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THE ROLE OF CJEU IN ENSURING MIGRANTS' SECURITY – ANALYSIS OF THE POST-CRISIS CASE LAW[1]

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ABSTRACT

The current article presents the findings of research on the case-law of the CJEU in the area of asylum and return migration law concerning protection of migrants' rights. The analyzed case-law concerns proceedings from the period after the escalation of the European migration crisis in April 2015. The presented study seeks to answer the question about the existence of a juridical standard for the protection of the right to migration security. The analysis also includes the examination of the relation between the necessity of providing security in migration processes and the obligation to ensure the protection of migrants' fundamental rights.

Key words: Common European Asylum System, migration security, migration crisis, CJEU case-law

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1. INTRODUCTORY REMARKS

The aim of the present article is to analyze the case-law of the Court of Justice of the European Union (further also as CJEU) in the Area of Freedom, Security and Justice and to attempt to define the jurisprudential standard of migration security concerning the protection of migrants. The analysis will include the examination of the relation between the necessity of providing security in migration processes and the obligation to ensure the protection of migrants' fundamental rights.

The analysis will focus on the so-called post-crisis case-law, that is the rulings issued by the CJEU after the escalation of the migration crisis in April 2015[2]. The article constitutes a part of research results on the case-law of the CJEU – the remaining two articles concern the issues from the area of the case-law in Dublin cases and the case-law regarding the security of the Member States[3]. The current article also aims to present collective conclusions with regard to the post-crisis *acquis* of the CJEU in the area of migration. The selection of the analyzed case-law is broad and comprises

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[2] See: J. Freedman, "Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean 'Crisis'," Journal of Refugee Studies, vol. 29, no. 4: 571.

[3] It is justified by the scope of the research material. The article on the analysis of the migration security of the Member States, entitled "The problem of migration security in the current case-law of the CJEU – the perspective of Member States" – was published in "Rocznik Integracji Europejskiej" - the Yearbook of European Integration (Anna Madalena Kosińska, „The problem of migration security in the current case-law of the CJEU – the perspective of Member States", *Rocznik Integracji Europejskiej* 2019: 175-188 DOI : 10.14746/rie.2019.13.12) - (C 601/15 PPU, C 18/16, C 240/17, C 369/17, C 444/17, C 443 and C 444/14; C 331/16, C 573/14, C 82/16, C 225/16, C 643 and C 647/15), whereas the article "Standard bezpieczeństwa migracyjnego w świetle aktualnego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej w sprawach dublińskich" was published in "Rocznik Instytutu Europy Środkowo-Wschodniej" - the Yearbook of the Institute of East Central Europe (Anna Magdalena Kosińska, „Standard bezpieczeństwa migracyjnego w świetle aktualnego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej w sprawach dublińskich", *Rocznik Instytutu Europy Środkowo-Wschodniej*: 17 (2019), zeszyt 2: 10 lat Partnerstwa Wschodniego UE – perspektywa Polski i Europy Środkowej, red. Jakub Olchowski: 277-291, DOI: 10.36874/RIESW.2019.2.11) - (Cases C 646/16, C 490/16, joined C 47/17 and 48/17, C 647/16, C 670/16, C 661/17, C 327/18, joined C 391/16 and C 77/17 and C 78/17).

the majority of rulings issued after 2015 and concerning applicable EU asylum and return law[4].

The protection of migrants' rights posed a considerable challenge during the migration crisis. On the one hand, migrants were exposed to a risk to life already at the stage of the sea journey to Europe[5]. The EU-Turkey refugee agreement of 2016 aimed at returning irregular migrants from the EU to Turkey also caused significant controversy[6]. Substantial opposition from human rights defenders was further caused by the proposed reforms with regard to the preparation of the minimum common list of safe countries of origin[7] or the adoption of a new Dublin Regulation[8]. Thus, the period of increased migration influxes proved also to be a challenging time in the area of protection of fundamental rights.

In accordance with the thesis of the project carried out by the author of the present study, a model of the right to migration security was con-

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[4] The principle of migration security priority should be understood as a recognition of – at the level of both defining political strategies and even more so at the level of law making – the priority of guaranteeing the highest possible level of security to all participants of the migration process, that is migrants, as well as the receiving society – see: A.M. Kosińska, "The Creative Role of the European Council in the Area of Managing Asylum Migration and Return of Third-Country Nationals to Their Country of Origin in the Times of the Migration Crisis. Research on the Content of the EC's Conclusions 2011–2017," Yearbook of Polish European Studies (2018): 102, 107, 110-111.

[5] It is estimated that only in 2018 the death toll at the Mediterranean Sea was 2 299 persons – see: FRA Fundamental Rights Report 2019,128. The report available on the website: https://fra.europa.eu/en/publications-and-resources/publications/annual-reports/fundamental-rights-2019. [last access: 2.08.2019].

[6] M.J Alpes, S.Tunaboylu, I.van Liempt, Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum, Policy Brief Issue 2017/29, Migration Policy Centre Robert Schuman Centre for Advanced Studies, 2.

[7] Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU. See also: A. M. Kosińska, "Ewolucja koncepcji bezpiecznego kraju pochodzenia w dobie kryzysu migracyjnego," In: W obliczu kryzysu. Przyszłość polityki azylowej i migracyjnej Unii Europejskiej, ed. A. Kosińska (Lublin, 2017), 141-164.

