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RIGHTS AND OBLIGATIONS OF PARTICIPANTS IN ADMINISTRATIVE PROCEDURES IN INTERNATIONAL PROTECTION

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Abstract. *The rights and obligations of the state represented by the corresponding body or official are not specifically highlighted in the Directive. The certainty of some duties of the "representative" of the state can be concluded only by analysing the scope of refugee rights, because the procedural rights of a refugee are positive and for their implementation the state is obliged to take certain measures, otherwise these rights cannot be exercised. Consequently, the obligations of the state, represented by authorised persons, correspond to the rights of a refugee: if a refugee, for example, has the right to remain in the territory of the asylum state, the state must ensure that such refugee enjoys this right, including the*

non-refoulment of such a refugee from the asylum state. Therewith, certain procedural rights and obligations of participants in proceedings are specifically defined, and states can only expand their scope, or the scope of their guarantees. Other rights, obligations, mechanisms for their implementation or restrictions are relatively defined and are formulated in the form of the rights or powers of member states to implement them in national legislation. Consequently, in the Directive, next to specifically determined rules on the legal status of participants in the procedure, there are authorising and allowable provisions, which authorise or allow states to independently determine the elements of this legal status.

Keywords: *directive, administrative procedures, international protection, European Union, legislation.*

Introduction

Specific rights of the state include the right to speed up the consideration of an application for granting status primarily to other applicants who have previously submitted them. Another example concerns the relevant state authorities involved in the asylum procedure. Each member state must determine one state body whose competence will include the full consideration of asylum applications. And only in some cases can other than specially authorised state bodies take part in the procedure. This applies, in particular: 1) to the transfer of the applicant to another country in accordance with the rules of distribution of responsibility between member countries (Regulation No. 604/2013…, 2013); 2) to the submission of applications at the border of an EU Member State, including cases of inadmissibility (Directive No. 2013/33/EU, 2013).

The rights and obligations of an EU Member State and its representatives are analysed in detail below in their interdependence and relationship with the corresponding rights of asylum seekers. However, they can be summarised as follows. The fundamental right and duty of a state body or its authority is to consider a refugee application and decide on the recognition of refugee status on its merits. Therewith, the application review procedure itself should be based on the following principles: individual consideration and decision-making; objectivity and impartiality; decision-making based on up-to-date information about the country of asylum obtained from various sources, primarily the Office of the United Nations High Commissioner (UNHCR) for refugees; competence of employees involved in the application review procedure.

Among the special duties or prohibitions that the Directive stipulates to ensure the rights of asylum seekers, the authors of this study would like to highlight those that relate, firstly, to their detention and, secondly, to the collection of information on an individual asylum case. In the first case, Article 26 of Directive No. 2013/32/EU (Directive No. 2013/32/EU, 2013) explicitly stipulates that it is prohibited to detain a person solely on the grounds that they are an asylum applicant. In other words, the fact that a person is an asylum seeker cannot be grounds for their detention and custody. If such a person is detained on other grounds, EU Member States should ensure

that a speedy judicial review is possible in accordance with EU legislation (Directive No. 2013/33/EU, 2013). Evidently and most importantly, this rule applies to persons detained for violating the rules of crossing the state border or otherwise illegally staying in the asylum state, because in any country of the world such acts are offences for which in some cases detention and subsequent custody can be applied. Therewith, according to universal standards, refugees and asylum seekers are exempt from legal liability for illegally crossing the border for the purpose of obtaining asylum. Consequently, the rule of Article 26 of the Directive is formulated in such a way that, while protecting the rights of a refugee to the greatest possible extent, it does not remove them from the scope of national legislation on legal liability for committing other offences.

Materials and Methods

In a certain way the EU legislation on refugee rights and asylum protects the rights of these individuals and creates additional tools and guarantees for the protection of applicants' rights at various stages of refugee status proceedings. However, the legislation of Ukraine does not establish such rules, and therefore it should be improved. For this, the authors of this study propose to introduce appropriate amendments in the Law of Ukraine No. 3671-VI (Law of Ukraine No. 3671-VI…, 2011).

