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Commenti e Note

LIMITS TO INTRA-EU FREE MOVEMENT RIGHTS AND THE COMMON EUROPEAN ASYLUM SYSTEM: REMARKS ON THE CJEU CASE LAW AND THE ACTIVATION OF THE TEMPORARY PROTECTION DIRECTIVE

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1. *De facto* circulation of asylum seekers and refugees within the EU

Unlike EU citizens, asylum seekers and beneficiaries of international protection are often subject to restrictions on their freedom of movement *within* the territory of an EU Member State and *across* Member States. Within the Member State responsible for their application for international protection, they might be subject to retention measures,[1] confined in border zones pending their application[2] or obliged to reside in a particular place on the grounds of reception conditions or integration policy.[3] EU law does not

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The present paper is the result of a joint research carried out by both Authors. However, §§ 1 and 3 have been written by Eleonora Frasca, while §§ 2 and 4 have been written by Silvia Rizzuto Ferruzza. The Authors shared the writing of § 5.

[1] A. DEL GUERCIO, *La detenzione amministrativa dei richiedenti asilo nel diritto dell'UE e in quello italiano*, in G. CATALDI, A. DEL GUERCIO, A. LIGUORI (a cura di), *Il diritto di asilo in Europa*, Napoli, 2014, pp. 59-90.

[2] E. CELORIA, *La normalizzazione della detenzione amministrativa alle frontiere esterne dell'Unione nel Nuovo Patto sulla migrazione e l'asilo*, in this *Journal*, 2021, no. 2, pp. 43-70.

[3] See, for instance, Court of Justice, Grand Chamber, judgment of 1 March 2016, *Alo and Osso*, joined cases C-443/14 and C-444/14. See 14. J.-Y. CARLIER, L. LEBOEUF, *Choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso*, in *Common Market*

confer upon them the right to *choose* their country of asylum.[4] Moreover, applicants and beneficiaries of international protection do not enjoy intra-EU free movement rights across Member States. Besides some exceptions, any non-authorised movement between EU countries is banned, resulting in them being "legally stranded in one Member State".[5] However, asylum seekers and beneficiaries of international protection often move irregularly from one Member State to another to benefit from more favourable economic conditions, for reasons of language or cultural proximity, or to join family members.[6] Other reasons might concern "living conditions and available housing in a Member State when basic needs are not met or […] lacking opportunities for integration and social participation; difficult access to work and study as well as limited access to healthcare and social security in the first State".[7]

Secondary movements create significant challenges for the Common European Asylum System (CEAS), resulting in administrative duplication, significant delays and costs, and general inefficiency of the asylum systems' reception capacities in different countries.[8] In addition, the fight against secondary movements can jeopardise asylum seekers and beneficiaries of international protection's fundamental rights, exposing them to the risks of exploitation or detention. Consequently, they may remain in a 'limbo' where they have no rights, nor can they secure a legal status.[9] The European Commission declared that "at present there is no possibility of knowing how many persons applied for asylum (and how many of these are first time applicants) at EU level" and that "there is no possibility of accurately mapping secondary movements of asylum applicants within the EU".[10]

Law Review, 2017, pp. 631-644 and L. MAROTTI, *Sul diritto di scegliere la residenza per i beneficiari dello status di protezione sussidiaria: profili evolutivi e aspetti problematici nell'approccio della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2016, pp. 481-488.

[4] I. GOLDNER LANG, *Freedom of movement of EU citizens and mobility rights of third-country nationals: where EU free movement and migration policies intersect or disconnect?*, in E. TSOURDI, P. DE BRUYCKER (eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham, pp. 98-113.

[5] E. GUILD et al., *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection*, Study for the LIBE Committee, 2014, p. 42.

[6] See J. SILGA, *The fragmentation of reception conditions for asylum seekers in the European Union: Protecting fundamental rights or preventing long-term integration*?, in this *Journal*, 2018, no. 3, pp. 87-115; S. CARRERA and others, *When Mobility Is Not a Choice. Problematising Asylum Seekers. Secondary Movements and Their Criminalisation in the EU*. 11 CEPS Paper in Liberty and Security in Europe, n° 11, 2019; E. PISTOIA, *Social Integration of Refugees and Asylum Seekers through the Exercise of Socio-Economic Rights in European Union Law*, in *European Papers*, 2018, no. 3 (issue 2), pp. 781-807; F. WEBER, *Labour Market Access for Asylum Seekers and Refugees under the Common European Asylum System, in European Journal of Migration and Law*, 2016, no. 18, pp. 34-64.