[8] B. Mikołajczyk, "Mechanizm dubliński na rozdrożu – uwagi w związku z pracami nad rozporządzeniem Dublin IV," Europejski Przegląd Sądowy, (2018/3): 6.

structed[9]. The right to migration security finds its roots in the right of any person to security and in the idea of *human security*. This right, as well as the scope of the guarantees that it entails, might be reconstructed on the basis of the provisions of EU primary and secondary law and the case-law of the Court of Justice of the EU in the area of asylum and returns of third-country nationals to their countries of origin, as well as the provisions of public international law and the case-law of the European Court of Human Rights (ECtHR). Migration security should be ensured to all actors of the migration process – both migrants (seeking protection or remaining subject to the return procedure), as well as the receiving society[10]. The analysis of the said case-law is also aimed to provide an answer to the question whether it is possible at present to ensure effective protection of such right in the case-law of the CJEU.

In the light of the issues presented in the current article, it is crucial to emphasize that a special role in the development of the Union's system for the protection of fundamental rights has been played by the Court of Justice. In the initial stage of European integration, the CJEU in its case-law decided about the protection of fundamental rights "enshrined in the general principles of law"[11]. Truth be told, for many years the jurisdiction of the Court in the area of migration was limited. However, in the present state of the Union's law, the Court is ruling in the broad area relating to the AFSJ, mainly through the institution of questions referred for a preliminary ruling[12]. Thus, the Court assumes the role of the "doctrinaire authori-

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[9] The model of the right to migration security was presented in the article: A.M.Kosińska, B. Mikołajczyk, "Does the Right to Migration Security Already Exist? Considerations from the Perspective of the EU's Legal System," European Journal of Migration and Law, (2019/1): 83-116.

[10] The obligation to guarantee the right to migration security lies with the EU's institutions and national authorities transposing EU provisions into national legal systems of the Member States. Ibidem, 110.

[11] Judgment of the ECJ, 12.11.1969, Case C 29/69, *Stauder v. City of Ulm*, EU:C:1969:57. See: D. Chalmerd, G. Davies, G. Monti, European Union Law, Second Edition (Cambridge, 2011), 233 et seq.

[12] C. Costello, The Human Rights of Migrants and Refugees in European Law (Oxford, 2016), 51-53.

ty"[13], which, on the grounds of the interpretive power acquired by virtue of the treaties becomes the "institutional creator of legal doctrine"[14]. In spite of the lack of direct guarantees of the right to migration security in the Union's law, the aim of the article is to examine whether such protection is possible on the grounds of the case-law of the Court of Justice, which in its rulings refers to multiple dimensions of the problem of the protection of security in the migration process. The next question addresses the issue whether the said case-law of the CJEU provides sufficient grounds for the reconstruction of the standard of protection in this area.

2. ANALYSIS OF THE POST MIGRATION CASE-LAW OF THE CJEU

Migrants' fundamental rights, including the right to migration security, are guaranteed in the Charter of Fundamental Rights, especially in its Art. 18 (the right to asylum), 19 (protection in the event of expulsion), 4 (prohibition of inhuman treatment) and 6 (the right to security)[15]. Among the rulings directly and indirectly relating to the area of migration security, one could distinguish several groups of issues.

Firstly, they are issues with regard to the qualification procedure, that is access to international protection. The rules on the eligibility for international protection within the framework of the CEAS have been provided for in the so-called Qualification Directive (2011/95). The Directive is a source of secondary law, which is in force as for its objective and which does not unify, but merely harmonizes the national systems of the Member States[16]. Thus, the key for ensuring legal security and, in consequence, the right to migration security is to provide a uniform interpretation and

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[13] G. Ilik, "The Doctrinaire Authority: The Court of Justice of the EU and the Fundamental Rights," Singidunum. Journal of Applied Sciencies, (2013/10/2): 1.

[14] Ibidem, 5.

[15] For more on the subject, see: A.M. Kosińska, B. Mikołajczyk, "Does the Right to Migration Security Already Exists?" 95; D. Weissbrodt, M. Divine, "International Human Rights of Migrants" In: Foundations of International Migration Law, eds. B. Opeskin, R. Perruchond, J. Redpath-Cross (Cambridge University Press, 2012), 160 et seq.

[16] See: Art. 288 TFEU, Consolidated version of the Treaty on the Functioning of the European Union, OJ EU C 202, 7.06.2016, 47.

application of the provisions with regard to qualification. The role which cannot be overestimated in this regard is that of the CJEU and the institution of questions referred for a preliminary ruling.

In the case C 52/16 the Court carried out an interesting interpretation of the Qualification Directive, stating that during the procedure of the qualification for protection account should be taken of "the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat"[17]. By raising the standard for the qualification for protection, the Court simultaneously increased the standard of migration security[18]. What is more, in the present case, the Court permitted, as in accordance with the Qualification Directive, the possibility of extending the scope of international protection, granted to one member of the family, to other family members, in so far as "their situation is, due to the need to maintain family unity, consistent with the rationale of international protection"[19]. Necessarily, the interpretation of the circumstances allowing for the eligibility for international protection, even when conducted in the light of fundamental rights, has its boundaries. However, what is interesting in this case is the fact that

[17] Judgment of the CJEU, 4.10.2018, Case 652/16, *Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Ogla Ahmedbekov v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, ECLI:EU:C:2018:801, para. 51.