Quite specifically, the Directive defines another participant in the proceedings – an individual asylum seeker. Among the legal regulation of certain legal definitions of a procedural nature, first and foremost, special attention should be paid to delineate the term "applicant" from the term "refugee" as a separate procedural subject. The 1951 Convention and the documents adopted on its basis not only do not distinguish between these terms, but rather emphasise that a person becomes a refugee not as a result of granting the appropriate status, but as a result of certain events that forced such a person to seek asylum. However, Article 2(g) of Directive 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002) defines a refugee as a person who meets the requirements of Article 2(d) of Directive 2011/95/EU (Directive No. 2011/95/EU, 2011) (qualification Directive). "Applicant" is defined in paragraph (c) as a third-country national or a stateless person who has lodged an application for protection in respect of whom no final decision has been made. An application for international protection is understood as an application of a third-country national or a stateless person for protection by a Member State, and from which it is obvious that the applicant requires refugee status or additional protection, and the applicant does not explicitly ask to be granted another type of protection outside the scope of Directive 2011/95/EU (Directive No. 2011/95/EU, 2011), regarding which an application can be submitted separately. A final decision under Article 2 (e) of the procedural Directive is a decision granting refugee status or additional protection to a third-country national or stateless person based on Directive 2011/95/EU (Directive No. 2011/95/EU, 2011), and which is no longer subject to appeal (revision) under Chapter V of Directive 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002), whether such appeal (revision) makes provision for the applicant's right to remain in the Member States concerned until its final outcome.

Results and Discussion

The Preamble of the Directive additionally proclaims the procedural rights of asylum seekers – persons who are somehow "removed" from the scope of legal regulation of the 1951 Convention (Refugee Convention No. 995_011, 1966): 1) effective access to procedures; 2) possibility of cooperation and proper communication with the competent authorities to present the corresponding facts; 3) sufficient procedural guarantees for the examination of the case at all stages of the procedure; 4) the right to remain in an EU state until a decision is made by the authorised body; 5) access to translation services during government interviews; 6) opportunity to communicate with the representative of the UNHCR and with organisations that advise applicants for international protection; 7) right to appropriate notification of the decision taken and its factual and legal justification; 8) opportunity to be counselled by a lawyer or other consultant; 9) the right to be informed of their legal situation at crucial moments in the procedure in a language that the applicant understands or is reasonably supposed to understand; 10) in the event of a negative decision – the right to an effective remedy (appeal/review) by a court or tribunal (Churpita 2020).

Guarantees for the exercise of these rights are defined in the following articles of the Directive. Next, the study considered at the main of these guarantees. Proclaiming adherence to the international principles and rules concerning asylum as defined by the 1951 Convention (Refugee Convention No. 995_011, 1966) and other international instruments, determining that states can only set more favourable standards for the procedure for granting and revoking refugee status, defines the rights of Member States regarding a certain restriction of such access. Access to the procedure for granting refugee status is ensured by the fact that every person with legal capacity has the right to apply for asylum on their own behalf and on behalf of their dependents with their consent.

The Directive defines a prohibition on the state not to accept or consider an application for asylum, based on the fact that it was not submitted in the shortest possible time. Although the legislation of the EU and EU Member States establishes such a requirement, it is obvious that being in difficult conditions of stay in an unfamiliar country, the refugee is actually deprived of the opportunity to apply within such a period. Paragraph 2 of Article 6 of Directive 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002) makes provision for an exception to this rule. If the applicant does not make such an application, Member States may apply Article 28 of the directive accordingly. The analysis of the provisions of this article of the Directive, in authors' opinion, is critical for understanding the level of ensuring the right of access to the procedure and compliance of EU legislation with universal standards of international protection.

The right to stay in the asylum state is guaranteed by Article 9 of Directive No. 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002), which, in particular, stipulates that every applicant should be granted the right to stay in an EU state solely for the purpose of taking part in the procedure until the authorised state body makes a decision on such an applicant at first instance. An exception to such a right of the applicant to remain in the asylum state for the duration of consideration of their application is the

cases when a person submits repeated applications. Other cases that may constitute exceptions to the general rule regarding the applicant's stay in the territory of the asylum state are the surrender or extradition of the applicant to another Member State as a result of a European Arrest Warrant (Directive No. 2013/32/EU, 2013), or to another (third) country, or to international criminal courts. Part 3 Article 9 of procedural Directive No. 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002) establishes that a Member State may extradite an applicant to a third country only when the competent authorities are confident that the decision on extradition will not result in direct or indirect extradition in breach of that Member State's international obligations and EU obligations (Zavalna and Starynskyi, 2021).

