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## **Poland's Stance on the Refugee and Migration Crisis in the European Union**

**Abstract:** The increased influx of refugees into Europe in 2015 put a strain on Europe's common asylum system. The European Union was faced with the challenge of solving this urgent problem, and was forced to take interim measures. In September 2015, the Council took two decisions: the first to relocate 40,000 applicants and the second to relocate 120,000 applicants to Member States. The relocation decisions were based on the principles of solidarity and fair sharing of responsibility as expressed in Article 80 of the TFEU. Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfill the obligations arising from the relocation decisions. Poland's stance on the solutions adopted by the EU has evolved; the changes were dictated by internal as well as external factors.

**Keywords:** Refugee-migration crisis, relocation, principle of solidarity, national security

### **Introduction**

The area of freedom, security, and justice is a field of shared competence between the European Union and the Member States. The EU's asylum policy aims to grant appropriate status to any third-country nationals who require international protection in one of the Member States. To this end, the Common European Asylum System has been introduced. A key solution in this system is the adoption of the mechanism, criteria, and procedures for determining the Member State responsible for examining an asylum application. The increased influx of immigrants to European Union countries has been a major challenge to the existing system.

In 2015–2016, a huge number of foreigners came to Europe seeking refuge. They were mainly people fleeing war and terror from countries in the Middle East and Africa. In 2015, 1,255,600 people applied for refugee status or another form of protection in EU countries. This was a significant increase of 123% compared to 2014 when the number of applicants was 562,680. Those seeking refuge were mainly citizens of Syria (362,800 people), whose numbers doubled, Afghanistan (178,200 people), whose numbers nearly quadrupled, and Iran (121,500 people), whose numbers increased sevenfold compared to 2014. Applications by nationals of these countries accounted for more than half of all asylum applications<sup>1</sup>.

UNHCR data shows that more than 1 million refugees and migrants arrived in Greece alone in 2015 and early 2016<sup>2</sup>. In October 2015, arrivals to Greece peaked at 10,000 people per day<sup>3</sup>. The problem of mass influx has also affected other countries, most notably Turkey and Italy.

The European Union faces a huge challenge in solving the migration crisis. This paper shows what temporary measures the European Union has taken to handle this emergency situation. The stance of Poland, which held a parliamentary election during the migration crisis, is also significant in this situation. Did the election affect the implementation of the commitments? In the context of the relocation cases considered by the Court of Justice of the European Union, which resulted from the application of the temporary solutions adopted, it seems appropriate to present the stance of Poland, in particular with regard to the principle of solidarity in the implementation of asylum and relocation policy versus state security.

## 1. Measures Taken by the EU in the Face of the Migration Crisis

As a part of the creation of the Common European Asylum System, the European Union introduced criteria and mechanisms for the responsibility of a single state for examining an asylum application. The principles first adopted in the Convention Implementing the Schengen Agreement and in the Dublin Convention were refined in internal acts of the European Parliament and of the Council, commonly referred to as the Dublin II Regulation, and as Dublin III, which amended the former. Criteria were adopted to determine which country would examine the application: the principle of family unity, the issuance of a residence permit or visa, irregular bor-

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1 Eurostat news release 44/2016, 4.03.2016, <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> (accessed 18.02.2020).

2 Data cited from <https://www.unhcr.org/greece.html?query=migrants%202015> (accessed 29.02.2020).

3 EU and... the migration crisis, <https://op.europa.eu/webpub/com/factsheets/migration-crisis/pl/> (accessed 18.02.2020).

der crossing or residence, and legal entry<sup>4</sup>. In practice, however, the entry criterion was used most often, with the result that Greece and Italy had to bear a disproportionate share of the burden of examining asylum applications. This created huge disparities and plunged the European asylum system into chaos. The already-inefficient asylum system in Greece<sup>5</sup> completely collapsed.

The mass influx of immigrants exposed the weaknesses of the European asylum system. Questions arose about the responsibility of individual states and their solidarity in implementing the European Union's asylum policy. Pursuant to Article 67(2) of the TFEU<sup>6</sup>, "[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals." Similarly, Article 80 of the TFEU provides that "[t]he policies of the Union [including the asylum policy] (...) and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States." Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Such a deep crisis prompted the institutions of the European Union to take action. Initially, the European Council, at its extraordinary meeting held on April 23, 2015, decided, among other things, to increase assistance to the frontline countries and to consider options for organizing emergency relocation of migrants on a voluntary basis<sup>7</sup>. However, as early as the meeting held on June 25 and 26, 2015, the European Council decided on the need for relocation from Italy and Greece in which all countries would participate, and addressed the issues of return, readmission, reintegration, and cooperation with countries of origin and transit<sup>8</sup>.

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4 M. Zdanowicz, Rozporządzenia Dublin II i Dublin III z polskiej perspektywy, (in:) L. Brodowski and D. Kuźniar-Kwiątek (eds.), *Unia Europejska a prawo międzynarodowe*. Księga pamiątkowa dedykowana Prof. Elżbiecie Dyni, Rzeszów 2015, pp. 399–402.

5 *Ibidem*, p. 404.

