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TRENDS IN MIGRATION CASES IN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

Master thesis

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LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
CJEU, Luxembourg Court	Court of Justice of the European Union
CoE	Council of Europe
ECHR, Convention	European Convention on Human Rights
ECtHR, Strasbourg Court	European Court of Human Rights
EEC	European Economic Community
EU	European Union
EU CFR	European Union Charter of Fundamental Rights
EU Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

Problem of research

According to the United Nations estimation, "in 2019, the number of international migrants worldwide was nearly 272 million, up from 221 million in 2010 and 174 million in 2000. More than half of all international migrants lived in Europe (82 million)"[1]. A marked increase in the number of migrants and asylum-seekers in recent years lead to an increasing number of appeals to international institutions. This became a particular challenge for national and international (European) justice, as this may provoke conflicts of law in courts' practice. The European Court of Human Rights, together with the Court of Justice of the European Union, plays a crucial role in the protection of the fundamental rights of migrants and asylum-seekers. While some of the approaches of these courts may intertwine, others may cause legal gaps or uncertainty.

The main questions (problems) of the research are how these courts coexist in terms of migration and asylum, what are the trends in their migration-related case-law, and what influence such case-law may have on the jurisprudence of national courts, in particular, the courts in Ukraine.

The relevance of the thesis

The migration is an unpredictable phenomenon due to the developing social changes in the world – wars, instability in the global economy, natural disasters. The migrants' and asylum seekers' rights are often violated, and thus, there is a pressing need to respond to the present challenges these people may face. The European Court of Human Rights and the Court of Justice of the European Union are the international legal mechanisms through which the rights and guarantees of the people concerned may be protected. The jurisprudence of these two courts should guarantee the same level of protection. Hence, first of all, it is essential to examine the courts' relationship and the extent of their cooperation in the sphere of migration. Secondly, the research on the tendencies in the courts' practice is necessary in order to understand the current approaches of the European courts' in the sphere of asylum and migration. Lastly, the developments in the courts' case-law relating to migration and asylum may serve as a guidance for the national judicial bodies, both of the EU Member States and Ukraine.

Scientific novelty and overview of the research on the selected topic

There is a considerable number of international scholars that have published their studies on the relationship between the ECtHR and the CJEU. Among the authors are the following:

[1] United Nations, Department of Economic and Social Affairs, Population Division (2019). International Migration 2019: Wall Chart (ST/ESA/SER/A/431), p. 1, https://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/MigrationStock2019_Wallchart.pdf

Francesca Ippolito and Samantha Velluti[2], Dr. Sonia Morano-Foadi and Dr. Stelios Andreadakis[3], Barrett Jizeng Fan[4], Johan Callewaert[5], S. Peers[6], B. de Witte[7], S. Douglas-Scott[8], Jasper Krommendijk[9], Federico Fabbrini and Joris Larik[10], L. Garlicki[11], Laurent Scheeck[12]. The scholars in their studies have also referred to the judicial and legislative interactions between the EU Charter on Fundamental Rights and the European Convention on Human Rights. The works of the mentioned scholars have been used in the research. Even though the topic of the relationship between two courts is widely examined, a deeper view on the tendencies in the European courts' interaction in the sphere of migration and asylum is currently lacking.

The evolution of asylum and migration legislation in Ukraine have been studied by some legal experts such as V.D. Bakumenko, V.I. Lugovyi, N.R. Nizhnik, V.A. Rebkalo, V.P. Troschanskyi, as well as known scientists on migration – V.I. Muravyov, S.P. Britchenko, O.A. Malinovska, V.P. Subotenko, V.O. Novik, O.I. Piskun, S.B. Chekhovich, Ya.Yu. Kondratiev, Yu.I. Rimarenko, V.I. Olefir, Z.M. Makarukha. Although the list of authors is extensive, the existing scientific publications have not comprehensively investigated the jurisprudence of the ECtHR and CJEU, including in migration sphere, and the place of the European courts' decisions in the Ukrainian national system.

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[2] Francesca Ippolito and Samantha Velluti, 'The relationship between the ECJ and the ECtHR: the case of asylum', March 2014

[3] Dr Sonia Morano-Foadi and Dr Stelios Andreadakis, 'A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon'; 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence'*, European Journal of International Law*, December 2011

[4] Barrett Jizeng Fan, 'Convergence, Compatibility or Decoration: The Luxembourg Court's References to Strasbourg Case Law in its Final Judgments', *Pécs Journal of International and European Law* - 2016/II

[5] Johan Callewaert, 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony'

[6] S. Peers, 'The European Court of Justice and the European Court of Human Rights: Comparative Approach', in E. Örücü (ed.): Judicial Comparativism in Human Rights Cases, United Kingdom National Committee of Comparative Law, London, 2003, pp.113-127.

[7] B. de Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice', in P. Popelier & C. Van de Heyning & P. Van Nuffel (eds.): Human Rights Protection in the EU Legal Order: The Interaction between European and National Courts, Intersentia, Antwerp, 2011

[8] S. Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after Lisbon', in S. De Vries et al. (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart, 2013)

[9] Jasper Krommendijk, 'The use of ECTHR case law by the Court of Justice after Lisbon', *The View of Luxembourg Insiders*

[10] Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights', iCourts - The Danish National Research Foundation's Centre of Excellence for International Courts Forthcoming in (2016) 35 Yearbook of European Law, December 2015

[11] L. Garlicki, 'Cooperation of courts: the role of supranational jurisdictions in Europe', *International Journal of Constitutional Law* 6, 2008, 509–530

[12] Scheeck, Laurent. "Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks. Laurent Scheeck, Institut d'Etudes Européennes-Université Libre de Bruxelles." (2007).

Significance of research

The theoretical importance of this scientific research is driven by the generalization of the jurisprudence of two European courts in the sphere of migration and asylum, their standards and approaches, as well as the study of the interaction between these courts.

The practical significance is that the findings of the study can be used to further implement the principles deriving from the case-law of two European courts concerning the treatment of migrants, which may be useful for the national courts, the central executive body implementing the state policy on migration, and the Government of Ukraine.

The aim of the research

The research aims to examine the role of the ECtHR and the CJEU in the migration-related cases, the developments in the relevant case-law and how the standards elaborated by these courts may influence the jurisprudence of Ukraine's national courts in the sphere of asylum and migration.

The objectives of the research

The main objectives of the research are the following:

1. to analyze the theoretical background for the jurisdiction of the European courts on migration and asylum matters;
2. to identify the developments in the relevant case-law of these two courts, define and analyze the trends;
3. to compare the approaches of the courts in the sphere of migration and asylum;
4. to examine how the courts interact;
5. to evaluate the place of the European courts' decisions in Ukrainian jurisprudence;
6. to study in what terms the courts' practice may be useful for Ukraine.

Research methodology

The legal dogmatic method was used for this research when a significant number of subject-related materials have been read and assessed. With the purpose of examining the development of jurisdiction of the courts in migration-related cases, a comparative historical method was used. A comparative methodology employed to compare how the two courts function and the different approaches of the courts in terms of migration. The statistical method applied for the estimation of the global trends in migration and the determination of the number of cases decided or pending before the courts. A logical-analytical method was used for examining the relevant case-law, the legal acts and the scholars' works. It was also used to formulate research objects and tasks. The linguistic method was applied to analyze the provisions of the relevant legal documents. The method of generalization was applied for formulating conclusions.

Structure of research

This thesis will focus on the trends in the sphere of migration and asylum case-law through the analysis of the jurisprudence of the European courts and the interrelationship between these two courts. The work is divided into three different parts. The first part will illustrate the theoretical background and the legal basis for the jurisdiction of the courts in migration and asylum matters and the main trends in developments of their jurisdiction relating to this particular field through the analysis of the EU law developments. The second part will be dedicated to the examination of how the two courts interplay in the relevant sphere and to the comparison of their approaches in identified thematic areas of migration and asylum law in Europe. The third and final part will investigate what role the European courts could play in Ukraine and how the trends in the jurisprudence of the two courts could be useful for Ukraine in the sphere of migration.

Defense statements

1. The ECtHR and the CJEU mainly show preferential treatment for the protection of fundamental human rights of the applicant as opposed to the protection of the national interests of a state, without, however, restricting the latter's discretion in matters of the formation and implementation of the state’s migration policy.

2. The proper application by the Ukrainian courts of the ECtHR and CJEU case-law as a source of law in migration and asylum-related cases will improve Ukrainian legislation and judicial practice in the field of migration and bring them in line with established international and European standards and approaches in this sphere.

1. THE JURISDICTION OF THE EUROPEAN COURTS IN ASYLUM AND MIGRATION MATTERS. TRENDS AND DEVELOPMENTS

According to the World Migration Report 2018, published by International Organization for Migration,

> "international migration is a complex phenomenon that touches on a multiplicity of economic, social and security aspects affecting our daily lives in an increasingly interconnected world. Migration is a term that encompasses a wide variety of movements and situations that involve people of all walks of life and backgrounds. More than ever before, migration touches all states and people in an era of deepening globalization. Migration is intertwined with geopolitics, trade and cultural exchange, and provides opportunities for states, businesses and communities to benefit enormously. Migration has helped improve people's lives in both origin and destination countries and has offered opportunities for millions of people worldwide to forge safe and meaningful lives abroad. Not all migration occurs in positive circumstances, however. We have in recent years seen an increase in migration and displacement occurring due to conflict, persecution, environmental degradation and change, and a profound lack of human security and opportunity"[13].

The International Organization for Migration reported the current global estimate of around 272 million international migrants in the world in 2019, which equates to 3.5 percent of the global population[14].

There is no universal legal instrument that would define the framework for the governance of migration. However, the norms, the rules, or specific approaches to the migration issues may be found in bilateral and multilateral treaties or be a part of customary international law.

There are two European legal orders regulating migration – the Council of Europe (CoE) and the European Union law. The Council of Europe's legal system relates to the European Convention on Human Rights and the case-law developed by the European Court of Human rights (hereinafter "the ECtHR" or "the Court"). The European Union law is "mainly presented through the relevant regulations and directives and in the provisions of the EU Charter of Fundamental Rights"[15]. The Court of Justice of the European Union (hereinafter "the CJEU") deals with the EU law and ensures its proper and uniform interpretation and application by the EU Member States.

The phenomenon of overlapping legal systems may be historically justified. Initially, the EU (former European Economic Community (EEC)) was designed to create a common or internal market, while the CoE had the main goal to guarantee the protection of fundamental

[13] IOM, World Migration Report 2018, p. 1, https://publications.iom.int/system/files/pdf/wmr_2018_en.pdf
[14] IOM, World Migration Report 2020, p. 19, https://publications.iom.int/system/files/pdf/wmr_2020.pdf
[15] Handbook on European law relating to asylum, borders and immigration, Edition 2014, p. 15 https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf

rights in Europe. Later the EEC evolved into the EU and was charged with other tasks – political, economic, and social, including human rights protection. The present legal framework at the EU level consists of three human rights instruments: firstly, the ECHR; secondly, the general principles of EU law; and finally, the EU CFR.

1.1 The Legal Basis for the ECtHR Jurisdiction in Asylum and Migration Cases

The European Court of Human Rights is an influential body that allows migrants to defend their rights violated. According to Article 1 of the Convention, the High contracting parties (the countries that have ratified the Convention) shall guarantee to everyone within their jurisdiction the rights and freedoms set out in the Convention.

"The Court has jurisdiction on individual applications or inter-States complaints concerning violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (generally known as the "European Convention on Human Rights" or "ECHR"). However, complaints submitted to the Court must concern violations of the Convention allegedly committed by a State party to the Convention, and that directly and significantly affected the applicant. As of November 2019, there were 47 State parties to the Convention. Some of these States have also ratified one or more of the Additional Protocols to the Convention, which protect additional rights.

Since August 2018, the Court also has advisory jurisdiction. Under Protocol 16 to the European Convention, which entered into force on August 1, the highest domestic courts in the States that are a party to the Protocol may request the ECtHR advisory opinions on questions of interpretation of the ECHR and its Protocols. The questions must arise out of cases pending before the domestic court.

The Court is not exclusively the asylum court, and it repeatedly noted that the right to asylum as such is not contained in either the Convention or its Protocols (*Vilvarajah and others v. the United Kingdom*[16], *Salah Sheekh v. the Netherlands*[17]). However, as was noted by Yannis Ktistakis "all applicants, including migrants, are subject to the conditions set by the ECHR and the ECtHR regarding the jurisdiction of the Court and the admissibility of their application. According to Article 32 ECHR, the Court has jurisdiction over 'all matters concerning the interpretation and application of the Convention and the Protocols thereto'. In addition, should

[16] ECtHR, *Vilvarajah and others v. the United Kingdom,* nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, §102, 30 October 1991

[17] ECtHR*, Salah Sheekh v. the Netherlands*, no. 1948/04, §135, 11 January 2007

there be uncertainty regarding its jurisdiction, the ECtHR has the power to decide itself and settle the dispute"[18].

"The ECHR contains few provisions expressly mentioning foreigners or limiting certain rights to nationals or lawful residents. […] Migration issues have generated a vast body of case law from the ECtHR. They mainly relate to Articles 3, 5, 8, and 13 of the ECHR. […] States have an international obligation to ensure that their officials comply with the ECHR. All Council of Europe member states have now incorporated or given effect to the ECHR in their national law, which requires their judges and officials to act in accordance with the provisions of the Convention"[19].

Asylum or migration issues most frequently concern the following articles of the ECHR:

- Article 2 – Right to life (concern the prohibition to expel a person to a country where his/her life would be in danger);
- Article 3 – Prohibition of torture (relevant in the context of expulsion as it contains the principle of *non-refoulement*);
- Article 4 – Prohibition of slavery and forced labour (may concern the forced labour of migrants);
- Article 5 – Right to liberty and security (relevant in the context of detention);
- Article 8 – Right to respect for private and family life (may be relevant in the case of deportation – family ties);
- Article 13 – Right to an effective remedy (in the case with migrants and asylum seekers the effectiveness of a remedy consists in suspensive effect);
- Article 14 – Prohibition of discrimination (may concern discrimination on the ground of nationality);
- Article 4 Protocol 4 – Prohibition of collective expulsion of aliens (a special provision dedicated to protecting the rights of foreigners);
- Article 1 Protocol 7 – Procedural safeguards relating to expulsion of aliens (a provision which determines the procedural rights of the aliens lawfully residing in the territory of a State).

