

ASYLUM LAW REGULATION AND CURRENT EVENTS OF ITS APPLICATION IN LATVIA

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Abstract. *The development of the regulatory framework of Latvia's Asylum and external border is determined by international regulatory framework, the EU's regulatory framework and influence of Latvian bilateral relationship as well as the need to balance the free movement of persons which is essential part of human rights in order to ensure the legislation in relation to Latvian external border regime within international and national legal framework. This is evidenced as a problematic issue in regulatory framework, law practices and border control both in Latvia and other EU countries. It is necessary to explore international, EU and national legal framework within the EU's external borders functioning in Latvia by detecting problems in the EU's Asylum determination in the context of border regime and border control regulatory framework, by exploring legislation, legal concepts, incompleteness of terminology and eventually to develop suggestions for improving laws and regulations. The primary method is Analytical method - the analysis of international, EU, the Schengen Acquis and the national regulatory framework and administrative practice.*

Keywords: *Asylum, regulatory framework, external borders, Schengen Acquis, border regime*

Introduction

The threat of illegal immigration in Latvia in comparison to other EU Member States is increasing. Taking into account the level of socio-economic development, small territory, population quantity, geographic location of Latvia among the Baltic States it is important to avoid mistakes in immigration control process as happened in the biggest European countries.

Major threats of illegal immigration are on the Latvian - Russian and Latvian - Belarusian border. Russia as a transit country is used not only for the citizens of East and Central Asia, but even for citizens of Africa. In contrast, Belarus as a transit country is used for illegal immigrants mostly from Ukraine, Moldova, Caucasus, Central Asian and Eastern countries. Illegal immigration risk direction is also "Riga" airport, where the annual flow of persons is increasing rapidly (Public reports of the State Border Guard, year 2010 - 2015).

The aim and objectives of the research are to explore international, EU and national legal framework.

Objectives of the research:

- to study legal framework in the European Union region;

- to summarize topical problematic issues of Asylum cases in legal practice of Latvian Administrative courts;
- to detect problems and to provide recommendations and solutions to improve Asylum regulatory framework.

Research period 2015 – 2016. Research methods:

- monographic or descriptive method - describing the internal and external regulatory framework application trends, issues, and current events;
- analytical method - the analysis of international, EU, the Schengen Acquis and the national regulatory framework in Asylum Law (external and internal regulations), jurisprudence, administrative practice of the Public institutions and operational performance indicators.

Hypothesis envisages further strengthening of Latvia's status, as a law-bound and secure state, in the European Union is impossible through implementing improvement and upgrade of the European Union and national legal framework in the sphere of Asylum Law, as well as fulfilling harmonization of basic legal definitions and terminology of the regulatory framework, accomplishing standardisation of judicial practice according to the unified internationally recognized legal principles of Asylum Law in regulatory framework.

I Tendencies of development of Asylum Law

In the beginning of the 20th century the refugees' problem became a burning issue to the entire humankind, and guided by the issues of humanity many states started to take responsibility on refugees' protection and their support. After resolution of the United Nations General Assembly (*UNGA*) in 1951 there was established United Nations High Commissioner for Refugees Office (also known as Agency) (*UNHCR*) and the Articles of this Agency were passed, but on June 28 of 1951 there was adopted a Convention on refugees status, that has particularized and unified Asylum international regulatory framework, thus it became the principal regulatory act in the sphere of Asylum, on which legal basis Asylum Law as amended (previous revisions were in 2002 and in 2009) came into effect in Latvia on the 19th January of 2016. Frequent revision of the Law evidences on dynamic development of Asylum Law in the beginning of the 21st century.

In the beginning of application of Geneva Convention refugees' problem was considered as a temporary issue, because there were hopes for the end of the consequences of the World War II. However the events in diverse regions of the globe made to reorganize a temporary mechanism into a constant instrument. Therefore by virtue of the New-York Protocol Geneva Convention was applicable to all the persons, which can be persecuted due to the reasons as regulated by the mentioned convention

without any restrictions. This regulatory framework form a legal basis of refugees' international protection, because it includes 144 out of 193 countries of the United Nations system, except most states of Southeast Asia, some states of the Near East, states of North Africa and USA that joins only to the New-York Protocol (UNHCR, 2016). This is an obvious evidence of the global nature of Asylum problem and inertness of the United Nations system.

