

THE PRACTICE OF THE SLOVAK CONSTITUTIONAL COURT CONCERNING MIGRATION AND REFUGEE AFFAIRS

Lubica Gregová Širicová¹

ABSTRACT

The judicature of the Slovak Constitutional Court concerning migration and refugee affairs after the accession of the Slovak Republic to the EU has been diverse, covering several important issues. Remarkably, in 2023, the Court took a new turn on its 'self-restraining approach' in a case related to migration and refugee matters. The article concludes that the Slovak Constitutional Court has not linked migration or asylum issues to the issue of constitutional identity in its case law. From the material viewpoint, the case law of the Constitutional Court forms four key areas: 1) fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment; 2) detention of foreigners; 3) an applicant's right to comment on evidence; 4) right to respect for family and private life. The article features a summary of the main thrust of the flagship judgments with developmental arch (where possible). Finally, the study showed that the Slovak Constitutional Court regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU.

KEYWORDS

*Constitutional Court of the Slovak Republic
migration
asylum
detention of foreigners
right to comment on evidence
right to respect for family life*

1 | Assistant Professor, Institute of International and European Law, Faculty of Law, Pavol Jozef Šafárik University in Košice, Slovakia; lubica.siricova@upjs.sk; ORCID: 0000-0002-6818-928X.



1. Introduction

Accession to the EU has significantly influenced Slovak national law concerning the migration and refugee affairs, related activities of the Slovak state authorities and judicature of Slovak courts including the Constitutional Court of the Slovak Republic. This article aims to study the position of the Slovak Constitutional Court on migration and asylum in relation to the boundaries of the competences of the EU and Member States. It addresses the question of whether, regarding this issue, the national constitutional court has linked migration or asylum issues to constitutional identity. In addition, as a second issue, the case law of the Slovak Constitutional Court on migration and asylum is summarised for the period after accession to the EU. In this section, the main thrust of the relevant (flagship) judgments and a developmental arc of the case law is given. Finally, we examine whether the Slovak Constitutional Courts considers the case law of other countries, specifically EU Member States, or the documents and case law of another organization when developing its relevant case law.

The Constitutional Court of the Slovak Republic is a constitutional institution with several exclusive competences typical of specialized and centralized models of judicial review of constitutionality,² such as a constitutional review of legislation and authoritative interpretation of the Constitution of the Slovak Republic.³ In terms of competences, the Slovak Constitutional Court is among the strongest.⁴ Notable missing competences are the *actio popularis* and *ex ante* constitutional review (its competence is limited to the preventive control of the constitutionality of international treaties and referendum questions). The court executes mainly *ex post* review of constitutionality (of national legislation and sub-legislative acts) including abstract constitutional interpretation in disputed matters. Other important competences include the individual constitutional complaint procedure (on the protection of fundamental rights and freedoms), review of electoral complaints, proceedings in competence disputes of central State administration bodies, proceedings related to the President of the Slovak Republic, and proceedings on the responsibility of constitutional officials.⁵

2 | Drgonec, 2017, pp. 4–10.

3 | Constitution of the Slovak Republic, No. 460/1992 Coll., hereafter 'Constitution'. The Constitution ranks highest in the hierarchy of the legal acts in the Slovak Republic, together with constitutional acts, followed by international treaties with primacy over acts, then acts, and lastly, sub-legislative acts. A special position among the international treaties is attributed to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, hereafter 'ECHR'), often described as 'constitutional status'. For more on the position of the ECHR in the Slovak constitutional system, see Baraník, 2020, pp. 233–246. The relationship with EU law is elaborated in the second section of this article.

4 | Steuer, 2019, p. 2; Orosz, 2020a, p. 332.

5 | For detailed commentary on the Slovak Constitution, see Drgonec, 2019; Orosz et al., 2021; Orosz et al., 2022.

2. Position of the Slovak Constitutional Court on migration and asylum in relation to the boundaries of the competences of the EU and Member States

The relationship between EU law and the Slovak Constitution is not yet fully resolved. The Constitution contains the definition of the relationship of the Slovak legal order and EU law in Art. 7 (2);⁶ however, its scholarly interpretation differs among authors who underline that the article does not definitively answer elementary questions on Slovak constitutional and EU law.⁷ Therefore, there remains broad space for the Constitutional Court to fill in the gaps by its judicature. The key decision came in 2015,⁸ when the Constitutional Court implied it has the power to decide on compliance of the national law with the primary EU law. According to the Constitution, the Court decides on compliance of the national law with the Constitution, constitutional laws, and international treaties. The primary EU law was categorized by the Court as international treaties; thus, it was included in the scope of reference for the national law. Furthermore, the Court subsumed the primary EU law under legally binding acts with primacy over the laws of the Slovak Republic according to Art. 7 (2) of the Constitution. However, the Constitutional Court introduced the 'self-restraining approach' to the exercise of its jurisdiction.⁹ The Constitutional Court believes that if it decides that the challenged national law, its part, or its provisions are not in accordance with the Constitution, it is in principle no longer necessary to further examine their inconsistency with EU law (despite the proposal). This is because their possible discrepancy would lead to the same result and legal effect achieved by the decision according to which the challenged national law is unconstitutional. Moreover, importantly, the Court expressed its view on the following (hypothetical) situation: what if the challenged national law is in accordance with the Constitution, but inconsistent with the primary EU law (possibly confirmed in the authoritative finding by the Court of Justice of the EU)? In this context, the Constitutional Court states that if the inconsistency cannot be bridged by applying the principles of euro-conform interpretation then the question of the change in the Constitution might arise. (This question would not be within the jurisdiction of the Constitutional Court.) In conclusion, the Slovak Constitutional Court potentially views the primary EU law above the Constitution,¹⁰

6 | 'The Slovak republic may transfer the exercise of part of its rights to the European Communities and EU by an international treaty ratified and published in the manner established by law, or based on such a treaty. Legally binding acts of the European Communities and EU shall have primacy over the laws of the Slovak Republic' (translated by the author).