6 Treaty on the Functioning of the European Union (consolidated version) (O.J.C 326, 26.10.2012, pp. 0001–0390).

7 European Council, Press Release, Extraordinary European Council Meeting (23 April 2015), <https://www.consilium.europa.eu/pl/press/press-releases/2015/04/23/special-euco-statement/> (accessed 18.02.2020).

8 European Council, Conclusions, European Council Meeting (25 and 26 June 2015), EUCO 22/15, <https://data.consilium.europa.eu/doc/document/ST-22-2015-INIT/pl/pdf> (accessed 18.02.2020).

In September 2015, the Council made two decisions: first to relocate 40,000 applicants<sup>9</sup> and second to relocate 120,000 applicants to Member States<sup>10</sup>. In addition, Greece and Italy received support in creating so-called “hotspots,” or rapid registration points for migrants. They were supposed to improve the management of the incoming migrants. The EU also deployed experts from Member States to assist in the screening and registration of these individuals.

With most immigrants coming to Europe through Turkey, cooperation with the Turkish government was inevitable<sup>11</sup>. In March 2016, at the initiative of Germany, an agreement was signed whereby, starting from March 20, 2016, “all new irregular migrants entering Greece from Turkey will be sent back to Turkey.” Instead, “each return of a Syrian from the Greek islands to Turkey will be accompanied by resettlement of another Syrian from Turkey to the EU”<sup>12</sup>. In addition, the EU allocated EUR 6 billion under the EU Facility for Refugees in Turkey. As emphasized by Joanna Dobrowolska-Polak, the legal basis for readmission of migrants was to be the 2001 Greek–Turkish agreement on readmission of irregular migrants and the EU Asylum Directive of 2013. However, the author points at doubts related to considering Turkey as a “safe third country” when implementing the procedures contained in these acts<sup>13</sup>.

In 2016, the European Commission proposed a reform of the EU asylum policy that provided for, among other things, a permanent refugee distribution system that would be triggered automatically in a crisis, as well as the possibility to buy out of the relocation obligation<sup>14</sup>. This proposal was met with criticism from states, and in 2017 the European Parliament proposed a solution that, among other things, moved

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9 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (O.J.L 239, 15.9.2015, pp. 146–156).

10 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (O.J.L 248, 24.9.2015, pp. 80–94).

11 M. Ineli-Ciger, Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe, “European Journal of Migration and Law” 2016, vol. 18, p. 11.

12 European Council, EU–Turkey Statement, 18 March 2016, <https://www.consilium.europa.eu/pl/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 18.02.2020).

13 J. Dobrowolska-Polak, Turcja, Unia Europejska i uchodźcy. Porozumienia w sprawie zarządzania kryzysem migracyjnym, “Biuletyn Instytutu Zachodniego” (special series “Uchodźcy w Europie”) 2016, no. 229, pp. 3–4. Similarly, K.M. Greenhill notes that the EU treats Turkey as a safe country, despite growing human rights violations and repression of the free Turkish press. K.M. Greenhill, Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis, “European Law Journal” 2016, vol. 22, no. 3, p. 326.

14 Proposal for a Regulation of the European Parliament and of the Council 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, COM (2016) 270 final.

away from placing excessive burdens on the state of first entry and introduced relocation based on a permanent corrective allocation system to states with the lowest admission rate<sup>15</sup>. Barbara Mikołajczyk assesses the Commission's draft as restrictive, both to Member States and to persons seeking international protection. On the other hand, according to that author, the amendments of the European Parliament refer more to the principle of solidarity contained in Article 80 of the TFEU and take greater account of the rights of migrants<sup>16</sup>. Also, Sophie Capicchiano Young believes that the Commission's draft exacerbates inequalities in the burden placed on Member States, mainly due to the removal of financial safeguards for countries that are particularly vulnerable to an influx of refugees<sup>17</sup>.

In its meeting held in June 2018, the European Commission highlighted, among other things, the need to dismantle the "smugglers' business model"<sup>18</sup> and to tackle migration at source, i.e. to develop a partnership with Africa, and pointed to the need to build consensus on the Dublin Regulation in order to reform it based on a balance between responsibility and solidarity<sup>19</sup>.

## 2. Poland's Stance on the Implementation of the Relocation Decisions

Of the numerous instruments used by the EU institutions to address the migration crisis, the acts on relocation have been of fundamental importance. In September 2015, the Council adopted two such decisions. Council Decision (EU) 2015/1523 of 14 September 2015 provided for relocation of persons in clear need of international protection, from Greece and Italy to other EU Member States. Over two years, 40,000 people would be affected: 24,000 from Italy and 16,000 from Greece (Article 4). Member States were to report regularly, at least every three months, the number of applicants they could rapidly relocate to their territory (Article 5(2)). The decision therefore gave Member States the possibility to decide how many people

15 Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council 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, COM (2016) 0270 – C8–0173/2016 – 2016/0133(COD).

16 B. Mikołajczyk, Mechanizm dubliński na rozdrożu – uwagi w związku z pracami nad rozporządzeniem Dublin IV, "Europejski Przegląd Sądowy" 2018, no. 3, p. 9.