[18] The CJEU carried out an interesting interpretation of the Qualification and Procedural directive in the case C 585/16 (Judgment of the CJEU, 25.07.2018, *Serin Alheto v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite EU*:C:2018:584) in the proceedings concerning a national of Palestine. The persons living in the Gaza Strip are covered, in principle, by the protection of the UNRWA (United Nations Relief and Works Agency for Palestine Refugees in the Near East). In the case the Court held that it is possible to grant protection to such a person "where it becomes evident, based on an assessment, on an individual basis, of all the relevant evidence, that the personal safety of the Palestinian concerned is at serious risk and that it is impossible for UNRWA, whose assistance was requested by that person, to guarantee that the living conditions of that individual would be compatible with its mission, and that person is forced to leave the UNRWA area of operations" (para. 86 of the judgement). Therefore, the Court confirmed that the necessity of ensuring individual protection and, as a consequence, the guarantees of migration security remains a priority allowing for exceptional situations with reference to general principles.

[19] Case 652/16 para. 74. The condition for permitting such an extension is of course the lack of circumstances excluding such persons from international protection.

the Court decided that the bringing of the complaint to the ECtHR by the applicant against one's country of origin might be qualified "as a reason for persecution for 'political opinion', within the meaning of Article 10(1) (e) of the Directive, if there are valid grounds for fearing that involvement in bringing that claim would be perceived by that country as an act of political dissent against which it might consider taking retaliatory action"[20].

An interesting and important ruling from the perspective of the protection of the right to migration security was also the ruling in case C 56/17[21]. In this case, the Court carried out an interpretation of the concept of persecution on the grounds of religion under Art. 10 of the Qualification Directive. Firstly, the CJEU held that that the concept of "religion" for the purposes of qualification should be understood in a broad way[22]. The Court also held that it is not necessary for the applicant to submit proof in the form of documents or relevant statements concerning one's persecution in the country of origin, provided that the statements of the applicant might be considered as "coherent and plausible and do not run counter to available specific and general information relevant to his case, as well as the fact that the applicant's general credibility has been established"[23]. It is without doubt that in the case of the lack of qualification for protection, the applicant is forced to return to his country of origin, which at the same time exposes him to a potential risk of real persecution. Therefore, it seems that the primary objective of the qualification procedure is to ensure the applicant's security and to allow him to really seek protection.

The ruling directly connected to the situation of the migration crisis with the problem of access to the protection and territory of the MS was also the judgement of the CJEU in the case of X and X[24]. The case con-

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[20] Ibidem, para. 90.

[21] Judgment of the CJEU, 4.10.2018, Case C 56/17, *Bahtiyar Fathi v. Predsedatel na Darzhavna agentsia za bezhantsite* , EU:C:2018:803.

[22] Ibidem, para. 78: "the provision gives a broad definition of 'religion' which encompasses all its constituent components, be they public or private, collective or individual" (see, to that effect, judgment of 5 September 2012, Y and Z, C-71/11 and C-99/11, EU:C:2012:518, para. 63).

[23] Ibidem, para. 87.

[24] Judgment of the CJEU, 7.03.2017, Case C 638/16 PPU, *X and X v. Etat belge*, EU:C:2017:173. On the subject of this judgement I wrote in the context of the protec-

cerned a Syrian family who reached Lebanon and there in the Belgian embassy applied for visas with limited territorial validity. On the basis of the visas, the family wanted to enter into the territory of Belgium and lodge an application for international protection there. Upon the rejection of the application, the case was eventually brought before the CJEU in the manner of a question referred for a preliminary ruling. In accordance with Art. 25(1)(a) of the Visa Code, visas with limited territorial validity are issued "when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations". The applicants claimed that visas should be issued to them under Art. 18 CFR[25], guaranteeing the right to asylum, as the granting of international protection would be the only means of avoiding an infringement of Art. 4 CFR (3 ECHR)[26]. In its answer, the national court argued that the only obligation of Belgium is to observe the principle of non-refoulement, and that it has no obligation to receive foreign nationals into its territory[27]. In the proceedings, the Court carried out an interpretation of the concept of international obligations under Art. 25 of the Community Code on Visas (CCV) and examined whether "the international obligations referred to in that article include compliance by a Member State with all the rights guaranteed by the Charter, in particular, in Articles 4 and 18 thereof, by the ECHR[28] and by Article 33 of the Geneva Convention"[29]. By making the legal and systemic interpretation of the provision under Art. 25 CCV, the Court ruled that in accordance with its provisions, the granting of visas with limited territorial validity is

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tion of the right to cultural identity of a foreign national in a monographic study entitled Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej, (Lublin, 2018), 242-244. See also: E. Brouwer, AG Mengozzi's conclusion in X and X v. Belgium on the positive obligation to issue humanitarian visas. A legitimate plea to ensure safe journeys for refugees, CEPS Policy Insights 2017 (March), Issue 9, https://www.ceps.eu. [last access: 20.01.2019].

[25] Charter of Fundamental Rights of the European Union, OJ EU 202, 7.06.2016, p. 391.

[26] Case C 638/16 PPU, para. 23.

[27] Case C 638/16 PPU, para. 24.

[28] The Convention for the Protection of Human Rights and Fundamental Freedoms drafted in Rome on 4 November 1950, Journal of Laws of 1993 no. 61 item 284, as amended.

[29] Case C 638/16 PPU, para. 12.

not covered by the scope of the application of the Code and thus, in the present state of EU law, should be regulated by national law[30].

