CJEU case law has a potential to contribute effectively on the development of the EU asylum law, but the jurisprudence of the Court does not lead to the enhanced protection of asylum seekers and only partially impacts the practice of the domestic courts in EU Member States. In order to confirm the hypothesis, following methods were used: historical, logical-analytical, systematic analysis, comparative, descriptive, statistical, analysis of legal documents and scientific literature. The first chapter analyzes the legal background and changing role of the CJEU in the EU asylum law development; the second part focuses on the influence of the CJEU jurisprudence on the EU asylum law; the third chapter assesses how domestic courts of the EU Member States apply the CJEU case law.

After the analysis was conducted, the hypothesis was confirmed. The CJEU jurisprudence lacks volume in order to have more significant impact towards EU asylum development. The need of recurrent preliminary ruling procedure and inconsistency appears because of the superficial approach and ambiguities regarding the use of the regional human rights protection instruments (ECHR and EU Charter). CJEU jurisprudence affects asylum authorities and domestic courts, in EU Member States. However, the impact of the CJEU jurisprudence is rather limited. The coherent system of asylum seekers protection is not ensured because of dissenting practices among Member States. Analysis of Lithuanian practice reflects, how domestic courts misapprehend standards set by CJEU concerning asylum and as a result do not enhance national protection system of the asylum seekers.

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SANTRAUKA

Šiame Magistriniame darbe analizuojamas ESTT jurisprudencijos poveikis Europos prieglobsčio teisės vystymuisi. Po Lisabonos sutarties įsigaliojimo (2009), prieglobsčio bylų skaičius auga. Šis tema aktuali, nes besiplėtojanti teismo praktika atskleidžia naujas tendencijas ir atsirandančias problemas ES prieglobsčio teisėje. Be to tema yra nauja, nes ne tik nagrinėja ESTT praktiką, tačiau atskleidžia įtaką tiek ES prieglobsčio sistemai, tiek ES valstybių narių nacionalinėms prieglobsčio sistemoms. Darbe išskiriamos dvi pagrindinės problemos: 1) ar Teisingumo Teismo jurisprudencija sustiprina prieglobsčio prašytojų apsaugos lygį Europos Sąjungoje; 2) nacionalinių teismų ir prieglobsčio institucijų gebėjimas taikyti Teisingumo Teismo praktiką ir jos įtaka nacionalinei prieglobsčio sistemai. Atsižvelgiant į naujausią teisminę praktiką ir teisinę bazę susijusę su prieglobsčiu, buvo iškelta hipotezė: ESTT turi potencialą reikšmingai paveikti ES prieglobsčio teisės raidą, tačiau Teisingumo Teismo jurisprudencija nesustiprina prieglobsčio prašytojų apsaugos ir tik dalinai įtakoja nacionalinius teismus. Siekiant ją patvirtinti ir įrodyti buvo naudojami šie metodai: istorinis, loginis - analitinis, sisteminės analizės, lyginamasis, aprašomasis, statistinis metodai, bei teisinių dokumentų ir mokslinės literatūros analizė. Pirmasis Magistrinio darbo skyrius analizuoja ES prieglobsčio teisyno vystymąsi ir kintantį Teisingumo Teismo vaidmenį. Atskleidžiama evoliucijos įtaka Europos prieglobsčio teisei; antrajame skyriuje dėmesys sutelkiamas į ESTT jurisprudencijos poveikį ES prieglobsčio sistemai; trečiajame skyriuje vertinama kaip nacionaliniai teismai valstybėse narėse taiko ESTT praktiką. Atlikus analizę hipotezė buvo patvirtinta. ESTT jurisprudencijos turinio trūkumai lemia silpnėjantį teismo vaidmenį tobulinant ir stiprinant ES prieglobsčio teisę. Dėl paviršutiniško požiūrio ir neaiškios praktikos taikant regioninius žmogaus teisių gynymo instrumentus (EŽTK ir ES Chartija), kyla poreikis kartoti prejudicinio sprendimo procedūrą, taip pat atsiskleidžia praktikos nenuoseklumas. Teisingumo Teismo praktika turi įtakos tiek nacionalinėms prieglobsčio institucijoms, tiek nacionaliniams teismams. Tačiau šis poveikis gana ribotas. Skirtinga praktika valstybėse narėse, neužtikrina darnios prieglobsčio prašytojų apsaugos. Situacijos Lietuvoje analizė atskleidė, kad nacionaliniai teismai klaidingai interpretuoja ir pritaiko ESTT praktiką. Tai neturi teigiamo poveikio nacionalinės prieglobsčio sistemos vystymui.

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