Nowadays one of the most essential disadvantages of Geneva Convention is to be acknowledged, unlike regional instruments of international law, for instance, European Convention on Human Rights and Fundamental Freedoms (ECHRFF), Geneva Convention does not envisage establishing of any specialized international court institutions, arbitration courts or other duly effective international institutions, that would be competent to decide on interpretation of Asylum regulatory framework and would solve the current migration crisis at least partially.

In 1967 the United Nations General Assembly (*UNGA*) in the Declaration on territorial asylum broadened interpretation of non-refoulement principle, which is quite an old principal of international Customary Law. Its essence can be described as interdict for the country to expel any person against his/her will to the state, where his/her life or freedom could be endangered. However this principle is not applicable to the refugee, "which can be reasonable considered as dangerous to the security of this country, where s/he is located, or if s/he is acknowledged as guilty in committing particularly serious crime, which might threaten to the state's public safety". Moreover "the state can decide, to who it can provide asylum". At first it might seem there is a collision between the frameworks. Therefore there is need to return to the definition of a 'refugee status', where each wording is of importance in considering of each particular case.

"Well reasoned fears of victimization"- the fundamental phrase in the definition of the refugee's status, which emphasizes the essential motif of asylum search – general concept of fears. Fears as subjective concept are to be related to a person, who asks to acknowledge him/her as a refugee. When deciding on a status of a refugee, first of all it is necessary to evaluate the statements of the applicant, not the expressed evaluation of situation in the state of applicant's origin. Element of fears, which is a psychic and subjective condition, is described with wording *"well reasoned"*. This means that a refugee's status is not defined only by a person's psychic state, but this mental state is to be reasoned by the objective situation. That's why the definition's wording *"well reasoned fears"*, has both subjective and objective elements, and, when deciding, whether there exist *"well reasoned fears"*, both elements are to be taken into account.

An applicant's fears can be considered as well reasoned, if s/he can quite persuasively prove, that further accommodation in his/her place of origin has become intolerable due to the reasons as specified in the definition, or could be intolerable due to the same reasons, if s/he would return there. 'Victimization' according to Geneva Convention are interpreted as threats to life or freedom, taking into consideration belonging to certain race, religion, nationality, political views or a social group, as well as other severe human rights' violations for the same reasons (Geneva Convention, Article 33.). In this case 'victimization' should be differentiated from 'discrimination', that is unfavourable attitude toward a person on the part of public or state, which can be equalled to victimization only if the methods and approaches could seriously threaten this person. According to the author discrimination causes considerably less threat person's life or freedom, but more related to a person's duties in any society, with restrictions of relevant rights and freedoms. Most likely 'discrimination' should be perceived as a different attitude in equal social and legal circumstances, that cannot be a satisfactory argument when considering a request in asylum, as far as it does not reveal an obvious and immediate threat to life and freedoms.

'Victimization' shall be distinguished from punishment for a regular law violation – these persons are not refugees, as far as refugee is the victim of unjust (or a potential victim), but not a person, who tries to escape a trial. When a person is illegally leaves his/her place of origin, where a grave penalty is stipulated for such infringement of law, this person can be reasonably acknowledged as a refugee, if it would be possible to prove, that such a residence beyond the state borders is related to the arguments as specified in Article 1 A (2) of Geneva Convention. Other persons, who voluntarily leave their homeland due to the reasons unspecified in the definition of a 'refugee', in order to move to another place for the sake of changes, in quest of adventure, due to some personal reasons, are considered as economic migrants, because they have moved only due to economic reasons or personal benefits.

The European Union (EU) competences, including asylum and refugees sphere, were broadened in the Treaty of Amsterdam of 1997, under this treaty the legislative functions regarding to asylum, refugees, as well as migration and accommodation of citizens of third countries were delivered to the Union. As a basis of primary legal powers, a new Article 73.k, which later reorganized, into Article 63 of the European Community Treaty (ECT), was added. The legislative functions were delivered to the Union on stipulation as specified in Par. 1 Article 63 of the European Community Treaty (ECT), that acts adopted by the Union's legislative bodies in the sphere of asylum shall correspond to Geneva Convention and to the

Protocol of refugees status of January 31, 1967, as well as other relevant treaties. European Convention on Human Rights and Fundamental Freedoms (ECHRFF) is also referred to the "*other relevant treaties*". What is more Par. 1 Article 63 of the European Community Treaty (ECT) unambiguously sets forward that powers to settle Asylum Law include only definition of compulsory standards. Based on these primary legal powers, the EU legislative bodies adopted several directives, specifying compulsory standards, regarding the aspects of asylum systems in diverse countries. Part 7 of Schengen Implementation Convention envisages responsibility on considering requests about asylum, as well as tries to standardize and unify Asylum Law ensuring, by virtue of Geneva Convention and Dublin Convention, on which basis asylum standards, as included into most directives, of Schengen Implementation Convention are fulfilled.