This ruling spurred intense discussion on the matter of the boundaries of the Union's moral responsibility for the fate of the Syrians cut off from the world in Aleppo[31]. As a result, the European Parliament started work on the draft of a legal act which would facilitate applying for humanitarian visas at the level of the Union[32]. The present ruling is a perfect, albeit sad, example of the balancing of the interests of the Member States, together with the receiving society, and of migrants, remaining under threat. In view of the lack of legal grounds for the issuing of visas, the formalistic interpretation conducted by the CJEU is by all means correct; nevertheless, it exposes a dichotomy which is difficult to accept by human rights defenders, namely that of the existence of the norms for the protection of fundamental rights and the possibility of their application. In the present case, the Court took the stance that it is necessary to ensure legal security. Without doubt, the possibility of the issuing of humanitarian visas would facilitate to a large degree the guaranteeing of migration security, by providing for the legal and secure migration channels from third countries into the territory of the Union. The ruling is an important example of the extent to which the case-law of the CJEU, even though not satisfactory for human rights defenders, might function in the social sphere. Already during the proceedings, the most important NGOs signed a joint statement on the need of creating safe migration channels[33]. A proof of the real impact of the ruling on the realization of the Union's policies is also the

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[30] Case C 638/16 PPU, para. 43-45. See also: the sentence of the judgement.

[31] See: M. H. Zoeteweij-Turhan, A. Romano, "X and X v. Belgium: the need for EU legislation on humanitarian visa," *Sui Generis,* (2017): 68-84. https://sui-generis.ch/article/view/sg.35/388. [last access: 20.01.2019].

[32] The first draft of the project was rejected: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2017/2270(INL). Next, Civil Liberties Committee voted in favour of the proposal to the European Commission for submitting legislative proposals on humanitarian visas until March 2019 - http://www.europarl.europa.eu/news/en/press-room/20181203IPR20713/humanitarian-visas-would-reduce-refugees-death-toll. [last access: 20.01.2019].

[33] https://redcross.eu/latest-news/ngos-call-for-safe-and-legal-avenues-for-migrants. [last access: 20.01.2019].

fact of the active involvement of the European Parliament for the establishment of humanitarian visas[34].

The question directly connected with applying for international protection and ensuring security to all the actors of migration processes is the observance of the principle of non-refoulement and the question of the assessment of the security in the country of origin of migrants in a situation of their potential return there[35]. In the case C 353/16, the CJEU interpreted the provisions for eligibility for subsidiary protection. The case concerned a national of Sri Lanka, tortured in the country of origin, who, as a consequence of being subjected to torture suffered from post-traumatic stress disorder and psychological problems[36]. In the proceedings, the Court examined the possibility of applying to the case protection under Art. 4 CFR (protection against inhuman treatment) and emphasized that for that case the standards for protection under Art. 3 ECHR might be applied, as established in the line of jurisprudence of the ECtHR. The Court held that "the removal of a third country national with a particularly serious mental or physical illness constitutes inhuman and degrading treatment, within the meaning of that article, where such removal would result in a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned"[37]. The CJEU simultaneously observed that the very aggravation of mental problems in the case of the return to the country of origin does not constitute inhuman treatment, whereas such inhuman treatment might be that of depriving the applicant of access to health care, provided that it would have a degrading effect on

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[34] Humanitarian visas. European Added Value Assessment accompanying the European Parliament's legislative own initiative report (Rapporteur: Juan Fernando Lo pez Aguilar), Study. European Parliamentary Research Service, 2018, report available on the website: www.europarl.europa.eu. [last access: 20.01.2019].

[35] See: D. Ghezelbash, "Refuge Lost. Asylum Law in an Interdependent World," Cambridge Asylum and Migration Studies (2018): 31; V. Moreno-Lax, "Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law," Oxford Studies in European Law, (2017): 281 et seq.

[36] Judgment of the CJEU, 24.04.2018, Case C 353/16, MP v. Secretary of State for the Home Department, EU:C:2018:276.

[37] See: Ibidem, para. 41.

the applicant's state of health[38]. What is also significant, the security of an eventual return should be assessed on the basis of international standards as contained in the Convention against torture. The Court carried out a broad interpretation of the provisions for the eligibility for international protection in the above case, taking the stance that it is a necessary to provide a higher level of protection against the risk of inhuman treatment[39].

Moving further, in the case C 180/17, the Court examined the compliance of the Return Directive (2008/115) with national regulations in a situation where in the case of issuing a return decision, the national regulations (Dutch) provided for a two-instance appeal procedure[40]. In the proceedings of the II instance, in accordance with the national law, the bringing of a complaint did not automatically suspend the enforceability of the return decision, even in the case when foreign nationals referred to the risk of an infringement of the principle of non-refoulement. The Court observed that the interpretation of the provisions of the Directive must be carried out in full respect for fundamental rights. The Court also emphasized that the compatibility of the national provisions with the Union's law should be assessed on the grounds of the principles of equivalence and effectiveness. However, due to compatibility of the national standards with the Union's standards – the providing of the measure suspending the realization of the return decision at the level of the I instance procedure – the Court did not find incompatibility in the standards for protection. As it transpires from the above ruling, the protection granted to foreign nationals is of a limited character on account of the rational assessment of the legal measures the foreign nationals are entitled to and should not lead to abuse of the law[41].

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[38] Ibidem para. 49.

[39] This ruling seems to be significant also due to the fact that the Court took a different stance from that of the Advocate General in the above case. Yves Bot in his opinion decided that in the case C 353/16 there are no circumstances justifying the granting of subsidiary protection.

