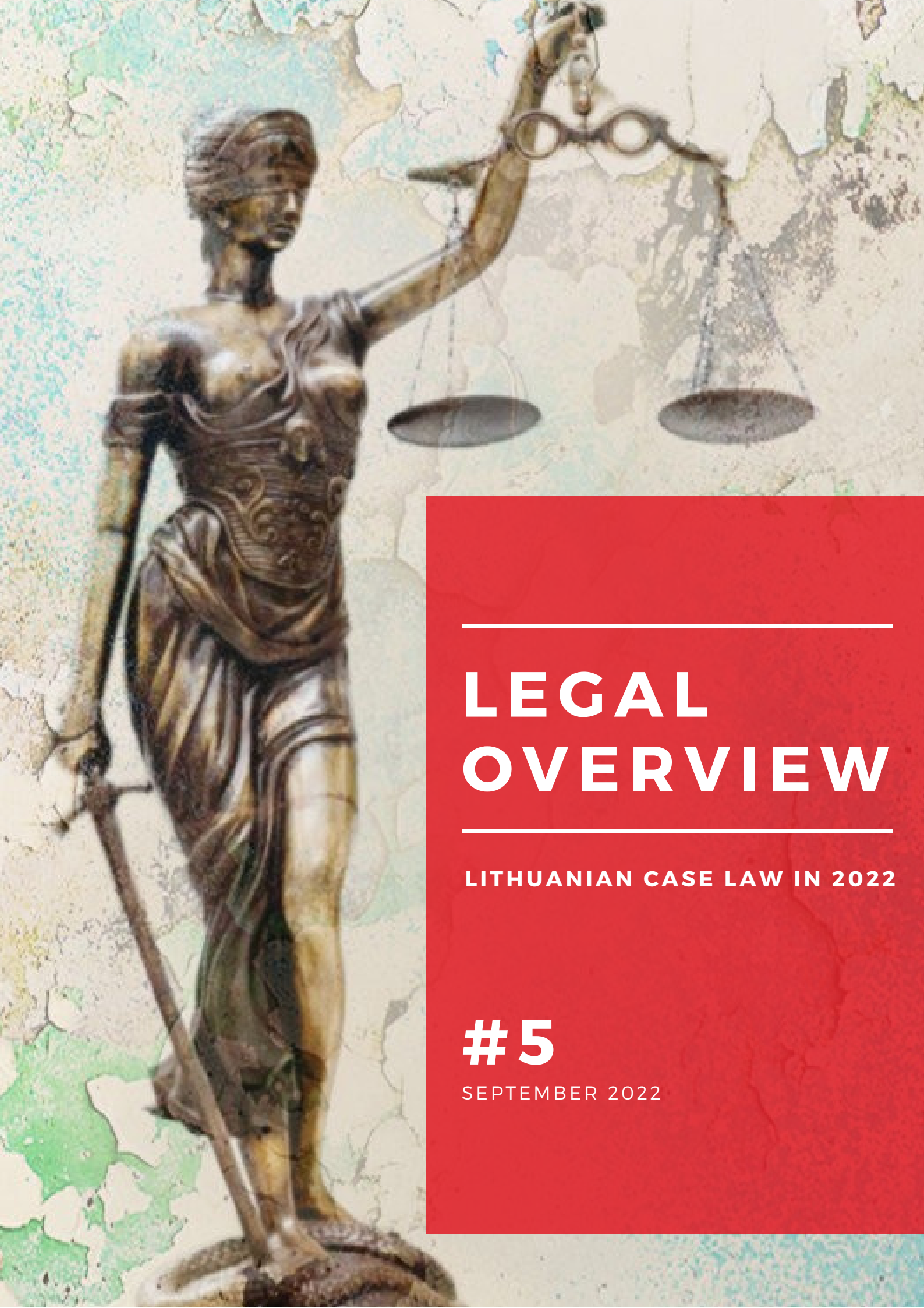

LEGAL OVERVIEW

LITHUANIAN CASE LAW IN 2022

#5

SEPTEMBER 2022

Lithuanian Red Cross is a nongovernmental organization which has been providing social, humanitarian, and legal assistance to refugees, asylum seekers, stateless persons, and other migrants irrespective of their legal status for over 25 years.