Directive 2001/55 was adopted at first. This directive envisages compulsory standards so that in case of mass inflow the refugees could get temporary protection. Owing to other three directives almost in all member-states were introduced unified compulsory standards for asylum seekers hosting (*Hosting directive*), for third countries citizens or non-citizens' qualifying as refugees or persons who need international protection (*Qualification directive*), and refugee status conferring or annulment for certain proceeding of the member-states (*Proceeding directive*).

It is appropriate to agree to M.Baldwin-Edwards' opinion, that in spite of various legislative acts, the tendency of malicious use of Asylum Law is increasing rapidly not only in the states of the Mediterranean region affected by migration crisis, like Greece (Baldwin-Edwards, 2006), but also states unattractive to asylum seekers like Latvia, which is at the moment is mostly used for trials of illegal transit (Djačkova et.al., 2011). This is the evidence of necessity of further thoroughly elaborated development of Schengen Acquis (Guild, Harlow, 2002), what will be partially accomplished through Directive 2008/115EC (*Deportation directive*) and with further suggestions of the EU Parliament in improving the standards of asylum procedure, therefore achieving the more peculiar framework of the main parts of the EU external borders regime – solving the board crossing problem regarding to asylum requesting procedure.

According to the primary rights requirements proceeding from Par.1 Article 63 of the European Community Treaty (ECT) and stipulating that adopted on this basis secondary legislative acts shall comply with Geneva Convention, Directive 2001/55, the statements of preambles of Qualification directive and Proceeding directive there is an unambiguous reference to conclusion made on the special meeting of the European Council in Tampere, that the total being established European asylum

system shall be based fully and absolutely application of Geneva Convention. The statements of preambles of these directives is emphasized, that these shall respect the acknowledged by Charta fundamental rights and principles, and the member-states shall use and apply international legislative instruments in relation with the persons whom these directives refer to. Therefore Hosting, Qualification and Proceeding directives include essential compulsory standards referring to the asylum seekers and considering of their requests. Moreover Paragraph 2 Article 24 of Hosting directive unambiguously stipulates that necessary assets are to be allocated to the member-states in order to achieve the specified compulsory standards for asylum seekers hosting. Likely Article 36 of Qualification directive says that the member-state shall ensure the respective institutions and organizations' employees with necessary training.

Taking into account the stated above, it is legally ensured that attitude of the member-state, which shall follow the compulsory standards of Hosting, Qualification and Proceeding directives, toward asylum seekers and the principle of considering asylum seekers' requests are to be fulfilled according to the requirements of Charta, Geneva Convention, and European Convention for the Protection of Human Rights and Fundamental Freedoms.

II Current events of Asylum Law application

Statistics evidences that within the period from 1998 to July 30, 2015, in Latvia from the total amount of registered asylum seekers (1621 persons) a status of refugee was adjudged to 65 persons and an alternative status was adjudged to 137 persons. The main tendency of recent years – the number of asylum seekers has considerably increased (*In 2011 – 335 persons, in 2012 – 189 persons, in 2013 – 185 persons, in 2014 – 364 persons*).

According to the data of Latvia's Court information system, there are accessible anonymous court decisions of the Administrative Court (Riga Court House), the Administrative District Court and the Supreme Court. 30 court decision have been analyzed, 27 of which – decisions of the Administrative Court (Riga Court House), 2 – decisions of the Administrative District Court, 1 – decision of the Administrative Cases Department of the Senate of the Supreme court. In these cases were applied both verbal and written processes; in the Administrative Court the cases are considered by one (sitting alone) and three judges (collegially). Mostly the statistic data evidence that suits in asylum cases on refugee status conferring are dismissed. For instance, in 2012 out of 189 persons who asked for asylum, i.e. asylum seekers, a refugee status was conferred only in 10 cases. From 2012 in Administrative court out of 55 considered suits on

refugee status conferring were sustained only 4 suits, in 16 cases the suits were left without consideration, and in 35 cases the suits were dismissed.