[40] Judgment of the CJEU, 26.09.2018, Case C 180/17, X and Y v. Staatssecretaris van Veiligheid en Justitie, EU:C:2018:775.

[41] In a similar way, the Court ruled in the case C 239/14, which concerned the compatibility of the Union's law with the national law, which provided for the lack of suspensive effect of the appeal against the contested decision, leaving another asylum application

In the case of Mirza, the CJEU examined the permissibility of the application of the concept of the safe third country[42]. The proceedings concerned a foreign national who arrived in Hungary from Serbia and then was detained in the Czech Republic and returned to Hungary. In accordance with the national list of the safe third countries, Serbia was considered to be one of such countries and therefore Hungary wanted to send the foreign national there. Hence, Hungary referred a question for a preliminary ruling to the CJEU, asking whether such a transfer, preceded by the fact that the Member State (in that case Hungary) established itself as the State responsible on the grounds of the Dublin III regulation, might take place even before the formal closure of the first proceedings for granting international protection. The Court answered this question in the positive. Thus, the Court held that the national lists of safe third countries adopted on the basis of the Union's provisions meet the standards for the protection of the interests and rights of the returned foreign national, with regard to the effectiveness and access to the procedure[43]. Moreover, from the ruling of the Court it transpires that the effective examination of the applications for protection and the effective management of migration influxes are key for the security of migration management.

Similarly, the concept which might be viewed as controversial from the perspective of the protection of human rights is that of the safe country of origin. The project of the regulation establishing such a list was subject to severe criticism during the migration crisis[44]. At present, there is work in

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without examination. Having examined the compatibility of the national law with the Union's law in the light of Art. 19 and 47 CFR, the Court did not find an infringement of the right to an effective appeal procedure. See: Judgment of the CJEU, 17.12.2015, Case C 239/14, Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy (CPAS de Huy), ECLI:EU:C:2015:824.

[42] Judgment of the CJEU, 17.03.2016, Case C 695/15 PPU, Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal , EU:C:2016:188. Art. 38 Directive 2013/32 lays down the conditions for acknowledging a third country as a safe country for the applicant.

[43] The criteria are provided for under Art. 38 Directive 2013/32 (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, OJ L 180, 29.6.2013, p. 60).

[44] See footnote 7.

progress on a Procedural Regulation, which would include the governance on the adoption of a common, EU list of safe countries[45].

Directive 2013/32, still remaining in force, allows for the adoption of an accelerated procedure in the case of granting international protection, amongst others, in the case where a foreign national comes from a safe country of origin (Art. 31(8)(b)). The criteria for the establishing of the lists of the safe countries of origin were provided for under Art. 37 of the Directive; however, what is significant is that the Member States were not obligated to draft such lists as it was left to their discretion. The question for a preliminary ruling in the case C 404/17 was referred to the CJEU by the Swedish court, which asked for the interpretation of the amended Swedish law on foreign nationals in the light of the Union's law[46]. The Swedish law was updated with a view to implementing Art. 31(8) of the Directive and thus its provisions allowed for "the immediate enforcement of its removal decisions, even before they become definitive, if the asylum application was manifestly unfounded and there was manifestly no other reason to grant the asylum seeker a residence permit"[47]. In its assessment of the compatibility of the Swedish regulation with regard to the accelerated proceedings, the Court observed that the Swedish authorities based their procedure on an algorithm analogous to the one provided for under Art. 36 and 37 of the Directive concerning the safe countries, whereas the list of safe countries of origin was not introduced into the Swedish law. The Court emphasized that the application of a rebuttable conception of the safe countries of origin cannot take place in the absence of the implementation of the provisions of the Directive in this area into the national law. All the more so, as it transpires from the provisions of the Directive that "a Member State may not consider an application for international protection to be manifestly unfounded because the applicant's representations are insufficient"[48]. Thus, the Court ruled that there is no possibility of

[45] Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final - 2016/0224 (COD).

[46] Judgment of the CJEU, 25.07.2018, Case C 404/17, *A v. Migrationsverket*, EU:C:2018:588.

[47] Case C 404/17, para. 13.

[48] Ibidem, para. 34.

considering an application for international protection as manifestly unfounded on the basis of Art. 31(8) in the light of Art. 32(2)[49] in a situation when a Member State has not adopted a national list of the safe countries of origin.

In the case of M.[50], while interpreting Art. 14(4-6) of the Qualification Directive, the CJEU also referred to the guarantees transpiring from the non-refoulement principle. The Court emphasized that in the case when a person has been refused international protection or when a person's refugee status has been revoked, the provisions of the Directive should be interpreted in the light of the fundamental rights as guaranteed by the Charter. In view of the above, it is not possible to return a foreign national to his country of origin if he were to be exposed there to a risk of inhuman treatment, even in a situation when the foreign national concerned has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of the receiving country[51].

The security of the migrants applying for international protection and remaining subject to the return procedure is also determined by whether they are guaranteed administrative and legal security, i.e. whether they are guaranteed, in administrative procedures and the procedures before the national court, the right to good administration under Art. 41 CFR and the rights of an affective remedy and to fair trial under Art. 47 CFR. The Court has expressed its opinion on this matter extensively in the existing case-law[52].

In the cases examined after 2015, the Court expressed its opinion on the subject, amongst others, of the right to a fair public hearing and its importance for the procedure of applying for international protection –

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[49] In accordance with the Article: "In cases of unfounded applications in which any of the circumstances listed in Article 31(8) apply, Member States may also consider an application to be manifestly unfounded, where it is defined as such in the national legislation".