Legal overviews have been prepared within the framework of the Lithuanian Red Cross initiative, which aims to monitor the practice of Lithuanian courts in the area of migration and asylum and to share information on some significant decisions. The overviews include relevant extracts from this year's case law and additional explanations that are not legally binding.

The commentaries provided in the overviews are intended to explain the wider context and potential impact of the judgements covered on the development of case law. In providing these commentaries, the lawyers of the Lithuanian Red Cross rely on their subject matter competency and long-term experience in the field of migration and asylum, as well as on case law of international courts, legal and scientific literature. We are grateful to our partners and colleagues for additional insights.

Legal overviews prepared by the Lithuanian Red Cross are for information purposes only, they do not create/entail in itself rights or legal obligations when considering individual cases. Reference to the source of the information is required for quotation or distribution of this Legal overview:

Lithuanian Red Cross. (September 2022). ***Legal overview #5***

DECISIONS IN THIS OVERVIEW

I. Decision of the Supreme Administrative Court of Lithuania (hereinafter referred to as the SACL) of 29 June 2022 in administrative case No eA-3025-552/2022
KEYWORDS: interests of the child, individual assessment of the situation.

II. Ruling of the SACL of 5 July 2022 in administrative case No eA-3085-881/2022
KEYWORDS: interests of the child, individual assessment of the situation.

III. Ruling of the SACL of 5 July 2022 in administrative case No eA-3093-575/2022
KEYWORDS: interests of the child, individual assessment of the situation.

IV. Decision of 28 July 2022 of the SACL in administrative case No eA-3321-789/2022
KEYWORDS: interests of the child, individual assessment of the situation, non-state actor of persecution, internal protection.

I. DECISION OF THE SACL OF 29 JUNE 2022 IN ADMINISTRATIVE CASE NO EA-3025-552/2022

CASE SUMMARY: The applicants (a family with 3 minor children) brought an action before the Court against the decision of the Migration Department refusing to grant them asylum. During the proceedings, the Migration Department argued that the circumstances of the applicants' individual situation had been thoroughly examined and that the examination of their asylum application had been carried out individually, objectively and impartially.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the assessment of the individual situation of children when considering the family's application for asylum.

In its Decision of 29 June 2022, the SACL noted that in the given case, the asylum application is made by the entire family, and that the minor children of the asylum-seeking spouses are themselves asylum-seekers whose exceptional situation must be assessed individually and whose qualification as beneficiaries of international protection must be determined not solely according to the situation of their parents. In paragraphs 43-45, 48 and 53 of its Decision, the SACL stated:

*„43. <...> Since **the Migration Department did not take into account in its decision the fact that the asylum was requested by a family with minor children and did not provide an individual assessment of the individual situation of the applicants' children**, the Panel of Judges of the court of the appeal instance disagrees with such conclusion of the Migration Department.*

*44. In the case law of the Supreme Administrative Court of Lithuania, the position is taken that, **when deciding on the granting of asylum to children, it is necessary to take into account all the relevant facts relating to the personal situation and circumstances of the asylum seeker concerned, in particular the cumulative effect of the various measures on an asylum seeker whose personal status is that of a child**. A person's situation may amount to persecution if the cumulative effect of the various measures, taken together with other adverse personal circumstances and/or in the overall context, affects the person in a manner similar to violations of fundamental rights. The persecution must also reach a certain level of seriousness. **When a child's application for asylum is being considered, the child's age and dependence on caregivers, and the long-term impact on the child's physical and psychological development and well-being are criteria which must be duly assessed** (see, for example, Decision of the Supreme Administrative Court of Lithuania of 18 August 2021 in administrative case No eA-3467-520/2021).*

45. In this respect, Directive 2011/95/EU states in its recital: "<...> (18) The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity; it is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child; <...>".

<...>

48. Thus, in the given case, ***the Migration Department did not address in its Decision the qualification of the applicants children as beneficiaries of international protection, nor did it assess whether the best interests of the children would be adequately safeguarded if international protection were not granted****, as required by the objectives of Directive 2011/95/EU, in the context of which the Law should be interpreted.*

<...>

53. The content of the Migration Department's ***Decision, in so far as it concerns the deportation of the applicants from the Republic of Lithuania, does not confirm that the interests of the applicants' children and family life were taken into account in the given case and that the principle of non-refoulement in this regard was respected****. It is apparent from the content of the Decision that the emphasis was placed solely on the fact of the applicants' unlawful entry and stay in the Republic of Lithuania, the circumstances of their entry, the possibility of their hiding or leaving for other countries, which is not in line with the objectives of Directive 2008/115, recital 6 thereof, which states that decisions should be taken on a case-by-case basis and on the basis of objective criteria, i.e. the examination should not take account of the mere fact of their unlawful entry and stay*."