17 S. Capicchiano Young, Dublin IV and EXCOM: Aspirational Blunders and Illusive Solidarity, "European Journal of Migration and Law" 2017, vol. 19, p. 373.

18 For more on the crime of migrant smuggling in the context of the migrant crisis, see C. Briere, Defining the Offence of Migrant Smuggling: When the Migration Crisis Revives Old Debates, (in:) E. Kuźlewska, A. Weatherburn and D. Kloza (eds.), Irregular Migration as Challenge for Democracy, Cambridge/Antwerp/Portland 2018, pp. 139–164.

19 European Council, Conclusions, European Council Meeting (28 June 2018), EUCO 9/18, <https://data.consilium.europa.eu/doc/document/ST-9-2018-INIT/pl/pdf> (accessed 18.02.2020).

they would admit and when. Council Decision 2015/1523 was adopted by qualified majority with the Czech Republic, Hungary, Romania, and Slovakia voting against (Finland abstained from the vote). Poland voted in favor of the decision.

Due to the ongoing high influx of migrants to Europe caused by the continued instability and conflicts in the immediate vicinity of Italy and Greece, there was a need to complement the actions taken so far to address the crisis situation more efficiently. On September 22, 2015, the Council adopted Decision 2015/1601 to relocate 120,000 applicants to other Member States. According to the commitments, 15,600 immigrants from Italy and 50,400 from Greece were to be relocated in accordance with the annexes to the Decision (Article 4(1)). Poland was therefore required to admit 1,201 applicants from Italy (Annex I) and 3,881 applicants from Greece (Annex II). The remaining 54,000 persons were to be distributed in proportion to the figures given in Annexes I and II (Article 4(1)(c)). As before, the Council made its decision by qualified majority. The Czech Republic, Hungary, Romania, and Slovakia voted against this proposal, and the Republic of Finland abstained from voting. Poland voted in favor of the resolution.

The government formed by the Civic Platform referred to the principle of solidarity and initially declared its intent to accept 2,000 refugees. The prime minister emphasized that Poland was able to provide such a number of immigrants with decent living conditions. At the same time, Prime Minister Kopacz noted that many foreigners from across our eastern border, mainly Ukrainians, were coming to Poland. These people worked legally in Poland<sup>20</sup>. The government advocated the separation of refugees from economic migrants, the sealing of the external borders of the European Union, and the full vetting of persons Poland intended to accept by Polish security services<sup>21</sup>. In its efforts to solve the refugee and migration crisis, the government of Prime Minister Ewa Kopacz also advocated stricter protection of the EU's external borders, fighting the smuggling of people, and providing assistance to refugee camps in Syria, Lebanon, and Jordan.

As emphasized by Konrad Pędzwiatr and Agnieszka Legut, the government of Ewa Kopacz justified not only its restraint with regard to the declared quota, but also its selectivity in the selection of the refugees. The conservative nature of such a stance was also connected with the demand for a shift in the emphasis on the actions taken outside the EU area or at its external borders<sup>22</sup>.

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20 Prime Minister Ewa Kopacz, "Poland will accept 2,000 refugees. This is an expression of European solidarity," 21 July 2015, <https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-ewa-kopacz-polska-przyjmie-2000-uchodzcow-to-wyraz-solidarnosci.html> (accessed 18.02.2020).

21 Prime Minister Ewa Kopacz, "Poland is and will be safe, pro-European, and tolerant," 20 September 2015, <https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-ewa-kopacz-polska-jest-i-bedzie-bezpieczna-proeuropejska-i.html> (accessed 18.02.2020).

22 K. Pędzwiatr, A. Legut, *Polskie rządy wobec unijnej strategii na rzecz przeciwdziałania kryzysowi migracyjnemu*, p. 684, [https://www.academia.edu/30941600/Polskie\\_rz%C4%85dy\\_wobec\\_](https://www.academia.edu/30941600/Polskie_rz%C4%85dy_wobec_)

As Mieczysław Stolarczyk has pointed out, before the parliamentary election (October 25, 2015), the discussion concerning refugees and migrants intensified. Refugee and migration issues became an important part of the pre-election debate in Poland<sup>23</sup>. The parliamentary election held in Poland on October 25, 2015 was won by the Law and Justice (PiS) party, which was endowed with the mission to form a new government. On the day of her appointment as Prime Minister, Beata Szydło said that her government would honor the decisions that had been taken on the European level. However, she emphasized that on the issue of acceptance of refugees, the most important goal would be to ensure the security of Polish citizens<sup>24</sup>. In her statement, Prime Minister Szydło said: “the refugee issue also makes us aware of the need to be clear about solidarity. It should consist in sharing what is good and being ready to help when extraordinary or dangerous events occur”<sup>25</sup>.

In its first months, Szydło’s government postulated preparation of the process of selection of the refugees to be relocated in such a way as to minimize the risk of entry into Poland of persons who could pose a threat to national security, mainly terrorists. In addition, a great deal of emphasis was placed in EU discussions on the issue of measures that needed to be taken to reduce the flow of refugees to Europe. This plan was to be based on three pillars:

- firstly, on the maximum sealing of the EU’s borders and developing procedures to separate economic migrants from real refugees;
- secondly, on helping countries located next to areas of instability so that a maximum number of refugees can stay in camps in their territory;
- thirdly, on conducting activities aimed at ending conflicts so that it becomes possible for those displaced by hostilities to return to their homes<sup>26</sup>.