As noted by a Judge of the ECtHR Ledi Bianku, "there are no specific articles in the ECHR dedicated to the asylum seekers or migrants; however, the Convention has become itself a very effective instrument for the protection of the asylum seekers in Europe. Although the

[18] Yannis Ktistakis, 'Protecting migrants under the European Convention on Human Rights and the European Social Charter', Council of Europe, February 2013, p. 107
https://www.coe.int/t/democracy/migration/Source/migration/ProtectingMigrantsECHR_ESCWeb.pdf
[19] Handbook on European law relating to asylum, borders and immigration, Edition 2014, p. 15-16
https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf

legislative aspects of the EU law are much more detailed in the sphere of migration, the ECtHR remains a leading institution in this regard"[20].

According to Ledi Bianku,

> "there are two categories of cases, and it should be noted that the approach of the court changes in specific cases concerning the asylum seekers and then migrants. Asylum seekers cases concern mostly Articles 2, 3, 5, 13, Protocol 4 Article 4, Protocol 7 Article 1. Migrants' issues concern mostly Article 8 [which protects] family law or private life in very few cases and Article 14. There are those cases involving the decision to refuse to admit or to expel third-country nationals with close family members in the Contracting State, normally on economic interest grounds, or for the maintenance of immigration policy; and those involving the expulsion of integrated migrants (both second generation and long term residents) normally on public order grounds following a criminal conviction. Also, under migrants, the tight of analysis might differ depending on whether there are migrants already established in the country or migrants seeking to enter in the specific country"[21].

Over the last decade, the ECtHR has elaborated a body of case-law establishing the norms and standards which should be met by national authorities in the asylum procedure, immigration, detention, family unity.

"Many immigration-related cases before the Court begin with a request for interim measures under Rule 39 of the Rules of Court, measures most commonly consisting of requesting the respondent State to refrain from removing individuals pending the examination of their applications before the Court"[22].

Although there is no right to asylum guaranteed in the ECHR or its Protocols, and the states have a sovereign right to establish their immigration policy, to regulate the entry, residence and expulsion of aliens as a matter of well-established international law and subject to their treaty obligations, "problems with managing migratory flows cannot justify a State's having recourse to practices which are not compatible with its obligations under the Convention" (*Hirsi Jamaa and Others v. Italy*[23]*, § 179,* and *Georgia v. Russia* [24]*, § 177*). Therefore, all the states should follow the legal standards that are prescribed by the international and regional documents and respect human rights. One such standard is the principle of *non-refoulement,* which is one of the fundamental principles of refugee law.

[20] Judge Ledi Bianku, Recent ECtHR Case Law in Asylum Matters https://www.era-comm.eu/stream/Free_e-presentations/2016/Bianku_416R20/media/movie/bianku.mp4
[21] *Ibid.*
[22] Council of Europe/European Court of Human Rights, "Guide on case-law of the European Convention on Human Rights– Immigration", 31 August 2019, p. 6
[23] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 179, 23 February 2012
[24] ECtHR, *Georgia v. Russia* (merits)*,* no. 13255/07, § 177, 3 July 2014

The *non-refoulement* principle is embodied explicitly and implicitly in various international and regional instruments: 1951 Convention relating to the Status of Refugees (Article 33), 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Article 45), human rights treaties (Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance), the EU law (Article 78 (1) of the Lisbon treaty, Articles 4, 18, 19 of the EU Charter of Fundamental Rights, directives and regulations, e.g. Schengen Border Code). The principle of *non-refoulement* as a customary law rule applies to States irrespective of their participation in the treaties.

Usually, the principle of *non-refoulement* is associated with refugee or asylum law. However, the scope of this principle is broader. It may have three different meanings. First of all, it applies to the refugees within the territory of a State. Secondly, it applies to the refugees or asylum seekers at the border or within the territory of a State. In both cases, the prohibition of *refoulement* is based on the danger of persecution on the five grounds defined in the 1951 Refugee Convention. Another context in which the concept is relevant is human rights law concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment based on the ECtHR case-law.

Despite the lack of an explicit *non-refoulement* provision in the ECHR, the ECtHR in its landmark case *Soering v The United Kingdom*[25] interpreted Article 3 as imposing a prohibition on *non-refoulement*. This case was one of the ground-breaking judgments in the late 1980s to early 1990s that established the applicability of Article 3 to the expulsion cases (*Vilvarajah and Others v. the United Kingdom*[26], *Cruz Varas and Others v. Sweden*[27]).

Elspeth Guild commented on these cases:

> "Article 3 [of the] ECHR and its interpretation by ECtHR as limiting the power of states to expel foreigners has been the subject of substantial controversy. The prohibition on torture contained in the provision was first interpreted by the ECtHR as applying also to return of a person to a country where there is a substantial risk of torture in 1989 (*Soering v. the United Kingdom 1989 Ser. A 161*). […] The application of Article 3 to asylum seekers followed very shortly in a case against Sweden (*Cruz Varas v. Sweden 1991 Ser. A 201*). However, it was not until 1996 that an individual successfully challenged his expulsion (as opposed to extradition) from

[25] ECtHR, *Soering v. The United Kingdom*, no. 1/1989/161/217, § 88, 7 July 1989
[26] ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991
[27] ECtHR, *Cruz Varas and Others v. Sweden*, no. 15576/89, 20 March 1991

> Europe on the basis of Article 3 and the real risk that he would be subjected to torture in his country of origin (*Chahal v. UK)"*[28].

The ECHR prohibits the removal of asylum seekers through several articles. The most critical are Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) – no one should be treated contrary to these provisions. Therefore the expulsion to such treatment will constitute serious human rights violations. For instance, in the case of *Sufi and Elmi v. the United Kingdom*[29], the ECtHR has found that the deportation of two applicants to Somalia would constitute a violation of Article 3 because they risked being ill-treated or killed if returned to Mogadishu which was subjected to indiscriminate violence.

The prohibition of torture and other forms of ill-treatment is an absolute guarantee from which no derogation is possible. In this respect, the principle of *non-refoulement* should be inviolable and applicable to "all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or effective control, even when outside of that State's territory"[30].

"Articles 2 and 3 of the Convention also prohibit "indirect *refoulement*". Indirect *refoulement* means an expulsion to a State from where migrants may face farther deportation without a proper assessment of their situation. This also applies in the context of the Dublin Regulation of the European Union"[31]. For instance, in another landmark case *M.S.S. v. Belgium and Greece*[32], the Court stated that the Member States cannot just presume that the applicant would be treated in accordance with human rights obligations and that where there are deficiencies in the asylum procedure in a particular Member State, other Member State must refrain from returning asylum seekers to that country.

When the asylum seekers are denied at the frontier or intercepted at sea, not only Articles 2 and 3 of the ECHR may be violated, but also Article 4 of Protocol No. 4 to the Convention, which prohibits the collective expulsions of aliens. Under EU law, the EU Charter of Fundamental Rights prohibits collective expulsions in §1, Article 19. The example of collective expulsion may be found in one of the prominent cases of the refugee law – *Hirsi Jamaa and Others v. Italy*[33], where the Italian authorities intercepted at the High Seas a group of migrants and returned them back to Libya without necessary assessment of all risks. The ECtHR has

[28] Elspeth Guild, "The Legal Elements of European Identity: EU Citizenship and Migration Law", the Hague: *Kluwer Law International*, 2004, p. 16
[29] ECtHR, *Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07,* 28 June 2011
[30] The Office of the High Commissioner for Human Rights, "The principle of non-refoulement under international human rights law", p. 2
[31] *Ibid.*
[32] ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011
[33] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012

found that Italy has extra-territorial jurisdiction over these migrants according to Article 1 of the Convention and that such actions of the Italian authorities took the form of collective expulsion and amounted to the violation of Article 4 of Protocol No. 4 of the Convention and because there was no effective remedy – violation of Article 13 taken together with Article 3.

Through its case-law, ECtHR determined "collective expulsion" as "any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group" (*Vedran Andric v. Sweden*[34]*; Čonka v Belgium*[35]*,* §59*; Sultani v. France*[36]*,* §81; *Henning Becker v. Denmark*[37]*; K.G. v. Germany*[38]*; Alibaks and Others v. the Netherlands*[39]*; Dalip Tahiri v. Sweden*[40]).

Hitherto the ECtHR has found a violation of Article 4 of Protocol No. 4 only in seven cases by November 2019. The four cases concern the individuals who were expelled based on their origin – Slovakian nationals of Roma origin by Belgium (*Čonka v. Belgium*) and the Georgian nationals by Russia (*Georgia v. Russia*[41]*, Berdzenishvili and others v. Russia*[42]*, Shioshvili and others v. Russia*[43]). In *Hirsi Jamaa and Others v. Italy, Sharifi and Others v. Italy and Greece*[44]*, N.D. and N.T. v. Spain*[45] an entire group of people was returned without an appropriate individual examination.

Jean-Yves Carlier and Luc Leboeuf stated in their article:

> "At first relatively discrete, the prohibition of collective expulsions has gained importance in the jurisprudence of the ECtHR following the evolution of European border policies. In various rulings, the Court relied on art. 4 of Protocol n° 4 to condemn 'push-back' policies, which consisted in the systematic expulsion of asylum seekers as soon as they reached the European territory or even before they could reach it, thereby preventing access to the asylum procedure. […] The ruling in *Hirsi Jamaa v. Italy* opened a new line of jurisprudence in which procedural guarantees are at the heart of the reasoning of the Court"[46].

[34] ECtHR, *Vedran Andric v. Sweden*, no. 45917/99, 23 February 1999
[35] ECtHR, *Čonka v Belgium,* no. 51564/99, 5 February 2002
[36] ECtHR, *Sultani v. France,* no. 45223/05, 26 September 2007
[37] ECHR, *Henning Becker v. Denmark,* no. 7011/75, 3 October 1975
[38] ECHR, *K.G. v. Germany,* 7 February 1973
[39] ECHR, *Alibaks and Others v. the Netherlands,* no. 14209/88, 16 December 1988
[40] ECHR, *Dalip Tahiri v. Sweden,* no. 25129/94, 11 January 1995
[41] ECtHR, *Georgia v. Russia* (merits)*,* no. 13255/07, § 177, 3 July 2014
[42] ECtHR, *Berdzenishvili and others v. Russia,* nos. 14594/07, 14597/07, 14976/07, 14978/07, 15221/07, 16369/07 and 16706/07, 20 March 2017
[43] ECtHR, *Shioshvili and others v. Russia,* no. 19356/07, 20 December 2016
[44] ECtHR, *Sharifi and Others v. Italy and Greece,* no. 16643/09, 21 October 2014
[45] ECtHR, *N.D. and N.T. v. Spain,* nos. 8675/15 and 8697/15, 3 October 2017
[46] Jean-Yves Carlier, Luc Leboeuf, "Collective expulsion or not? Individualisation of decision making in migration and asylum law", *8 January 2018*

However, in *Khlaifia v. Italy*[47] the Court raised the question of the extent of procedural guarantees that go with the prohibition of collective expulsions. The Grand Chamber found that there must be a fair balance between the effective protection of individual rights and efficient border control due to the sudden mass influx that may occur.

Although the expulsion cases raise the issues specifically applicable to the human rights violations of migrants and asylum-seekers irrespective of their legal status, and there is a protection mechanism provided by the Convention, these sorts of complaints under Article 1 of Protocol 7 and Article 4 of Protocol 4 in most cases have been declared inadmissible and have not reached the ECtHR's final judgment. To date, as of the end of November 2019, the Court found a violation of Article 1 of Protocol 7 only in three cases – *Nolan and K. v. Russia*[48], *Takush v. Greece*[49] and in the most recent case of *Sharma v. Latvia*[50].

Article 4 of the ECHR prohibits slavery and forced labour. To this date (November 2019), only in one case the ECtHR found a violation of Article 4 §2 (prohibition of forced labour) in relation to migrants - *Chowdury and Others v. Greece*[51]. It was for the first time when the Court ruled on the exploitation of migrants through work which also amounted to human trafficking.

Article 5 of the ECHR provides an exhausted list of exceptions to the right to liberty and security. The guarantees prescribed by may also be violated in expulsion cases, e.g., by the receiving State. For example, if the receiving State arbitrarily detains an asylum seeker without bringing him or her to trial. The provision in Article 5 (1) f provides two situations when a person may be lawfully arrested or detained: "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition"[52]. Thus, the ECtHR found a violation of this provision in the cases of *Bozano v. France*[53] and *Quinn v. France*[54]. The Court, however, claims that in such cases a high threshold must be proved:

> "Hence, the Court considers that a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any

[47] ECtHR, *Khlaifia and Others v. Italy*, no. 16483/12, 15 December 2016
[48] ECtHR, *Nolan and K. v. Russia,* no. 2512/04, 12 February 2009
[49] ECtHR, *Takush v. Greece,* no. 2853/09, 17 January 2012
[50] ECtHR, *Sharma v. Latvia,* no. 28026/05, 24 March 2016
[51] ECtHR, *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017
[52] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 16, 1950
[53] ECtHR, *Bozano v. France*, no. 9990/82, 2 December 1987
[54] ECtHR, *Quinn v. France,* Series A, No. 311, 22 March 1995

> intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial"[55].

In *Chahal v. the United Kingdom*[56], the Court stated that Article 5 (1) f does not require that the detention is reasonably considered necessary, for example, to prevent the commission of an offence or to prevent a person fleeing. Thus, in the recent case of 2019 – *Al Husin v. Bosnia and Herzegovina (no. 2)*[57] – the Court found a violation of Article 5 §1 as the applicant was kept in detention for more than eight years awaiting deportation and, being classified as a threat national security, was unwelcome to most of the safe third countries.