[7] See, for instance, European Migration Network (EMN), *Secondary movements of beneficiaries of international protection*, EMN INFORM, September 2022, p. 1.

[8] On this topic, see J. VESTED HANSEN, *Reception Conditions as Human Rights: Pan-European Standard or Systemic Deficiencies*?, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System – The New European Refugee Law*, Leiden, 2016, pp. 317-352.

[9] See, for instance, European Asylum Support Office (EASO), *Detention of applicants for international protection in the context of the Common European Asylum System*, European Asylum Support Office, 2019.

[10] European Commission, *Commission Staff Working Document accompanying document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and*

This Article focuses on the *de facto* circulation of international protection seekers and beneficiaries. We define '*de facto* circulation' as a non-authorised movement across EU Member States which can result in the possibility of legalising ex-post one's own position in exceptional and limited cases. After presenting the relevant EU legal framework illustrating the limits to intra-EU free movement rights for both asylum seekers and holders of international protection (Section 2), the scrutiny moves to the Court of Justice of the European Union (CJEU)'s interpretation of the Dublin Regulation and the Asylum Procedures Directive in preliminary ruling procedures where the *de facto* circulation of asylum seekers and beneficiaries of international protection can be observed (Section 3).[11] Indeed, *de facto* circulation occurs notwithstanding the prohibition in EU law and finds its *ex-post* legitimacy precisely in the CJEU' interpretation of EU asylum law in light of fundamental rights.[12] The analysis includes the activation of the Temporary Protection Directive, which may suggest a change of paradigm regarding secondary movements (Section 4). Against this background, both the CJEU's case law analysis and the activation of the Temporary Protection Directive foster a reflection on the extent to which current restrictions on intra-EU free movement rights of asylum seekers and beneficiaries of an international protection status are necessary, effective and respectful of fundamental rights (Section 5).

2. Limited intra-EU free movement rights for asylum seekers and beneficiaries of international protection

According to EU law, both asylum seekers and beneficiaries of international protection are excluded from intra-EU free movement rights. While the rules concerning asylum seekers are meant to ensure quick access to the asylum procedures and the examination of an application on the merits by a single, clearly determined EU country, the rules limiting intra-EU free movement rights for beneficiaries of international protection are mainly collateral results of the absence of EU law on mutual recognition of positive asylum decision and the transfer of responsibility for beneficiaries of international protection.

*amending Council Directive (*EC) 2003/109 and proposed Regulation EU XXX/XXX, SWD (2020) 207, p. 105.

[11] An account of this CJEU case law in the EU Member States' domestic case law can be found in *Jurisprudence on Secondary Movements by Beneficiaries of International Protection: Analysis of Case Law from 2019–2022*, European Union Agency for Asylum (EUAA), 2022.

[12] The European Commission defines secondary movements as "the movement of migrants, including refugees and asylum seekers who, *for different reasons*, move from the country in which they first arrived to seek protection or permanent resettlement elsewhere". See European Migration Network (EMN)'s 'Asylum and Migration glossary' available at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary_en.

2.1. Applicants for international protection

The Dublin system aims to avoid asylum seekers' secondary movements by establishing that a single Member State should examine an application for international protection determined according to the criteria set out in Chapter III of the Dublin Regulation.[13] Therefore, asylum seekers cannot choose their country of asylum and must remain in the Member State responsible for their application. If they move to another country, that country will organise their transfer back to the one responsible for the application.[14] Implementing the Dublin Regulation has proved so burdensome and inefficient that, for a long time, many scholars and advocates have pleaded for its abolition.[15]

Two situations reverse the assumptions of the Dublin system. The first is an exception to that comes directly from the CJEU's interpretation of the Dublin II Regulation and it has been later incorporated in the Dublin III Regulation. In 2013, the CJEU considered that in the event of subsequent applications lodged by unaccompanied minors in more than one Member State, the Member State responsible is that "in which the minor is present".[16] This means that children with no family members in the territory of the European Union should not be transferred to another Member State pursuant to the Dublin Regulation. Pointing out that "the child's best interests are to be a primary consideration", the Court's interpretation is consistent with fundamental rights as it refers expressly to Article 24(2) of the Charter.[17] The consequence of this ruling is that, unlike adults, unaccompanied minors with no family members in the Union can technically choose their country of asylum, namely the country in which they are present. This means that for

[13] Regulation n° 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* (recast), *O.J.*, L 180 of 29 June 2013, pp. 31-5.

[14] However, statistics suggest that "between 66% and 75% of all agreed transfers are not implemented. Therefore, majority of the Dublin procedures carried out yearly – both 'take charges' and 'take backs' – achieve no tangible result even when a transfer decision is adopted". See, F. MAIANI, *Responsibility allocation and solidarity*, in P. DE BRUYCKER, M. DE SOMER, J.-L. DE BROUWER (eds.) *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration*, European Policy Centre, 2019, pp. 103-119.

