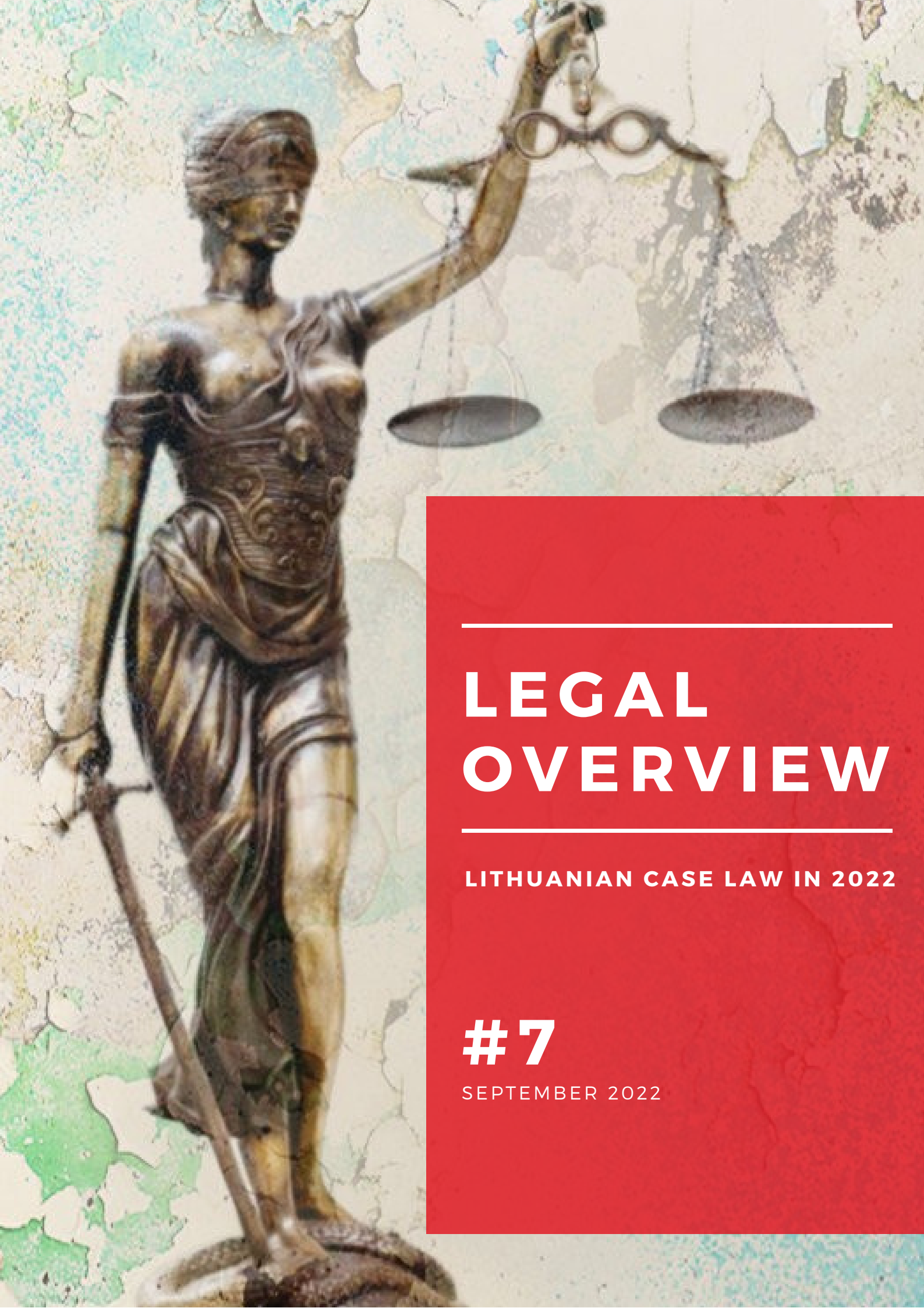

LEGAL OVERVIEW

LITHUANIAN CASE LAW IN 2022

#7

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 #7***

DECISIONS IN THIS OVERVIEW

I. Decision of the Supreme Administrative Court of Lithuania (hereinafter referred to as the SACL) of 27 July 2022 in administrative case No eA-3313-815/2022
KEYWORDS: prospective risk assessment, case law of the European Court of Human Rights.

