



**FACULTÉ  
DROIT**  
Université Catholique  
de Lille 1875

**C3RD**



# The RoL and Immigration

Dr Silvia Bartolini

Associate Prof Université catholique de Lille

Guest Lecturer NKUA

# Background

- EU Asylum/Immigration acquis > urgent challenges facing the EU.
- Crisis since 2015.
- Mass influx of asylum seekers > the limitations inherent in the legal design and implementation modes :
  1. **A persistent and intentional non-compliance** > mutual trust between MS.
  2. **Fundamental rights violations** > systemic > humanitarian emergency.

# CORE PRINCIPLES/PROCEDURAL GUARANTEES

# Asylum Key Rules

- Access to procedures ➤ Article 6 of Directive 2013/32 and Article 18 of the Charter ➤ access to an effective (impartial) remedy in line with Article 46(5) of Directive 2013/32 and Article 47 CFR (Commission v Hungary I - C-808/18)
- Right to remain while pending and application
- Unsuccessful applicants ➡ Return Directive

# Immigration Key Rules

- Article 3(4) Return Directive, a 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a TCN to be illegal and imposing or stating an obligation to return.
- Article 13(1) Return Directive ➤ return decisions must be capable of being **appealed** against or **reviewed** before a competent judicial or administrative authority or a body composed of members who are **impartial and independent**.
- Article 47 CFR requires the Member States to guarantee, at a certain stage of the proceedings, the possibility for the TCN concerned to bring any dispute relating to a return decision adopted by an administrative authority before a court (FMS, *E/ Hassani*).
- Article 5 of the Return Directive, in conjunction with Article 19(2) CFR ➤ administrative authorities to ensure compliance with the *non-refoulement* principle

# Use of Detention

- Verifying information Directive 2013/33/EU (Reception Conditions Directive)
  - To determine or verify identity or nationality.
  - To determine elements on which the application for international protection is based.
- When protection of national security or public order so requires.
- Dublin transfer - Regulation (EU) No 604/2013 (Dublin III Regulation)
- Removal - Directive 2008/115/EC (Return Directive)

# Effective Remedy

- **Respect for the rule of law** implies that for every EU right, there **must** be an effective remedy ('ubi jus ibi remedium').
- A remedy may only be effective where individuals have **access to justice**, and **enjoy the full protection of their rights**, obtaining, as the case may be, interim, injunctive, declaratory, and/or monetary relief.

# FMS – Judicial Independence – External Pressure

- C-924/19 PPU and C-925/19 PPU
- Transit zones Röszke and Tompa
- Asylum applications > inadmissible > the applicant “arrived through a country where he or she is not exposed to persecution ... or to serious harm..., or in the country through which the applicant arrived in Hungary provides an adequate level of protection.”
- Return Decision to Serbia
- Denied admission to Serbia
- Back to the transit zones > Return Directive > amended > the country of destination (Syria, Afghanistan) > no principle of refoulement



# What remedy?

- *“an objection against an administrative decision amending an initial return decision can be lodged only with the asylum authority and that no appeal lies against the decision whereby that authority rejects that objection.”*
- *“It is apparent from the orders for reference that the asylum authority comes under the authority of the Minister responsible for the police and is thus part of the executive” (para 134)*

# So?

- It does not satisfy the conditions laid down in Article 47 CFR ➡ no subsequent judicial review of the decision incompatible with Article 13(1) Return Directive 2008/115 ➡ fails to comply with the essential content of the right provided for in Article 47 CFR ➡ it deprives the person concerned of any judicial remedy against a return decision relating to him or her

# What's the role of the national courts?

- principle of primacy of EU law ➡ any national court, acting in the exercise of its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case before it
- Article 47 CFR has direct effect...
- Up to the MS > Article 19 (2) TEU

# Ensuring effective judicial protection

1. The absence, in the laws of the MS concerned, of a judicial remedy permitting a review of the lawfulness, ... cannot relieve the national court of its obligation to ensure the full effectiveness of **Article 13(1) of Directive 2008/115** which, having direct effect, may constitute in itself a directly applicable basis for jurisdiction, when it has not been properly transposed into the national legal order.
2. Article 47 CFR ➤ require the referring court to declare that it has jurisdiction to hear the actions brought by the applicants in the main proceedings against the decisions of the asylum authority rejecting their objections to the administrative decisions ordering them to return to their countries of origin **and to disapply, if necessary, any national provision prohibiting it from proceeding in that way.**

# AG BOBEK in Torubarov C–556/17

- **The role of national courts** is key to ensure that “the law is observed and individual rights are protected” (para 50)
- When national judges act as EU law judges within the scope of EU law, they have the same duty to **ensure that “the law is observed and the rights of individuals which are derived from EU law are protected at national level”** ( para 51).