[15] F. GAZIN, N. MAHROUG, S. GAKIS, J. RONDU ET E. STOPPIONI, *Et si on abolissait vraiment le règlement Dublin?*, in *Revue de l'Union européenne*, 2022, no. 662, pp. 537-569; E. GUILD *et al.*, *New approaches, alternative avenues and means of access to asylum procedures for persons seeking international protection*, Study for the LIBE Committee, 2014; E. GUILD, C. COSTELLO, M. GARLICK; V. MORENO-LAX, S. CARRERA, *Enhancing the Common European Asylum System and Alternatives to Dublin*, Brussels: European Parliament, 2015; M. DEN HEIJER, J. RIJPMA AND T. SPIJKERBOER, *Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System*, 53, in *Common Market Law Review*, 2016, no. 3, pp. 607-642; F. MAIANI, T*he Reform of the Dublin III Regulation*, Brussels: European Parliament, 2016.

[16] Court of Justice, judgment of 6 June 2013, *MA and others*, C-648/11, para 60. See J.-Y. CARLIER, *Droit européen des migrations*, in *Journal de droit européen*, 2014, no. 3, pp. 167-169, and A. DEL GUERCIO, *Superiore interesse del minore e determinazione dello Stato competente all'esame della domanda di asilo nel diritto dell'Unione europea*, in *Diritti umani e diritto internazionale*, 2014, pp. 243-248. This is the first reference to the best interests of the child in an EU asylum case.

[17] *MA and others*, C-648/11, paras 57, 58 and 59.

unaccompanied minors – a "special" legal category of children and a particularly vulnerable category of asylum seekers – considerations linked to the best interests of the child, even regardless of family protection, prevail over the logic of the Dublin system. As a consequence of this ruling, Article 8 of the Dublin III Regulation now expressly provides that "[..]in the absence of a family member, a sibling or a relative [...], the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor".

The second situation concerns the mass influx of displaced persons from Ukraine.[18] The Council's decision allows applicants – including adults – to choose the country where they seek protection, thus creating a different way of regulating Member States' allocation of responsibility for asylum applications.[19]

Regardless of whether secondary movements are allowed, asylum seekers move irregularly, posing continuous challenges to the Dublin system. In limited cases, their irregular movement may determine a transfer of responsibility for their asylum application from the Member State in principle responsible to a new one.

2.2 Beneficiaries of international protection

Similarly, beneficiaries of an international protection status (both refugee status and subsidiary protection status) must remain in the Member State that granted them protection, which has the sole responsible for their protection under the Qualification Directive.[20] They have no access to intra-EU free movement rights, except for the right to travel to another EU Member State for up to 90 days within a 180-day period, but they are not free to move and reside in another EU country.[21]

Beneficiaries of international protection are entitled to apply for long-term resident status according to the Long-term Residents Directive.[22] The long-term resident status (LTR) differs from the residence permit in that, while the latter is valid for five years

[18] Council Implementing Decision (EU) 2022/382 establishing *the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, *O.J.*, 2022, L 7/1–6, see recital 15 where Member States have agreed that they will not apply Art. 11 Directive 2001/55/EC (see *infra*).

[19] Recital 15 of the Decision states that Member States have agreed that they will not apply Art. 11 Directive 2001/55/EC. See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such per- sons and bearing the consequences thereof, *O.J.*, 2001, L 212/12–23.

[20] 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),* Art. 4.

[21] Art. 6(1) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 *on a Union Code on the rules governing the movement of persons across borders* (Schengen Borders Code), *O.J.*, L 77 of 23 March 2016, pp. 1-52.

[22] Council Directive 2003/109/EC of 25 November 2003 *concerning the status of third-country nationals who are long-term residents*, *O.J.*, L 16 of 23 January 2004, pp. 44-53.

unless renewed, the status is permanent unless revoked.[23] A set of material and procedural requirements must be fulfilled to obtain long-term resident status. It can be obtained after five years of uninterrupted legal residence in the Member State that granted them protection, provided that the applicant has adequate stable and regular resources (to support themselves and their family members) and a sickness insurance. Once the status is acquired, they also acquire the right to move to another EU country as the holder acquires the right to equal treatment with nationals of the state of residence.[24] However, if they move to another Member State, they have to apply for a residence permit in that country based on the Long-term Residents Directive, lodging a second application under the same conditions.[25]