As to the right to a fair trial, which is guaranteed by Article 6 of the ECHR, the jurisprudence of the ECtHR does not generally face the situations when an asylum seeker or migrant complain about the violations under Article 6 – the Court used to reject such claims. The reason is that immigration questions, such as the entry, residence, removal of aliens, or the asylum proceedings, fall outside the scope of Article 6. These are the matter of administrative procedure of the national authorities, rather than a question of civil rights determination within the meaning of Article 6 (1). The Court had not examined the issue of the applicability of Article 6 (1) to procedures for the expulsion of aliens until the case of *Maaouia v. France*[58]: "the decision whether or not to authorize an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention". Subsequently, the Court continued to adhere to its position in the following cases: *Penafiel Salgado v. Spain*[59], *Sardinas Albo v. Italy*[60], *Mamatkulov and Askarov v. Turkey*[61], *Panjeheighalehei v. Denmark*[62], *Dalea v. France*[63], *Smirnov v. Russia*[64].

By the end of the 1990s, the number of complaints to the Strasbourg Court grew rapidly as well as the migration-related applications. The focus of immigrant and asylum seeker applicants was predominantly on the violation of Article 3 and 8 ECHR, which now still remains. The Court has plenty of rulings relating to a violation of Article 8 (right to respect private and family

[55] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, §233, 17 January 2012
[56] ECtHR, *Chahal v. the United Kingdom,* no. 22414/93, § 112, 15 November 1996
[57] ECtHR, *Al Husin v. Bosnia and Herzegovina (no. 2),* no. 10112/16, 25 September 2019
[58] ECtHR, Maaouia v. France, no. 39652/98, §35, 38, 5 October 2000
[59] ECtHR, *Penafiel Salgado v. Spain*, no. 65964/01, 16 April 2002
[60] ECtHR*, Sardinas Albo v. Italy, no. 56271/00, 17 February 2005*
[61] ECtHR*, Mamatkulov and Askarov v. Turkey [GC], §§ 81-83, nos. 46827/99 and 46951/99, 4 February 2005*
[62] ECtHR*, Panjeheighalehei v. Denmark, no. 11230/07, 13 October 2009*
[63] ECtHR*, Dalea v. France,* no. 964/07, 2 February 2010
[64] ECtHR*, Smirnov v. Russia*, no. 14085/04, 6 July 2006

life). In 1991, in the case of *Moustaquim v. Belgium*[65], the Court qualified for the first time the deportation of a foreigner as a violation of his right to family life under Article 8 ECHR. The ECtHR has developed a broad understanding of the family life that the Court equally applies to immigration cases.

The freedom to manifest one's religious belief is guaranteed by Article 9 of the ECHR. However, this provision does not in itself grant a right for a foreigner to stay in a given country. Deportation does not therefore as such constitute an interference with the rights guaranteed by Article 9 unless it can be established that the measure was designed to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers[66]. The Court found a violation of Article 9 only in few cases, as of November 2019, which were related to migration: *Perry v. Latvia*[67] and *Nolan and K. v. Russia* cited above. Without finding a violation of Article 9, the Court declared the applications admissible in *Al-Nashif v. Bulgaria*[68] and *Lotter v. Bulgaria*[69] – both cases concerned the cancellation of the residence permits. Moreover, Article 9 of the Convention does not guarantee a foreign national the right to obtain a residence permit with the purpose of employment, even if the employer is a religious association (*Öz v. Germany*[70]).

Other provisions in the Convention that may be engaged in the protection of migrants' rights are Article 13 (the right to an effective remedy) and Article 14 (the right against discrimination). A similar provision to Article 13 may be found in Article 47 of the EU Charter of Fundamental Rights. When the applicant's allegations regarding his or her expulsion concern the violation of the rights safeguarded by Article 3 and Article 2 of the Convention, based on the Court's jurisprudence it is crucial for a person concerned to have access to a remedy with automatic suspensive effect and "the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority"[71]. Moreover, the requirement that a remedy should have an automatic suspensive effect was confirmed for complaints under Article 4 of Protocol No. 4 (*Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206)[72]. In contrast, if the expulsion allegedly interferes

[65] ECtHR, *Moustaquim v. Belgium,* no. 12313/86, 18 February 1991
[66] Commission (Plenary), *Omkarananda and Divine Light Zentrum v. Switzerland,* no. 8118/77, 19 March 1981
[67] ECtHR, *Perry v. Latvia,* no. 30273/03, 8 November 2007
[68] ECtHR, *Al-Nashif v. Bulgaria,* no. 50963/99, §§ 139-142, 20 June 2002
[69] ECtHR *Lotter v. Bulgaria,* no. 39015/97, 6 February 2003
[70] Commission, *Öz v. Germany,* no. 32168/96, 3 December 1996
[71] ECtHR, De Souza Ribeiro v. France, no. 22689/07, § 82, 13 December 2012
[72] *Ibid.*

with the person's right to private and family life, "it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect"[73].

Article 14 is sometimes referred to in cases involving migrants, as it was in *Moustaquim v. Belgium*[74], where, however, the Court has not found a violation of Article 14 taken together with Article 8. Furthermore, only in *Gaygusuz v. Austria*[75] the ECtHR ruled on the applicability and the breach of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 because the Turkish national was denied emergency assistance in Austria on the ground of his nationality. While Article 14 of the ECHR does not exist independently and must complement other provisions of the Convention, Protocol No. 12, which prohibits discrimination according to its autonomous non-discrimination clause, was an important development in the jurisprudence of the ECtHR.

To sum up, from the stated above, it can be seen that the jurisprudence of the ECtHR is not vast when it comes to migrants. The Court's practice concerns mostly asylum-seekers. However, it is clear that the European Court of Human Rights remains the leading institution that ensures the fundamental rights of this group of people.

1.2 The Jurisdiction of the CJEU in Asylum and Migration Cases

On the EU level "[…] there has been an ongoing evolution of the EU asylum acquis, a body of intergovernmental agreements, regulations, and directives that governs almost all asylum-related matters in the EU. Not all EU Member States, however, are bound by all elements of the asylum acquis. Over the past decade, the EU has adopted legislation concerning immigration to the EU for certain categories of persons as well as rules on third-country nationals residing lawfully within the Union"[76]. Pursuant to Article 78 of the Treaty on the Functioning of the European Union, "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties".

[73] *Ibid*, § 83
[74] ECtHR, *Moustaquim v. Belgium,* no. 12313/86, 18 February 1991
[75] ECtHR, *Gaygusuz v. Austria,* no. 17371/90, 16 September 1996
[76] Handbook on European law relating to asylum, borders and immigration, Edition 2014, p. 19 https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf

It should be mentioned that "migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the ESC and by other international obligations entered into by European states"[77].

It must be pointed out that "the Treaty of Lisbon has greatly improved the legal protection of individuals in the area of freedom, security and justice"[78]. With the entry into force of the Treaty of Lisbon in 2009, the development of the immigration and asylum jurisprudence in the context of the EU has begun. The Lisbon Treaty removed Article 68 of the Treaty of Amsterdam and opened up the CJEU jurisdiction for the future asylum and migration cases. Article 68 restricted the Court of Justice jurisdiction to give preliminary rulings. Therefore, the CJEU was given a possibility to have preliminary rulings brought by the courts and tribunals (not only ruling at last instance) of the Member States, which since that time have greatly increased. "In the area of freedom, security and justice, the urgent preliminary ruling procedure (PPU) was created to ensure a quick ruling in cases pending before any national court or tribunal with regard to a person in custody"[79]. Moreover, the Treaty has made the EU Charter of Fundamental Rights a legally binding instrument, and it may be referred to in the Court of Justice.

The Court of Justice of the European Union is one of the EU's most important institutions. The CJEU, *inter alia*, has jurisdiction to give preliminary rulings regarding the interpretation or the validity of the EU law provision. The preliminary rulings procedure is governed by Article 267 TFEU. Such a procedure is the main instrument for communication between the national courts of all Member States and the CJEU. When the national court faces problems with the interpretation or validity of EU law, it may request such a procedure. Preliminary decisions are important in the process of approximation of legislation, as they contain an interpretation of EU law. However, the Court of Justice does not decide on the matter of a dispute. It is not a fact-finding body. "Assessment of the facts is a matter for the national court. […] The Court's function is only to give national courts help in resolving interpretative issues concerning EU law"[80].

The role of the CJEU in protecting the rights of asylum seekers, refugees, stateless persons and migrants is "much more recent than that of the ECtHR and began as a result of the decision by the EU to establish a Common European Asylum System (CEAS) based on the "full and

[77] *Ibid.*

[78] Directorate-General for Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, European Parliament, European Union, "The influence of ECJ and ECtHR case law on asylum and immigration", 2012, p. 8 http://www.europarl.europa.eu/studies

[79] European Union Agency for Fundamental Rights, Handbook on European law relating to asylum, borders and immigration, 2015 Council of Europe, 2015, p. 20 https://www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf

[80] Hugo Storey, "Preliminary references to the Court of Justice of the European Union (CJEU)", September 2010, p. 4 https://www.iarmj.org/images/stories/lisbon_sep_2010/storey.pdf

inclusive" application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol"[81]. The first cases decided by the CJEU in the sphere of migration and asylum concerned the infringement by certain EU Member States in relation to the CEAS. However, most cases are related to the interpretation of CEAS provisions under the CJEU preliminary reference procedure.

Neither the CJEU nor the ECtHR exercise jurisdiction over the 1951 Refugee Convention and its 1967 Protocol, nevertheless the CJEU have to interpret this Convention, namely when it comes to the EU law provisions. For instance, the CJEU has given many times its rulings on the criteria for refugee status – whether the EU Qualification Directive is in conformity with the 1951 Refugee Convention. Although the EU is not a party to the 1951 Refugee Convention, Article 78(1) TFEU and Article 18 of the Charter requires it to respect the rules set out on the Convention. However, from the case-law of the Court of Justice it may be seen that "the Court's jurisdiction to interpret that convention is limited" (*M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*[82], §§ 68, 69; *Qurbani*[83], §§ 20, 21 and 28).

The preliminary rulings by the CJEU concerning the refugee status determination judgments had addressed, for instance, the following issues: inclusion criteria, such as the test for well-founded fear; the interpretation of the term "act of persecution"; the connection between "acts of persecution" and "reasons for persecution"; whether homosexuals form a "particular social group"; cessation of refugee status on the grounds of ceased circumstances in the country of nationality; exclusion from refugee status; more favourable standards in national law than in the EU Qualification Directive regarding exclusion from refugee status[84]. Other references by the EU Member States to the preliminary rulings procedure concern the interpretation of the provisions of the Reception Conditions Directive 2003/9/EC (recast 2013/33/EU), the Dublin III Regulation 604/2013, the Procedures Directive 2005/85/EC (recast 2013/32/EU), etc.

"Since 2015, Europe has experienced a major migration crisis which has given rise to numerous issues. The Court of Justice has, on several occasions, considered cases concerning asylum applications and the associated procedure"[85]. Due to the arrival of a high number of asylum seekers in the EU, the CJEU has to deal with numerous cases relating to EU asylum policy. The Court of Justice of the European Union through its well-established case-law

[81] UNHCR Manual on the Case Law of the European Regional Courts, June 2015, 1st edition, p. 2 https://www.refworld.org/pdfid/558803c44.pdf
[82] CJEU, Joined Cases C-391/16, C-77/17 and C-78/17, M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides, 14 May 2019
[83] CJEU, Qurbani, C 481/13, 17 July 2014
[84] *Ibid.*
[85] Court of Justice of the European Union, Annual report 2017, The year in review https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_pan_2018.0421_en.pdf#page=18

developed criteria and assessment of claims for refugee status and subsidiary protection status, as well as the procedural aspects, such as the asylum procedure, standards concerning reception conditions, detention, return procedures, issues relating to family reunification.

1.3 Trends and Developments in the Courts' Case-Law Regarding Migration and Asylum

The trend is the general direction of changes or developments[86]. Although it is difficult to determine general trends from a set of individual cases of the courts, especially that the courts' jurisprudence is quite different in terms of the legal background and the mechanism, the following tendencies and developments may be shown.

The first trend is emerging from the case-law of the ECtHR and concerns the non-derogatory character of the principle of *non-refoulement*. As was stated previously, the ECtHR strictly prohibits the deportation of the asylum-seekers to their country of origin or the third country if they may face there danger described in Article 3 of the Convention, which was reaffirmed many times in the case-law of the Court (*Soering v The United Kingdom*[87], *Vilvarajah and Others v. the United Kingdom*[88], *Cruz Varas and Others v. Sweden*[89], *Chahal v. the United Kingdom*[90]). The CJEU position in this regard does not differ. For instance, recently, in May 2019, the CJEU has reaffirmed in the joined cases *C-391/16, C-77/17 and C-78/17* (*M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*[91]) that the EU Member States cannot deport refugees if they face inhuman or degrading treatment upon return even if they committed serious crimes. Instead, Member States must allow them to remain in the country.