The right to stay in the asylum state to take part in the corresponding procedures is also specified by the Directive No. 2013/33/EU on establishing minimum standards of stay of asylum seekers of June 26, 2013 (Directive No. 2013/33/EU, 2013). Therewith, Directive No. 2013/33/EU is not aimed at ensuring and guaranteeing the prohibition of the extradition of an asylum seeker, and, ultimately, at protecting the individual from persecution, but at establishing the basis for creating appropriate living conditions for an asylum seeker in an EU Member State. In this regard, a detailed analysis of the provisions of European Union law is covered in a corresponding section of this study. Article 11 of the Directive stipulates that decisions on an application for international protection must be made in writing and provided to the applicant. Article 30 sets out separate special prohibitions on the disclosure of information about an asylum seeker/protection to ensure their safety and the safety of their loved ones and relatives from persecution by the state of origin. Thus, to collect information about the state of origin and the asylum applicant, the competent authorities of Member States are prohibited from disclosing information about individual applications for international protection or the fact that such application has been filed to an alleged subject of persecution or serious harm.

Paragraph (a), Part 1, Article 12 of the Directive establishes guarantees for the exercise of this right. According to it, information must be provided to the applicant in a language that the applicant understands or is reasonably supposed to understand. The applicant must be informed about: a) the procedure; b) their rights and obligations; c) the possible consequences of failure to perform their duties or non-cooperation; d) the time frame and ways to perform their obligations as well as the consequences of direct or indirect refusal of the application. Applicants and their representatives should have access to information about the country of origin and to information provided by experts, which the authorised body has considered to decide on their application. Furthermore, the authorised body must notify applicants and their advisers and notify them within a reasonable time of the decision taken on their application. If the applicant is represented by a jurisconsult or other legal adviser, Member States may notify them and not the applicant of the decision taken.

Providing an interpreter is directly related to the right to receive information in an understandable language and (Article 12, Part 1, Paragraph (b)) must occur for applying for asylum and at any time if necessary. At the same time, it is considered necessary when the authorised body summons the applicant for an interview stipulated by the Directive, if proper communication cannot be provided without an interpreter. In all cases of

summoning the applicant by the responsible state body, these services must be paid for at the expense of public funds. When considering an application at first instance, Member States are required to provide legal and procedural information free of charge upon the applicant's request. The Directive does not establish an exhaustive list of data included in such information. Such information may also be provided by non-governmental organisations or employees of state bodies or specialised services of the state. The Directive also empowers Member States to impose restrictions on the provision of such information free of charge only for those applicants who lack sufficient resources and/or only for legal advisers or other consultants specifically authorised by national law to assist and represent applicants (Kalaur and Moskaliuk, 2020; Budiachenko, 2021).

Member States may also impose cost and/or time limits on the provision of legal and procedural information free of charge, provided that such measures do not arbitrarily restrict access to the provision of legal and procedural information. Member States may also provide that, in respect of protection applicants, the regime of gratuitous and other costs could not be more favourable than the regime normally applied to nationals of such a state in respect of legal aid. They may also claim reimbursement of any expenses in whole or in part. However, only if and when the applicant's financial situation has considerably improved or if the decision to make such expenses was made based on false information provided by the applicant. Furthermore, the specified aid or counselling can be provided both at the expense of the applicant, and in certain cases free of charge. The Directive defines the mandatory grounds for providing free legal aid and the limits of discretion of Member States to restrict the right to free legal aid. Such free legal aid for the applicant is crucial, especially for persons in need of international protection (Vinnyk, 2019).

Therefore, in accordance with Paragraph 1, Article 20 of the Directive (Directive No. 2011/95/EU, 2011), Member States, at the request of the applicant, must provide free legal aid and representation in appeal procedures. This paragraph of Article 20 also sets out the minimum standard or scope of such legal aid. It includes, in particular, the preparation of the necessary procedural documents and participation in a hearing before a court or tribunal of first Instance on behalf of the applicant. It is clear that Member States can take an expanding approach to determining the scope of such free legal aid. Therewith, the legislation of the EU Member States may establish the procedure for provision and certain restrictions on free legal aid, similar to the legal regulation of the right to receive free legal and procedural information. Such restrictions on the provision of free legal aid in accordance with the Directive may include:

– refusal to grant free legal aid and representation if the court or other competent authority considers that the applicant's appeal (complaint) has no real prospects of being satisfied. The authors of this study believe that this basis for refusing to provide free legal aid is unacceptable, since even before the case is resolved on its merits, the relevant body or court provides a legal opinion on the application and actually decides on it, which directly contradicts the requirements of the rule of law, according to the practice of the European Court of Human Rights. In addition, the criterion defined in Paragraph 3, Article 20 of the Directive is value-based and non-specific. Obviously, understanding the controversial nature

of the introduction of this rule, the legislator introduced the applicant's right to an effective remedy in court against this decision, if the decision on non-provision of free legal aid and representation is made by a body that is not a court or tribunal. Unlike free legal aid, which is provided in a limited way, applicants for protection are entitled to the paid effective aid of a legal adviser or other consultant on matters relating to their applications for international protection at all stages of the procedure, including after a negative decision. Member States may also allow non-governmental organisations to provide legal aid and/or representation to applicants in the proceedings during the consideration of the application and the review of the decision taken in accordance with national legislation. In such a case, access to information can only be granted to authorised state bodies, and national legislation sets out procedures that should ensure the applicant's right to protection. The applicant's adviser should be granted access to "closed" places, such as transit zones or facilities of temporary detention or restriction of liberty, to advise or represent the applicant. However, such access cannot be substantially restricted, or restricted to such an extent that it becomes impossible.

Therewith, if an adviser is involved in the interview, Member States may stipulate the applicant's mandatory participation in them, as well as the latter's obligation to personally provide answers to questions. And the absence of an adviser cannot be a reason for postponing or cancelling such an interview. The right to refuse an application for refugee status belongs to each of the applicants. Such refusal may take the form of a direct (unequivocal) refusal or withdrawal of the application, or indirect refusal of it. Directive No. 2013/32/EU (Articles 27, 28) (Council Framework Decision 2002/584/JHA, 2002) distinguishes between the forms and consequences of these acts of the applicant. The indirect refusal of the applicant from the application is not so much an element of the applicant's rights, but the rights of the Member State to respond accordingly to certain acts of the applicant. And the main purpose of this institution is to ensure that the Member State can reduce the burden on the authorised body and stop considering applications that cannot be considered because of the applicant's actions.

If in the case of direct refusal, affirmative acts of the applicant are necessary to refuse further consideration of the application, then in the case of indirect refusal, the so-called "reasonable grounds to believe" that the applicant refused or evades maintaining their application is necessary to conclude that it exists. Evidence of this may include the applicant's evasion from providing the information necessary to consider their application, or failure to appear for an interview. The consequences of withdrawing an application may be the adoption of a procedural decision to terminate the proceedings, or a decision on the merits of the case. Terminated proceedings may be resumed at the applicant's request if the latter has appeared before the relevant authority or informed it in writing after the decision on termination, or the applicant may be invited to submit a new application. The proceedings may be resumed from the stage at which they were terminated.

Thus, an application that was not timely submitted may be considered withdrawn. This suggests that it is necessary to apply a selective, balanced approach to the implementation

of EU legislation on international protection or asylum in the legislation of Ukraine. Otherwise, due to a violation of universal standards of international protection, defined, among other things, by the UN Convention Relating to the Status of Refugees of 1951 (Refugee Convention No. 995_011, 1966), Ukraine will become a violator of its international obligations. However, Member States are not entitled to extradite the applicant if this violates the principle of prohibition of expulsion as defined by the relevant international instruments. Article 24 stipulates the need for the Member States to establish procedures for identifying persons who are additionally granted special procedural guarantees. The wording of the said article suggests that such persons should in any case be considered persons who have been subjected to psychological, physical, or sexual violence.

First and foremost, Member States must assess within a reasonable time after the application for international protection is submitted whether the applicant is a person in need of special procedural guarantees. In the event of a positive decision to identify a person in need of special procedural guarantees, the applicant is provided with adequate appropriate aid that will allow them to exercise the rights and perform the obligations established by the procedural Directive throughout the asylum procedure (Kulinich, 2016). One of the guarantees for such persons is the termination and prohibition of the use of accelerated procedures, procedures in transit or border areas, procedures in the case of repeated applications, if adequate aid cannot be provided to persons in need of special procedural guarantees under these procedures. Among such cases, are cases where the applicant requires special procedural guarantees due forms of psychological, physical, or sexual violence (Luspenyk, 2006).