Both with or without the acquisition of long-term resident status, the issue arises of what happens to the protection status that beneficiaries have obtained in the first Member State.[26] Currently, there is no mutual recognition of positive asylum decisions between Member States. This issue is not regulated by secondary EU law despite the existence of a strong legal basis in the TFEU.[27] This is questionable considering that the principle of mutual recognition is a reality in many fields of EU law, based on the principle of mutual trust.[28] In the field of asylum and migration with regards, the principal of mutual recognition exists in the case of *negative* asylum decisions, return decisions and entry ban decisions registered in the Schengen Information System.[29] In any case, the principle is the automatic recognition of documents and decisions in civil and commercial matters, even where, as in the case of refugee status, they fall outside the scope of secondary law, regarding persons' status and capacity.[30] For the smooth functioning of the principle of

[23] A. DI STASI, *La prevista riforma della direttiva sul soggiornante di lungo periodo limiti applicativi e giurisprudenziali*, in I. CARACCIOLO, G. CELLAMARE, A. DI STASI, P. GARGIULO (a cura di), *Migrazioni internazionali. Questioni giuridiche aperte*, Napoli, 2022, p. 442.

[24] The original directive did not apply to beneficiaries of international protection. The scope of the Directive was extended to them in 2011 with Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, *O.J.*, L 132 del 19 May 2011, pp. 1-4.

[25] For an appraisal of the legal as well as practical shortcomings of the Long-term Residents Directive for refugees' free movement rights, see A.-H. NEIDHARDT, *Beyond relocations and secondary movements: Enhancing intra-EU mobility for refugees*, MEDAM Policy Study, n° 1, 2023.

[26] See ECRE, *Protected across borders: mutual recognition of asylum decisions in the EU*, Policy Note 3/2016.

[27] Article 78(2)(a) TFEU envisages "a uniform status of asylum for nationals of third countries, valid throughout the Union".

[28] Cfr. The EU Regulations on private international law, *e.g.* Regulation (EC) No 1215/2012 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (recast); Regulation (EC) 2019/1111 of 25 June 2019 *on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), repealing Regulation (EC) No 2201/2003*.

[29] See V. MORENO-LAX, *Mutual (Dis-)Trust in EU Migration and Asylum Law: The 'Exceptionalisation' of Fundamental Rights in* S. IGLESIAS SÁNCHEZ, M. GONZÁLEZ PASCUAL (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge, pp. 77-99.

[30] For example, Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("Brussels I *bis*") excludes from its scope the status and capacity of persons (Article 1(2)(a)). See J.-Y.

mutual recognition, it is essential for Member States to trust each other in respecting fundamental rights and to ensure that judgments from one Member State can be recognized and enforced in any other. In principle, the protection status is not portable and not transferred to the second State. The rights attached to that status by the Qualification Directive – including the right to work, social assistance, basic medical care, and others – are also not recognised in the second Member State.[31]

This lack of legal rules on mutual recognition, which hinders the mobility of beneficiaries of international protection within the EU and limits their protection to a single Member State, is partially filled by the Council of Europe's Agreement on Transfer of Responsibility for Refugees, which is not an EU law instrument and has been ratified only by one-third of the EU Member States.[32] Refugees can only invoke the agreement if the two Member States involved are parties to it. Moreover, beneficiaries of subsidiary protection are not covered by the agreement unless the Member State that ratified the agreement has extended its scope to cover the transfer of their protection.[33] This agreement has been designed to facilitate the application of Article 28 of the 1951 Geneva Convention and to specify the conditions on which responsibility for issuing a travel document when a refugee moves residence from one country to another.[34] It allows responsibility to be transferred "on the expiry of a period of two years of actual and continuous stay in the second State with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the travel document."[35] Instead, the Long-term Residents Directive excludes the transfer of responsibility for the protection of beneficiaries of international protection from the scope of the Directive.[36] However, it refers to this mechanism, leaving Member States discretion in applying the "more favourable provisions of […] the European Agreement on Transfer of Responsibility for Refugees of 16 October 1980".[37]

CARLIER, E. FRASCA, *Droit européen des migrations*, in *Journal de droit européen*, 2022, no. 3, pp. 131-148.

[31] See Art 23-37 of 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)*.

[32] Council of Europe, European Agreement *on Transfer of Responsibility for Refugees* (Strasbourg, France: 1980), ETS n° 107.

[33] On this subject, extensively: S. PEERS, *Transfer of International Protection and European Union Law*, in *International Journal of Refugee Law*, 2012, no. 3, pp. 527-560.

[34] Art. 28 of the Geneva Convention: "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence".

[35] European Agreement on Transfer of Responsibility for Refugees, Article 2 (1).