The EU Member States are given a wide margin of discretion in regulating their immigration policy. Therefore, the CJEU ruled in the judgment of 7 March 2017, *X and X, C-638/16*[92] that "the Member States are not required to grant a humanitarian visa to persons who wish subsequently to lodge an asylum application in that Member State"[93]. The applications for

[86] Definition of "trend" from the Cambridge Academic Content Dictionary © Cambridge University Press https://dictionary.cambridge.org/dictionary/english/trend
[87] ECtHR, *Soering v. The United Kingdom*, no. 1/1989/161/217, § 88, 7 July 1989
[88] ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991
[89] ECtHR, *Cruz Varas and Others v. Sweden*, no. 15576/89, 20 March 1991
[90] ECtHR, *Chahal v. the United Kingdom,* no. 22414/93, § 112, 15 November 1996
[91] CJEU, Joined Cases C-391/16, C-77/17 and C-78/17, *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*, 14 May 2019
[92] CJUE [GC], X et X c. État belge, 7 mars 2017, C-638/16 PPU
[93] Court of Justice of the European Union, Annual report 2017, The year in review https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_pan_2018.0421_en.pdf#page=18

humanitarian visas fall outside the scope of EU law and the Charter of Fundamental Rights, it is at the discretion of Member States to grant such visas on the basis of their national law. It is noteworthy that the similar judgment is now (as of end November 2019) pending before the Grand Chamber of the ECtHR – *M.N. and Others v. Belgium*. However, the legal framework of the decision is different: while the CJEU had to decide on the interpretation of the EU Visa Code and the EU Charter of Fundamental Rights, the ECtHR will have to determine whether the applicants had faced violation of the Article 3, 6 and 13 of the ECHR in the result of the denial of their visa requests and whether Belgium had an extra-territorial jurisdiction through its embassy and the obligation prescribed in Article 1 of the ECHR.

Another tendency is the dynamics in the ECtHR's case-law due to the challenges that the world may face during a particular period. In the decision-making process, the Court does not only focus on the past but responds to the requirements of the time and is continuously developing. According to the Court's established case-law, the Convention is "a living instrument which must be interpreted in the light of present-day conditions" (*Soering v. the United Kingdom*[94], §102). Therefore, the Court may overturn its own decisions as it was in 2011 with *M.S.S. v. Belgium and Greece* which overturned *K.R.S. v. the United Kingdom*[95].

There are so-called "Dublin" cases. It all starts with *T.I. v. the United Kingdom*[96] (7 March 2000), where the Court found the application inadmissible (manifestly ill-founded) due to the lack of the real risk to be sent back to Sri Lanka by Germany in violation of Article 3 of the ECHR. The case related to the Dublin Convention and responsibility for the applicant of the Member States concerned. The Court stated that the indirect removal of the applicant to Germany did not affect the responsibility of the United Kingdom to ensure that the applicant was not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. The Court concluded that "the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany".

"In 2008, following the publication of the UNHCR report in April, the ECtHR received a large number of Rule 39 requests from asylum applicants in the UK seeking to prevent their removal to Greece"[97]. Among these requests, there was a claim by an Iranian national, which is known as *K.R.S. v. the United Kingdom*[98] (2 December 2008). In this case, the applicant "had made his way to the United Kingdom after passing through Greece. In compliance with the

[94] ECtHR, *Soering v. The United Kingdom*, no. 1/1989/161/217, § 88, 7 July 1989
[95] ECtHR, *K.R.S. v the United Kingdom*, no. 32733/08 (decision on admissibility), 2 December 2008
[96] ECtHR, *T.I. v. The United Kingdom*, no. 43844/98, 7 March 2000, p. 15, 18 https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/T.I.%20v%20UK.pdf
[97] *K.R.S. v the United Kingdom*, application no. 32733/08, https://www.asylumlawdatabase.eu/en/content/ecthr-krs-v-united-kingdom-application-no-3273308-decision-admissibility-2-december-2008
[98] ECtHR, *K.R.S. v the United Kingdom*, no. 32733/08 (decision on admissibility), 2 December 2008

Dublin II Regulation, the British authorities had requested that Greece accept responsibility for his asylum request and Greece accepted. The applicant alleged that his expulsion from the United Kingdom to Greece would be contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention, because of the situation of asylum seekers in Greece"[99]. The applicant was refused permission to bring a judicial review challenge against his removal. However, removal was suspended as the applicant lodged an application with the ECtHR for a Rule 39 interim measure, which was granted on the basis of a UNHCR position paper, recommending that governments refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. The Court declared the application inadmissible (manifestly ill-founded) and lifted the interim measure. The evidence before the Court indicated that Greece was not removing people to the applicant's country of origin, Iran, which meant the applicant did not face a risk of *refoulement*[100]. There was a presumption that Greece would abide by its international obligations, despite the concerns expressed, *inter alia*, by the UNHCR[101], Amnesty International[102] and NGOs[103] regarding the situation in Greece and the access to an effective remedy.

As a result, this ruling was the basis for further challenges to Dublin transfers to Greece, until it was later overturned by the Court itself in its judgment *M.S.S. v. Belgium and Greece* (21 January 2011).

The facts of the case *M.S.S. v. Belgium and Greece* concerned an Afghan national who fled Kabul in 2008 and entered the EU via Greece before arriving in Belgium, where he applied for asylum. In accordance with the Dublin II Regulation, the Belgian Aliens Office asked the Greek authorities to take responsibility for the asylum application. Therefore, the Belgian authorities transferred the applicant to Greece in June 2009, "where he faced detention in insalubrious conditions before living on the streets without any material support"[104]. The applicant complained in particular about the conditions of his detention and his living conditions in Greece

[99] ECtHR Factsheet – "Dublin" cases https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf
[100] ECtHR, K.R.S. v the United Kingdom, Application no. 32733/08, https://www.asylumlawdatabase.eu/en/content/ecthr-krs-v-united-kingdom-application-no-3273308-decision-admissibility-2-december-2008
[101] UNHCR Position on the return of asylum seekers to Greece under the "Dublin Regulation" ("the UNHCR Position Paper"), 15 April 2008
[102] In a press release dated 28 February 2008 and entitled "No place for an asylum-seeker in Greece", Amnesty International stated: "Greece must urgently improve the current situation for refugees and asylum-seekers in the country. We call on the Greek authorities to comply with their obligations under international human rights, refugee and European law".
[103] Norwegian Organization for Asylum Seekers, the Norwegian Helsinki Committee and Greek Helsinki Monitor report "A gamble with the right to asylum in Europe-Greek asylum policy and the Dublin 2 Regulation", 9 April 2008
[104] ECtHR, M.S.S. v Belgium and Greece [GC], Application No. 30696/09, https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609

and alleged that he had no effective remedy in Greek law in respect of these complaints. He further complained that Belgium had exposed him to the risks arising from the deficiencies in the asylum procedure in Greece and to the inadequate detention and living conditions to which asylum seekers were subjected there. He further maintained that there was no effective remedy under Belgian law in respect of those complaints. Thus, the applicant alleged the violation of Article 2 (the right to life), Article 3 (prohibition of inhuman or degrading treatment or punishment) and/or Article 13 (the right to an effective remedy) of the ECHR[105]. The Court found a violation of Articles 3 and Article 13 taken in conjunction with Article 13 ECHR both against Belgium and Greece regarding the applicant's detention and living conditions in Greece, lack of any serious examination of his case and any access to an effective remedy.

According to Gina Layton,

> "the judgment of the ECtHR in *M.S.S.* interrupts the system of transfers under the Dublin Regulation […]. The Court's findings against Belgium mean that Member States of the EU can no longer take it as given that the system established by the Dublin Regulation absolves a sending state of responsibility for the procedure applied to asylum seekers in the receiving state nor for their living conditions, nor that the receiving state's membership of the CEAS entails that an asylum seeker will be safe from *refoulement* there. This marks a significant change from the earlier position taken by a Chamber of the ECtHR in K.R.S. v United Kingdom"[106].

The *M.S.S. v. Belgium and Greece* is not just a renowned case in the international refugee law, this judgment has a crucial role and has significant importance for the case-law of the ECtHR in terms of human rights. Moreover, it has a legal impact on the Common European Asylum System. The Court noticed: "When they apply the Dublin Regulation, therefore, States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention" (*M.S.S. v. Belgium and Greece*, §342).

Gina Layton says: "The numerous reports about the situation in Greece relied upon by the Court were all in the public domain. In *K.R.S.* they were not enough to undermine a transfer, whereas in *M.S.S.* they were"[107]. This statement clearly portrays how the approach of the Court had changed only within one and a half year. While in *K.R.S. v. the United Kingdom* there was a

[105] ECtHR Factsheet – "Dublin" cases https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf
[106] Gina Layton, "Asylum Seekers in Europe: M.S.S. v Belgium and Greece" , p. 763 http://www.corteidh.or.cr/tablas/r27639.pdf
[107] *Ibid*, p.763

presumption of compliance with the ECHR obligation, in *M.S.S. v. Belgium and Greece* the Court reached the completely different conclusion that presumption is rebuttable and removing asylum seekers to Greece is problematic under the Convention.

It should be noted, that the CJEU referred to this finding in the case of *N.S. and Others C-411/10*[108] (21 December 2011). It adopted a similar position to *M.S.S. v. Belgium and Greece* and elaborated the notion of "systemic deficiencies" in the asylum procedure and reception conditions, which was later used by the ECtHR in such cases as *Halimi v. Austria and Italy*[109], *Abubeker v. Austria and Italy*[110], *Mohammed Hussein v. the Netherlands and Italy*[111], *Mohammed v. Austria*[112], *Sharifi v. Austria*[113].

Ledi Bianku, the judge of the ECtHR, stated: "*M.S.S.* changed the case-law of the court based on the additional sources we have: UNHCR, Human Rights Commission of the CoE, all the NGOs informing what the situation in Greece was. So, we changed the case-law from *K.R.S. v. United Kingdom* to *M.S.S. v. Belgium and Greece*"[114].

Nowadays, it is a global trend to fight terrorism. It is not just a trend though, but rather an urgent need for States to combat and to prevent the growing number of terrorist attacks. The ECtHR in its terrorism-related jurisprudence faces with two different aspects: "on the one hand, the protection of the fundamental rights of the terrorists or suspected terrorists, and on the other hand the interests of national security, the preservation of public order and the protection of the rights of others"[115]. However, when it comes to the deportation of a terrorist or a suspected terrorist to a country where he or she will face a real risk of torture or another form of ill-treatment, it cannot be said that public interest will overweight the threat to individual's life, regardless of the offence the person committed or may potentially commit. It was several times confirmed by the ECtHR (*Chahal v. the United Kingdom*, *Shamayev and Others v. Georgia and Russia*[116], *Saadi v. Italy*[117], *Daoudi v. France*[118]). For instance, in *Chahal v. the United Kingdom* the Court held that Article 3 of the ECHR is an absolute right with no exceptions:

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[108] *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, §88-91

[109] ECtHR, *Halimi v. Austria and Italy* (decision on the admissibility), no. 53852/11, 18 June 2013

[110] ECtHR, *Abubeker v. Austria and Italy* (decision on the admissibility), no. 73874/11, 18 June 2013

[111] ECtHR, *Mohammed Hussein v. the Netherlands and Italy* (decision on the admissibility), no. 27725/10, 2 April 2013

[112] ECtHR, *Mohammed v. Austria* (Chamber judgment), no. 2283/12, 6 June 2013

[113] ECtHR, *Sharifi v. Austria* (Chamber judgment), no. 60104/08, 14 April 2014

[114] Judge Ledi Bianku, Recent ECtHR Case Law in Asylum Matters https://www.era-comm.eu/stream/Free_e-presentations/2016/Bianku_416R20/media/movie/bianku.mp4

[115] Council of Europe, Press Unit, Factsheet – Terrorism and the European Convention on Human Rights, October 2019

[116] ECtHR, *Shamayev and 12 Others v. Georgia and Russia*, no. 36378/02, 12 April 2005

[117] ECtHR, *Saadi v. Italy*, no. 37201/06, 28 February 2008

> "The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. […] In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees"[119].

The CJEU had three rulings so far (until the end of November 2019) concerning the terrorist activity by the refugees in the light of the interpretation of the exclusion clause of the EU Qualification Directive[120]. In *B and D*[121] the Court of Justice ruled that the terrorist acts could lead to exclusion from refugee status; in *H. T. v Land Baden-Württemberg*[122] it was found that a residence permit, once granted to a refugee, may be revoked on the ground that a refugee supports a terrorist organization. In the most recent ruling, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*[123] the Court of Justice expanded the scope of the exclusion clause on its previous judgment of *B and D* for those engaging in terrorist acts by merely providing a logistical support to such organizations, even if they have not personally committed terrorist acts.

Through their case-law, the ECtHR and the CJEU developed various standards and approaches to the asylum law and immigration. The two European courts are the guardians of the fundamental rights of the asylum-seekers and migrants. With the regular and endless flow of arrivals of migrants and refugees to the European Union, these two courts have to continually deal with human rights issues arising before them through the development of the new approaches or improving already established jurisprudence.

Summarizing all the abovementioned, the following trends in the case-law of the ECtHR and the CJEU may be established:

1. The principle of *non-refoulemet* has an absolute, non-derogatory character.
2. Even if the person commits a serious crime in the territory of a state where he/she seeks asylum or reside and presents a threat to national security, this person should not be expelled to a country where he/she will face torture or other forms of ill-treatment.

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[118] ECtHR, *Daoudi v. France*, no. 19576/08, 3 December 2009

[119] ECtHR, *Chahal v. the United Kingdom,* no. 22414/93, §§ 79,80, 15 November 1996

[120] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011

[121] CJEU, C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, 09 November 2010

[122] CJEU, C 373/13, H. T. v Land Baden-Württemberg, 24 June 2015

[123] CJEU, C-573/15, Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani, 31 January 2017

3. The EU Member States are given a wide margin of discretion when it comes to internal immigration policy; therefore, the national authorities are not obliged to give the humanitarian visas to the persons seeking asylum in their country.
4. The ECtHR may overturn its own decisions by responding to the current migration challenges.

2. THE INTERPLAY OF THE EUROPEAN COURTS IN THE CONTEXT OF MIGRATION AND ASYLUM

The two European courts present two different legal systems with different mechanisms, legal frameworks, and approaches. The practice of these two bodies sometimes overlaps, and it is essential to understand to what extent these courts may interplay, how they co-exist and what are their relationships, as the case-law of the CJEU and the ECtHR have a crucial influence in the sphere of asylum and migration.