The PiS government expressed its readiness to accept the first group of 100 refugees by the end of March 2016, as a part of the relocation from Italy and Greece.

unijnej\_strategii\_na\_rzecz\_przeciwdzia%C5%82ania\_kryzysowi\_migracyjnemu (accessed 18.02.2020).

23 M. Stolarczyk, Stanowisko Polski wobec kryzysu migracyjno-uchodźczego Unii Europejskiej, “Krakowskie Studia Międzynarodowe” 2017, no. 2, p. 32.

24 Prime Minister Beata Szydło, “We will do everything to make Poles feel safe,” 16 November 2015, <https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-beata-szydlo-zrobimy-wszystko-aby-polacy-czuli-sie-bezpiecznie.html> (accessed 18.02.2020).

25 The Sejm of the Republic of Poland, statement of Prime Minister Beata Szydło, 18 November 2015, <https://www.premier.gov.pl/expose-premier-beaty-szydlo-stenogram.html> (accessed 18.02.2020).

26 “The Szydło government will not change the decisions of the Kopacz government on refugees,” 16 November 2015, <https://wiadomosci.dziennik.pl/polityka/artykuly/505626,polska-przyjmie-uchodzcow-rzad-szydlo-nie-zmieni-ustalen-rzadu-kopacz-w-sprawie-imigrantow.html> (accessed 18.02.2020).

They were supposed to be Christians from Syria or Iraq<sup>27</sup>. After the terrorist attacks in Brussels on March 22, 2016, the PiS government stiffened its stance on the acceptance of refugees under the EU relocation scheme.

On April 1, 2016, the Sejm held a debate followed by a resolution on Poland's immigration policy. The Polish parliament negatively assessed the decision of the Council of the European Union of September 22, 2015 on the relocation of 120,000 refugees. It called on the Polish government to apply particularly carefully the national criteria of refugee policy, which should extend special protection to single women, children, large families, and religious minorities. It expressed strong opposition to any attempt to establish permanent EU mechanisms for allocation of refugees and migrants<sup>28</sup>.

The stance of the Polish government on admission of Christian families and the stance of the Sejm on protection of particular groups, as expressed in the resolution, raise serious doubts. This is because granting protection only to selected groups of persons in need of international protection results in unequal treatment of foreigners and constitutes a violation of Article 3 of the 1951 Refugee Convention, which provides that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin"<sup>29</sup>. Atle Grahl-Madsen has emphasized that a person who meets the criteria specified in Article 1 of the Convention (the definition of a refugee) is entitled *ipso facto* to the benefits provided by the Convention<sup>30</sup>. Bogdan Wierzbicki has emphasized that the act of recognition as a refugee is only declarative and not constitutive<sup>31</sup>. Of key importance in this respect is the stance of the UNHCR, which indicates that a person is a refugee within the meaning of the 1951 Convention if he or she fulfils the criteria contained in its definition. This must be the case before refugee status is formally granted. Therefore, recognition of refugee status does not make someone a refugee, but merely confirms the fact that they are one<sup>32</sup>. Therefore, even at the procedural

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27 "The first refugees will arrive in Poland by the end of March. They are to be thoroughly vetted," 8 January 2016, <https://tvn24.pl/wiadomosci-z-kraju,3/szydlo-polska-przyjmie-pierwszych-uchodzcow-do-konca-marca,608966.html> (accessed 18.02.2020).

28 The Sejm of the Republic of Poland, Resolution of the Sejm of the Republic of Poland of 1 April 2016 on Poland's immigration policy, 1 April 2016, [http://orka.sejm.gov.pl/proc8.nsf/uchwaly/18\\_u.htm](http://orka.sejm.gov.pl/proc8.nsf/uchwaly/18_u.htm) (accessed 18.02.2020).

29 Convention Relating to the Status of Refugees, Geneva 28 July 1951, Journal of Laws of 1991, no. 119, item 515.

30 A. Grahl-Madsen, *The Status of Refugees in International Law*, Leyden 1966, pp. 157, 340.

31 B. Wierzbicki, *Uchodźcy w prawie międzynarodowym*, Warsaw 1993, p. 57.

32 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1. Reedited, Geneva January 1992, UNHCR 1979, p. 7, <https://www.unhcr.org/4d93528a9.pdf> (accessed 18.02.2020).



stage, the provisions of the Convention cannot be applied in a discriminatory manner that results in unequal treatment.

On July 26, 2017, the Commission released a report that shows that Poland had not relocated or declared the number of applicants for admission since December 2015. Similarly, Hungary had not taken any action since relocation began, and the Czech Republic had not relocated any persons at all since August 2016 and had not made any new commitments for over a year. The Commission called on these countries to immediately start relocation<sup>33</sup>.