[50] Judgment of the CJEU, 14.05.2019, *M v.Ministerstvo vnitra* (C 391/16) and X (C-77/17) and X (C-78/17) v. Commissaire général aux réfugiés et aux apatrides, EU:C:2019:403.

[51] Case C 391/16, para 94.

[52] F. Ippolito, "Migration and Asylum Cases before the Court of Justice of the European Union: Putting the Eu Charter of Fundamental Rights to Test?" European Journal of Migration and Law, vol. 17 (2015/1): 31.

the CJEU emphasized that "the right to be heard forms an integral part of the rights of the defence, the observance of which constitutes a general principle of EU law…"[53]. Further, in the case C 348/16, the Court examined the compatibility of national provisions with EU law in the light of the principle of effective judicial protection. As the formation of the court reminded, with reference to the existing case-law: "The principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented"[54]. However, the CJEU pointed out, referring also to the line of jurisprudence of the ECtHR, that the right of the defence is not of an absolute character and might be subject to limitations with a view to protecting the general interest[55].

Expressing its opinion on the subject of the realization of the guarantees under Art. 47 CFR in the area of asylum and return procedures, the Court emphasized in its judgement in the case C 181/16 that in the case of appealing against the return decision, the guaranteeing of the suspensive effect on the realization of that decision by virtue of law is aimed at the protection of fundamental rights of a foreign national – including the principle of non-refoulement, and in consequence the guarantees of the rights under Art. 18 CFR and Art. 19(2) CFR[56]. Moreover, with regard to the validity of the existence of two-instance appeal procedure in asylum and return cases, the CJEU emphasized that EU law does not impose such a requirement on the Member States; however, the eventual implementation of such legal solutions should be compatible with the principle of equivalence[57]. Moreover, the implementation of the Union's provisions

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[53] Judgment of the CJEU, 7.02.2017, Case C 560/14, *M v. Minister for Justice and Equality Ireland and the Attorney General*, EU:C:2017:101, para. 25. See also para 32.

[54] Judgment of the CJEU, 26.07.2017, Case C 348/16, *Moussa Sacko v. Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, EU:C:2017:591, para. 32.

[55] Ibidem, para. 38.

[56] Judgment of the CJEU, 19.06.2018, Case C 181/16, *Sadikou Gnandi v. État belge*, EU:C:2018:465, para. 54.

[57] Judgment of the CJEU, 26.09.2018, Case C 175/17, *X v. Belastingdienst/Toeslagen*, EU:C:2018:776], para 39. In accordance with the equivalence principle "procedural rules

into the national law should be carried out in accordance with the principle of effectiveness[58].

An especially controversial measure applied by the Member States with a view to ensuring migration security is the detention of the persons seeking international protection or the detention of persons in the return procedure. The present legal regulations allow for the application of the so-called alternatives to the detention of asylum seekers, such as house arrest or electronic monitoring. Nevertheless, in accordance with the provisions of the Return Directive and Directive 2013/33, in some special cases the detention of foreign nationals remains possible[59]. The existing case-law of the CJEU in this regard is very extensive[60]. In the judgement in the case C 18/16 handed down already after the escalation of the migration crisis, the Court, in its opinion on the appropriateness of the application of detention measures, emphasized that the scope of the right to personal security, as guaranteed under Art. 6 CFR, corresponds to the protection provided for under Art. 5 ECHR[61].

The Court also observed, referring to the opinion of the Advocate General in this case, that all measures limiting the rights and freedoms of an individual, should serve the realization of the general objective of the Union, which is "the proper functioning of the Common European Asylum System, based on the application of criteria common to the Member

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governing actions for safeguarding the rights which individuals derive from EU law must not be any less favourable than those governing similar domestic actions".

[58] Case C 175/17, para. 39. In accordance with the principle of effectiveness: "procedural rules governing actions for safeguarding the rights which individuals derive from EU law … must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union". The interpretation of the principle of effectiveness was carried out by the CJEU in Case C 429/15 *Evelyn Danqua v. Minister for Justice and Equality and others*, 20.10.2016, EU:C:2016:789.

[59] See: Art. 15 of the Directive 2008/115, Art. 8 of 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, OJ EU L 180, 29.06.2013, 96.

[60] See: M.-L. Basilien-Gainche, "Immigration Detention under the Return Directive: The CJEU Shadowed Lights," European Journal of Migration and Law, vol. 17 (2015/1): 104 -126.

[61] Judgment of the CJEU, 14.09.2017 Case C 18/16, *K. v Staatssecretaris van Veiligheid en Justitie* EU:C:2017:680, para. 32.

States"[62]. Assessing the compatibility of the regulations introduced to EU law allowing for the detention of third-country nationals with the standards for protection of fundamental rights of an individual, the CJEU emphasized that they were based on "the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers of 16 April 2003 and on the United Nations High Commissioner for Refugees' (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999", and that they belong to exceptional measures and may be used only as a last resort[63]. Further, referring to the compatibility of the Union standards with the Strasburg standards, the Court reminded that the detention of a foreign national is permissible provided that the measure of detention will be in accordance with the law and will be applied in accordance with the objective and in the conditions which protect an individual against arbitrariness[64]. The ensuring of migration security in a situation of the detention of migrants is a procedural challenge and refers to a difficult situation in which the authorities of the Member States must strike a balance in the appropriate application of legal measures for the proper functioning of the CEAS, limiting for that purpose the migrant's personal freedom[65].