7 | For example, the scope of the article has been debated (secondary law, primary and secondary law). The discussion is summarized in Baranič, 2021, p. 95.

8 | Ref. No. PL. ÚS 3/09 from the 3rd July 2015.

9 | *Ibid.*, p. 80.

10 | Baranič, 2021, p. 99. Strong conclusion by Šipulová and Steuer, 2023, pp. 81–104: for Slovakia, EU law gained supremacy over constitutional order, even if it meant changing the interpretation of the constitutional provisions from their original meaning.

although some authors remain cautious.¹¹ Some predict that in the future, the Court may need to fence the core of the Constitution to reject any unacceptable influence of EU law.¹² Thus far, the Constitutional Court has rarely used the term 'constitutional identity', and it has never used this term in relation to EU law.¹³ Rather, the Slovak constitutional doctrine uses the term 'substantive core'. This topic is much debated and controversial,¹⁴ and not necessarily the same notion as constitutional identity.¹⁵ According to the Constitutional Court, the substantive core doctrine includes the protection of human rights, democracy, and the rule of law.¹⁶ Again, importantly, the Court has not linked this doctrine with the effects of EU law yet.

Clearly, the Court continues to apply the 'self-restraining approach' to the interpretation of EU law, e.g. having declined to consider the compliance of the national law with the EU Charter of Fundamental Rights.¹⁷ In case Ref. No. PL ÚS 10/2014 of 29 April 2015, the Court decided that the national law is inconsistent with the provisions of the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Consequently, the Court did not decide on the proposed inconsistency of the national law with the Charter. From a legal consequences perspective (loss of effectiveness of the challenged national legislation, and after the expiration of six months, possible loss of validity), according to the Constitutional Court, the purpose pursued by the proposal was fulfilled, which also eliminates the possible inconsistency of the national law with the provisions of the Charter.¹⁸

Another opportunity for the Constitutional court to apply the Charter came in case Ref. No. II. ÚS 480/2014 of 12 February 2015. Here, the merits related to the topic of this study (migration and refugee affairs): an applicant's right to comment on evidence according to which he is dangerous for the Slovak Republic (the

11 | Drgonec, 2019, p. 328. Berdisová advocates for legal pluralism rather than the search for primacy (Berdisová, 2021, pp. 109–112.).

12 | e.g. Baranik, 2021, p. 100; Dobrovičová, Jánošíková and Mazák, 2016, pp. 164, 165. More sceptically, Benko, 2018, pp. 258–259.

13 | Decision of the Constitutional Court of the Slovak Republic Ref. No. III ÚS 427/2012 of 17 December 2014, para. 59: 'the President is a significant element of the constitutional identity of the country'. The Court referred to the same wording in its decision Ref. No. PL ÚS 16/2019 of 2 April 2020, para. 27.

14 | Káčer and Neumann, 2019; Breichová Lapčáková, 2020; Orosz, 2020b; Štiavnický and Steuer, 2020; Balog, 2022; Šipulová and Steuer, 2023.

15 | Káčer and Neumann, 2019, pp. 98–105.

16 | Decision Ref. No. PL. ÚS 7/2017 of 31 May 2017; decision Ref. No. PL. ÚS 21/2014 of 30 January 2019; decision Ref. No. PL. ÚS 8/2022 of 25 May 2022.

17 | Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

18 | This approach was criticized by Mazák and Jánošíková, who proposed that the Court should change its approach and consider the compliance of the national law with the Charter. Should the Court find that the national law is in conflict with the Charter, then the national law cannot be in compliance with the ECHR or the Constitution, even if the review suggests such conflict. It would suffice to refer to the primacy of EU law and its consequence, the non-application of the Constitution in conflict with the Charter. Mazák and Jánošíková, 2015, p. 597. See also Dobrovičová, Jánošíková and Mazák, 2016, pp. 130–131. For the advantages of the self-restraining approach, see Drgonec, 2018, p. 374.

proceedings on the stay of a foreigner).¹⁹ The Court considered whether this is a case of implementing Union law under Art. 51 Charter and identified Directive 2008/115/EC²⁰ as the only relevant standard, which in the Court's opinion, explicitly allows deviation from procedural standards. Therefore, the Court did not deal with the alleged violation of the Charter.²¹

In another recent decision, the Constitutional Court of the Slovak Republic interpreted the mutual relations between the EU law and national law in the context of migration and asylum. In 2019, the Supreme Court of the Slovak Republic initiated proceedings in the Constitutional Court on the compliance of certain provisions of the Act on asylum²² with Art. 47 of the Charter. Therefore, the Constitutional Court in its decision Ref. No. PL. ÚS 15/2020 of 15 March 2023 first considered it necessary to comment on the assessment of proposals for the initiation of proceedings on the compliance of legal regulations by the ordinary courts (including the Supreme Court), in which the Charter is the proposed reference norm. In its decision, the Constitutional Court emphasized the nature of the EU law expressed in the judicature of the Court of Justice of the European Union (CJEU),²³ according to which:

Community Treaties, unlike ordinary international treaties, established a new legal order of its own, which is incorporated into the legal system of the Member States and which is binding for their courts. In the areas defined by the Treaties, the Member States limited their sovereign rights in favor of this new legal order with its own institutions and whose subjects are not only the Member States but also their nationals.²⁴

According to the Constitutional Court, the cited concept is confirmed by current jurisprudence.²⁵ Accordingly, it follows from the nature of EU law that if it is impossible to interpret national legislation in accordance with the requirements of EU law, the principle of the primacy of EU law requires the national court to ensure the full effect of the requirements of EU law in the case on which it is deciding. The Constitutional Court has repeatedly highlighted this particularity of EU law. The Court recalled here its decision Ref. No. PL. ÚS 3/09 of 26 January 2011,

19 | For more details on the merits of this case, see sections 3.3 (applicant's right to comment on evidence) and 3.4 (right to respect for family and private life) of this article.

20 | Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, pp. 98–107.

21 | Decision Ref. No. II. ÚS 480/2014 of 12 February 2015, para. 59. The Court was criticized for not referring a question to the Court of Justice of the EU for a preliminary ruling. Dobrovičová, Jánošíková and Mazák, 2016, pp. 151–152.

22 | Act No. 480/2002 Coll. on asylum, amending and supplementing certain acts (hereafter 'Act on asylum').

23 | Hereafter 'CJEU'.

24 | The Constitutional Court refers to judgements of the ECJ from 5. 2. 1963, van Gend and Loos, 26/62, EU:C:1963:1, p. 23; and from 15. 7. 1964, Costa, 6/64, EU:C:1964:66, pp. 1158 and 1159.

25 | Judgement of the CJEU from 21. 12. 2021, Euro Box Promotion and others, C-357/19, C-379/19, C-547/19, C-811/19 a C-840/19, EU:C:2021:1034, para. 245.

that the jurisprudence of the CJEU implies that the effect of the directly applicable provisions of the Treaty and of acts of the institutions in relation to the national law of Member States is not only the loss of applicability of any existing and conflicting provision of the national law, but—given that these provisions and acts are an integral part of the legal order applicable in the territory of each Member State, over which they have priority—also the exclusion of the adoption of such national law that is incompatible with the law of the European Community.²⁶

The Constitutional Court added that the ordinary court (i.e. also the Supreme Court) cannot initiate proceedings before the Constitutional Court pursuant to Art. 125 (1) of the Constitution on the compliance of national legislation with those international treaties by which the Slovak Republic transferred the exercise of part of its sovereign rights to the EU. Within the scope of their authority, the ordinary courts apply the provisions of EU law and are obliged to ensure the full effect of these standards; they will not apply any national provision *ex officio* in conflict with Community law (even if it is a later provision); they shall not first request or wait for cancellation of this national law by legislative means or another constitutional procedure.²⁷ The specialized and concentrated model of constitutional justice characterizing the Slovak constitutional system does not allow ordinary courts, without cooperation with the Constitutional Court, to enforce and apply a decision on the inconsistency of a legal regulation with a legal regulation of higher legal force.²⁸ However, the principle of the primacy of the EU law introduces diffuse elements into the process of checking compliance of national law with the Charter when it does not require the court of a Member State to confirm its belief of such inconsistency by another competent authority. Therefore, if the ordinary court considers that the provisions of national legislation conflict with the Charter, then as a court of an EU Member State entrusted within its jurisdiction to apply EU law, it is obliged to ensure the full effect of the requirements arising from the provisions of that law.

The Constitutional Court subsequently focused on the applicability of the Charter in the case under consideration. The Court repeated that the CJEU has developed and is still developing several situations in which the compliance of national legislation with the requirements for the protection of fundamental rights and freedoms established by the Charter can be examined. First, the Charter is applicable in the national implementation of obligations arising from the EU law, including situations where Member States have adopted stricter standards than those determined by EU law, if these national standards would limit the effective application of the EU law in the harmonized area.²⁹ Second, the Charter covers

26 | The Constitutional Court refers to the judgement of the ECJ from 9. 3. 1978, *Simmenthal*, 106/77, EU:C:1978:49, para. 17.

27 | See para. 24 of the decision.

28 | Art. 144 (2) of the Constitution.

29 | Judgement of the CJEU from 19. 11. 2019 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry against Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*, C-609/17 and C-610/17, EU:C:2019:981, para. 48.

national legislation, which falls under derogatory exceptions defined by EU law.³⁰ Finally, the Charter is also applicable in situations with a sufficient connection between the national act and EU law that extends beyond the similarity of the affected areas or indirect effects of one of the areas on another.³¹