### **3. Relocation and the Principle of Solidarity and Fair Sharing of Responsibility between Member States (in the Context of Proceedings before the CJEU in Cases C643/15 and C647/15)**

Hungary and Slovakia had a negative attitude towards the relocation of refugees from Greece and Italy from the very beginning. They voted against Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601. This resulted in the filing of actions by the Republic of Slovakia (C643/15) and the Republic of Hungary (C647/15) for the annulment of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection in favor of Italy and Greece. By order of the president of the Court<sup>34</sup>, Poland was admitted as an intervener or supporting the demands of Slovakia and Hungary. On September 6, 2017, the Court of Justice, sitting in the Grand Chamber, delivered its judgment dismissing the actions<sup>35</sup>.

The applicants' allegations concerned several issues. One of them was incorrect reference to Article 78(3) of the TFEU as the legal basis for the contested decision. The applicants alleged that, although Decision (EU) 2015/1601 was adopted under the non-legislative procedure and is therefore formally a non-legislative act, due to its content and effects, it must nevertheless be regarded as a legislative act. They pointed

33 European Commission, Report from the Commission to the European Parliament, the European Council and the Council, Fourteenth report on relocation and resettlement, COM (2017) 405 final, 26 July 2017, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170726\\_fourteenth\\_report\\_on\\_relocation\\_and\\_resettlement\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170726_fourteenth_report_on_relocation_and_resettlement_en.pdf) (accessed 18.02.2020).

34 By order of the president of the Court of 29 April 2016, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Sweden, and the Commission were admitted as intervenors supporting the demands of the Council in cases C643/15 and C647/15.

35 Court of Justice, Judgment of the Court (Grand Chamber) of 6 September 2017, Slovak Republic (C643/15) and Hungary (C647/15) / Council of the European Union (Joined Cases C643/15 and C647/15), 6 September 2017, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=18E2D9F5DDD0645EE9D1C90BA3F79020?text=&docid=194081&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=6962956> (accessed 18.02.2020).

out that it amended, in a fundamental manner, a number of legislative acts of EU law. The Court emphasized that a legislative act can be considered to be a legislative act of the Union only if it is adopted on the basis of a provision of the Treaty which expressly makes reference either to the ordinary legislative procedure or to a special legislative procedure (paragraph 62 of the judgment). The Court referred to Article 78(3) of the TFEU, which provides that the Council adopts provisional measures on a proposal from the Commission and after consulting the parliament, and in no way directly refers to either the ordinary legislative procedure or the special legislative procedure (paragraph 65 of the judgment). Consequently, the Court held that since the measures that may be adopted on the basis of Article 78(3) of the TFEU are not adopted in the context of a legislative procedure, they must be classified as “non-legislative acts” (paragraph 66 of the judgment).

The Slovak Republic and Hungary claimed that Article 78(3) of the TFEU is not a valid legal basis for adoption of the contested decision, since it is not provisional. In the opinion of those states, it cannot be regarded as a “provisional measure” because its term was set at two years with the possibility of extension. The Court pointed out that Article 78(3) of the TFEU, which was the legal basis for the adoption of the Decision, allows adoption of “provisional measures” only (paragraph 89 of the judgment). The Court argued that an act should be regarded as “provisional” only if its purpose is not to regulate a matter permanently and, moreover, if its duration is strictly limited (paragraph 90 of the judgment). The decision to apply measures for a period of 24 months is justified due to the fact that relocation of such a large number of persons as envisaged in the contested decision is an unprecedented and complex operation. Preparing and carrying it out requires coordination between administrative bodies of the various states and thus takes time (paragraph 97 of the judgment). The Court also rejected the allegations concerning infringement of essential procedural requirements.

The allegations concerning the merits of the case should also be indicated. The Slovak Republic, supported in that regard by Poland, argued that the contested decision was not appropriate for attaining the objective which it pursued and, therefore, violated the principle of proportionality. Hungary also raised a plea of breach of the principle of proportionality. In the opinion of those countries, the relocation mechanism provided for in the decision was inadequate as it could not address the structural deficiencies of the asylum systems of Greece and Italy. The Court pointed out that the relocation mechanism was only one part of a whole spectrum of measures designed to alleviate the difficulties faced by Greece and Italy. The decision also provided for other forms of aid, including operational and financial support (paragraphs 212–216 of the judgment).

The Court pointed out that, where one or more Member States are in an extraordinary situation, the burden resulting from the application of provisional measures must be shared by all the other Member States in accordance with the principle of

solidarity and fair sharing of responsibility between the Member States. The Court emphasized that under Article 80 of the TFEU, it is on this principle that the EU's common asylum policy is based (paragraph 291 of the judgment). Iwona Wróbel points out that the Polish version of the discussed judgment contains the phrase "the common EU asylum policy is based on this principle." The English version contains a stronger phrase, i.e. "that principle governs EU asylum policy," which is in line with the wording of Article 80 of the TFEU in English. This principle therefore governs the EU's asylum policy<sup>36</sup>.