3. CONCLUSIONS

After the analysis of the rulings of the CJEU handed down after the escalation of the migration crisis in 2015, one could bring up certain general conclusions. Firstly, the case-law is distinctly diverse with respect to the issues related to the Area of Freedom, Security and Justice. On the other hand, the said diversity also concerns the origin of the institution of the questions for preliminary ruling, referred to the Court by both the old, as well as the new (2004) Member States. It is a proof of the activity of the national courts, and, simultaneously, of the Union's judges in the appli-

[62] Case C 18/16, para. 36.
[63] Case C 18/16, para. 46.
[64] Ibidem, para. 52.
[65] Ibidem, para. 49.

cation of EU law. It might be thus assumed that the case-law sets out the broad lines for the implementation of the Union's law, which the Member States had to face during the mass influx of migrants.

The main objective behind the analysis of the rulings of the CJEU was to provide an answer to the question whether there exists a jurisprudential standard of the right to migration security, i.e. whether in such a special time when the Union had to deal with the migration crisis, one could identify, in the line of jurisprudence of the CJEU on the AFSJ, certain special and consequently protected values or social groups which are granted protection. As regard the scope of the above analysis, as well as the analyses presented in the previously cited articles outlining the scientific results of the current research stage of the project, one could present the following conclusions:

Firstly, the Court of Justice in its case-law often refers to the concept of legal security. Through its judicial activism, the concept of legal security found its broad application in the cases relating to the AFSJ. Legal security entails, on the one hand, the certainty of the law (C 661/17[66]), both for the addressees – migrants, as well as for the authorities of the Member States, and on the other hand, the strict delineation of the boundaries of EU law and the possibilities of its application (as in the widely-debated case of X and X). The legal security also entails the administrative and procedural security, encompassing the right of the defence and the right to be heard guaranteed to the participants of the migration process. What was somewhat surprising in the analyzed material was the sheer number of cases that the Court examined with regard to precisely the question of legal and administrative security of foreign nationals[67]. However, the appropriateness of such an approach remains beyond doubt and although it might seem to be oversaturated with bureaucratism and formalism, the security of the administrative procedures guarantees migration security. It is a condition *sine qua non*. For instance, a fair procedure of the qualification for protection is a condition of protection against an arbitrary expulsion

[66] Judgment of the CJEU, 23.01.2019, Case C 661/17, *M.A. and Others v The International Protection Appeals Tribunal and Others*, EU:C:2019:53.

[67] See, to that effect, Judgment of the CJEU, 9.02.2017, Case C 560/14, *M v Minister for Justice and Equality Ireland and the Attorney General*, EU:C:2017:101; C 180/17.

and inhuman treatment in the country of origin, and thus safeguards the migration security of the migrant.

Secondly, the key word which might be used to characterize the whole case-law of the CJEU after 2015 is the need to maintain BALANCE[68]. The maintenance of such balance requires establishing equilibrium between the necessity of protecting fundamental rights of foreign nationals and the necessity to ensure security to the receiving society. Simultaneously, it will facilitate the implementation of the migration security principle with regard to all the participants of the migration process[69]. The necessity of striking a balance between the protected goods, such as migrants' fundamental rights and the interest of the receiving society can be found in the rulings of the CJEU in the cases concerning the bans on entry issued to foreign nationals (e.g. C 82/16, C 225/16[70]), exclusion from international protection (C 369/17[71]) or the necessity of applying detention against foreign nationals (C 18/16, C 601/15). However, the CJEU consequently emphasized that the derogation of migrants' fundamental rights, such as personal freedom or the freedom of movement is possible only on condition that an individual assessment of the migrant's situation is carried out. Thus, the limitation of migrants' rights with a view to protecting the security of the receiving society is possible, but is not unconditional, as it should always take place on the basis of an "individual assessment"[72].

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[68] See also, to that effect, S. Peers, "Irregular Migrants. Can Human Treatment be Balanced Against Efficial Removal?" European Journal of Migration and Law, vol. 17 (2015/4): 296.

[69] See more: A.M. Kosińska, "The problem of migration security in the current case-law of the CJEU – the perspective of Member States".

[70] Judgment of the CJEU, 8.05.2018, Case C 82/16, *K.A. and Others v Belgische Staat*, EU:C:2018:308; Judgment of the CJEU, 26.07.2017, Case C 225/16, Criminal proceedings against Mossa Ouhrami, EU:C:2017:590.

[71] Judgment of the CJEU, 13.09. 2018, Case C 369/17, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, EU:C:2018:713.

[72] This is what the Court emphasized in the cases C 82/16; Judgment of the CJEU, 2.05.2018, Case C 331/16, *K. v Staatssecretaris van Veiligheid en Justitie* and *H.F. v Belgische Staat*, EU:C:2018:296; C 369/17; Judgment of the CJEU, 16.01.2018, E., C 240/17, EU:C:2018:8.

The above analysis of the case-law of the CJEU concerning the problem of protection of migrants' fundamental rights leads to certain conclusions and open questions.

A large number of questions for a preliminary ruling is proof of the appropriateness of the extension of the jurisdiction of the Court by the cases relating to the AFSJ. It is worth remembering that the parties to the proceedings cannot individually apply for referring a question for a preliminary ruling to the CJEU – the final decision in this matter lies with the national court. Hence, C. Costello's observation that "National judges are guardians and gatekeepers of migrants' EU rights"[73] is accurate and important. It is worth remembering about this special moral responsibility of the judges and, at the same time, carry out civil education in this respect.