[36] Directive 2011/51/EU, whereas n° 9.

[37] Article 3 (3) *sub* c) of Council Directive 2003/109/EC.

Yet, many beneficiaries of refugee status or subsidiary protection status also move irregularly from one Member State to another, even before acquiring long-term resident status, posing a challenge to the CEAS's rationale. They often lodge a new asylum application in the second Member State, which can be declared inadmissible according to Article 33(2)(a) Procedures Directive, on the ground that another Member State has granted the person international protection.

3. The CJEU case law interpretation of EU asylum law in light of fundamental rights

Through time, the CJEU has been regularly asked by domestic judges to assess the compatibility of the CEAS framework – which places limitations on asylum seekers and beneficiaries of international protection intra-EU free movement rights – with their fundamental rights. A series of exceptions have emerged from the CJEU case law interpreting EU asylum law.

3.1. Transfer of asylum seekers and restrictions to rights to free movement within the EU

For asylum seekers, in specific and exceptional circumstances, secondary movements might determine a change in the country responsible for their asylum application because of the duty of Member States to derogate from the Dublin rules on inter-State transfers. In the landmark case *N.S. and Others*, the CJEU established that Member States have an obligation to respect fundamental rights and that they cannot proceed to a Dublin transfer "where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the responsible] Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of [Article 4 of the Charter]".[38] The teachings of the *NS* ruling crystallised into Article 3(2) of the Dublin III Regulation.[39]

[38] Court of Justice of European Union, Grand Chamber, judgment of 21 December 2011, *N. S. and Others*, joined cases C-411/10 and C-493/10, para 94. See G. MELLON, *The Charter of Fundamental Rights and the Dublin Convention: An Analysis of N.S. v. Secretary of State for the Home Department* (C-411/10), in *European Public Law*, 2012, pp. 655-663; L. GRASSO, *Rispetto dei diritti fondamentali di richiedenti asilo ed operatività della sovereignty clause del regolamento Dublino II*, in *Diritto pubblico comparato ed europeo*, 2012, pp.733-729; G. MORGESE, *Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S. e altri*, in *Studi sull'integrazione europea*, 2012, no. 1, pp. 147-162.

[39] Article 3(2) of the Dublin III Regulation provides that "where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the [EU], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".

Later, in *C.K. and Others*, the Court identified another exceptional situation where an asylum seeker with a particularly serious illness could not be transferred to the Member States responsible for his application if the transfer itself would result "in a real and proven [individual] risk of a significant and permanent deterioration in their state of health", constituting inhuman and degrading treatment within the meaning of Article 4 of the Charter, "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum".[40]

In the case of *Jawo*, the CJEU clarified that, to assess potential risks of breaching Article 4 of the Charter in the cases of a Dublin transfer, it is irrelevant if the risk would occur at the very moment of the transfer, during the asylum procedure or following it.[41] The *Jawo* case concerned an asylum seeker who, in order to prevent his Dublin transfer from Germany to Italy, provided evidence of the existence of a risk of inhuman or degrading treatment on account of the living conditions of beneficiaries of international protection in Italy, although he was still under the asylum procedure.[42] Conversely, the *Ibrahim and Others* case concerned beneficiaries of subsidiary protection granted by a Member State (Bulgaria and Poland), who had lodged new applications in Germany, also opposing their transfer.[43] The Court established that deficiencies in a Member State, "which may be systemic or generalised, or which may affect certain groups of people"[44] must attain a particularly high level of severity (a threshold) as regards the living conditions of *beneficiaries* of international protection. Depending on all the circumstances of the case, such level of severity "is attained where the indifference of the national authorities would result in a person finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs and that undermines his physical or mental health or his human dignity".[45] The judge hearing the appeal challenging a Dublin transfer or a declaration of inadmissibility of the asylum application must assess whether there exist flaws in the Member State responsible for the asylum application or of the protection "on the basis of information that is objective, reliable, specific and properly updated and

[40] Court of Justice, judgment of 16 February 2017, *C. K. and Others*, C-578/16 PPU:127, para 96. See J.-Y. CARLIER, L. LEBOEUF, *Droit européen des migrations*, in *Journal de droit européen*, 2018, pp. 95-110 ; Š. IMAMOVIC, E. MUIR, *The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers*?, in *European Papers*, 2017, no. 2, pp. 719-728.

[41] Court of Justice, Grand Chamber, judgment of 19 March 2019, *Jawo*, C-163/17, para 88. See G. ANAGNOSTARAS, *The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection*, in *German Law Journal*, 2020, Vol. 21, no. 6, pp. 1180-1197.