Consequently, the Constitutional Court assessed the applicability of the Charter in this case. It concluded that based on an explicit delegation from Member States, which is enshrined in the primary law of the EU,³² the EU determines the contours of the asylum policy of all its Member States through secondary legal acts. Subsequently, the Court focused on the Act on asylum. The basis of the provisions challenged before the Constitutional Court concerns the amendment to this Act, according to which the negative opinion of the Slovak Information Service and Military Intelligence creates a new (additional) reason for not granting asylum for the purpose of family reunification or subsidiary protection in the Slovak Republic. The revised procedural directive³³ does not explicitly rely on this reason for not granting asylum or supplementary protection. This reason represents a national security exception according to Art. 72 Treaty on the Functioning of the European Union (TFEU). However, regarding the national security exception, it is necessary to comply with the conditions set by EU law. A stricter national regulation must not hinder the effective implementation thereof at the national level. Therefore, the applicability of the Charter under Art. 51 (1) of the Charter can be established with regard to the disputed provisions of the Act on asylum. Based on this, the Supreme Court of the Slovak Republic, a court of an EU Member State, is authorized within its jurisdiction to apply the EU law. In case of doubt, the Supreme Court may, according to Art. 267 TFEU, refer to the CJEU in the framework of the preliminary question, similar to the Budapest High Court (Fővárosi Törvényszék) in its proposal of 27 January 2021 in case C-159/21. As such, the Constitutional Court did not proceed in assessing the compliance of the contested provisions of the Act on asylum with Art. 47 of the Charter.³⁴

Remarkably, in this case, the Court took a new turn on its 'self-restraining approach'. The applicability of the Charter was analysed before the Court delved into the proposed inconsistency of the national law with the Constitution and ECHR. Although the applicability of the Charter was confirmed, the Constitutional Court did not deal with the proposed inconsistency of the national law with the Charter, and merely recommended the Supreme Court refer preliminary

30 | Judgement of the CJEU from 18. 6. 1991 *Elliniki Radiophonia Tiléorassi AE a Panellinia Omospondia Syllogon Prossopikou against Dimotiki Etairia Pliroforissis a Sotirios Kouvelas a Nicolaos Avdellas and others ('ERT')*, C-260/89, EU:C:1991:254.

31 | Judgement of the CJEU from 6. 3. 2014 *Siragusa*, C-206/13, EU:C:2014:126.

32 | Arts. 4 (2) j), 78 (1) and (2) of the Treaty on the Functioning of the European Union (Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

33 | 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 (recast), OJ L 180, 29.6.2013, pp. 60–95.

34 | However, the Constitutional Court did assess the compliance of the contested provisions of the Act on asylum with the Slovak Constitution and the Convention (see section 3.3).

questions to the Court of Justice of the EU. Afterwards, the Constitutional Court decided³⁵ that the challenged national law is not consistent with the Constitution and ECHR. Unlike in previous cases, the Court did not derive any consequences for the Charter. (Previously, it would state it is unnecessary to further analyse the Charter, because the purpose of the proceedings has already been fulfilled. The national law would then become ineffective based on its inconsistency with the Constitution and ECHR).

3. Case law of the Slovak Constitutional Court on migration and asylum

The competence of the Constitutional Court concerning migration and asylum is not specifically regulated and the general rules on its jurisdiction are applicable. A survey of its judicature shows that migration and asylum matters mainly arise in two types of proceedings: the individual constitutional complaint procedure (on the protection of fundamental rights and freedoms) and review of constitutionality (of the national legislation). This section examines the case law of the Constitutional Court from the material viewpoint, where it forms four key areas: fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment (1 case); detention of foreigners (3 cases); an applicant's right to comment on evidence (5 cases), and right to respect for family and private life (4 cases).

| **3.1. Fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment**

In 2011, the Constitutional Court dealt with a complaint according to which the Migration Office rejected the applicant's request for asylum as inadmissible. This meant his transfer to Greece, the country responsible in this case.³⁶ The applicant, a citizen of Afghanistan, highlighted that should he be transferred to Greece, the insufficient level of the asylum legal system and practice in the country would mean he would not be guaranteed admission to the asylum procedure. He also expressed his concern that by subsequent deportation to his country of origin—Afghanistan—he may be exposed to a threat to his life due to serious injustice against his person. The applicant objected to the violation of his fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment or punishment according to Art. 16 (2) of the Constitution of the Slovak Republic and the prohibition of torture according to Art. 3 ECHR caused by the judgment of the Supreme Court of the Slovak Republic.

The Constitutional Court stated that given the nature of this right as characterized by its absolute guarantee, it is the duty of the ordinary court to apply the

35 | For more details, see section 3.3 of this article (Applicant's right to comment on evidence).

36 | Decision of the Constitutional Court Ref. No. III. ÚS 110/2011 of 31 May 2011.

standards of protection resulting from this article (and from the Convention), even if such protection is not explicitly stipulated in the legal norms.

Moreover, the Constitutional Court noted that the fundamental right under Art. 16 (2) of the Constitution and right under Art. 3 ECHR are indisputably rights of a material nature. The applicant did not object to their violation by the decision of the Supreme Court in connection with the violation of any of the procedural rights guaranteed to him by the Constitution. The Constitutional Court recalled its case law,³⁷ according to which the fundamental right under Art. 16 (2) of the Constitution and under Art. 3 ECHR include procedural components in its content. The Constitutional Court reiterated that the procedural components of both indicated rights emerge in these types of proceedings (e.g. extradition proceedings, asylum proceedings) when a person comes under the jurisdiction of another state, which in connection with the decision of a public authority of the Slovak Republic in the circumstances of the case, may negatively impact the applicant's personal sphere.

The Constitutional Court concluded that the Supreme Court underestimated the significance of the applicant's fundamental right under Art. 16 (2) of the Constitution and his rights under Art. 3 ECHR. Formally referring to the national legal regulation and purpose of the reasoning of the administrative body, the court did not consistently assess the circumstances of the case, resulting in the emergence of shortcomings in its decision with constitutional relevance.