In this Decision, the Court reminded that it is not only the content of the measures that the persecutor may take that is relevant for the purpose of determining the need for international protection, but also the potential impact of such measures on the asylum seeker. In this respect, the impact on an adult may be radically different from that on a child. Accordingly, in the case of a family with children, the particular situation of the children requires an individual assessment of their situation beyond the exclusive qualification of the situation of the parents.

In this respect, it should be noted that the Court does not link its findings to whether the children's parents, in stating their reasons for seeking asylum, have highlighted the individual threat to the children. Thus, irrespective of whether the parents of the children point to specific circumstances relating to the children that make it unsafe for them to return to their country of origin, the determining authority has a positive obligation to properly assess the best interests of the children and to carry out an individual assessment of the children's situation. In deciding whether an asylum-seeking child should be qualified as a beneficiary of international protection, the determining authority is bound by the general obligation under the Convention on the Rights of the Child to assess the best interests of the child in all cases (on its own initiative) and no longer has the luxury of narrowing the scope of the investigation to the circumstances "identified by the asylum seeker". If the child's best interests have not been individually assessed or taken into account in the decision concerning the child, such decision may be declared unlawful in essence.

It should also be noted that the Court made a similar assessment of the decision to deport the applicants to their country of origin. A decision to refuse asylum and a decision to deport such person to the country of origin, even if taken together and formalized in a single document, are different decisions and are subject to different legal rules. The assessment of the best interests of the child is necessary both for the purpose of deciding whether such child should be qualified as a beneficiary of international protection and for the purpose of deciding whether he or she should be deported. In certain situations, a proper assessment of the best interests of the child will lead to a fully justified decision not to grant international protection. However, this does not relieve of the obligation

to assess the best interests of the child separately when deciding on his or her deportation, since the mere fact that the child does not qualify for international protection does not in itself mean that his or her return to the country of origin is compatible with his or her best interests and will not violate the principle of non-refoulement.

To summarise the case law of the Court in this case, several rules which the decision-making authority must follow may be formulated:

- The child's situation must be assessed on an individual basis, without being limited to the exclusive qualification of the situation of the child's parents;
- In assessing the child's situation on an individual basis, the decision-making authority must answer the following questions:
  - Is it in the child's best interests to refuse granting the child asylum?
  - Is it in the child's best interests to return the child to the country of origin?

II. RULING OF THE SACL OF 5 JULY 2022 IN ADMINISTRATIVE CASE NO EA-3085-881/2022

CASE SUMMARY: The applicants (a family with 2 minor children) brought an action before the Court against the decision of the Migration Department refusing to grant them asylum. During the proceedings, the Migration Department argued that none of the grounds stated by the applicants (including the children's medical condition) would automatically lead to them being granted international protection.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the assessment of the individual situation of children when considering the family's application for asylum.

In its Ruling of 5 July 2022, the SACL followed a similar position as in the previously discussed Decision of 29 June 2022 and emphasised the need to assess the interests of the children individually. However, unlike in the previous Decision, in this case the SACL also addressed the content of such "assessment" and in paragraph 28 of its Ruling stated:

„<...> *It is apparent from the decision of the Migration Department that it analyses in detail the disease (data not to be disclosed) referred to by the applicants, the methods of treatment of this disease and concludes that no obstacles to the access to medical care for children for the treatment of the disease (data not to be disclosed) (data not to be disclosed) have been identified, which would lead to the establishment of the grounds for asylum laid down in the Convention (race, religion, nationality, belonging to a particular social group, or political opinion). However, in this respect, the Panel of Judges of the court of appellate instance draws attention to the part of the decision of the Migration Department stating that "the EASO identifies several profiles of persons at high risk which should be taken into account when taking a decision to grant asylum: <...> women; children <...>. The information collected shows that the asylum seekers do not belong to any of the groups which, according to the EASO, may face an increased risk of persecution, neither are they vulnerable persons."* ***In the given case, the asylum seekers are also two minor girls suffering from a serious disease****, and the Migration Department unreasonably disregarded in its decision the fact that the applicants/children belong to one of the groups that may be exposed to a higher risk of persecution. In the view of the Panel of Judges, the mere fact that (data not to be disclosed) is undergoing treatment and (data not to be disclosed) (similar treatment as in Europe) does not mean that the respondent was not required to assess whether the best interests of the children would be adequately safeguarded in the absence of international protection, taking into account their particular status as children.* ***In the disputed decision, the Migration Department analysed the general situation of the treatment of (data not to be disclosed) (data not to be disclosed) but did not analyse the situation of the children individually****. As already mentioned, it is necessary to take into account individually all the relevant facts relating to the personal situation and circumstances of the asylum seeker concerned, in particular the cumulative effect of the various measures on an asylum seeker whose personal status is that of a child.*"

Thus, the Court uses a particular example to illustrate how the Migration Department, when examining a family's asylum application, assesses the parents' situation exclusively and ignores the fact that the children are also "asylum seekers". In the given case, the

Migration Department itself identifies “children” as a category of persons at increased risk but also states that “asylum seekers” are not included not only in this category but also in the category of “vulnerable persons” (even though “minors” are one of the categories of vulnerable persons referred to in Article 2(18/2) of the Law on the Legal Status of Aliens). Almost certainly, when referring to “asylum seekers” in this particular case, the Migration Department is referring only to adult family members, while the individual situation of children is not taken into account.

Commenting on the assessment provided by the Migration Department, the Court notes that detailed country of origin information was collected but points out that an “individual assessment” is not limited to such general information. The country of origin information in the present case is merely a general background, a context, a point of reference for an individual assessment of the situation of a particular person. Just as individual circumstances alone, without context, do not in themselves justify conclusions on the qualification of a person as a beneficiary of international protection, similarly, contextual information alone, without an individual situation, does not justify such conclusions. Thus, for “individual assessment” it is not sufficient to collect relevant country of origin information and to summarise it. An “individual assessment” requires both an “individual” (i.e. directly related to the individual) approach and a factual “assessment” (i.e. the drawing of rational inferences based on the entirety of personal circumstances and contextual information). The mere fact that the person concerned is a child is one of the aspects to be assessed, as the cumulative effect of different circumstances on a child may differ significantly from the effect of the same circumstances on an adult.

III. RULING OF THE SACL OF 5 JULY 2022 IN ADMINISTRATIVE CASE NO EA-3093-575/2022

CASE SUMMARY: The applicants (a mother with a minor child) brought an action before the Court against the decision of the Migration Department refusing to grant them asylum. During the proceedings, the Migration Department argued that the grounds stated by the applicants would not lead to them being granted international protection.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the assessment of the individual situation of children when considering the family's application for asylum.

In its Ruling of 5 July 2022 the SACL basically reaffirmed the case law discussed above and in paragraphs 36-37 stated:

„36. Having assessed the content of the Decision of the Migration Department, the Panel of Judges of the court of appellate instance agrees with the reasoning of the court of first instance that the applicants' application was not examined in detail, i.e. ***circumstances related to the protection of the interests of the applicant's minor child and the principle of non-refoulement were not assessed in the contested decision of the respondent****. In refusing to grant the applicants asylum in the Republic of Lithuania, the respondent stated in abstract terms that no individual circumstances had been identified which increased the applicants' risk of persecution on account of their individual characteristics but the decision did not discuss the grounds for granting asylum to the minor child in the context of the decision, which only mentioned the minor child in relation to the non-banning of the child's entry into the Republic of Lithuania. The respondent essentially took into account only the fact of the applicants' unlawful presence in the Republic of Lithuania, thereby infringing the provisions of point 6 of the preamble to Directive 2008/115/EC, according to which decisions on asylum seekers' applications for international protection should be taken on a case-by-case basis and in accordance with objective criteria.*