[42] On this topic, see E. ZANIBONI, *No Room for You Here? The Past and the Future of the Asylum Seekers' Receptions Conditions in Italy*, in this *Journal*, 2018, no. 2, pp. 80-103; E. TSOURDI, *EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers*?, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System – The New European Refugee Law*, op. cit., pp. 271-316.

[43] Court of Justice, Grand Chamber, judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 and C-438/17.

[44] *Jawo*, para 90 and *Ibrahim and Others*, para 88.

[45] *Jawo*, para 92 and *Ibrahim and Others*, para 90.

having regard to the standard of protection of fundamental rights guaranteed by EU law".[46] *Ibrahim* was the first case in which the Court dealt with *beneficiaries* of international protection moving to another Member State for reasons linked to living conditions in the Member State who granted protection.[47] As noted by den Hijer, disparities in the Member States' asylum systems are sometimes so "fundamental as to engage the most basic human rights".[48]

3.2. Movements of beneficiaries of protection and the loss of the rights attached to the protection status

The Court also dealt with cases in which beneficiaries of protection status granted by a Member State move to another Member State for reasons related to the maintaining of family unity (C-483/20) or the best interests of the child (C-720/20), even if EU law does not allow them to circulate and settle in a Member State other than the one of protection. In theory, secondary movements determine the loss of the rights attached to the protection status. In the first case, the question arises of extending a derived right to international protection status to the family members of a beneficiary of international protection in a Member State, in cases where the family member have already obtained protection in another Member States. The second case deals with an application for international protection made by a family member (a child) of a family whose members hold international protection in another Member State.

In *Commissaire Général aux Réfugiés et aux Apatrides (Family unity – Protection already granted)*, a father who obtained refugee status in Austria moved to Belgium where his two children, beneficiaries of subsidiary protection, resided, one of which was a minor. In Belgium, he lodged an application for international protection that was declared inadmissible because he had already benefited from protection in another Member State.[49] According to the CJEU, the need for international protection "as such […] is already satisfied in Austria" and the right to family unity and of the child's best interests principle, enshrined in Articles 7 and 24 of the Charter, "unlike protection against any inhuman or degrading treatment enshrined in Article 4 of the Charter, […] are not absolute in nature and may therefore be subject to restrictions under the conditions

[46] *Jawo*, para 90 and *Ibrahim and Others*, para 88.
[47] According to a study of the EUAA, national courts have been following the *Ibrahim* judgment in a variety of cases where there is a risk of violation of Article 4 of the Charter in case of people who had been granted international protection status in another Member State (most often: Greece, Bulgaria, Hungary). See EUAA, *Jurisprudence on Secondary Movements by Beneficiaries of International Protection: Analysis of Case Law* from 2019–2022", European Union Agency for Asylum (EUAA), 2022. On this topic, see I. WRÓBEL, "Extreme material poverty as a negative prerequisite for the transfer of an applicant for international protection to the competent Member State and for the rejection of an application for the grant of refugee status as being inadmissible", in *Review of European and Comparative Law*, 2019, vol. 37, no. 2, pp.139-161.
[48] M. DEN HIJER, *Transferring a refugee to homelessness in another Member State*: Jawo *and* Ibrahim, in *Common Market Law Review*, 2020, vol. 57, pp. 539-556, at p. 554.
[49] Court of Justice, judgment of 22 February 2022, *Commissaire Général aux Réfugiés et aux Apatrides (Family unity – Protection already granted*), C-483/20.

set out in Article 52(1) of the Charter".[50] If an applicant has already been granted international protection from a Member State where the living conditions would not expose him or her to a substantial risk of inhuman or degrading treatment or to live in a state of degradation incompatible with human dignity, their application can be deemed inadmissible. In other words, the *Ibrahim* threshold is not attained. However, the Court noted that since the father's application for asylum was declared inadmissible in Belgium owing to his refugee status in Austria, he does not individually qualify for international protection in the first Member State and, therefore, he must be granted a right of residence.