3.2. *Detention of foreigners*

The nexus between detention and deportation proceedings was explained by the Constitutional Court in its decision Ref. No. II. ÚS 264/09 of 19 October 2010. The Court stated that although detention and deportation proceedings are two separate actions, they are not completely independent or isolated. This statement results from the purpose of the detention, which in the given case, is the enforcement of administrative deportation. When appropriate, the law allows the state to have at its physical disposal a person subjected to pending deportation proceedings to carry out the deportation. From this perspective, the detention must be perceived as necessary. Administrative detention may not be necessary in the same way as detention in criminal proceedings wherein the reasons therefor must be fulfilled. The Constitutional Court added that the restriction of personal freedom is clearly tied to the essence of detention for the purpose of deportation. Certainly, a definitive conclusion regarding deportation will be reached in another proceeding, but the court cannot ignore obvious facts that prevent deportation even when deciding on detention. The substantive and procedural components of personal freedom are directly and indistinguishably linked, and as such, the protection of personal freedom is regulated in detail in the Constitution and ECHR. The Supreme Court, by separating detention and deportation proceedings, and by not assessing the possibility of deportation as a condition of detention, violated the procedural component of the applicant's personal freedom. The Constitutional Court considered the most serious violation of the fundamental right to be the fact

37 | Decisions of the Constitutional Court Ref. No. II. ÚS 111/08 of 26 June 2008, Ref. No. IV. ÚS 331/08 of 26 February 2009.

that the Supreme Court explicitly rejected the connection between detention and its purpose, i.e. deportation.³⁸

In its decision Ref. No. II. ÚS 147/2013 of 9 October 2013, the Constitutional Court emphasized the importance of the speed of the court's decision making when reviewing the detention decision. The Constitutional Court gave a clear message to the courts: it is their task to ensure the balance between the right to an expedited decision on deprivation of liberty according to Art. 5 (4) ECHR and right to maintain minimum investigative procedural standards.³⁹ According to the Constitutional Court, the ECHR in Art. 5 (1) f) assumes that a person can be detained even when his deportation has not yet been legally decided on. It is sufficient that a deportation proceeding has started, that is, a proceeding that can actually lead to deportation. However, this means that the detained foreigner does not have to be, based on Art. 5 (1) f) ECHR, realistically and effectively deportable immediately at the moment of detention. This is because his deportation is the subject of proceedings that should lead to a decision on whether or not the foreigner will be deported.

The Constitutional Court further stated that the term 'deportation proceedings' according to Art. 5 (1) f) ECHR must be understood autonomously as a set of such acts of state bodies, which according to national law, are necessary for the deportation of the person to take place, i.e. his physical handover or sending to another state. It does not necessarily have to be the proceedings of a single state body. It could also be several interrelated proceedings, at the end of which is the final act of deportation. If the person has applied for asylum, then the asylum proceedings must be considered part of the 'deportation proceedings' for the purposes of Art. 5 (1) f). Therefore, Art. 22 (1) of the Act on asylum, according to which the asylum seeker has the right to stay in the territory of the Slovak Republic, does not prevent the actual deportation of such a person to the extent that his detention cannot be considered to have been carried out 'in deportation proceedings' in accordance with Art. 5 (1) f) ECHR. However, detention must always be free from arbitrariness. Therefore, the administrative authority deciding on detention is also obliged to consider the obstacles to the execution of administrative deportation, punishment of deportation, and transfer or return of the foreigner. This applies as long as such obstacles are obvious at the time of the decision on detention, are known to the administrative authority, or emerged during the proceedings. For an asylum seeker, the high probability of granting asylum (e.g. obvious persecution of a foreigner for political, racial, or religious reasons), which would have been obvious at the time of the decision on detention, may constitute an obstacle to the detention of the foreigner for administrative deportation. In fact, the detention of such an applicant could not be considered to have been carried out 'within the deportation proceedings' in the sense of Art. 5 (1) f) ECHR.

Finally, the Constitutional Court concluded that a delayed assessment of the legality of the deprivation of personal liberty by a court, coming more than a year after the restriction of personal liberty has already ended, has the same effect as if the person had no judicial protection against such restriction. Thus, the role of

38 | See pp. 24, 31 of the decision.

39 | Berthotyová, 2017, p. 102.

ordinary courts is to ensure a balance between the right to an expedited decision and right to maintain the minimum procedural standards of the investigation within the framework of Art. 5 (4) ECHR. The one who is deprived of personal freedom will hardly appreciate the court's careful care for his procedural rights if the consequence thereof is the prolongation of his lack of freedom. Therefore, if the Supreme Court decides on an appeal against the judgment of the regional court and the applicable procedural regulations allow it to make a meritorious (final) decision, it is the duty of the Supreme Court to prefer this method of decision over the annulment of the first-instance decision and return of the case to the regional court for further proceedings.⁴⁰