Also, Advocate General Yves Bot, in his opinion<sup>37</sup>, considered that Decision (EU) 2015/1601 was an expression of solidarity between Member States. In view of the actual inequality between Member States on account of their geographical location and their vulnerability to mass migratory flows, the nature of the adoption of measures on the basis of Article 78(3) of the TFEU is overriding. The measures contained in the Decision allow for the implementation of the principle of solidarity and fair sharing of responsibility between Member States, as laid down in Article 80 of the TFEU (points 16 and 22 of the opinion). The Advocate General noted that the contested decision had effect in all Member States and required that a balance be struck between the various interests of the states. Consequently, the search for such a balance, taking into account the situation of all the Member States of the European Union and not the specific situation of one Member State only, cannot be regarded as contrary to the principle of proportionality. The Advocate General invoked the principle of solidarity and fair sharing of responsibility between the Member States laid down in Article 80 of the TFEU, which implies that the burdens arising from temporary measures adopted under Article 78(3) of the TFEU in favor of one or more Member States in a situation of extreme migratory pressure should be borne by all other Member States (point 303 of the opinion)<sup>38</sup>.

This raises the key question of defining the essence of solidarity in European Union law. Cezary Mik has pointed out that in EU law, solidarity is embedded in various normative structures. He distinguishes solidarity as an objective and a value, solidarity as a legal principle, and solidarity as a rule of conduct. In the author's opinion, sol-

36 I. Wróbel, Tymczasowy mechanizm relokacji osób ubiegających się o ochronę tymczasową jako gwarancja prawa do azylu w Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 6.09.2017 r. sprawy połączone C-643/15 i C-647/15, Republika Słowacka i Węgry przeciwko Radzie Unii Europejskiej, "Europejski Przegląd Sądowy" 2017, no. 12, p. 35.

37 Opinion of Advocate General Yves Bot delivered on 26 July 2017, Cases C643/15 and C647/15, Slovak Republic, Hungary v. Council of the European Union, 26 July 2017, <https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:62015CC0643> (accessed 18.02.2020).

38 The principle of solidarity was also referred to by the Advocate General in Case C715/17, European Commission v. Republic of Poland, stating that the Court had repeatedly called for solidarity over the years and that the principle of solidarity sometimes inevitably means acceptance of the sharing of burdens (points 249–251 of the opinion). Case C715/17 will be further discussed in section 4.

idity is certainly regarded as a legally recognized objective of the European Union. Solidarity as an objective of the European Union cannot be the basis of a claim, for it is not a rule that governs conduct. Solidarity as a principle of EU law has no single legal basis. In a substantive sense, a principle should be understood as a generally applicable method (way) of operation of the EU, seen as an integrating relationship between the institutions and the Member States. The principle of solidarity does not generally allow claims to be made directly on the basis of this principle (however, as an exception, it can be the basis for more specific obligations), but it has high interpretative significance or is a determinant of specific rules of conduct. Solidarity can also be a rule of conduct that occurs most often not as a single legal norm, but as a set of norms<sup>39</sup>.

Article 80 of the TFEU explicitly provides that asylum policy and its implementation are governed by the principle of solidarity and fair sharing of responsibility between Member States. Sonia Morano-Foadi identifies three types of solidarity/responsibility of a Member State: 1) towards refugees and migrants; 2) towards another Member State; and 3) towards the EU itself<sup>40</sup>. Anna Doliwa-Klepacka has pointed out that solidarity between Member States has been repeatedly invoked in crisis situations<sup>41</sup>.

Neža Kogovšek Šalamon has expressed the view that it is clear from the wording of this provision that it does not impose concrete and practical legal obligations on EU institutions and Member States, but rather sets out a binding guiding principle for shaping policies and their implementation<sup>42</sup>. Esin Küçük also sees the principle of solidarity as a tool for interpretation. Therefore, in the author's opinion, both primary and secondary EU law that regulates the principles of border control, asylum, and immigration should be based on Article 80 of the TFEU. If a provision concerning these areas may be interpreted in different ways, this should be done in the light of Article 80 of the TFEU, i.e. in such a way as to give effect to the principle of solidarity and fair sharing of responsibility<sup>43</sup>.

Sonia Morano-Foadi notes that the terms "solidarity" and "responsibility" are used together in the same article, which suggests that the two concepts are related.

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39 C. Mik, *Solidarność w prawie Unii Europejskiej. Podstawowe problemy teoretyczne* (in:) C. Mik (ed.), *Solidarność jako zasada działania Unii Europejskiej*, Toruń 2009, pp. 48–52.

40 S. Morano-Foadi, *Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures*, "European Journal of Migration and Law" 2017, vol. 19, pp. 241–249.

41 A. Doliwa-Klepacka, *Case Comment – Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017, "Polish Review of International and European Law" 2019, vol. 8, issue 2, p. 153.

42 N. Kogovšek Šalamon, *The Principle of Solidarity in Asylum and Migration within the Context of the European Union Accession Process*, "Maastricht Journal of European and Comparative Law" 2017, no. 24, p. 698.

43 E. Küçük, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, "European Law Journal" 2016, no. 22, p. 463.

The author explains that equitable sharing of responsibility, i.e. burden-sharing between Member States, is a direct consequence of solidarity, while the latter is the motivation for burden-sharing. Together, they are the constitutive elements of a single principle applicable to the asylum policy<sup>44</sup>.