In *Bundesrepublik Deutschland (Child of refugees born outside the host state*), a whole family whose members were granted refugee protection in Poland moved to Germany, where a newborn child applies for international protection.[51] The family had left Poland because of intimidation linked to their Chechen origin. Intending to prevent refugee secondary movements, the German authorities rejected as inadmissible the application for international protection of the child born in Germany on the grounds that Poland was the State responsible for the asylum procedure in line with the Dublin Regulation. The Court stated that the Dublin Regulation does not apply in the case at stake because "[the] minor [...] was born after [his or her] family members obtained international protection in a Member State other than that in which the minor was born and resides with his or her family".[52] Moreover, the situation of a minor applying for international protection for the first time "is not comparable to that of an applicant for international protection who is already a beneficiary of such protection granted by another Member State".[53]

While admitting that the Dublin Regulation seeks to avoid secondary movements of asylum seekers, Advocate General Richard de la Tour criticised this blind fight against secondary movements of refugees. He considered that secondary movements of beneficiaries of international protection cannot be "reduced or summed up as parents' 'tourism'".[54] Its opinion, not followed in its substance by the Court, is built on the best interests of the child, which "require the Member State seised of the application to be responsible for examining it where that child was born and, together with his or her family members, has his or her habitual residence in the territory of that State, at the date on which his or her application is lodged".[55] He adds that "any solution which consists in removing that child and her family members from the social environment in which they are integrated, on the ground that the latter enjoy international protection in another

[50] *Ibidem*, para 36.
[51] Court of Justice, judgment of 1 August 2022, *Bundesrepublik Deutschland (Child of refugees born outside the host state)*, C-720/20.
[52] *Ibidem*, para 32
[53] *Ibidem*, para 54.
[54] Opinion of Advocate General Richard de la Tour, delivered on 22 March 2022, C-720/20, *Bundesrepublik Deutschland (Child of refugees born outside the host state),* para 71.
[55] *Ibidem*, para 77.

Member State, would be entirely contrary to the child's interests".[56] The Advocate General also suggested that the Council of Europe Agreement on Transfer of Responsibility for Refugees would allow responsibility for the international protection of the whole family to be transferred from Poland to Germany, thus allowing the family members to keep the rights attached to the protection status.

4. The Temporary Protection Directive as a testing ground for rethinking secondary movements

The activation of the Temporary Protection Directive has shown that it is possible to challenge the rules underlying the legal framework. Following the significant number of displaced persons from Ukraine fleeing the conflict, a *de facto* free movement model has been adopted for beneficiaries of temporary protection and rightly judging the recognition of mobility rights to beneficiaries of the temporary protection as a "Copernican revolution".[57] Even though it did not concretely increase mobility within the EU for all the other refugees, it has been designed to enable them to enjoy harmonised rights throughout the Union in order to offer an adequate level of protection. These rights include, among others, the right to family reunification, easier access to the labour market, health care and education opportunities.[58]

Therefore, it could be taken as an example to show that alternative solutions can be advanced.[59] As a matter of fact, there are a number of significant advantages inherent in the scope of the Directive. Firstly, the Directive offers the possibility to choose the country in which one wants to apply for temporary protection and, at the end of the temporary protection, it is possible to lodge an asylum application.[60] Furthermore, the Council implementing decision of 4 March 2022 provides for free movement of beneficiaries within the EU.[61] This means that intra-EU and short-term non-EU travel is permitted (in this case, short trips to Ukraine). Moreover, it is provided that in order to preserve family unity and avoid differences in status between members of the same

[56] *Ibidem*, para 71.
[57] S. PEERS, *Temporary Protection for Ukrainians in the EU? Q and A*, in *EU Law Analysis*, 27 February 2022.
[58] Council Directive 2001/55/EC of 20 July 2001 *on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, Art 12.
[59] On this topic, for further analysis see D. VITIELLO, *The Nansen Passport and the EU Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe*, in *European Papers*, 2022, no. 1, pp. 15-30; E. PISTOIA, *Dalla protezione temporanea alla protezione immediata. L'accoglienza degli sfollati dall'Ucraina come cartina tornasole della proposta di trasformazione*, in this *Journal*, 2022, no. 2, pp. 101-123.
[60] Ibid.
[61] Council Implementing Decision 2022/382 on the *Existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*.

family, temporary protection will also be granted to family members of beneficiaries.[62] Finally, it is worth mentioning that this protection was also extended to stateless persons and nationals of third countries other than Ukraine who were displaced persons and enjoyed refugee or equivalent protection status in Ukraine before 24 February 2022.[63] It offers concrete advantages as it facilitates the balancing of efforts between Member States in practice while reducing overall pressure on national reception systems. In addition to the increased level of rights it offers, the uniform status that temporary protection entails makes it possible to both limit secondary movements and ensure fundamental rights protection.