Decision Ref. No. I. ÚS 365/2015 of 26 August 2015 can be marked as the Constitutional Court's key decision on the requirement for expedited decision making on the deprivation of liberty and for periodic review at reasonable intervals. According to the Court, in principle, cases of deprivation of liberty require that the justifiability of their continued duration is periodically reviewed. The purpose of Art. 5 (4) ECHR is to enable a person deprived of liberty to demand that the court examine the lawfulness thereof. Given that the fulfilment of the conditions established by law evolves over time (especially regarding the existence of relevant and sufficient grounds for the deprivation of liberty), the possibility to request such review repeatedly at reasonable intervals should be ensured. Art. 5 para. 4 ECHR enshrines a procedural guarantee against continuing the deprivation of liberty, which, although originally ordered in a legal manner, could become illegal and lose justification. Referring to case law of the European Court of Human Rights,⁴¹ the Constitutional Court stated that the requirements for expedited decisions on deprivation of liberty and for periodic judicial review at reasonable intervals are fundamental, because they ensure a detainee does not have to be exposed to the danger of remaining in detention long after the deprivation of liberty ceased to be justified.⁴²

| 3.3. *An applicant's right to comment on evidence*

Already in 2012,⁴³ the Constitutional Court expressed critical remarks on the practice of the Migration Office and subsequent judicial review of its practice when it denied subsidiary protection, basing its decision on the 'security interest of the Slovak Republic'. The evidence was not included in the file, the judge did not examine it during the judicial scrutiny of the administrative decision, and thus, the applicant could not comment on it. In the opinion of the Constitutional Court, the basis of the decision of the competent authorities must be clear from the files of the administrative authority and court, even without an explicitly stated reason in the reasoning of their decision. The file must clearly show the facts the

40 | See p. 104 of the decision.

41 | Shishkov v. Bulgaria, Application no. 38822/97 from 9. 1. 2003, para. 88, Saadi v. United Kingdom, Application no. 13229/03 from 29. 1. 2008, para. 45, Amuur v. France, Application No. 19776/92 from 25. 6. 1996, para. 43, Abdolkhani and Karimnia v. Turkey, Application no. 30471/08 from 22. 9. 2009, Z.N.S. v. Turkey, Application no. 21896/08 from 19. 1. 2010, para. 56 and para. 63.

42 | See para. 23 of the decision.

43 | Decision of the Constitutional Court Ref. No. IV. ÚS 308/2011 of 25 January 2012.

decision-making body considered and attributed legal relevance, especially in view of the legal consequences of the decision not to provide or cancel the applicant's subsidiary protection. According to the Constitutional Court, the procedure in the Supreme Court⁴⁴ in connection with that in the regional court⁴⁵ means a violation of the applicant's fundamental right to comment on the evidence presented.⁴⁶

However, the Constitutional Court later limited the scope of the applicant's right to comment on evidence when this is a classified document. In its decision Ref. No. II. ÚS 480/2014 of 12 February 2015,⁴⁷ the Constitutional Court emphasized the great deal of discretion of the sovereign when regulating the foreigners' regime, especially regarding issues of legal long-term residence. In principle, the legal regulation is based on trust in the intelligence knowledge of the Slovak Information Service. From a constitutional and institutional perspective, trusting the political control thereof remains. Protection by administrative courts is limited in the particular area; therefore, foreigners may feel their rights are insufficiently protected. However, the area of state security is close to political issues where judicial discretion is limited. In the case under consideration, the law excludes the taking of evidence provided by the Slovak Information Service, thus also excluding the possibility of commenting on it. Furthermore, a statement from the Slovak Information Service can be perceived as a legal condition not considered as evidence, and is therefore outside the regime of Art. 48 (2) of the Constitution. According to the Constitutional Court, the wording of the relevant legal provisions is so unambiguous it does not allow for a shift in interpretation towards the procedural articles of the Constitution that would enable the complainant to contradict the information in the Slovak Information Service reports. The Constitutional Court further explained that the Supreme Court and the Constitutional Court in their case law found legal space for a broader judicial protection of foreigners' position. This intersection is the provision of the Act on Classified Information enabling judges to familiarize themselves with classified information and legal representatives to see the information with the consent of the Director of the Slovak Information Service under the condition of confidentiality. The Constitutional Court further recalled its earlier decision⁴⁸ that the protection of human rights and fundamental freedoms in our constitutional system is primarily the task of the ordinary courts and the Constitutional Court. Specifically, the duty of all courts to protect individuals from interference by public authorities is highlighted. This duty is a fundamental component of a rule of law that respects and honours human freedoms. Thanks to its defining features—*independence and being bound by the law*—the judicial power can and must protect individuals from the excesses of public power. In the case under review, the ordinary courts learned the classified

44 | Decision of the Supreme Court of the Slovak Republic, Ref. No. 10 Sža/10/2010 of 12 January 2011.

45 | Decision of the Regional Court (Krajský súd) in Bratislava Ref. No. 9 Sz/38/2010 of 6 October 2010.

46 | See p. 36 of the decision.

47 | The case was related to the breach of the applicant's rights in the proceedings on the residence of foreigners. It has been, however, argued that the conclusions are also applicable to the asylum proceedings *per analogiam*. Aláč, 2020, p. 23.