Two legal instruments that serve as a basis for the protection of the fundamental rights in the ECtHR and the CJEU are the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. These two documents influence each other in some way. For instance, the Convention plays a significant role in the EU legal order. Thus, according to Article 6 §2 of the Treaty on European Union (TEU), the fundamental rights recognized by the Convention constitute general principles of EU law. As to the Charter, it contains two provisions (Articles 52 and 53), providing the scope and the guidance for interpretation of rights and principles laid down in the Charter and the level of protection of these rights. Therefore, Article 52 §3 states that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Koen Lenaerts, the President of the Court of Justice of the European Union, stated: "Although both the Convention and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way. Whilst the Convention operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an internal component of the rule of law within the EU"[124].

Before moving to the next sub-chapters, it should be mentioned that the convergence, as well as the divergence in the courts' approaches, will be shown through the case-law of these two courts. The selection of the judgments for the analysis was based on the most relevant and critical spheres that are addressed in the ECtHR and CJEU migration-related jurisprudence, such as, *inter alia*, expulsion or deportation of third-country nationals, procedural safeguards, various questions relating to detention, states' obligations in relation to protection of asylum-seekers and migrants.

[124] Speech by Koen Lenaerts, The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection, Solemn hearing for the opening of the Judicial Year 26 January 2018, https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf

2.1 The Comparison of the Courts' Approaches to Migration Jurisprudence

First of all, it should be noted that the proceedings in both European courts have a very specific nature. While the ECtHR has a list of admissibility criteria for individual claims, the CJEU does not have jurisdiction for individual complaints at all. The primary function of the ECtHR is to decide whether the rights of individuals protected by the ECHR have been violated, whereas the function of the CJEU is to rule on the interpretation or validity of a provision of EU law when requested by a national court or tribunal of one of the EU Member State.

To go in more detail, in order to bring an application before the ECtHR, the person must be a victim of a violation of the rights guaranteed by the Convention according to Article 34. Only direct victims or the persons applying on their behalf may lodge an application before the ECtHR. It is noteworthy that through its case-law, the Court established the notion of "potential victim," which applies to migrants and is of particular importance to them. The notion was designed for the protection of persons who may face potential risk in the country, where they may be deported, of being a victim of torture or other ill-treatment, arbitrary detention, or of a violation of his right to family life. For instance, in *Soering* case, the Court stated:

> "It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article (art. 3)"[125].

The two courts have different relationships with national courts. Before applying to the ECtHR, all domestic remedies must be exhausted and, it should be noted that the Court is not a fourth instance court. Regarding the CJEU, every court or tribunal of an EU Member State have the possibility to request a preliminary ruling for clarifying the specific provision of the EU law. While Article 267 (2) TFEU[126] grants the discretion to a national court or tribunal to request a preliminary ruling "if it considers that a decision on the question is necessary to enable it to give judgment" in a particular case, Article 267 (3) establishes a duty to such reference if there is no judicial remedy under national law against the decision of a referring court or tribunal.

[125] ECtHR, Soering v. The United Kingdom, no. 1/1989/161/217, § 90, 7 July 1989
[126] Treaty on the Functioning of the European Union. March 25, 1957. 1957 O.J. (C 326) 47

Furthermore, the CJEU and the ECtHR have different interpretation methods. Dr. Sonia Morano-Foadi and Dr. Stelios Andreadakis argued that while "the CJEU favours what is known as a teleological interpretation, […] i.e. interprets a rule in a much broader context in the light of the aims of the legal order", while "the ECtHR employs the margin of appreciation doctrine" by mostly striking a balance between individuals and collective goals, where an individual's existence or identity is at stake"[127].

Operating in two separate legal systems, the courts, therefore, may have different approaches to the same issues. For instance, in relation to the protection of foreigners against expulsion in the context of immigration, the courts apply "different approaches"[128] and, hence, there are different consequences. Firstly, according to Callewaert, under the EU law, the status and rights of a person seeking protection from expulsion depend on "whether this person is an EU citizen, a person who has exercised his right of freedom of movement, a family member of one of the former categories or none of the above"[129]. By contrast, the decisive factor for the protection from expulsion under Article 8 of the ECHR is the level of the social integration of a person in the host country, rather than the nationality or legal status of the persons concerned. Moreover, in order to be qualified for the protection under Article 8 of the ECHR, a person does not have to possess a special legal status. However, the links with the receiving country should be sufficiently strong[130]. This particular situation does not cover the expulsion of asylum seekers and refugees under the threat of violation of Article 3 of the Convention as the courts' approaches in this matter are the same. Both European courts treat the principle of *non-refoulement* as an absolute right, as was already stated above.

Moreover, there are differences in approaches of the courts in terms of the procedural guarantees against expulsion. From the analysis of the ECtHR case-law, it is seen that Article 6 of the ECHR does not apply to the procedures of the expulsion of aliens. This position of the Court, as was already stated above, was expressed in the case of *Maaouia v. France*[131]. The Court, *inter alia*, stated that "the decision whether or not to authorize an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention" (§ 35). However, the ECHR provides for the right to an effective remedy (Article 13) by means

[127] Sonia Morano-Foadi, Stelios Andreadakis, 'A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon', July 2014, p. 36 https://dm.coe.int/CED20140017597
[128] Callewaert, "The European Convention on Human Rights and European Union Law: A Long Way to Harmony", *European Human Rights Law Review,* Issue 6, 2009, p. 778
[129] *Ibid.*, p. 778
[130] *Ibid.*, p. 778
[131] ECtHR, *Maaouia v. France*, no. 39652/98, §§ 35, 38, 5 October 2000

of which a third-country national may challenge his/her expulsion order. On the EU level, the situation is slightly different since there is a number of legal documents providing for the safeguards in expulsion procedures, such as Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[132] (Article 28 specifies which aspects should be taken into account before expulsion of a third-country national) and Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents[133]. Moreover, Article 47 of the EU Charter provides the right to an effective remedy and to a fair trial, the scope of which is broader than those of Article 6 of the Convention and is not confined to the disputes relating to civil rights or obligations.

It is important to point out that there is a difference in the scope of international protection against the removal granted under Article 3 of the Convention and the EU Law – while ECtHR recognizes that there could be exceptional grounds for the protection (when the removal of the severely ill person violates Article 3 of the ECHR – *N. vs. the United Kingdom*[134]), the EU law does not include compassionate grounds as a protection ground in the context of subsidiary protection. Two cases of the CJEU, *M'Bodj*[135] and *Abdida*[136], may serve as a illustrative example in which the CJEU, relying on the Strasbourg Court's approach in the case of *N. vs. the United Kingdom*, supported the position of the ECtHR that the removal of third-country national suffering from a severe illness to a country where there is no appropriate medical treatment guaranteed in very exceptional cases may amount to the breach of Article 3 of the Convention. However, according to the Luxembourg Court's approach, this does not mean that a person will be qualified for subsidiary protection under Directive 2004/83[137] and, therefore, he or she should be granted leave to reside in a Member State. None of the two mentioned claims analyzed by CJEU passed the requirements of subsidiary protection as the EU Qualification Directive does not include medical cases as the ground for subsidiary protection despite the possibility of more favourable provisions in the EU Member States under Article 3 of the Qualification Directive. The more thorough analysis of the abovementioned three cases and

[132] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

[133] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

[134] ECtHR, *N. v. The United Kingdom*, no. 26565/05, 27 May 2008

[135] CJEU, C-542/13, Mohamed M'Bodj v État belge, 18 December 2014

[136] CJEU, C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, 18 December 2014

[137] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; corrigenda OJ 2005 L 204, p. 24, and OJ 2011 L 278, p. 13)

the way of the courts' cooperation through these judgments will be presented in the subsection below.

Using the example of the judgment *Saadi v the United Kingdom*[138], some divergence may be observed between the Convention and the EU standards in relation to the detention of asylum-seekers. The case concerned the seven-day detention of a "temporarily admitted" asylum seeker. The applicant was placed in the reception center for the purpose of speeding up the processing of his application. The Court found that the procedure was non-arbitrary, and it was consistent with Article 5 (1) of the Convention, because the detention met all the necessary conditions, bearing in mind the fact that the United Kingdom was confronted "with difficult administrative problems" "with an escalating flow of huge numbers of asylum-seekers" (*Saadi v the United Kingdom*, §80). However, the 76-hour delay in providing the applicant with the information on the grounds of his detention was in violation of Article 5 (2). Moreover, according to the Court the detention of potential immigrants and asylum seekers do not violate the right to liberty: "[i]t is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident from the tenor of the judgment in *Amuur* that the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5 § 1 (f)" (§ 64).

This decision was consequently criticized by other judges in their joint dissenting opinion. They argued, *inter alia*, that there has been a violation of Article 5 § 1 (f) due to the applicant's detention for seven days in a reception center, which amounted to a deprivation of liberty for the purposes of the Convention. The judges argued that the Court, by giving such decision, assimilated all asylum-seekers to "potential illegal immigrants": "[…] as regards the *purpose of detention*, in stating that "since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant's claim to asylum, his detention was closely connected to the purpose of preventing unauthorized entry" […], the Court does not hesitate to go a step further and assimilate all asylum-seekers to potential illegal immigrants".

Thus, such approach of the Strasbourg Court regarding the legality of the detention of asylum seeker merely for the purpose to speed up the asylum procedure goes in conflict with the EU provision on procedural standards, namely Article 26 (1) of the Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast): "Member

[138] ECtHR, *Saadi v. United Kingdom*, no. 13229/03, 29 January 2008

States shall not hold a person in detention for the sole reason that he or she is *an applicant*"[139]. It is noteworthy that the previous Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status contained a narrower provision: "Member States shall not hold a person in detention for the sole reason that he/she is *an applicant for asylum*" (Article 18 (1)) [140]. Moreover, a detention on the ground of a risk of absconding of the applicant prescribed in the EU Directive on the standards for the reception of applicants for international protection (Article 8 (1) (b))[141] contradicts the ECHR, as the Convention does not provide in Article 5 for such a ground.

Interestingly, the case of *Saadi v United Kingdom* was subsequently referred upon by the CJEU in *El Dridi*[142], and at that point, the two courts seemed to find a similar approach in the application of specific standards in terms of detention of a third-country national. This particular situation and several other examples of the courts' interplay will be presented in the next sub-chapter.

As noted by some scholars, "despite their differences, the cases in which the [CJEU] and the ECtHR have reached opposing conclusions have so far been very few"[143]. This was in the joined Cases 46/87 and 227/88, *Hoechst v. Commission*[144] and Case 374/87, *Orkem v. Commission*[145] cf. *Niemietz v. Germany*[146] and *Funke v. France*. It is noteworthy, though, that neither of these judgments concerned migration issues.

As Dr. Sonia Morano-Foadi and Dr. Stelios Andreadakis noted: "the two Courts, to date, have tried to maintain a more cooperative and harmonic approach in relation to human rights, but the possibility of divergences between the two Courts exist due to diverse methods of interpretation and goals of the two systems"[147]. Taking into account the different nature of two European courts, it is justified and predictable to find contrastive approaches in the courts' jurisprudence. However, the mentioned scholars further concluded that "any differences should

[139] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
[140] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
[141] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
[142] CJEU, El Dridi, C-61/11, 28 April 2011, §43
[143] Sonia Morano-Foadi, Stelios Andreadakis, "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence", *European Journal of International Law,* Volume 22, Issue 4, November 2011, Pages 1071–1088, https://doi.org/10.1093/ejil/chr074
[144] CJEU, *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, 1989 E.C.R. 2859
[145] CJEU, *Orkem v. Commission*, Case 374/87, 1989 ECR 3283
[146] ECtHR, *Niemietz v. Germany,* no. 13710/88, 16 December 1992
[147] Sonia Morano-Foadi, Stelios Andreadakis, 'A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon', July 2014 https://dm.coe.int/CED20140017597

not become an obstacle in the Courts' way towards convergence and mutual understanding and cooperation"[148].

2.2 The Cooperation of the European Courts in the field of Migration

Although no special communication mechanism is provided between the ECtHR and the CJEU, these institutions are not isolated from each other. The cooperation between the ECtHR and the CJEU in the field of migration consists of applying the same approaches and sharing the same values. According to certain scholars, "a formal and informal dialogue is being created between the Courts"[149] and "[t]he dialogue between them is a very powerful instrument for a convergent human rights system in Europe"[150]. "Three categories of dialogue between the two Courts have emerged: the informal, the institutionalized, and the judicial dialogues"[151]. The informal one consists of the regular meetings between the Strasbourg Court and the Luxembourg Court, where the judges discuss different issues relating to their respective work. The "institutionalized dialogue" would be initiated upon the accession of the EU's to the ECHR. The "judicial dialogue" is being applied now by two courts every time one court cites another one in its judgments, and this also concerns migration-related judgments. As was noted by Callewaert, "there is no formal hierarchy between ECHR and EU law and they both claim the right to set standards applicable to a substantial part – if not all – of the continent"[152].

In the result of the analysis of the practice of two European courts, an observation was made that, as a rule, the CJEU makes more references to the ECtHR case-law in its jurisprudence, whereas the Strasbourg Court occasionally cites the CJEU practice. This phenomenon may be explained by the fact that the jurisprudence of the CJEU in the sphere of asylum and migration is more recent than the Strasbourg Court's case-law that it has developed throughout the years. Barrett Jizeng Fan regards the references by the CJEU to the Strasbourg case law "as part of 'legitimate guidance' function [which] falls into the sphere of one of three

[148] Sonia Morano-Foadi, Stelios Andreadakis, "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence", *European Journal of International Law,* Volume 22, Issue 4, November 2011, p. 1071–1088, https://doi.org/10.1093/ejil/chr074

[149] Sonia Morano-Foadi, Stelios Andreadakis, "A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon", July 2014 https://dm.coe.int/CED20140017597

[150] *Ibid*., p.42

[151] *Ibid*., p.42

[152] Callewaert, "The European Convention on Human Rights and European Union Law: A Long Way to Harmony", *European Human Rights Law Review,* Issue 6, 2009, p. 783

sub-functions: guidance, comparative analysis, and confirmation of a domestic decision"[153]. However, at the same time, according to several scholars, the CJEU lacks a uniform methodology regulating its references to the ECtHR's case-law. For instance, S. Douglas-Scott finds such a practice "messy, unpredictable and complex"[154]. Nevertheless, the absence of a specific systematic approach in examining the jurisprudence of the Strasbourg Court by the CJEU should not, in any case, undermine the importance of such reliance on the ECtHR's practice as the way of cooperation between European courts.