37. The Migration Department did not take into account the fact that the asylum seeker is not only the applicant (data not to be disclosed) but also her minor son (data not to be disclosed). ***In deciding whether the applicant's minor son should be qualified as a beneficiary of international protection, it did not discuss and assess whether his interests would be adequately safeguarded if international protection were not granted. The Migration Department analysed the general situation of (data not to be published), assessed the applicant's story but it is clear from the content of the Decision that the assessment was carried out essentially in the context of the validity of her own asylum application as an asylum seeker, and did not analyse the child's situation individually****. As already mentioned, it is necessary to take into account individually all the relevant facts relating to the personal situation and circumstances of the asylum seeker concerned, in particular the cumulative effect of the various measures on an asylum seeker whose personal status is that of a child. When a child's application for asylum is being considered, the child's age and dependence on caregivers, and the long-term impact on the child's physical and psychological development and well-being are criteria which must be duly assessed. For the reasons set out above, the Panel of Judges, while agreeing with the findings of the court of first instance in its decision, states that the Decision of the Migration Department, in its content, contradicts the legislation of higher force (Article*

91(1)(1) of the Law on Administrative Proceedings), and, consequently, it cannot be considered lawful and justified."

As already mentioned, in this ruling, the court basically reaffirmed its case law on the assessment of the individual situation of asylum-seeking children. In support of its conclusions, in paragraph 35 of the Ruling, the SACL also refers to its previous decisions, which have not been discussed in this overview but which illustrate the consistency of the case law on this issue:

- Decision of the SACL of 6 April 2022 in administrative case No eA-1790-602/2022
- Decision of the SACL of 6 April 2022 in administrative case No eA-1913-556/2022
- Decision of the SACL of 13 April 2022 in administrative case No eA-1978-502/2022

IV. DECISION OF THE SACL OF 28 JULY 2022 IN ADMINISTRATIVE CASE NO EA-3321-789/2022

CASE SUMMARY: The applicants (a mother with a minor daughter) brought an action before the Court against the decision of the Migration Department refusing to grant them asylum. During the proceedings the Migration Department did not contest in principle that the applicant (mother) was at risk of domestic violence but argued that she could rely on the protection of her country of origin (Iraq).

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the assessment of the individual situation of children when considering the family's application for asylum;
- on non-state agents of persecution;
- on the availability of internal protection.

In its Decision of 28 July 2022, the SACL reaffirmed its consistently established case law and reiterated, in paragraphs 58-68, the conclusions on the need to assess the best interests of the asylum-seeking child individually [1], that were already discussed in this overview. However, this decision is interesting and important in the sense that the SACL, by referring back to its previous case law (see, for example, paragraph 35 of Decision of 6 April 2022 of the SCAL in administrative case No eA-1790-602/2022), challenges the position of the Migration Department that the alleged persecutor is a non-state agent, which "in itself" does not give rise to a need for protection. This aspect was addressed in the Lithuanian Red Cross Legal Overview #4, which discussed the Ruling of the SACL of 15 June 2022 in the administrative case No eA-2865-629/2022 and urged to stop developing the practice in question. On 28 July 2022 the SACL, dealing with a substantially analogous situation from a legal point of view, adopted a diametrically opposite decision and in paragraphs 55-57 stated:

„55. Having assessed the content of the contested Decision and the assessment carried out by the Migration Department, the Panel of Judges found that the Migration Department, in deciding on the issue of granting asylum to the applicants, carried out its assessment in a superficial manner, inadequately fulfilling its duty to cooperate with the asylum applicants. ***The respondent based the contested Decision essentially on the arguments that the applicant's persecutor is not a state actor****, and that the State of origin has the primary duty to protect its own nationals, which is only assumed by the international community in the event of failure by the States of origin to fulfil that duty.* ***The respondent also noted that, although Iraq continues to face difficulties in implementing measures against domestic violence, women in Iraq have access to law enforcement authorities or to assistance from non-governmental organisations and shelters****.*

56. ***The Panel of Judges notes, in relation to the respondent's arguments, that, according to Article 6 of Directive 2011/95/EU, non-state actors may also be the persecutor, and that, therefore, this fact does not, in itself, invalidate the condition of the existence of a well-founded fear, as that condition is understood in the Law****. In the view of the Panel of Judges, in this case, the respondent has formally stated that the applicant's persecutor (her spouse) is not a state actor but has failed to take into account that* ***the applicant's application is also based on the fact that she is unable to divorce her spouse and to seek help from the authorities due to the prevailing customs and the disapproval of the family (clan), as such help would bring shame on the***