48 | Ref. No. II. ÚS 111/08 of 26 June 2008.

facts and thus provided vertical protection to the applicant. They did it without the applicant being able to oppose it, but as mentioned, the law does not allow opposition. The Constitutional Court added that efforts to include reasoning in decisions have been its dominant doctrine in individual protection since the introduction of a constitutional complaint in 2002. However, in this case, the legislator preferred a simple finding in the complexity of the current world. The sense of judicial protection may seem suppressed, but the ordinary courts protect foreigners by checking the more formal but relevant aspects of the process. They also familiarize themselves with the reasons regardless of whether they are untenable. Here, the judiciary returns to the conscience of the judges, for example, as is the case with a jury decision.⁴⁹

The problem of unavailability of the evidence to the applicant (migrant) for a residence permit was raised again by the Slovak Ombudsman (Public Defender of Rights). However, the proceedings in the Constitution Court have been hindered by the argument that the Ombudsman is not legally entitled to initiate them from her own motion.⁵⁰

In 2016, these doubts regarding unconstitutionality led the Supreme Court of the Slovak Republic to contest the conformity of the provisions of the Act on asylum and Act on the residence of foreigners⁵¹ with the Constitution. Indeed, the Constitutional Court in its decision Ref. No. PL. ÚS 8/2016 of 12 December 2018 reached the same conclusion as the public defender of rights, i.e. that the provisions in question are not in accordance with the Constitution. The time gap since the submission of the ombudsman's first proposal in the matter was almost five years.⁵² The Constitutional Court was criticized for the fact that with its decision rejecting the locus standi of the ombudsman, it interpreted the Act on the public defender of rights in a significantly formalistic and restrictive manner, and thus contributed to the substantial narrowing of the protection of human rights and freedoms in the Slovak Republic.⁵³

Regarding the decision of the Constitutional Court Ref. No. PL. ÚS 8/2016 of 12 December 2018, the Constitutional Court stipulated the following: if, due to the security of the state, the person concerned cannot be notified of the exact and complete reasons forming the basis of decisions under the Act on the residence of foreigners and the Act on asylum, a judicial review of such decisions from the perspective of the protection of the rights and legally protected interests of such a person cannot be effective, it cannot be a sufficient guarantee against the possible arbitrariness of a competent state authority, and it cannot realistically fulfil the fundamental right of the affected person to judicial protection according to the Constitution of the Slovak Republic, and the right to a fair trial according to Art. 6 (1) ECHR, or the right to an effective remedy and a fair trial according to Art. 47 Charter of Fundamental Rights of the European Union.

49 | See paras. 47, 48, 49, 50, and 55 of the decision.

50 | Decision of the Constitutional Court of the Slovak Republic Ref. No. PL. ÚS 5/2014 zo of 5 March 2014.

51 | Act No. 404/2011 Coll. on residence of foreigners, amending and supplementing certain acts (hereafter 'Act on residence of foreigners').

52 | Patakyová, 2020, p. 53.

53 | Kresák, 2014, p. 210.

Finally, this topic again recently appeared in the case law of the Constitutional Court.⁵⁴ In 2018, the Asylum act was supplemented with new reasons for not granting asylum for the purpose of family reunification and for not providing subsidiary protection: in the event that the opinion of the Slovak Information Service or of the Military Intelligence disagrees with the granting of asylum or provision of subsidiary protection. This statement was crucial in proceedings on the granting of asylum/subsidiary protection before administrative authorities and subsequently before courts in the administrative judiciary. However, to the applicant, the reasons for which the Slovak Information Service or Military Intelligence did not consent were not made available because of the protection of the security of the Slovak Republic. In its submission to the Constitutional Court, the Supreme Court of the Slovak Republic stated that the application of these provisions may limit the applicant's fundamental right in the administrative proceedings and subsequently, potentially also in the court proceedings, to comment on all the evidence presented. This simultaneously implies a possible unequal status of the applicant in the proceedings before administrative authorities and before the administrative courts.

First, the Constitutional Court stated that the right to adversarial proceedings is not absolute and its scope may change depending on the specifics of a case. However, the Court explained that the importance of this right is multiplied in situations where the evidence, on which the party to the proceedings cannot comment, is decisive for the entire proceedings. By not making the evidence available en bloc for any negative opinion, the applicant is denied the opportunity to comment on the often decisive evidence in the asylum procedure.

The Constitutional Court further explained that a less invasive alternative to the non-accessibility of the reasons for the Slovak Information Service or Military Intelligence's negative opinion could be established. The affected applicant and the Ministry that decides on the granting of subsidiary protection should have an opportunity to become familiar with the justification at least to the necessary extent. Knowing at least the basic reasons for which the Slovak Information Service or Military Intelligence disagreed with the provision of subsidiary protection would allow the applicant to assess whether it is useful for him to turn to the administrative court. The fundamental right to judicial protection in the administrative judiciary presupposes the formal enabling of the examined person's access to judicial protection and an approach that will provide an effective attempt to protect the applicant's individual interests. This effectiveness depends on many factors, but especially on the right of the affected person to defend his interests under the best possible conditions. In the context of the considered Act, this means the affected person could demand from the competent authority at least the basic reasons for its decision, and thus assess the matter with knowledge regarding whether it is useful to turn to the court with the relevant proposal. The competent court can ensure the effective protection of the affected rights and legally protected interests of this person only when the subject of its scrutiny (review) is the legality of the reasons for the contested decision. Here, the Constitutional Court recalled to its previous ruling Ref. No. PL. ÚS 8/2016 (see above).

54 | Decision Ref. No. PL. ÚS 15/2020 of 15 March 2023.

Moreover, the Constitutional Court stated that to preserve the constitutionality of the Act on asylum, the relevant facts should be made available to the applicant to the necessary extent by means of the relevant opinion of the Slovak Information Service or Military Intelligence. This refers to at least the substance of the reasons relating to public security, which form the basis of decisions under the challenged legislation, in a manner that considers the necessary confidential nature of intelligence information. The opinion of the Slovak Information Service and Military Intelligence could no longer contain only a strict agreement or disagreement with the provision of subsidiary protection. This would ensure that the applicant is able comment on the evidence that led to the negative opinion of the intelligence services regarding the threat to the security of the Slovak Republic. This measure would ensure the protection of a part of the classified facts and fulfil the necessary framework for the application of constitutionally guaranteed rights. This would allow the affected persons to defend their interests under significantly better conditions than the challenged legal regulation allows.