II. Decision of the SACL of 28 July 2022 in administrative case No A-1091-822/2022
KEYWORDS: access to procedure, detention, preliminary ruling of the Court of Justice of the European Union.

I. DECISION OF THE SACL OF 27 JULY 2022 IN ADMINISTRATIVE CASE NO EA-3313-815/2022

CASE SUMMARY: The applicant brought an action before the Court against the decision of the Migration Department refusing to grant him asylum. During the proceedings, the Migration Department has taken the position that the narrative of the applicant about the persecution he suffered in the past is vague, uninformative, inconsistent, the narrative provided by the applicant lacks specific details and accuracy, and that the applicant, in response to clarifying questions, has provided vague explanations, which are not necessarily mutually compatible, often digressing into generalities, and has failed to provide any evidence in support of his claims about the alleged criminal case or the arrest warrant issued. The Migration Department based its refusal to grant asylum to the applicant on the grounds that he had not been arrested, charged or searched for.

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

- on prospective risk assessment.

Having essentially followed the judgment of the European Court of Human Rights of 22 March 2022 in T. K. and Others v Lithuania (No 55978/20) [1], in paragraph 27 of its decision of 27 July 2022 the SACL stated:

„27. In the present case, it is established and there is no dispute that the applicant is a relative, the nephew, of the Chairman of the IRPT, Muhiddin Kabiri. It should be noted that in the case of T.K. and Others v. Lithuania of 22 March 2022, the European Court of Human Rights stated that "Turning to the situation in Tajikistan, the Court observes that, according to the most recent reports from various reputable sources, the harassment and persecution of political opponents and their families remain widespread, and there are no grounds to believe that the situation in the country might be improving. In July 2019, when considering the third periodic report of Tajikistan, the UN Human Rights Committee expressed its concern about politically motivated harassment of opposition members, including the harassment of and lengthy prison sentences handed down to IRPT leaders after unfair and closed trials, and the imprisonment of party members following the designation in 2015 of the party as "terrorist" (see paragraph 47 above). In its 2021 annual report Human Rights Watch stated that the Tajik authorities had continued to subject critics of the government, including opposition activists and journalists, to lengthy prison terms on politically motivated grounds; they had intensified the harassment of relatives of peaceful dissidents living abroad and continued to forcibly return political opponents from abroad using politically motivated extradition requests (see paragraph 49 above). Amnesty International, in its 2021 submissions for the UN Universal Periodic Review, reported allegations of forcible returns and of enforced disappearances of IRPT members living in exile, and the harassment of their family members in Tajikistan (see paragraph 51 above). Freedom House in its 2021 report stated that dissidents and critics of the regime remained the principal targets of the Tajik security services, both inside and outside the country (see paragraph 52 above). There were also reports of torture and ill-treatment in custody and beatings of political opponents (see paragraphs 47, 49, 51 and 53 above). Many of the aforementioned reports contained examples of politically motivated prosecution or ill-treatment of specific individuals – mainly leaders and prominent members of the IRPT and other opposition groups (see, for example, paragraphs 50 and 53 above)" (see paragraph 83 of the above-mentioned

judgment). Thus, **the applicant, by virtue of his status (profile), is potentially subject to persecution by the Tajik state authorities, notwithstanding the fact that he has not been persecuted in the past,** especially since the IRPT itself has confirmed in writing that he is an activist of this party. Consequently, **both the Department and the court of first instance failed to properly assess the established facts of the case and failed to assess the prospective risk of persecution of the applicant**."