It should be stressed that, formally, the CJEU is not legally bound by the ECtHR jurisprudence as the EU is not yet a party to the European Convention on Human Rights. Therefore, the CJEU is not obliged to cite the case-law of the ECtHR. Nevertheless, the CJEU often uses the Strasbourg Court's jurisprudence in its rulings as the standards prescribed in the ECHR constitutes the basic principles of the EU law.

Thus, the following cases should be mentioned as an example of cooperation between the ECtHR and the CJEU in the field of migration and human rights.

In its well-known case *Elgafaji*[155] the CJEU gave an interpretation on the scope of Article 15 (c) of the EU Qualification Directive in relation to Article 3 of the ECHR. The Luxembourg Court was to decide whether Article 15 (c) offers additional or other protection in comparison to Article 3 of the Convention. The CJEU held that "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" (§ 28). Further, in this judgment, the CJEU ensured that the case-law of the ECtHR relating to Article 3 of the ECHR was taken into consideration, namely the case of *N.A. v. the United Kingdom*[156] (*Elgafaji*, § 44). Therefore, the interpretation of Article 15 (c) by the CJEU was relied upon the ECtHR approach regarding a general situation of violence in a country of destination which should be of such a level that may invoke a breach of Article 3 of the Convention in relation to an individual by his or her mere presence in that country (*N.A. v. the United Kingdom*, § 115).

Although the CJEU has demonstrated the autonomous interpretation of EU provisions in the context of asylum in *Elgafaji* (§ 28), the reference to the ECtHR case-law helped to avoid conflicts of interpretations between the two courts. It should be noted that subsequently, the

[153] Barrett Jizeng Fan, "Convergence, Compatibility or Decoration: The Luxembourg Court's References to Strasbourg Case Law in its Final Judgments"*, Pécs Journal of International and European Law* - 2016/II

[154] S. Douglas-Scott, "The Court of Justice of the European Union and the European Court of Human Rights after Lisbon", in S. De Vries et al. (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart, 2013), p. 657–658

[155] CJEU, C-465/07 *Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*, 17 February 2009

[156] ECtHR, *N.A. v. the United Kingdom,* no. 25904/07, 17 July 2008

Elgafaji judgment and the principles developed by the CJEU therein were repeatedly referred upon by the ECtHR in its case-law (*Sufi and Elmi v. the United Kingdom*[157](the Court disagreed with the CJEU position that the scope of Article 3 of the Convention does not offer comparable protection to that afforded under the Article 15 (c) of the Directive, § 226), *M.S.S. v Belgium and Greece* (the Court mentioned *Elgafaji* judgment when was defining the provisions of EU law on asylum matters, §86), *S.H.H. v. the United Kingdom*[158] (the Court referred to *Elgafaji* judgment as the relevant European Union law, §35)).

Another example of cooperation between two European courts may be seen in the cases of *M.S.S. v Belgium and Greece* and *N.S. and M.E*[159]. The facts of the *M.S.S.* case and the reasoning of the ECtHR were discussed above. In the present context, it should be mentioned that both courts questioned the concept of "mutual trust" according to which there is a presumption that every Member State of the Dublin System is a safe country and removal of asylum seekers to other Member State would not constitute a violation of their fundamental rights. Moreover, the CJEU established a notion of "systemic flaws" or "systemic deficiencies"[160] that may lead to a breach contrary to Article 4 of the EU Charter as a test for removal. In contrast, the ECtHR uses various reports as evidence for systemic shortcomings in the receiving state. It seems like the CJEU's test is more rigid if to consider it as an additional requirement for the protection. However, Cathryn Costello argues that "systemic deficiency" test should not be interpreted as an additional requirement but rather as an element of the risk assessment; otherwise such interpretation of Article 4 of the EU Charter by the CJEU would undermine the interpretation of Article 3 of the ECHR by the ECtHR, although it has no mandate to do so[161]. Nevertheless, the Luxembourg Court did not have the intention to undermine the ECtHR methods for collecting evidence and estimating the situation for asylum seekers in the receiving state and fully agreed with the Court's approaches.

In relation to the EU Returns Directive[162] and Article 5 of the ECHR, the two courts came to a consensus in the cases of *Saadi v the United Kingdom*[163] and *El Dridi*[164]. In the latter judgment, the CJEU clarified the scope of the Returns Directive in the light of the EU's immigration policy. The Luxembourg Court ruled that the Member States cannot imprison irregular migrants who do not comply with an expulsion order. According to the Court's ruling,

[157] ECtHR, *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011
[158] ECtHR, *S.H.H. v. The United Kingdom*, no. 60367/10, 29 January 2013
[159] CJEU, Joined Cases *N.S. vs SSHD* (C-411/10) and *M.E.* (C-493/10), 21December 2011
[160] *Ibid*., § 86
[161] Cathryn Costello, Dublin-case NS/ME: Finally, an end to blind trust across the EU?, A&MR 2012 Nr. 02, p. 89
[162] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
[163] ECtHR, *Saadi v. United Kingdom*, no. 13229/03, 29 January 2008
[164] CJEU, El Dridi, C-61/11, 28 April 2011

such legal measures contravenes the objectives and the effectiveness of the Returns Directive (*El Dridi*, §§ 55, 56). The CJEU referred to the ECtHR's approach regarding the principle of proportionality applied to detention determined in the case of *Saadi v the United Kingdom*, in particular, that "the detention should not continue for an unreasonable length of time"[165] (*El Dridi*, § 43).

In continuation of the topic of the conditions of the detention of asylum seekers, another example of the mutual understanding between two courts involves relatively recent ruling by the CJEU, namely *Al Chodor*[166] case. The judgment concerned the interpretation of Article 28 of the Dublin III Regulation[167] read in conjunction with Article 2 (n) of the Dublin III Regulation. The Luxembourg Court had to decide to what extent a "risk of absconding" should be "defined by law," as it stated in Article 2 (n). Since the word 'law' is quite ambiguous in its sense and has a different meaning in different languages, the CJEU noted that Article 6 of the EU Charter (right to liberty and security) should be interpreted in the light of the case-law of the ECtHR. In this regard, the Luxembourg Court referred to *Del Río Prada v. Spain*[168] and reiterated that "a national law authorizing the deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness" (§ 38). As a result, the CJEU ruled that a binding provision of a general application defining a "risk of absconding" must be established (§ 45). Otherwise, the detention under Article 28 (2) should be considered unlawful (§ 46).

Such a critical issue as an expulsion of foreign nationals should always be regarded with some precautions by state authorities. When there is a question of deportation of non-national at stake, a state must consider all possible consequences that may cause such deportation, for the individual concerned. For instance, a person may face a serious threat to his or her health or life in violation of Article 3 of the ECHR. This leads to the well-accepted principle of *non-refoulement* and the obligation to respect this principle by all states. However, a question arises whether this principle concerns exclusively the refugees and the persons seeking asylum. The answer may be found in the well-established practice of the ECtHR. In its judgment *N. vs. the United Kingdom* the Court stated, *inter alia*, that "[T]he decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the

[165] *Saadi v. United Kingdom,* §72
[166] CJEU, Case C-528/15 Al Chodor, 15 March 2017
[167] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person
[168] ECtHR, *Del Río Prada v. Spain*, no. 42750/09, § 125, 21 October 2013

removal are compelling"[169]. It should be noted that a high threshold of the severity of illness was originally set in the case of *D. v. the United Kingdom*[170] in 1997, where the Court found that a deportation of a gravely ill applicant would amount to the violation of Article 3 of the ECHR. However, another important principle was established by the Court in the case of *N. vs. the United Kingdom* – "Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State"[171].

The case of *N. vs. the United Kingdom* subsequently served as certain legal guidance for two judgments of the CJEU – *M'Bodj*[172] and *Abdida*[173]. In both cases, the CJEU supported the position of the ECtHR that the removal of third-country national suffering from a severe illness to a country where there is no appropriate medical treatment guaranteed in very exceptional cases may amount to the breach of Article 3 of the Convention. In *Abdida*, the CJEU also characterized very exceptional cases in its own way "by the seriousness and irreparable nature of the harm that may be caused by the removal of a third-country national to a country in which there is a serious risk that he will be subjected to inhuman or degrading treatment" (§ 50), and urged the Member States to observe the ECtHR position in this matter. The CJEU further added on the importance of the suspensive effect of the remedies that should be guaranteed to the applicant following the refusal to issue a leave to reside on medical grounds (§52). Such reasoning was again based on the ECtHR case-law.

It is notable that in 2016, in the case of *Paposhvili v. Belgium*[174], the ECtHR, when giving the decision, relied on the European Union law. Namely, the Court reaffirmed all the statements that the CJEU previously made in *M'Bodj* and *Abdida*. The reference to the Luxembourg Court was inevitable since all three cases concern the question of removal of an ill third-country national by the Belgium authorities. This judgment is significant because, for the first time since 2008, the ECtHR clarified the concept of "other very exceptional cases" (*Paposhvili v. Belgium*, § 183) within the meaning given in *N. v. the United Kingdom* (§ 43). Another illustrative example of mutual understanding between the ECtHR and the CJEU may be seen in the following. The ECtHR, when it was giving the explanation of "other very exceptional cases," used the wording of the CJEU from the *Abdida* ruling.

[169] ECtHR, *N. v. The United Kingdom*, no. 26565/05, §§42,43, 27 May 2008
[170] ECtHR, *D. v. the United Kingdom,* no. 30240/96, 2 May 1997
[171] *N. vs. the United Kingdom, §42*
[172] CJEU, C-542/13, Mohamed M'Bodj v État belge, 18 December 2014
[173] CJEU, C-562/13, Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, 18 December 2014
[174] ECtHR, *Paposhvili v. Belgium,* no. 41738/10, 13 December 2016

The Member States are given a wide margin of discretion when regulating their immigration policy. This also concerns the regulation of family life aspects of migrants. On the EU level, the Family Reunification Directive (2003/86/EC)[175] establishes the conditions for exercising the right to family reunification. The respect for private and family life is guaranteed by both the EU Charter (Article 7) and the ECHR (Article 8). Therefore, another example of the CJEU's reliance on the ECHR standards is illustrated in the *Baumbast*[176] case. The CJEU held that the refusal to grant a right of residence in a Member State to a parent of a minor child who already has a right of residence in that state interferes with family life as protected by Article 8 of the Convention. The Court also determined that "[…] in accordance with the case-law of the Court, Regulation No 1612/68 (*authors note*: Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community) must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognized by Community law" (§ 72).

In conclusion, based on the cases analyzed, as of the end of November 2019, the following tendencies in the European courts' interaction may be seen:

1. No formal communication mechanism exists between two courts; however, the courts apply the so-called judicial dialogue in relation to each other.
2. There are more references by CJEU to the case-law of the ECtHR than by the Strasbourg Court in relation to the Luxembourg Court due to the more recent engagement of the CJEU jurisprudence in the sphere migration and asylum.
3. Although the CJEU is not bound by ECtHR jurisprudence, it still widely cites the Strasbourg Court's case-law in migration and asylum spheres as the standards prescribed in the ECHR constitutes the basic principles of the EU law.
4. There is a lack of specific methodology on how the CJEU refers to ECtHR migration-related case-law.
5. While showing a certain degree in decisional autonomy, the CJEU still frequently uses the Strasbourg Court's developments in the field of asylum and migration.
6. In at least one judgment, a divergence as like as a convergence in the legal approaches of the courts may be observed.

[175] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03/10/2003 P. 12 – 18

[176] CJEU, Case C-413/99, Baumbast and R v Secretary of State for the Home Department, 17 September 2002

3. THE SIGNIFICANCE OF THE EUROPEAN COURTS' DEVELOPMENTS FOR UKRAINE IN THE SPHERE OF MIGRATION

According to the UNHCR fact sheet on Ukraine by November 2019[177], there are 1,5 million internally displaced persons (IDPs) and other conflict-affected persons, 2,171 asylum seekers, 35,650 stateless persons, and 2,627 refugees coming from various countries.

In the aftermath of over five years of conflict, Ukraine has undergone its own refugee crisis; nevertheless, it has provided refuge for thousands of people over the years. According to the statistics of the State Migration Service of Ukraine, 1,789 refugees and 806 people in need of subsidiary protection were registered in Ukraine in the first half of 2019[178].

Ukraine has taken the international obligations to protect refugees by acceding to the 1951 Convention relating to the status of refugees and the 1967 Protocol relating to the status of refugees in 2002. In 2013, Ukraine acceded to the UN Convention relating to the status of stateless persons (1954) and the Convention on the reduction of statelessness (1961). A significant legislative framework on migration management has been developed in Ukraine throughout the years. The main document in Ukraine regulating the legal status of refugees and the persons in need of complementary or temporary protection is the Law of Ukraine "On refugees and persons in need of subsidiary or temporary protection."[179] The Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" determines the legal status of foreigners and stateless persons who stay in Ukraine and establishes the order of their entry and exit.