# Torubarov

- C–556/17
- T. applies for asylum in Hungary (Immigration office)
- T. appeals against that decision before the Administrative Court > annuls the Immigration Office's decision on the grounds that it contained inconsistencies and that the Immigration Office had failed generally to examine the facts had assessed them in a biased manner, with the result that the decision was unfounded and was not amenable to a review by the court. In its **decision**, that court also provided the Immigration Office with detailed guidance as to the factors that it was required to examine in the new procedure that was to be undertaken.
- T. second application > rejected > again the Administrative court annuls the decision
- T. third application ...here we go again !

# Res Judicata

- Public authorities should not call into question the position taken by a court in a final decision.
- ‘the right to an effective remedy would be illusory if a Member State’s legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party’
- **“In the EU legal order, the principle of finality of judgments also applies to those issued by the Court of Justice.** Accordingly, when it comes to the interpretation of EU law, the Court of Justice has the *final* say, and when it comes to the validity of that law, it has the *only* say. Otherwise, if public authorities, in general, and national courts, in particular, were to second-guess the interpretation of EU law put forward by the Court of Justice, the rule of law within the EU would become no more than the rule of lawlessness”. (K. Lenaerts)

What if disregarding res judicata is not a single mishap but a systematic and intentional manoeuvre to dismantle EU immigration and asylum policy?



## Commission v Hungary II C-123/22

Failure to comply with a judgment relating to a **general and persistent** practice to circumvent EU obligations under Asylum/Immigration law is particularly serious and it further undermines the principle of legality and the principle of *res judicata* in a Union based on the rule of law.

*The **systemic and deliberate** evasion by a Member State of the application of a common policy constitutes an unprecedented and exceptionally serious infringement of EU law, which represents a significant threat to the unity of EU law and to the principle of equality of the Member States, referred to in Article 4(2) TEU*

# Commission v Poland, Hungary and Czech Republic Joined Cases C-715/17, C-718/17 and C-719/17

Para 139 In a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness. Since Decisions 2015/1523 and 2015/1601 were, as of their adoption, of a binding nature for the Republic of Poland and the Czech Republic, those Member States were required to comply with those acts of EU law and to implement them throughout their two-year period of application. The same applies in respect of Hungary as regards Decision 2015/1601, an act which was of a binding nature for that Member State as of its adoption and throughout its two-year period of application

# Commission v Hungary I (C-808/18)

- Consistent and generalised administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so *systematically and drastically* that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection in Hungary.
- TCN subject to forcible deportation beyond the border fence, without prior compliance with the procedures and safeguards provided for in the Return directive

# Commission v Hungary II C-123/22

## Deliberate Evasion

- **No access to procedure**: Infringement of that fundamental provision systematically prevents any access to the international protection procedure, making it impossible for the Member State concerned to apply that policy, as established in Article 78 TFEU, in its entirety.
- Use of Detention
- Automatic removal
- **No application of procedural/substantive safeguards** ➤ infringement of fundamental provisions > removal of irregular TCN : makes it impossible to apply Article 79(2)(c) TFEU.

# Prolonged Failure

102 *In the first place, as regards the seriousness of the infringements at issue, a prolonged failure to comply with a ruling of the Court of Justice in itself **seriously undermines** the principle of legality and the principle of res judicata in a Union based on the rule of law.*

# *X v State Secretary for Justice and Security*

- A Syrian national challenged a decision on a Dublin transfer from the Netherlands to Poland, claiming that he risked a violation of his fundamental rights after such a transfer, considering that he had already been subjected to pushbacks to Belarus on three occasions by Polish authorities and that he was detained for 1 week in the border guard centre, without food and medical checks.
- A Dublin transfer must not take place if there are substantial grounds to believe that the applicant would, during or after the transfer, face a real risk of being subjected to pushbacks or detention that would place the person in a situation of extreme material poverty which would amount to inhuman or degrading treatment.

# Moving further

## New Pact on Asylum and Migration

- Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147
- Border Procedure
- Asylum Procedure Regulation > return directive