In this decision, the court essentially reminded that the examination of an asylum application is, by its essence, a prospective risk assessment and not a retrospective analysis of the persecution suffered. The subject-matter of the asylum procedure is the reasonableness of a person's fear of persecution. According to both national and European Union law, the fact that an asylum seeker has been persecuted in the past is a strong indicator that his or her fear is well-founded but it is not a necessary prerequisite for asylum. In the given case, the respondent focused on past episodes of persecution and, after critically assessing the narrative of the asylum-seeker about these episodes, used it as a basis for refusal to grant him asylum. In paragraph 27 of its decision of 27 July 2022, the SACL addressed this fundamental methodological error and defined, in essence, the risk assessment model to be followed in assessing the reasonableness of the fear of persecution. Inter alia, this model clearly defines the relationship between "individual circumstances" and country of origin information. Based on the relevant country of origin information, the authorities of the country of origin of the asylum seeker systematically apply measures against a certain profile of persons which qualify as persecution. The country of origin information makes it possible to establish both the fact and the systematic nature of the application of such measures, to qualify them as persecution on "conventional" grounds (e.g. due to political opinion), and to define the circle of persons against whom such measures are applied. In this way, the totality of the relevant country of origin information confirms that the persons of the relevant profile face a real risk of persecution. "Individual circumstances" are relevant in this context insofar as they make it possible to qualify (or not) a particular asylum seeker as belonging to such a profile. According to the SACL, the individual characteristics of the applicant (and not his past persecution) are the reason why he should be qualified as such. Thus, if an asylum seeker is qualified as belonging to a relevant profile of persons ("individual circumstances"), and if persons of that profile are persecuted in his country of origin (country of origin information), then his fear of persecution must be regarded as well-founded, irrespective of whether or not he has been persecuted in the past. In principle, the standard of proof applicable to the examination of asylum applications does not require either greater certainty of conclusions or a greater individualisation of risk.

The interpretation of the SACL in this case reflects the fundamental principles of asylum law and, irrespective of the fact that the court is actually assessing the situation in the particular country of origin (Tajikistan), is universal, i.e., applicable in many situations and contexts. The same risk assessment model would be applicable, for example, in the context of the prosecution of people who took part in 2020 protests in Belarus or the prosecution of Uighurs in China.

It should be noted that in the given case, the contested decision of the Migration Department was adopted on 24 March 2022, i.e., a few days after the adoption of the judgment of the

European Court of Human Rights, which is referred to by the SACL in this case, and which assessed a substantially similar situation. This decision of the SACL is one of 87 decisions [2] taken in January-August of this year in which the SACL upheld appeals of foreigners against refusals to grant asylum and returned more than one and a half hundred applications for asylum to the Migration Department for re-examination. Unfortunately, an analysis of the content of the decisions adopted by the Migration Department in recent years shows that court interpretations on certain fundamental issues are generally not taken into account, and that the examination of asylum applications remains in many cases formalistic and boilerplate-based.

II. DECISION OF THE SACL OF 28 JULY 2022 IN ADMINISTRATIVE CASE NO A-1091-822/2022

CASE SUMMARY: The applicant brought an appeal to the SACL against the decision of the Alytus District Court, Alytus Chamber, by which he was detained at the State Border Guard Service. The applicant challenged the proportionality and reasonableness of the detention as the most severe measure, as well as pointed out that the responsible authorities refused to register his application for asylum and did not consider him an asylum seeker. In the light of the issues raised in the case and the applicable legal framework, the SACL suspended the proceedings and referred the case to the Court of Justice of the European Union for a preliminary ruling on the following questions [3]:

1. Must Article 7(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in conjunction with Article 4(1) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection, as refugees or as beneficiaries of subsidiary protection and the content and nature of the protection granted, be interpreted as precluding rules of national law, such as those applicable in the present case, which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, do not in principle allow a foreigner who has entered and remains unlawfully in the territory of a Member State to lodge an application for international protection?
2. If the answer to the first question is in the affirmative, must Article 8(2) and (3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection be interpreted as precluding rules of national law under which, in the event of a declaration of martial law, a state of emergency or also a declaration of an emergency due to a mass influx of foreigners, an asylum applicant may be detained merely because he or she entered the territory of the Republic of Lithuania by crossing the State border of the Republic of Lithuania unlawfully?

After examining the request of the SACL, the Court of Justice of the European Union clarified in its judgment of 30 June 2022 in the case of M.A. (Case No C-72/22 PPU) that:

1. Article 6 and Article 7(1) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined.
2. Article 8(2) and (3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, an asylum seeker may be placed in detention for the sole reason that he or

she is staying illegally on the territory of that Member State.