Judicial power bodies (Administrative courts, District Courts) like law-enforcement institutions (State Border Guard, Citizenship and Migration Affairs Authority) act according to the same legislative instruments that are effective by Laws (*Administrative Proceeding law, Immigration Law*) in a particular period. If it was refused to provide a status of a refugee or an alternative status, such a person becomes an illegal immigrant. In this case could be unreasoned threat of victimization, if the court refused to confer a refugee status due to plausibility of data submitted by the asylum seeker (Fig.1.,2).

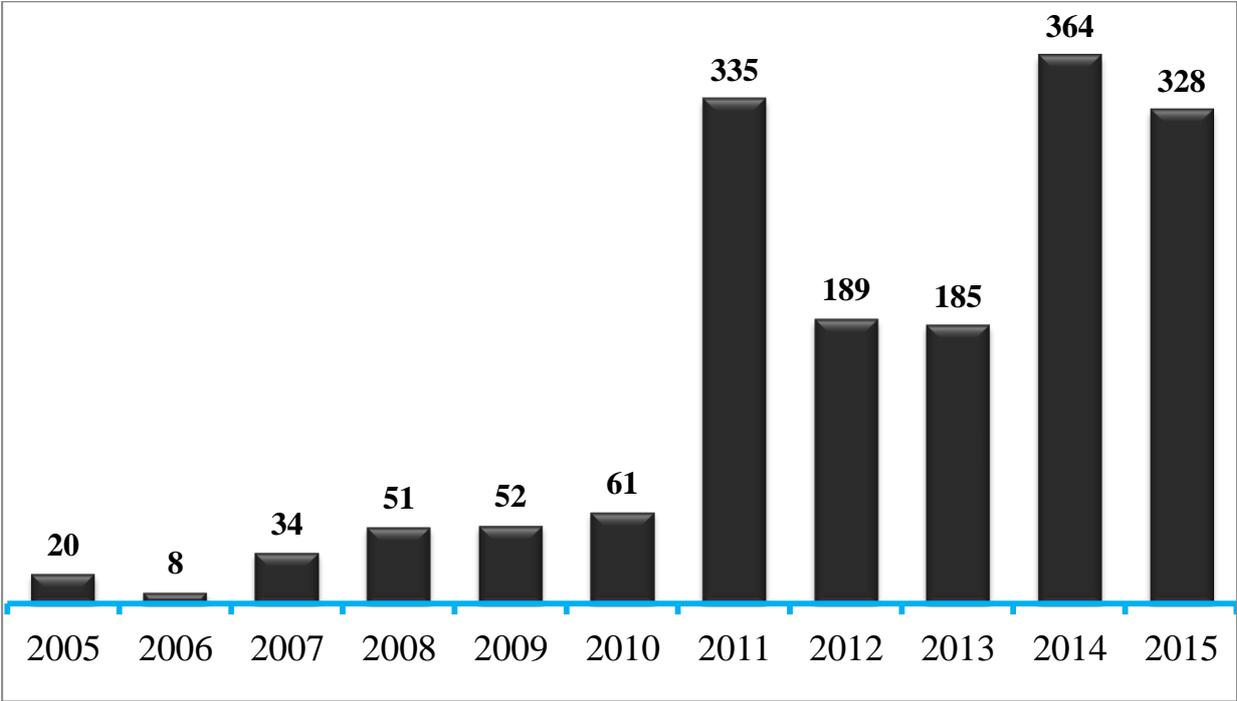


Fig. 1. Number of applications of asylum seekers in Latvia
(Source: Trofimovs, 2016).