The Constitution of Ukraine does not regulate the place of decisions of European courts in the national legal system. This is a matter of legislative regulation. However, Article 9 of the Constitution states that "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine"[180]. Ukraine ratified the ECHR in 1997, and since that time, the Convention is a part of the national legal system according to Article 9 of the Constitution. Having ratified the Convention and its Protocols, Ukraine has, above all, undertaken to guarantee to everyone within its jurisdiction the rights and freedoms set out in the Convention and its Protocols. Paragraph 1 of Part One of the Law of

[177] UNHCR, County Fact Sheet, Ukraine, November 2019 https://www.unhcr.org/ua/wp-content/uploads/sites/38/2019/11/2019-11-UNHCR-UKRAINE-Fact-Sheet-FINAL_ENG-1.pdf

[178] The statistics of the State Migration Service of Ukraine, Performance indicators for the first half of 2019 https://dmsu.gov.ua/assets/files/statistic/year/2019_6.pdf

[179] Law of Ukraine "On Refugees and Persons in Need of Subsidiary or Temporary Protection": Law of Ukraine of July 8, 2011 No 3671-VI, https://zakon.rada.gov.ua/laws/show/3671-17

[180] The Constitution of Ukraine, Law on June 28, 1996 № 254к/96-ВР, Article 9 https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

Ukraine No. 475/97-BP of 17 July 1997[181], on the basis of which the Convention and its separate protocols were ratified, states that: "Ukraine fully recognizes […] that the jurisdiction of the European Court of Human Rights in all matters relating to the interpretation and application of the Convention is binding in its territory, without concluding special agreement".

Moreover, in Ukraine, a special law has been adopted "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights" (hereinafter – the Law No. 3477-IV) [182] which defines relations arising from the obligation of the state to comply with the decision of the European Court of Human Rights in cases against Ukraine. Thus, according to Article 2 of the Law, the [Court's] judgments are to be binding and enforceable for Ukraine in accordance with Article 46 of the Convention. Furthermore, when deciding on the cases, the Ukrainian national courts have to apply the ECHR and recognize the case-law of the ECtHR as the source of law (Article 17 of the Law No. 3477-IV). Article 18 of the Law No. 3477-IV sets out the procedure for the reference to the Convention and the case-law of the Court.

By ratifying the Convention, Ukraine has undertaken the obligations to comply with the Court's legal practice and execute the decisions that had been lodged against Ukraine where violations of the Convention were found. Thus, as defined by Law of Ukraine No. 3477-IV (Article 1), under the execution of the decisions of the ECtHR it is meant that Ukraine has to: a) award to an applicant non-pecuniary damage or to undertake additional measures of an individual character; b) take general measures. The additional measures of an individual character include the restitution ("restitutio in integrum"). The measures of a general nature, according to the Law No. 3477-IV, shall be taken to ensure that the provisions of the Convention, the violation of which was established by the decision, are observed by the State; to remedy the deficiencies of the systemic nature in Ukraine underlying the violation found by the Court, and to eliminate the basis for further applications to the Court against Ukraine.

Therefore, from this perspective, there are two possible effects of the ECtHR decisions for Ukraine – personal effect and global effect.

1. The personal effect.

The ECtHR judgment may be perceived as an individual legal act in the individual legal aspect as its provisions directly concern a particular applicant. It has the legal outcomes for the state as well – Ukraine must take the necessary steps in respect of the applicant, which must

[181] Law of Ukraine "On ratification of the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms, First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention": Law of Ukraine of July 17, 1997 No. 475/97-BP, https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80

[182] Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights": Law of Ukraine of 23 February 2006 No. 3477-IV, https://zakon.rada.gov.ua/laws/show/en/3477-15

comply with the Court's conclusions outlined in that decision, such as, the amount of compensation and the actions that the state should take to restore the infringed rights.

As was stated above, there are additional individual measures to the compensation, and the restitution is included in this list. Individual measures are designed to put an end to the violations that continue in time and remedy the consequences of the violations committed in the past, in order to restore as far as possible, a situation that has occurred prior to a violation of the Convention. According to the Law No. 3477-IV, "the previous legal status of the Beneficiary is to be restored, *inter alia*, by means of (a) reconsideration of the case by a court, including reopening of the proceedings in that case; (b) reconsideration of the case by an administrative body" [183]. Thus, the personal effect from the Court's decisions for Ukraine is that the Ukrainian national judicial system operates in conformity with the position of the ECtHR.

2. The global effect.

Legally, under the Convention, the ECtHR decisions are binding only on the respondent State in the case. However, the significance of the ECtHR decisions goes beyond national boundaries, affecting the law and the enforcement practice of other State Parties to the Convention. Even though Ukraine is not obliged to refer to the Court's case-law where it is not a respondent, the Ukrainian national judicial bodies do refer to the ECtHR practice relating to different spheres and apply them as a source of law. For instance, the Kharkiv Administrative Court of Appeal, by relying on Article 17 of the Law No. 3477-IV [184], in its two decisions on the permission on immigration[185] refers to *McMichael v. the United Kingdom*[186], §86: "According to the Court's well-established case-law, "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life" and domestic measures hindering such enjoyment amount to an interference with the rights protected by Article 8 (art. 8)". Another example of the reference to the Court's case-law by Ukrainian national courts is the decision by the Kyiv Administrative Court of Appeal on the detention and expulsion of a foreign national[187]. This court cited not only one case of the ECtHR but referred to several cases, namely *Winterwerp v. the Netherlands*[188], *Reinprecht v. Austria*[189], *Idalov v. Russia*[190], *Benjamin and*

[183] *Ibid.,* Art. 10(3)
[184] *Ibid*, Art. 17
[185] Kharkiv Administrative Court of Appeal, cases № 820/5953/16, 11.05.2017 http://reyestr.court.gov.ua/Review/66501718, № 820/3281/17, 15.11.2017 http://reyestr.court.gov.ua/Review/70340819
186 ECtHR, *McMichael v. United Kingdom*, no.16424/90, 24 February 1995
[187] Kyiv Administrative Court of Appeal, № 743/461/17, 18.05.2017 http://reyestr.court.gov.ua/Review/66548861
[188] ECtHR, *Winterwerp v. the Netherlands*, no. 6301/73, §§37,39, 24 October 1979
[189] ECtHR, *Reinprecht v. Austria*, no. 67175/01, §31, 15 November 2005
[190] ECtHR, Idalov v. Russia, no 5826/03, §161, 22 May 2012

Wilson v. the United Kingdom[191] and *Amuur v. France*[192] and to the European Convention on Human Rights. The Kyiv Administrative Court of Appeal relied on the legal practice of the ECtHR to substantiate its reasoning regarding a national of the Republic of Uzbekistan, whose detention in the Chernihiv Migrant Accommodation Centre for foreigners and stateless persons illegally staying in Ukraine exceeded the reasonable time.

Thus, when relying on the ECtHR case-law in its judgments, the Ukrainian judicial bodies align national jurisprudence with the ECtHR well-established standards and best practices in terms of migration, which is extremely important as it guarantees the respect of the rights of migrants, foreigners, and stateless persons. Therefore, it may be characterized as the first global effect of the decisions of the ECtHR on Ukraine.

The ECtHR establishes a violation of the Convention committed by a state in order to further eliminate the causes of such violation, and this is the main purpose of the implementation of ECtHR decisions. There are general measures that Ukraine is required to take to prevent new violations in the future, similar to those found by ECtHR decisions. The importance of measures of a general nature is that they go beyond a specific case and affect a wide range of people. General measures are intended primarily to analyze the causes that led to the violation of the Convention and to find ways to remedy them. In some cases, legislative changes may be needed to prevent new violations of the Convention. According to Article 13 of the Law No. 3477-IV, general measures are aimed at eliminating the systemic problem identified in the decision and its root causes, and include the following:

a) amendment of the current legislation and practice of its implementation;

b) changes in administrative practices;

c) legal expertise of legislation;

d) providing the study of the Convention and the Court's jurisprudence for prosecutors, lawyers, law enforcement officials, immigration officials, other categories of professionals whose activity is related to law enforcement, as well as to the detention of people;

e) other measures to be determined by the respondent State.

Therefore, the second global effect from the decisions of the ECtHR is found in Ukraine's obligations to take the necessary measures of a general nature to prevent violations in the future and eliminate the existing systemic deficiencies, including in the migration sphere.

An example of such an effect are ECtHR pilot judgments in relation to Ukraine. On October 12, 2017, the ECtHR ruled in the case of *Burmych and Others v. Ukraine*[193] under the

[191] ECtHR, *Benjamin and Wilson v. the United Kingdom,* no. 28212/95, §§33,34, 26 December 2002
[192] ECtHR, *Amuur v. France*, no 19776/92, 25 June 1996
[193] ECtHR, *Burmych and Others v. Ukraine* [GC], nos 46852/13 et al., 12 October 2017

pilot judgment procedure, declaring non-enforcement or delayed enforcement of domestic court decisions as a systemic problem in Ukraine. The case was joined with more than 12,000 similar applications against Ukraine concerning non-enforcement of court decisions. The case was transmitted to the Council of Europe Committee of Ministers by the Court for further communication with Ukraine. It is noteworthy that in this case the ECtHR stated the non-enforcement of its first pilot decision for Ukraine in the case of *Yuriy Nikolayevic Ivanov v. Ukraine*[194], made in 2009, which concerned the same issue of non-enforcement of decisions of national courts since no systemic problem has been eliminated since its adoption. *Burmych and Others v. Ukraine* and 12,000 pending applications "originated in the same systemic problem identified in the *Ivanov* pilot judgment, namely the series of dysfunctions in the Ukrainian judicial system which hinder the enforcement of final judgments, thus entailing a systemic problem of non-enforcement or delayed enforcement of domestic court decisions, combined with the absence of effective domestic remedies in respect of such shortcomings"[195]. The general enforcement measures set out in the *Ivanov* pilot judgment aim at eliminating the existing structural deficiencies in the national system.

Another example is the judgments against Ukraine in the sphere of asylum and migration. As of November 2019, only one case has been brought to ECtHR against Ukraine by an asylum-seeker, a third-country national, which concerned its expulsion (*Kebe and Others v. Ukraine*[196]), and two cases related to extradition of foreign nationals who fled their countries of origin to escape persecution (*Baysakov and Others v. Ukraine*[197], *Soldatenko v. Ukraine*[198]). In *Kebe and Others v. Ukraine*, the ECtHR found a violation of Article 13 in conjunction with Article 3 of the Convention in relation to the first applicant (Mr. Kebe). The representative of the State Border Guard Service of Ukraine unlawfully prevented a claim for asylum from Mr. Kebe, a national of the State of Eritrea, while he was on board the vessel. In particular, according to the circumstances of the case, "when carrying out border checks the border guards gave him no information about asylum procedures in Ukraine and did not take into consideration his need for international protection the national court and assistance. The border guards also [allegedly] told him that they could not accept asylum applications"[199]. However, in accordance with Articles 5 (2) and 29 (1) of the Law of Ukraine "On Refugees and Persons in Need of

[194] ECtHR, *Yuriy Nikolayevich Ivanov v. Ukraine,* no. 40450/04, 15 October 2009
[195] European Court of Human Rights, Registrar of the Court, "Strike-out and transmission to the Committee of Ministers of more than 12,000 Ukrainian cases", Press Release, ECHR 307 (2017) 12.10.2017, p. 3
[196] ECtHR, *Kebe and Others v. Ukraine,* no. 12552/12, 12 January 2017
[197] ECtHR, *Baysakov and Others v. Ukraine,* no. 54131/08, 18 May 2010
[198] ECtHR, *Soldatenko v. Ukraine,* no. 2440/07, 23 January 2008
[199] *Kebe and Others v. Ukraine,* §104

Complementary or Temporary Protection"[200], the officials of the State Border Guard Service of Ukraine were obliged to facilitate the submission of the application to be recognized as a refugee or as a person in need of complementary protection in Ukraine and to transfer an applicant, within twenty-four hours, to representatives of the State Migration Service of Ukraine. It is only in the result of the interim measures requested by the ECtHR under Rule 39 that the first applicant was granted an opportunity to disembark the vessel and lodge his application for asylum with the Ukrainian authorities. The Court found that there was no effective domestic remedy available to the applicant and no safeguards "capable of protecting […][him] from arbitrary removal in a situation where the risk of being brought back to the country, where he arguably faced treatment contrary to Article 3 of the Convention, was real, imminent and foreseeable"[201]. The UNHCR in its 2013 Observations on the Situation of Asylum-seekers and Refugees in Ukraine[202] concluded that "Ukraine is failing to provide sufficient protection against *refoulement*, and does not provide asylum-seekers with the opportunity to have their asylum claims considered in an efficient and fair procedure"[203]. Relying on that Observation, the Court found the shortcomings in the border-control procedure regarding the claims for asylum in Ukraine.

In *Soldatenko v. Ukraine,*[204] the ECtHR found that the extradition of an applicant to Turkmenistan would constitute a violation of Article 3 of the Convention as there were numerous reports on the use of force and torture against criminal suspects by the Turkmen law-enforcement authorities. Moreover, as the applicant "did not have an effective domestic remedy […] by which he could challenge his extradition on the ground of the risk of ill-treatment on return, there has been a violation of Article 13 of the Convention. Furthermore, the Court found a violation of Article 5 § 1(f) and concluded that "Ukrainian legislation does not provide for a procedure that is sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition" (§114). By referring to its findings under Article 5 § 1, the Court also found a violation of Article 5 § 4 of the Convention "as the Government failed to demonstrate that the applicant had at his disposal any procedure through which the lawfulness of his detention could have been examined by a court" (§126).