It should also be highlighted that the case law of the CJEU in the area of the rights of migrants and the receiving society to the security of migration is very abundant. In spite of the fact that the right to migration security has been guaranteed neither in EU primary nor secondary law, its guarantees may be reconstructed on the basis of the existing case-law. The activism of the jurisprudence of the Court leads to the co-creation of an added value, such as "human rights pluralism"[74]. It so happens, amongst others, through the extensive reference of the CJEU to the jurisprudence standards of the ECtHR, established primarily in the cases concerning Art. 5 and 3 ECHR. The joining of the systems of protection of the EU and EC transpires of course from the very EU primary law (most importantly under Art. 6(3) TEU and Art. 53 CFR). The joining of the standards concerning the security in the area of migration seems to be especially important for the management of migration in the Schengen area. It seems that it might be significant for the subject under discussion that there is a possibility of adopting the "positive obligation doctrine" from the field of ECHR[75] into the area of the jurisprudence of the CJEU. It is without doubt that the Court also imposes some obligations onto the administra-

[73] C. Costello, The Human Rights of Migrants and Refugees in European Law (Oxford, 2016), 325.

[74] Ibidem, 317.

[75] M. Beijer, "Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine," Review of European Administrative Law, vol. 8 (2015/2): 5.

tive bodies of the Member States in the area of asylum and return procedures (as, e.g. in the case C 404/17)[76].

One should also agree with K. Groenendijk that the formula in the case of CILFIT[77] established by the CJEU in 1982 finds its application in the cases concerning asylum and migration. In the judgement rendered in this case, the Court held that "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied"[78]. It remains without doubt that the migration *acquis* of the Union is at present much more developed in comparison with 1999, when the Treaty of Amsterdam entered into force. Hence, the Court in the justifications of its judgements refers to the whole case-law of the Union in the area of migration, taking into account the necessity of providing the greatest effectiveness to EU regulations.

The law of the Union to a large degree protects the rights of migrants as active participants of the migration process, which belong to a group especially exposed to violations. The case-law of the CJEU analyzed in the present study demonstrates the key role played by the guarantees under Art. 18 and 19 CFR, and further under Art. 4, 6 and 47 CFR[79] in the interpretation of EU law. Most certainly, an important contribution of the CJEU in the protection of migrants' fundamental rights in the future would also be the doctrine of *Reverse Solange*[80] in a situation when in one

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[76] Ibidem, 8. A specific effect of the "positive obligation doctrine" after the judgement in the case of X and X was also the beginning of work in the European Parliament on the law allowing the EU to issue humanitarian visas.

[77] K. Groenendijk, "Recent Developments in EU Law on Migration: The Legislative Patchwork and the Court's Appproach," European Journal of Migration and Law, vol 16 (2014/3): 329.

[78] Judgment of the ECJ, 6.10.1982, Case C 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, EU:C:1982:335 para. 20.

[79] See: C 18/16, C 353/16, C 181/16.

[80] In accordance with the doctrine: "…in the case when a Member State seriously and persistently breaches the essence of fundamental rights, the Charter of Fundamental Rights finds its application towards this Member State outside the jurisdiction of EU law, which is justified by the essence of EU citizenship and under Art. 2 TEU" – A. M. Kosińska, Prawa kulturalne obywateli państw trzecich w prawie Unii Europejskiej

of the Member States there would exist a real threat to migrants' fundamental rights.

Unfortunately, on the basis of the existing line of jurisprudence of the CJEU it is not yet possible to directly define the standard for the protective right to migration security as a solidarity right and the term itself is not directly present in the legal discourse and argumentation. However, in my view, it is justifiable to claim that on the basis of the case-law of the CJEU in the AFSJ , it is possible to indirectly reconstruct a jurisprudential standard for the protection of the right to migration security of migrants, which will consist of the interpretation of the protection of fundamental rights guaranteed in the Charter, the interpretation of the non-refoulement principle, the interpretation of the concept of legal and administrative security, the interpretation of the guarantees of access to international protection and the interpretation of the detention rules.

In the light of the above considerations, the right to migration security may be, in my opinion, reinterpreted from the case-law concerning the Dublin cases, security of the Member States and migrants' fundamental rights. Thus, the whole body of the interpretative output of the CJEU is based on the three axiological foundations existing in the line of jurisprudence of the Court – solidarity[81], certainty of the law and the need to strike a balance between the protected goods, when providing protection to each of them is mutually exclusive. The introduction of the concept of the right to migration security into the doctrinal discourse might contribute to a broader and a more inclusive understanding of the concept of migration security and at the same time strengthen the existing guarantees in this area, contribute to better protection of vulnerable groups and become a common denominator for numerous issues, which all play a part in the area of migration security.

(Lublin, 2018), 129. See: D. Kornobis-Romanowska, "Prawa podstawowe w orzecznictwie TSUE jako czynnik konstytucjonalizacji czy umiędzynarodowienia UE?" In: Unia Europejska w roli gwaranta i promotora praw podstawowych, ed. D. Kornobis-Romanowska (Sopot, 2016), 32.

[81] See: A.M. Kosińska, "Standard bezpieczeństwa migracyjnego w świetle aktualnego orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej w sprawach dublińskich."

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