Procedural guarantees of minors who are not accompanied by adults are given a special place in the Directive. This category of persons is protected by the international community and the European Union is trying to demonstrate its commitment to the principles and obligations imposed on the Member States to the 1951 Convention. In this regard, Directive 2013/32/EU (Article 25) obliges the Member States as follows: 1) take measures as soon as possible to provide the minor with a representative; 2) ensure that the representative of the minor is informed about the consequences and legal significance of the interview; 3) ensure that the representative can attend the interview, ask questions, and make comments; 4) ensure that an interview is conducted by a person who has special training relating to the needs of minors; 5) ensure the preparation of a decision of the corresponding state body on the application of a minor by an official with an appropriate training regarding the needs of minors (Kot, 2017; Zaika, 2017).

EU Member States are granted the right not to provide a minor with a representative in cases where the minor in any case reaches the age of majority before the issue is resolved in the first instance. Notably, the current version of the Directive No. 2013/32/EU (Council Framework Decision 2002/584/JHA, 2002) excluded some grounds for refusing to provide a minor with a representative. Thus, in the previous wording, such grounds included cases where: 1) a minor may use the services of a legal adviser free of charge; 2) minor is married or has entered into marriage; 3) the minor is 16 years old and can support its application without a representative (Aslani et al., 2016). It is clear that

these changes are aimed at best ensuring the interests of minors in accordance with the standards of their protection established at the universal level, in particular, by United Nations documents.

To identify the age of a minor, Member States may conduct a medical examination of the minor as part of the asylum proceedings. The minor must be notified of its necessity prior to considering its application and in a language that the minor understands or is reasonably supposed to understand. Such an examination can only be performed with the consent of the minor and/or its representative. The refusal of a minor to undergo such an examination cannot be the sole reason for refusing to grant it international protection (Popov and Fedonyuk, 2012). Expedited procedures can only be carried out if the applicant originates from a country that meets the criteria of a safe country of origin; the application filed is a repeated application for international protection which is not inadmissible; or there are serious grounds to believe that the applicant poses a threat to the national security or public order of a Member State, or the applicant has been forcibly extradited for serious reasons of public safety or public order under national legislation. Border procedures may be applied to such minors or continued exclusively on the above-mentioned grounds and also if there are reasonable grounds to believe that a country that is not a Member State is a safe third country for the applicant; or the applicant misled the authorities by submitting false documents; or a dishonest applicant destroyed or disposed of an identity card or travel document (Kokhanovska, 2005).

Therewith, the destruction (loss) of documents and misleading as grounds for applying the relevant procedures can only be applied by Member States where there are serious grounds to believe that the applicant is trying to conceal relevant information by these actions. An application filed by an unaccompanied minor may be declared inadmissible on account of being in a third safe country only if it is in the best interests of the minor. Therefore, the corresponding authority of the country of protection needs to establish what these interests are and ensure that it is this third safe country that will ensure that these interests are respected and protected in the best possible way. Notably, the introduction of such evaluation and non-specific criteria in the legislation of Ukraine is risky and, in some cases, even dangerous (Kharitonov and Kharitonova, 2011). Furthermore, the corresponding authority or court may restrict the right to free legal aid to an unaccompanied minor only if the representative of the minor is legally qualified in accordance with national legislation.

Conclusions

1. An analysis of this provision suggests that the EU legislation on the free provision of legal and procedural information, on the one hand, is quite favourable to applicants for protection. However, it also allows the EU Member States themselves to take care of protecting their interests from dishonest applicants. Evidently, such high standards of free information and aid can be used by other states only with available resources. However, the authors of this study argue that this approach in itself deserves attention and can be implemented in the legislation of Ukraine after appropriate adaptation to Ukrainian realities.

2. The right to legal aid and representation is proclaimed in the Preamble of the Directive and is guaranteed by the rules for obtaining it, which are outlined in Articles 20-23 of the Directive. According to Paragraph 23 of the Preamble, in appeal proceedings, under certain conditions, applicants must receive free legal aid and representation provided by competent persons in accordance with national legislation. Furthermore, at all stages of the procedure, applicants should have the right, at their own expense, to consult with legal advisers or consultants who are recognised as such or who have the appropriate authorisation under national legislation. Apart from these restrictions, the Directive also makes provision for the possibility to set certain amounts and limits for providing legal aid to applicants for international protection. Such aid may be provided by a person who is authorised or allowed to provide legal aid or legal representation under national legislation.
3. Therewith, EU Member States may make exceptions to this rule if the disclosure of such information may harm national security, the security of the bodies or persons who provided such information, or those affected by this information; or if it may harm the interests of the authorities considering the application or the international relations of an EU Member State.

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