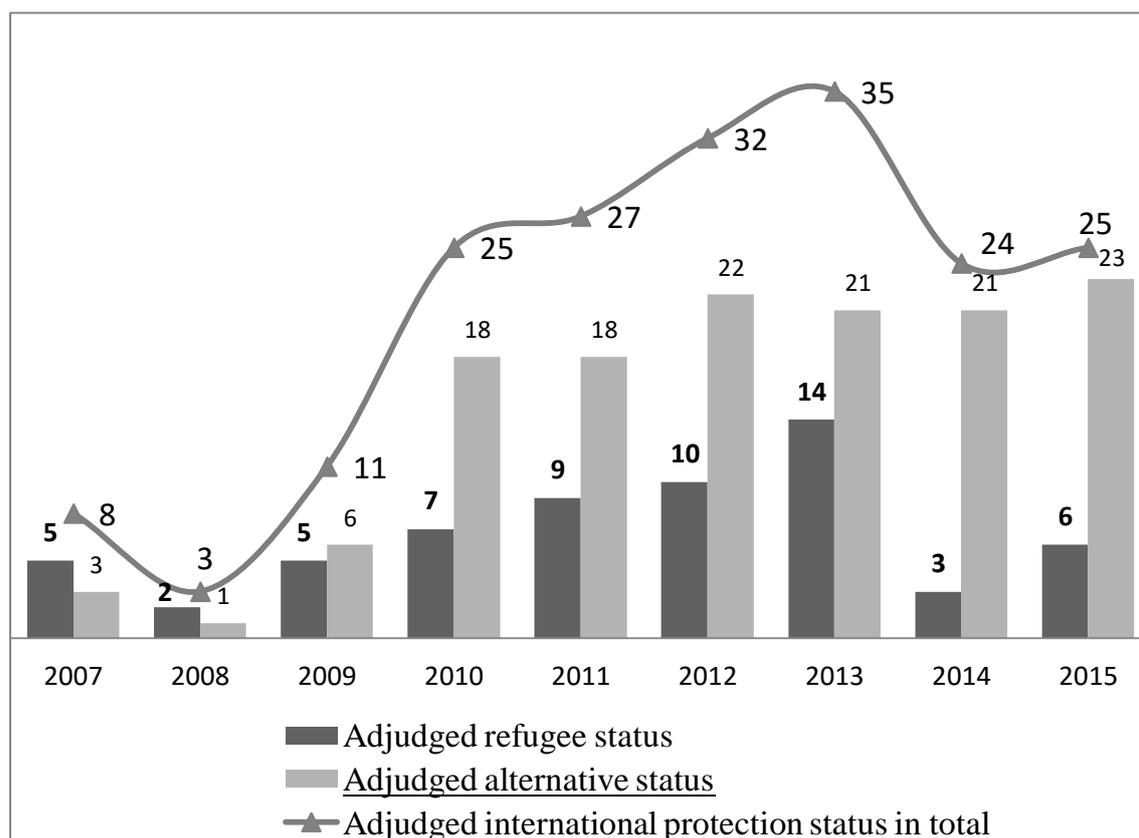


Fig. 2. Adjudged international protection status in Latvia (Source: Trofimovs, 2016).

Conclusions and suggestions

1. Secondary rights requirements on attitude to asylum seekers and asylum requests considering, supervening from Hosting, Qualification Directives and Dublin II Regulation, from the aspect of their aims, legal provisions, only partially comply with the provisions of Charta, Geneva Convention and European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. Enormously voluminous and unsatisfactory harmonized regulatory framework negatively reflects in application of practical proceedings in activity of respective institutions, when decisions are to be taken quickly and correctly in the periods of escalation of migration crisis. Situation is aggravated by European Union institutions' inertness in legal and practical deciding of migration crisis, because the current migration crisis has deeper roots than its escalation in 2014/2015 – "Record number of over 1.2 million first time asylum seekers registered in 2015".
3. In spite of embrasive asylum international and EU regulatory framework, malicious use of Asylum Law on the EU external border in Latvia is still progressing. In 2015 there were received 328 asylum seekers' requests, a refugee status was adjudged to 6 persons. From 1998 up to 2015 in Latvia international protection asked 1768 asylum

seekers (in 2014 - 364, what is the highest number of all the years). A refugee status was adjudged to 71 persons in total, an alternative status to 148 persons, what evidences also on the problem of malicious use of asylum procedure.

4. Malicious use of asylum procedure is mostly related to persons trials to use the asylum procedure in order to continue a transit way to economically more developed countries, to escape responsibility on state border illegal crossing, forged documents use or contraband, what is verified by court practice, for instance, European Court of Human Rights considered a case "*Longa Yonkeu versus Latvia*", when the mentioned person, crossing the Lithuanian border, was arrested on suspicion of forged documents use, was convicted, but later requested an asylum, reasoning it with the fears from Cameroon power authorities.
5. Principal problems of application of Asylum Law in Latvia are as follows:
 - a) a tendency of increase of the number of asylum seekers for recent years;
 - b) court expenses for considering asylum suits (most part of asylum seekers' suits are dismissed at the level of Administrative courts);
 - c) ensuring the asylum seekers with legal assistance;
 - d) ensuring effective communication with the asylum seekers, incl. problem of availability of interpreters;
 - e) availability of opportunities for asylum seekers and their effective realisation in administrative courts and contesting the decisions of the administrative courts;
 - f) difficulties in checking of the information submitted by the asylum seekers (*plausibility*).

It should be concluded that asylum seekers' hosting shall become the responsibility of all the member-states of Convention, it shall not be the problem of solely member-states of the European Union.

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