[200] Law of Ukraine "On Refugees and Persons in Need of Subsidiary or Temporary Protection" from 08.07.2011 No 3671-VI
[201] *Kebe and Others v. Ukraine,* §107
[202] UN High Commissioner for Refugees (UNHCR), "Ukraine as a country of asylum. Observations on the situation of asylum-seekers and refugees in Ukraine", July 2013, available at: https://www.refworld.org/docid/51ee97344.html
[203] *Ibid*., p.38, §133
[204] ECtHR, *Soldatenko v. Ukraine,* no. 2440/07, 23 January 2008

Baysakov and Others v. Ukraine[205] concerned four Kazakhstani nationals who left their country and obtained refugee status in Ukraine because of the persecution on political grounds in Kazakhstan. The Prosecutor General of Kazakhstan requested the applicants' extradition for prosecution. The ECtHR stated that there would be a violation of Article 3 if the applicants would be extradited to Kazakhstan. Such a decision was based on the various reports from the UN Committee Against Torture, Human Rights Watch and Amnesty International on ill-treatment of criminal suspects by the Kazakh law-enforcement authorities. The Court further found a violation of Article 13 of the Convention. In the Court's opinion, Article 13 of the Convention was violated since the national legal system did not provide for effective remedies, by which extradition could be prevented on the basis of the risk of ill-treatment. According to the Court, the possibility of challenging extradition decisions before the administrative courts constitutes, in principle, an effective remedy within the meaning of Article 13 of the Convention. "However, where an applicant seeks to prevent his or her removal from a Contracting State, such a remedy will only be effective if it has automatic suspensive effect" (§ 75). Therefore, the Court reached the conclusion that Ukrainian administrative procedure relating to the annulment of an extradition decision lacks the automatic suspensive effect, which is an essential guarantee for the applicant who is under the risk to be expelled to a country where he may face serious ill-treatment.

Thus, a series of problems in the Ukrainian legal system were outlined as a result of such decisions against Ukraine. In *Kebe and Others v. Ukraine*, the Court observed the situations of arbitrary rejection of asylum-seekers at the Ukrainian border by the representatives of the State Border Guard Service of Ukraine; *Baysakov and Others v. Ukraine* portrayed the lack of legal provisions governing the procedure for detention in Ukraine pending extradition, and the case of *Soldatenko v. Ukraine* showed the shortcomings in the administrative legal procedure in Ukraine relating to challenge of an extradition decision.

The importance of the judgments mentioned above may be described as the following:

1) The judgments concern the actual issues relating to the protection of the rights of the migrants and people seeking asylum in Ukraine; although the circumstances that were described have occurred in the past, they are still relevant today;

2) These decisions were made against Ukraine, reflecting (revealing) certain considerable shortcomings of the Ukrainian legal practice relating to the rights of the migrants and refugees;

3) These cases helped to reveal certain significant drawbacks that should be taken into account by Ukrainian authorities in order to prevent and avoid violations in the future.

[205] ECtHR, *Baysakov and Others v. Ukraine, no. 54131/08, 18 May 2010.*

The place of the CJEU jurisprudence in the Ukrainian legal system is harder to determine than in the case with the ECtHR. It is noteworthy to emphasize that the European Union legislation is not recognized as a source of law in Ukraine since Ukraine is not EU Member State, and, therefore, the practice of the CJEU is not mandatory for Ukrainian judicial bodies. Thus, as of November 2019, naturally, there has been no reference to the CJEU case-law in the sphere of migration and related spheres by national courts of Ukraine.

In 2014, the Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part[206] (hereinafter – the Agreement) was signed and entered into force on 1 September 2017. The Agreement is an important document for Ukraine as it is aimed at the deeper cooperation between Ukraine and the EU in economic and political spheres. One of the commitments that Ukraine has undertaken under the Agreement is the need to bring domestic legislation in line with the EU *aquis*. The approximation of the Ukrainian legislation to the EU *acquis* is a priority part of the process of Ukraine's integration into the EU. Article 114 of the Agreement reads as follows: "The Parties recognize the importance of the approximation of Ukraine's existing legislation to that of the European Union. Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*". The subject of the Association Agreement determines the scope of the legislation of Ukraine to be approximated and the scope of the EU acquis that serves as a basis for approximation. It covers 28 broad spheres including political (the rule of law, foreign and security policy, freedom, security and justice) and economic areas (includes, *inter alia*, access of goods to markets, different aspects relating to trade, custom services, intellectual property). A separate part of the Association Agreement is dedicated to freedom, security and justice sphere and regulates such issues as the rule of law and respect for human rights, protection of personal data, cooperation in the field of migration, granting the right of asylum and border control, treatment of workers, labour mobility, movement of persons and other related spheres. Several articles of the EU-Ukraine Association Agreement serve as the legal basis for the legislative approximation to the EU *acquis*, namely Articles 53, 56, 114, 153, 358, 403, 405, and 474 of the Agreement. However, it should be mentioned that the only provision of the Agreement which mentions the obligation to reference to the CJEU is Article 153 which prescribes that during the approximation of the legislation, "due account shall be taken of the corresponding case-law of the Court of Justice of the European Union". However, the mentioned provision is a sectoral one which means that it implies the application of the CJEU case-law only in the public procurement area and does not deal with migration sphere.

[206] Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part, the European Union – Ukraine, 21 March 2014, Official Journal of the European Union L 161/2135.

The absence of the provisions on the mandatory application of the jurisprudence of the CJEU in the sphere of migration and asylum does not undermine in any way the fact that the case-law of the CJEU may serve for Ukrainian judiciary as additional (doctrinal) source of law. The legal positions formulated in the decisions of the CJEU may be taken into account by the national courts of Ukraine as argumentation in their judgments in order to align the legislation of Ukraine in accordance with established standards of the legal system of the European Union, including the standards and approaches in the sphere of migration and asylum, which might be relevant and useful in the context of Ukraine's association relations with the EU.

Summarizing all of the abovementioned, it should be outlined that:

1. The decisions of the ECtHR have two effects upon Ukraine: personal and global.
2. Whereas Ukraine is obliged to apply the practice of the ECtHR, the reference to the CJEU jurisprudence is currently not compulsory for Ukraine.
3. It is advisable to make all decisions of the ECtHR binding for Ukraine, not only the cases against Ukraine, for a reason to meet international and European standards in the area of asylum.
4. Although Ukrainian judicial bodies do not refer to the CJEU case-law, Ukraine signed the Association Agreement with the EU under which Ukraine is obliged to align its legislation with the EU acquis. This will help to further strengthen the Ukrainian legal and regulatory framework in the area of migration and asylum.
5. It is necessary to enhance the national policy, legal and regulatory frameworks for migration and asylum in order to ensure the respect of the rights of the migrants and asylum seekers.
6. The migration policy of Ukraine should be developed with consideration of the current migration challenges in Europe.

CONCLUSIONS AND PROPOSALS

1. Having analyzed the theoretical background for the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union on migration and asylum matters the following trends in the courts' case-law were identified:

1) The principle of *non-refoulement* has an absolute, non-derogatory character.
2) Even if the person commits a serious crime in the territory of a state where he/she seeks asylum or reside and presents a threat to national security, this person should not be expelled to a country where he/she will face torture or other forms of ill-treatment contrary to Article 3 of the ECHR.
3) The removal of third-country national suffering from a severe illness to a country where there is no appropriate medical treatment guaranteed in the exceptional cases may amount to the breach of Article 3 of the Convention. However, such a situation does not guarantee a person to be qualified for subsidiary protection under the EU law.
4) The EU Member States are given a wide margin of discretion when regulating their immigration policy; therefore, the national authorities are not obliged to give the humanitarian visas to the persons seeking asylum in their country.
5) The ECtHR may overturn its own decisions by responding to the current migration challenges, as it has been seen in *M.S.S v. Belgium and Greece* in comparison with the judgment in *K.R.S. v. United Kingdom*.

2. As a result of the analysis of the migration-related jurisprudence of the European courts and the trends that emerged from it, the following tendency was discovered. The fundamental rights of a person in some cases overweight the national interests of a state (the danger to a person's life overweighs the national security concerns – *Chahal v. the United Kingdom, Shamayev and Others v. Georgia and Russia, Saadi v. Italy, Daoudi v. France*). However, at the same time, the states are given a wide margin of discretion to decide on their immigration policy (e. g. no obligation to issue a humanitarian visa – *X and X, C-638/16*).

3. The further analysis of the migration-related case-law of the two courts showed that, as a way of cooperation, the courts refer to each other's judgments. However, a noticeable trend is that there are more references by CJEU to the case-law of the ECtHR than by the Strasbourg Court in relation to the Luxembourg Court due to the more recent engagement of the CJEU jurisprudence in the sphere migration and asylum, although the CJEU is not obliged to make such references.

4. Despite the courts' differing interpretative methods, the lack of formal communication mechanism, contrasting judicial approaches, and justification of judgments, these two judicial institutions may usually come to common concepts and understanding, as it has been seen, for instance, in *Elgafaji* (CJEU) and *N.A. v. the United Kingdom* (ECtHR), *M.S.S. v Belgium and Greece* (ECtHR) and *N.S. and M.E* (CJEU). Nevertheless the lack of established communication between the two institutions extends the legal gaps that might influence the outcomes of the migration-related case-law.

5. From the two effects of the ECtHR decisions on Ukrainian legal practice that were determined, the global effect has more impact on Ukrainian jurisprudence compared to personal effect as it implies the general measures that Ukraine has to comply with which should help to eliminate the future violation of the Convention.

6. The Ukrainian judiciary does not refer to the CJEU case-law as it is not recognized as a source of law. However, the jurisprudence of the Luxembourg Court may be useful to improve Ukrainian legislation and judicial practice in the field of migration.

7. According to Article 17 "The application by the courts of the Convention and the practice of the Court" of the Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights"[207] the Ukrainian national courts, when deciding on cases, apply the European Convention on Human Rights and *the practice* of the ECtHR as the source of law. Article 1 paragraph 1 of the mentioned Law defines the notion of "*the practice of the Court*" as "*the practice of the European Court of Human Rights and the Commission of Human Rights*". It is advisable to make this provision more precise by adding the following clarification: "The practice of the Court is the case-law of the European Court of Human Rights, which includes the following decisions taken against any of the Contracting Party: a) judgments where the Court has found violation(s) of the Convention; b) judgments where the Court has not/ or partially found violation(s) of the Convention; c) admissibility decisions; d) advisory opinions. Such expanded and clear definition will allow the national courts of Ukraine to rely on the wider scope of the case-law of the ECtHR which will contribute to making their decisions more founded and in accordance with the well-established European and international standards, including in the area of asylum and migration.

[207] Law of Ukraine "On the Fulfillment of Decisions and Application of Practice of the European Court of Human Rights": Law of Ukraine of 23 February 2006 No 3477-IV, https://zakon.rada.gov.ua/laws/show/en/3477-15

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ABSTRACT

There is a marked increase in the number of migrants and asylum-seekers in Europe in recent years. Such tendency leads to an increasing number of appeals to international institutions. This becomes a particular challenge for national and international (European) justice, as this may provoke conflicts of law in courts' practice. Originating from two different European legal orders, the European Court of Human Rights together with the Court of Justice of the European Union plays a crucial role in the protection of the fundamental rights of migrants and asylum-seekers. While some of the approaches of these courts may intertwine, others may cause legal gaps or uncertainty. Therefore, it is essential to understand to what extent the level of human rights protection in these two courts coincides.

This Master's Thesis is focused on how the two European courts coexist in terms of migration and asylum, what are the trends in the migration-related jurisprudence of these two courts, and what role the courts play in the legal system of Ukraine.

SUMMARY

The European Court of Human Rights and the Court of Justice of the European Union are two judicial organs that co-exist in Europe and are safeguarding the fundamental rights. There is an impressive body of case-law developed throughout the years by the European Court of Human Rights in the sphere of migration and asylum. The following provisions of the European Convention on Human Rights, in most cases, cover the rights of the migrants, asylum seekers, and refugees: Article 2, 3, 4, 5, 8, 13, 14, Article 4 Protocol 4, Article 1 Protocol 7.

The jurisprudence of the CJEU is more recent in comparison to that of the ECtHR. The Treaty of Lisbon endowed the CJEU with the competences to give a preliminary ruling on migration and asylum issues arising from the national courts' applications. The EU asylum acquis regulates almost all asylum-related matters in the EU. The intergovernmental agreements, regulations, and directives govern the various migration-related aspects on the EU level. The Ukrainian judiciary does not refer to the CJEU case-law as it is not recognized as a source of law. However, the jurisprudence of the Luxembourg Court may be useful to improve Ukrainian legislation on migration.

The ECtHR and the CJEU operate in two different legal systems. The cooperation of the two courts is crucial as both institutions play a decisive role in the development of human rights standards. Their cooperation consists in mutual understanding and reciprocal references to one another's case-law. A particular tendency was discovered that there are more references by CJEU to the case-law of the ECtHR than by the Strasbourg Court in relation to the Luxembourg Court due to the more recent engagement of the CJEU jurisprudence in the sphere migration and asylum. Although there is a lack of the communication mechanism between the two courts and the divergences in their approaches, the courts' practice relating to migration and asylum sometimes intertwines. The ECtHR and the CJEU mainly show preferential treatment for the protection of fundamental human rights of the applicant as opposed to the protection of the national interests of a state, without, however, restricting the latter's discretion in matters of the formation and implementation of the state's migration policy.

Ukraine is a contracting party to the ECHR since 1997, which is considered as a part of national legislation. The decisions of the ECtHR are binding for Ukraine. Ukrainian is under obligation to execute the judgments of the Strasbourg Court, where it is a respondent state. The jurisprudence of the ECtHR has two effects on Ukraine – personal and global. Ukrainian legislation envisages application of the imperative norm only for ECtHR legal practice in cases when national courts in migration matters use the practice of international judicial institutions as

a source of law. However, for unimpeded application of the relevant imperative rule, it is necessary to explicitly define the category “ECtHR’s practice” by describing all judicial acts covered by this category. The proper application by the Ukrainian courts of the ECtHR and CJEU case-law as a source of law in migration and asylum-related cases will improve Ukrainian legislation and judicial practice in the field of migration and bring them in line with established international and European standards and approaches in this sphere.

HONESTY DECLARATION

16/12/2019

Vilnius

I, ANASTASIIA GUBARIEVA, student of Mykolas Romeris University (hereinafter referred to University), Mykolas Romeris Law School, Institute of International and European Union Law, International Law Master's Programme, confirm that the Master thesis titled "Trends in migration cases in the European Court of Human Rights and the Court of Justice of the European Union":

1. Is carried out independently and honestly;

2. Was not presented and defended in another educational institution in Lithuania or abroad;

3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

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