5. Final remarks

The cases examined above reveal the shortcomings of excluding asylum seekers and beneficiaries of international protection from intra-EU free movement rights. Paraphrasing the words of Advocate General Richard de la Tour in his opinion on case C-720/20, the EU Member States face many difficulties in implementing the Dublin Regulation – and, more broadly, the CEAS rules – "when the complexity of social realities is added to the technicality of [the Dublin] rules, in particular, the reality of the family life of refugees".[64] While the case law concerning asylum seekers keeps showing the intrinsic limits that the Dublin Regulation places on asylum seekers' agency, the case law on beneficiaries of international protection illustrates the consequences of the lack of mutual recognition of positive asylum decisions in EU law and transfer of responsibility for international protection. In practice, beneficiaries of international protection who wish to move to another EU Member State are likely to re-apply for international protection in the second Member State. Both groups challenge the EU legal framework by engaging in *de facto* circulation. In exceptional circumstances, the Member States' duty to respect their fundamental rights allows them to *change* the country of application and, possibly, their future.

The recent experience of activating the Temporary Protection Directive to assist people fleeing Russia's war against Ukraine demonstrates the benefits of *de facto* free movement of protection seekers. Thanks to it, temporary protection holders could benefit from a secure status, facilitating their socio-economic integration. The reaction to arrivals from Ukraine and the adoption of a *de facto* free movement model for beneficiaries of temporary protection, however, has not boosted mobility within the EU for all other refugees, which remains an exception. On the contrary, countering unauthorised movements has become a key priority for the Commission, which has led to the introduction of measures in the hope of discouraging them, as the proposal for a recast of

[62] Decision 2022/382, para 11.
[63] Ibid., paras 11 and 12.
[64] Opinion of Advocate General Richard de la Tour, delivered on 22 March 2022, C-720/20, *Bundesrepublik Deutschland (Child of refugees born outside the host state)*, para 1.

the Long-term Resident Directive shows. In the communication of 23 September 2020 on *a New Pact on Migration and Asylum*, the European Commission proposed "to amend the Long-term Residents Directive so that beneficiaries of international protection would have an incentive to remain in the Member State which granted international protection, with the prospect of long-term resident status after three years of legal and continuous residence in that Member State".[65] While this reduction in waiting time is positive and welcome, the Commission regrettably withdrawn the initial idea from the proposal for a recast Long-term Resident Directive: "In this regard, the impact assessment highlighted a specific divergence of views on the added value of lowering the required residence period to acquire EU LTR status from five to three years. As it is not possible at this stage to determine conclusively the extent to which such a reduction would effectively contribute to boosting the integration process of third-country nationals who intend to settle on a long-term basis in the EU, this proposal does not change the required residence period, which remains five years".[66]

The CJEU's case law suggests that preventing secondary movements of asylum seekers and beneficiaries of international protection in EU asylum law is highly ineffective when fundamental rights are at stake. Perhaps the fight against secondary movements should be abandoned, and the reasons why protection seekers and beneficiaries move should be better understood.[67] Drawing from the positive results that the application of temporary protection has brought, the fairness of limits to intra-EU free movement rights of protection seekers should be given closer consideration, including some possibility of 'choice' of the Member State, either at the stage of the asylum procedure or after the granting of a protection status.

ABSTRACT: Under the current architecture established by the Common European Asylum System (CEAS), asylum seekers and beneficiaries of international protection cannot move freely within the EU territory. Their legal status as third-country nationals is linked to the Member State responsible for their asylum application. Even so, asylum seekers and beneficiaries of international protection continue to move before and after acquiring a status. Both the case law of the Court of Justice of the

[65] European Commission, Communication of 23 September 2020 on *a New Pact on Migration and Asylum*, COM(2020) 609 final, p. 6. See. S. PEERS, Poundshop free movement? Long-term resident non-EU citizens: the EU Commission's new proposal (part 1-2), *EU Law Analysis*, 13 and 15 May 2022.

[66] European Commission, Proposal for a Directive of the European Parliament and of the Council concerning *the status of third-country nationals who are long-term residents* (recast), Brussels, 27 April 2022, COM(2022), 650 final, p. 7.

[67] See European Migration Network (EMN), *Secondary movements of beneficiaries of international protection*, EMN INFORM, September 2022, p. 3: "[L]ittle data is available on the overall intra-EU mobility of beneficiaries of international protection […] due to low case numbers, most Member States do not collect statistics on the number of transfers of responsibility for beneficiaries of international protection under EATRR. […] Some beneficiaries may apply for citizenship after this period rather than transfer of responsibility (depending on the requirements to obtain citizenship in individual Member States)".

European Union (CJEU) and the activation of the Temporary Protection Directive show that it is possible to pose a disruptive challenge to this legal framework and foster a reflection on the extent to which current restrictions on intra-EU free movement rights of asylum seekers and beneficiaries of an international protection status are necessary, effective and respectful of fundamental rights.

KEYWORDS: EU asylum law – Free movement of persons – Secondary movements – CJEU – Fundamental rights.