Following the clarification of the Court of Justice of the European Union, the SACL upheld the appeal of the applicant in part and annulled the contested decision of the Alytus District Court, Alytus Chamber. In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on lodging an application for asylum and the acquisition of the status of an asylum seeker;
- on measures restricting the freedom of movement of a person amounting to de facto detention and the justification for their application.

In paragraphs 15 and 20-22 of its decision of 28 July 2022, the SACL, when discussing the national rules governing the submission of an application for asylum [4], stated:

„15. A linguistic and systematic analysis of the aforementioned norms implies that, according to such national legislation, during an emergency situation, an application for international protection lodged in violation of the procedure referred to in Article 140/12 (1) of the Law shall not be accepted and shall be returned to the person submitting the application, and that, in principle, third-country nationals who do not comply with the conditions of entry to Lithuania as laid down in the Law may only duly seek asylum from abroad or at the border of the Republic of Lithuania, and shall generally be deprived of the possibility of such an application in case that they have entered the country illegally.

[...]

20. In this respect, the factual circumstances of the present case are relevant, namely that the foreigner claimed that he had submitted his asylum application in writing to an unidentified official of the SBGS, as well as that he had applied for asylum at the oral hearing before the court of first instance, he repeated a similar request during the oral hearing of the appeal proceedings, and finally, on 24 January 2021, the foreigner submitted his asylum application in writing to the SBGS, which was forwarded to the Migration Department but was returned to the latter on the grounds that it was not submitted in accordance with the relevant legal regulations and was not submitted without delay. Thus, in the assessment of the Extended Panel of Judges, although the foreigner did not comply with the procedure laid down in Article 140/12 (1) of the Law, he submitted an application for international protection to the competent authorities.

21. It should be noted that in the operative part of its 30 June 2022 judgment in case of M.A., the Court of Justice held that Article 6 and Article 7(1) of Directive 2013/32/EU are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined. Importantly, a third-country national acquires the status of an applicant for international protection within the meaning of Article 2(c) of Directive 2013/32/EU from the moment he or she "requests" such protection (see paragraph 80 of Judgment in M.A.). In that context, the Extended Panel of Judges points out that, ***following the case law of the Court of Justice, a national court, when it is obliged to apply a provision of European Union law, within the limits of its jurisdiction, must ensure that such provision is fully effective, if necessary by refusing, on its own initiative, to apply any provision of national law, even a subsequent one, which is contrary to that provision, and that this court is not obliged to request or await the repeal of that provision, whether by legislative or constitutional measures*** *(see, for example, Judgment of 9 March 1978 in Case 106/77 Simmenthal, paragraphs 21 and 24; Judgment of 20*

March 2003 in Case C-187/00 Kutz Bauer, paragraph 73; Judgment of 3 May 2005 in Joined Cases C-387/02, C-391/02, and C-403/02 Berlusconi and Others, paragraph 72; Judgment of 19 November 2009 in Case C-314/08 Filipiak, paragraph 81, etc.).
22. Having regard to the case-law of the Court of Justice referred to above, in accordance with the clear and unqualified interpretation of the rules of European Union law given in the aforementioned preliminary ruling in the case of M.A., and on the basis of the assessment of the circumstances of the case as set out in that judgment, the Extended Panel of Judges holds that, ***in the circumstances of this case, the foreigner is to be regarded as a person with the status of an asylum seeker****."*