***family, i.e. it might be regarded as an honour crime**. The data collected by the respondent confirms that domestic violence is tolerated in Iraqi society. Victims do not always seek support because they are afraid of embarrassing the family in public. UNOHCHR reported in May 2020 that there is often pressure to resolve family disputes, including domestic violence, without any third-party intervention due to the stigma and shame associated with such violence. In the article of February 2021, "Al Jazeera" reported that victims of domestic violence find themselves trapped in violent households due to conservative social norms that make women ashamed to leave the house or seek justice. According to USDOS, victims of domestic violence are afraid to come to family protection units because they suspect that the police will inform their families about their statements. According to USDOS, there are two private shelters and four shelters administered by the Ministry of Labour and Social Affairs that have provided some protection and assistance to female victims. The availability was limited and psychological and therapeutic services were poor. NGOs played a key role in providing services, including legal assistance, to victims of domestic violence. However, instead of using legal measures, the authorities often mediate between women and their families so that they can return to their homes, and women have had little access to shelters. Shelters provide temporary protection for their residents. There have been recorded cases of women being killed after leaving shelters. In January 2021, an article in the online magazine "Inside Arabia" reported that most women in the Kurdistan Region of Iraq are afraid to take legal action against their husbands or family members because they believe that seeking justice can only fuel the anger of their attackers and ultimately lead to their deaths.*

*57. **The Panel of Judges notes that, in the given case, it is important to assess not only the assistance provided in the State of origin to women who have experienced domestic violence but also the consequences that may arise for the woman who has sought assistance because of the violence she has suffered**. These considerations should have been assessed in the context of the collected country of origin information, since, as already mentioned, the country of origin information substantiates that victims of domestic violence in Iraq are afraid to come to family protection units or to take legal action against their husbands or family members, as they may be subjected to honour crimes.*"

Although the Court did not rule on certain relevant aspects of asylum law (e.g., whether the NGOs and shelters (and even private individuals) referred to by the Migration Department are generally considered to be actors capable of providing effective and durable protection against persecution within the meaning of Article 7 of Directive 2011/95/EU referred to in the court's decision, and whether the occurrence of violence against women in the relevant society can amount to persecution on the grounds of belonging to a particular social group) but addressed other important aspects, namely the qualification of non-state agents as persecutors, and the obligation to assess not only the existence of domestic protection measures but also the availability of those measures to the asylum seeker concerned. On the first issue, the court literally reiterates its previous case law developed in administrative case No eA-1790-602/2022, stating that „*according to Article 6 of Directive 2011/95/EU, non-state agents may also be the persecutors, and that, therefore, this fact does not, in itself, invalidate the condition of the existence of a well-founded fear, as that condition is understood in the Law*", but does not go any further on the issue of the qualification of non-state entities as agents of persecution or agents of internal protection in its conclusions. The court focuses on another issue that is qualitatively new and therefore significant. The

court notes that the applicant (the mother) herself has explained the reasons why she is unable to effectively avail herself of the protection from persecution offered by the State of origin: seeking help from the authorities would bring shame on the family and could be regarded as an honour crime. In the given case, the country of origin information collected is consistent with this explanation of the applicant and substantiates her fears. Considering this, the Court held that in a situation such as the present case, when assessing the availability of internal protection, it is necessary to „*assess the consequences that may arise for the woman who has sought help because of the violence she is experiencing*". The above interpretation is relevant primarily in the context of the applicants' country of origin (Iraq) and is applicable in situations of domestic violence (against women) but potentially has a wider applicability to the question of the availability of internal protection in any case. We hope that in the future the SACL will not only follow the case law developed in this case but also expand it by commenting on the other important aspects mentioned above and by adapting it to the context of other countries and other factual situations.

ENDNOTES

[1] The SACL has also taken an analogous position in subsequent decisions, e.g., Decision of 10 August 2022 in administrative case No eA-3530-463/2022, Decision of 31 August 2022 in administrative case No eA-3610-1047/2022.

Lietuvos
Raudonasis
Kryžius

Konstitucijos pr. 7A, PC Europa, III a.
Vilnius, LT-09307
+370 659 71 598
info@redcross.lt