Daniel Thym and Evangelia (L.) Tsourdi indicate that Article 80 of the TFEU requires the EU to establish immigration, asylum, and border control policies on the basis of the principle of solidarity. At the same time, the EU institutions have a margin of discretion in determining the requirements<sup>45</sup>. Alberto Miglio stresses that both Articles 67(2) and 80 of the TFEU establish solidarity between Member States as a fundamental legal principle of the EU that concerns border control, asylum, and immigration policies. According to the author, the use of the phrases “*shall* frame a... policy...*based* on solidarity” and “*shall* be governed” indicates that the principle was intended to be legally binding. Furthermore, Article 80 of the TFEU places specific obligations on the EU institutions to take action<sup>46</sup>. It should therefore be pointed out that the relocation decision implements the principle of solidarity enshrined in Article 80 of the TFEU and details the division of responsibilities between the Member States.

In addition, Poland also formulated the argument that states that are “almost ethnically homogeneous, such as Poland,” whose population significantly differs, culturally and linguistically, from the migrants, would have to make much greater efforts and bear a greater burden than other receiving Member States in meeting the mandatory relocation quotas (paragraph 302 of the judgment). Because Poland’s arguments in the intervenor’s comments go well beyond those of Hungary, they are inadmissible (paragraph 303 of the judgment). However, the Court pointed out that if relocation were to be made strictly conditional on the existence of cultural and linguistic links between each applicant for international protection and the Member State to which the applicant was to be relocated, adoption of a binding relocation mechanism would be impossible (paragraph 304 of the judgment). Izabela Wróbel rightly points out that building EU policy and law in any area on ethnic, cultural, and linguistic differences would be contrary to the fundamental principles of the EU’s operation<sup>47</sup>.

44 Morano-Foadi, *Solidarity and Responsibility*, *op. cit.*, pp. 230–231.

45 D. Thym and E. (L.) Tsourdi, *Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions*, “*Maastricht Journal of European and Comparative Law*” 2017, no. 24, pp. 611–612.

46 A. Miglio, *Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?*, (in:) E. Kuźelewska, A. Weatherburn and D. Kloza(eds.), *Irregular Migration as a Challenge for Democracy*, Cambridge/Antwerp/Portland 2018, pp. 36–37.

47 I. Wróbel, *Tymczasowy mechanizm relokacji*, *op. cit.*, p. 35.

#### **4. Relocation and Safeguarding of Public Order and Internal Security (in the Context of the Proceedings before the CJEU in Cases C715/17, C718/17, and C719/17)**

As a consequence of Poland's failure to accept even a single applicant under the relocation procedures envisaged by Council Decisions (EU) 2015/1523 and 2015/1601, despite the Commission's repeated calls and the submission of a reasoned opinion on July 26, 2017, the Commission brought an action before the Court of Justice on December 21, 2017. On December 22, 2017, the Commission brought analogous actions against Hungary (C718/17) and the Czech Republic (C719/17). The Court decided to hear the cases together.

The Commission alleged that Poland had failed to comply with its obligations under Article 5(2) of the relocation decision, namely, among other things, to regularly specify the number of applicants who can be relocated to its territory, that it had breached further obligations under Article 5(4–11) of those two decisions, and that it had failed to carry out the actual relocation.

Judgment in the combined cases was scheduled for April 2, 2020. On October 31, 2019, Advocate General Eleanor Sharpston delivered her opinion<sup>48</sup>. The Advocate General did not agree with the parties' arguments concerning the admissibility of complaints (points 91–152 of the opinion). In the complaints on the merits, the key issue that arises is protection of public order and protection of internal security. Poland claimed that implementation of the relocation decision would prevent it from maintaining public order and safeguarding internal security (it invoked Article 72 of the TFEU in conjunction with Article 4(2) of the TEU). It pointed out that these were matters for which it retained exclusive competence (point 172 of the opinion).

Referring to Poland's stance on this matter, the Advocate General first recalled two earlier judgments of the Court, which stated in their reasoning that the "concept of 'public order' entails, in any event, the existence –in addition to the disturbance of the social order which any infringement of the law involves –of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." The Court further held that, in relation to the fundamental rights of third-country nationals, concepts such as "security" cannot be "determined unilaterally by each Member State without any control by the institutions of the European Union" (points 196–197 of the opinion).

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48 Opinion of Advocate General Eleanor Sharpston delivered on 31 October 2019, Case C715/17 *European Commission v. Republic of Poland*, Case C718/17 *European Commission v. Republic of Hungary*, Case C719/17 *European Commission v. Czech Republic*, 31 October 2019, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=B29EF27095845EDA5B7B-D98CD73E6077?text=&docid=219670&pageIndex=0&doclang=pl&mode=lst&dir=&occ=-first&part=1&cid=7123291> (accessed 18.02.2020).