Notwithstanding the fact that the court decides on a specific case and holds that it is precisely this foreigner and precisely in the circumstances of the present case who is to be regarded as an asylum seeker, in paragraph 21 of its judgment of 28 July 2022, the SACL recalls the general and indisputable principle of the supremacy of the European Union law. This principle was already established in the judgment of 15 July 1964 of the Court of Justice in the case of Flaminio Costa v. E.N.E.L. (case number 6/64). According to the principle of the supremacy of European Union law, Member States may not enact national laws contrary to European Union law without calling into question the legal basis of the European Union itself. If they do so, the European Union law should prevail over national law before the national courts of the country concerned. In this regard, it should be noted that according to the Constitutional Act of the Republic of Lithuania "On Membership of the Republic of Lithuania in the European Union", in the event of a conflict of laws, the rules of the European Union shall take precedence over the laws and regulations of the Republic of Lithuania. Unlike the Court of Justice of the European Union, the Constitutional Act does not refer exclusively to national courts and establishes a general principle applicable to all legal subjects. Thus, even if a provision contrary to European Union law were to be introduced in national law, its application would infringe not only the relevant provisions of European Union law but also, in all likelihood, the Constitution of the Republic of Lithuania. In the present case, the Court of Justice of the European Union has held that a legal regime such as that laid down in Article 140/12 of the Law of the Republic of Lithuania on the Legal Status of Aliens is incompatible with European Union law. Accordingly, as the SACL notes, national courts are obliged to apply the provisions of European Union law and, on their own initiative, to refuse to apply any provision of national law that is contrary to them. Unfortunately, the jurisprudence of the Court of Justice of the European Union does not impose a similar obligation on public authorities, therefore, at this point in time, the application of national rules incompatible with European Union law is excluded only in the courts, while the Migration Department and the State Border Guard Service continue to apply them in their practice, despite the above-mentioned provision of the Constitutional Act. To paraphrase British politician Tony Benn [5], the attitude of the public authorities towards the fulfilment of their obligations with regard to asylum seekers is very instructive, because it shows how they would treat us if they thought they could get away with it.

In paragraphs 23-24 and 27 of its decision of 28 July 2022, the SACL, when discussing the national rules governing the detention of foreigners, stated:
„23. Pursuant to Article 140/17 of the Law, which regulates the grounds for detention of an asylum seeker in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of

aliens, an asylum seeker may only be detained in the cases referred to in Article 113(4) of the Law, and in the cases where he/she has entered the Republic of Lithuania by illegally crossing the state border of the Republic of Lithuania. Thus, ***according to the current legislation, the mere fact that an applicant for international protection is unlawfully present on the territory of the Republic of Lithuania may justify his/her detention****.*

24. The Extended Panel of Judges notes first of all that by the ruling of the Supreme Administrative Court of Lithuania of 2 February 2022, by which a request for a preliminary ruling was made to the Court of Justice, the foreigner was subjected to an alternative measure to detention until 18 February 2022, namely, accommodation in the SBGS or in another place adapted for that purpose, with the right of movement limited to the territory of that place of accommodation. ***Although such measure is formally regarded as an alternative to detention under the legislation of the Republic of Lithuania, it should be noted that such person is separated from the rest of the population, deprived of his freedom of movement, and therefore qualifies as a person subject to detention for the purposes of Article 2(h) of Directive 2013/33/EU*** *(see paragraphs 41-42 of the judgment in Case M. A.).*

[...]

27. Article 8(3) of Directive 2013/33/EU lists in detail the various grounds for detention, each of which corresponds to a specific need and is independent in nature. Given the importance of the right to freedom enshrined in Article 6 of the Charter and the severity of the restriction of that right by such detention, the restrictions on the exercise of that right must not exceed what is strictly necessary. The mere fact that an applicant for international protection is unlawfully present in the territory of a Member State is not one of the grounds on which the detention of such applicant can be justified under Article 8(3) of Directive 2013/33/EU. Since a third-country national cannot be subjected to a detention measure solely on the ground of being unlawfully present on the territory of a Member State (see paragraphs 83-84 of the judgment in Case M.A.), and such national legislation is expressly prohibited by EU law (see the second part of the operative part of the judgment in Case M.A.), the Extended Panel of Judges, following the above-mentioned case law of the Court of Justice, which obliges it to apply the provisions of European Union law and to ensure that they are fully effective, finds that ***the mere fact of the foreigner's unlawful entry into the territory of the Republic of Lithuania does not in itself constitute a ground for detention****.*"

In this part of the decision, the SACL also follows the principle of supremacy of European Union law and refuses to apply a provision of national law that is contrary to European Union law, in this case - Article 140/17 (2) of the Law of the Republic of Lithuania on the Legal Status of Aliens. Another important aspect is the equation of an "alternative measure to detention" (accommodation with the right to move only within the territory of the place of accommodation) with "detention". The Lithuanian Red Cross Legal Overview #2 discussed the case law of the SACL on this issue. In its ruling of 31 March 2022 in administrative case A-1804-502/2022 the SACL equated accommodation with restrictions on the freedom of movement in the Kybartai Foreigners' Registration Centre to de facto detention, and in its ruling of 5 May 2022 in administrative case No A-2414-881/2022 the SACL made a similar statement in relation to accommodation in the container house sector of the Pabradė Foreigners' Registration Centre. In its ruling of 19 May 2022 in administrative case No A-2595-602/2022 the SACL also equated to de facto detention accommodation in the Refugee Reception Centre, in this particular case without even discussing the actual conditions of

"accommodation" but simply assessing the substance of the measure as an alternative to detention itself, which in fact does not differ in content from detention.