The Advocate General explained that the *acquis communautaire* regarding asylum, in particular the Dublin III Regulation and the Qualification Directive, uses the principle of individual assessment of the applicant as a basis for the decision (point 99 of the opinion). The Advocate General pointed out that Article 72 of the TFEU<sup>49</sup> expressly recognizes the competence and responsibility of Member States for maintaining public order and safeguarding internal security. The relocation decisions, on the other hand, provide that Member States may decide to refuse to relocate an applicant only if there are reasonable grounds to indicate that the person concerned could pose a threat to national security or public order. On the other hand, in cases where a Member State has reasonable grounds to believe that an applicant poses a threat to its security, it informs other Member States of this fact (points 202–204 of the opinion). Article 72 of the TFEU is not a conflict-of-law rule that grants priority to the competences of Member States over measures adopted by the European Union legislator. It is a rule that governs coexistence of laws. Member States retain competence to act in a given area (it is not transferred to the European Union). Nevertheless, the measures taken must comply with the overarching principles that Member States accepted when they became Member States (point 212 of the opinion). The derived law of the European Union, as part of the *acquis communautaire* pertaining to asylum matters, offers an appropriate legal framework within which a Member State's legitimate concerns about national security, public order, and protection of the public may be taken into account in relation to an individual applicant for international protection (point 221 of the opinion).

It should be emphasized that a feature of proceedings for the granting of the status of a refugee is individual assessment of each case. The UNHCR points out that each person's situation must be assessed on its own merits<sup>50</sup>. Article 4(3) of the Qualification Directive<sup>51</sup> states explicitly: "The assessment of an application for international protection is to be carried out on an individual basis". The Dublin III Regulation<sup>52</sup> also adopts a case-by-case application assessment approach, as clearly demonstrated by the need for a personal interview (Article 5). A number of specific provisions of the Regulation refer explicitly to an individual assessment, e.g. assess-

49 Article 72 of the TFEU: "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

50 Handbook on Procedures, *op. cit.*, p. 9.

51 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 (O.J.L 337/9, 20.12.2011).

52 Regulation (EU) No 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 (O.J.L 180/31, 29.06.2013).

ments of the “risk of absconding” (Article 2(n)), the situation of a minor (Article 8(2)), detention (Article 28(2)), and exchange of information (Article 34(10)).

In 2015, the number of applicants for international protection per million residents in Poland was only 270. This represented 0.8% of the total number of applications submitted in the EU. In comparison, the highest numbers of registered protection applicants per million inhabitants in 2015 were recorded in Hungary (17,699, which accounted for 13.8% of the total amount of applications submitted in the EU), Sweden (16,016 – 12.4%), Austria (9,970 – 6.8%), Finland (5,876 – 2.6%), and Germany (5,441 – as much as 35.2%)<sup>53</sup>.

The above data indicates that Poland did not have a real and genuine problem resulting from the mass influx of foreigners to Europe. The area of security is a competence shared between the EU and the Member States (Article 4(2) of the TFEU). The relocation decisions explicitly state (Article 5(7)) that Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order. Therefore, each Member State, including Poland, has the full and sovereign right to assess whether extension of international protection to a particular person could constitute a threat to national security. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfil the obligations arising from the relocation decisions.

## Conclusions

The mass influx of immigrants exposed the weaknesses of the European asylum system. The European Union has taken a number of actions, mainly ones establishing provisional measures in the area of international protection in favor of Italy and Greece. This solution provided for the relocation of applicants to other Member States of the European Union. Decision 2015/1523 introduced a voluntary relocation mechanism for 40,000 people from Greece and Italy, while Decision 2015/1601 to relocate 120,000 applicants allocated mandatory quotas of people to be accepted by individual Member States. Poland voted in favor of both resolutions.

However, later on, Poland's stance on the refugee crisis evolved, due to both internal and external factors. Initially, the government formed by the Civic Platform referred to the principle of solidarity and initially declared its intent to accept 2,000 refugees. As a result of the election held on October 25, 2015, the Law and Justice Party was victorious and formed a government headed by Prime Minister Szydło. She announced that her government would honor the decisions adopted on the refugee issue and declared its readiness to receive the first group of 100 people. However, quickly after the terrorist attacks in Brussels, the lower chamber of the Polish parlia-

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53 Eurostat news release 44/2016, *op. cit.*



ment expressed its opposition to the EU's permanent refugee allocation mechanisms. Declarations to accept only Christians from Syria or single women, children, or religious minorities raise serious doubts about equal and non-discriminatory treatment of foreigners. In the end, Poland did not accept a single applicant under the relocation scheme.

Some Member States showed a negative attitude towards the relocation decisions, which resulted, among other things, in an action before the Court of Justice to annul Decision (EU) 2015/1601. Poland was an intervenor in this case. The Court dismissed the action. Article 80 of the TFEU establishes the principle of solidarity and fair sharing of responsibility between Member States in the implementation of asylum policy. It follows that the burden arising from the provisional measures adopted under Article 78(3) of the TFEU in favor of one or more Member States in a situation of extreme migratory pressure should be borne by all other Member States. Decision (EU) 2015/1601 is based on the principle of solidarity expressed in Article 80 (EU) of the TFEU and implements this principle. It is only the decision that defines the specific obligations and share of responsibilities for Member States.

Due to the failure of Poland, Hungary, and the Czech Republic to accept any applicants under the relocation procedures, the Commission brought an action for failure to fulfil the obligations under Decisions (EU) 2015/1523 and 2015/1601 before the Court of Justice. In her opinion, the Advocate General rejected Poland's arguments related to maintenance of public order. Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfil the obligations arising from the relocation decisions.

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