Thus, for some time now, the case law of the SACL sees a certain directionality in this matter, namely that "detention", as understood in international and European Union law, is to be regarded as "detention" irrespective of how the measure restricting a person's liberty is referred to in national law. This practice reflects the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. In deciding on the distinction between restriction of freedom of movement and deprivation of liberty within the meaning of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the context of the detention of aliens in transit zones and accommodation centres, the European Court of Human Rights has stated that detention in such centres amounts to a "deprivation of liberty", whatever it may be called in national law [6]. In joined cases C-924/19 PPU and C-925/19 PPU, the Court of Justice of the European Union held that an obligation imposed on a third-country national to remain permanently in a strictly defined closed transit zone, in which his/her movements are restricted and controlled and he/she is not lawfully able to leave the zone of his/her own free will in any direction, constitutes a deprivation of liberty which is to be regarded as "detention" within the meaning of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

In its decision of 28 July 2022, the SACL does not deviate from the aforementioned case law and essentially states that a measure of restraint of liberty, where the person in question is separated from the rest of the population, deprived of freedom of movement, constitutes a "detention", regardless of what such measure is formally called in the legislation of the Republic of Lithuania. Although the SACL refers to the "*alternative measure to detention*" provided for in Article 115(2)(5) and Article 140/19 (1) (3) of the Law of the Republic of Lithuania on the Legal Status of Aliens, the court's interpretation is fully applicable to the analogous, though non-judicial, measure of "*accommodation without the right of free movement within the territory of the Republic of Lithuania*", provided for in Articles 140/8 (3), 140/8 (6) and 140/8 (7) of the above-mentioned Law, which is granted by an administrative decision (or without a decision being taken at all), as that measure also separates the person from the general population and deprives him of freedom of movement. Thus, at least when considering the question of the lawfulness of the application of all of the above measures before the courts, it is very likely that they would only be considered lawful to the extent that their application is compatible with the provisions of Article 8 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Unfortunately, in this case it must also be acknowledged that the recent reluctance of the Lithuanian state authorities to comply with the requirements of the European Union legislation has led to an absurd situation in which the executive authorities follow one set of legal provisions, while the courts, while reviewing the legitimacy of the decisions adopted by the above-mentioned authorities, follow other legal provisions.

ENDNOTES

[1] http://lrv-atstovas-eztt.lt/uploads/T.K.%20ir%20KITI_2022_sprendimas.pdf

[2] https://liteko.teismai.lt/viesasprendimupaieska/paieska.aspx?detali=&bnr=&byloseilesnr=&procesinisnr=&eilnr=False&tid=19&trid=&br=&dr=18&nuo=2022.01.01%2000:00:00&iki=2022.09.27%2000:00:00&teis=&tk=&bb=&rakt=&txt=&kat=9489&term=&ikir=False

[3] https://curia.europa.eu/juris/showPdf.jsf?text=&docid=255681&pageIndex=0&doclang=LT&mode=req&dir=&occ=first&part=1&cid=1020873

[4] Article 2(18) and (20), Article 140/12 of the Law of the Republic of Lithuania "On the Legal Status of Aliens", Paragraph 23 of Description of the procedure for granting and withdrawing asylum in the Republic of Lithuania, approved by Order of the Minister of the Interior of the Republic of Lithuania No 1V-131 of 24 February 2016 "On the Approval of the Description of the Procedure for Granting and Withdrawing Asylum in the Republic of Lithuania"

[5] Original quotation: "*The way a government treats refugees is very instructive because it shows how they would treat the rest of us if they thought they could get away with it*" – Tony Benn

[6] Abdolkhani and Karimnia v. Turkey, Application no. 30471/08, 22 September 2009, § 127

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