Ultimately, the Constitutional Court concluded that the contested wording of the Act on asylum does not meet the requirements of the least invasive means of protecting the security of the Slovak Republic. The problem with this provision is that the opinion of the Slovak Information Service or Military Intelligence that agrees or disagrees with the granting of asylum or provision of subsidiary protection to an applicant does not provide sufficient guarantees of the possibility of reviewing the Ministry's decision. In case of filing an administrative lawsuit, the current legal situation does not guarantee a fair trial in the administrative courts. Therefore, the legal provision does not meet the prerequisites of necessity in limiting the fundamental right to judicial and other legal protection according to Art. 46 (1) and (2) of the Constitution, and within the framework of Art. 6 (1) ECHR as they are interpreted by the Constitutional Court. Furthermore, the basic requirement according to Art. 13 (4) of the Constitution was not fulfilled, which when restricting fundamental rights and freedoms, requires paying attention to their essence and meaning.⁵⁵

3.4. *Right to respect for family and private life*

The Constitutional Court has had several opportunities to explain how to apply the rules on (permanent, temporary) residence where they coincide with the right to respect for family and private life.

The key standpoint is in decision Ref. No. III. ÚS 331/09 of 16 December 2009. The Constitutional Court stated that the right to protection against arbitrary interference with private and family life in accordance with Art. 19 (2) of the Constitution of the Slovak Republic and with Art. 8 ECHR includes not only the negative obligation of the state to refrain from interference with them, but also its positive obligation to take effective measures to ensure their effective protection. The guarantees resulting from the right to respect for family life presuppose the existence of a family, i.e. the existence of a real and effective family life. They also include the intended family life, which although not yet fully established, is based

55 | See paras. 72–74 and 77 of the decision.

on a valid and real (genuine) marriage involving a close relationship and joint life (cohabitation) of the spouses at the time of or shortly before the objected interference. In the case of the conclusion that the marriage of a foreigner with a citizen of the Slovak Republic falls within the scope of protection provided in Art. 8 (1) ECHR, the criteria resulting from Art. 8 (2) ECHR require a proper legal assessment of the denial of a permanent residence permit, whether it can be considered in the given case as an interference with the applicant's right to respect for family life.

The interpretation of this topic was further developed in decision Ref. No. II. ÚS 480/2014 of 12 February 2015.⁵⁶ The Constitutional Court held that in principle, there is no legal right to the granting of residence.⁵⁷ The Slovak state authorities have a wide discretion, while the substantive fundamental right to family protection must also be assessed from the perspective of the personal responsibility of the foreigner, who must perceive the rank of his residence status (temporary, tolerated). The legislator balanced the constitutionally protected value of state security with constitutional procedural rights or the right to protect family life, emphasizing the security of the state. The legislator prioritized security from both its own perspective and that of the secrecy of intelligence information. In the confrontation with the security of the state, the legislator prioritized only the protection of life and prohibition of torture.

Decision Ref. No. III. ÚS 414/2016 of 21 June 2016 concerned the rejection of an application for temporary residence if a third-country national provides false or misleading information. The Constitutional Court stated that one reason for the cancellation of temporary residence exhaustively regulated in Art. 36 (1) of the Act on the Residence of Foreigners is the discovery of facts justifying the rejection of an application for temporary residence, including the case when a national of a third country provides false or misleading information or submits false or altered documents or a document of another person. These acts, within the proceedings under the Act on the Residence of Foreigners, also constitute a reason for the administrative expulsion of a national of a third country regulated in Art. 82 (2) of the Act on the Residence of Foreigners.

In decision Ref. No. II. ÚS 675/2017 of 10 November 2017,⁵⁸ the Constitutional Court reiterated that it pays careful attention to the relationship between the legal protection of private and family life and security interests of the state. To ensure these security interests, the 'criminal history' of a foreigner who applies for one of the forms of legal residence in the territory of the state must be considered. When balancing the applicant's private interest in the protection of his private and family life and the public interest in the protection of public order, or of the internal security of the state, whether the interferences of the state (public authority) are justified and necessary when the branch of national law applicable to foreigners is applied is also examined.

56 | See paras. 32, 46 of the decision.

57 | Here, the Court refers to Article 4 (1) in conjunction with Article 6 (1) of Directive 2003/109/EC on the legal status of third-country nationals who are long-term residents according to the directive on family reunification.

58 | See pp. 17 and 18 of the decision.

The Constitutional Court emphasizes that the applicant must have been aware of the risks associated with the formation of his family life, as he must and should have known that there is in principle, no legal right to be granted residence. Here, the relevant administrative authorities have a wide degree of administrative discretion. The fundamental right to the protection of private and family life must be assessed from the perspective of the personal responsibility of the foreigner, who must perceive the rank of his residence status (similarly in decision Ref. No. II. ÚS 480/2014 of 12 February 2015). In this case, the courts examined facts that were essential or decisive for security risk signals related to the applicant's potential stay in Slovakia (document of the criminal history of the complainant from Italy). From the viewpoint of the necessity of the interference by the state, the rejection of the applicant's request for a tolerated residence permit is consistent with the Constitution.

4. References to the case law of other countries or documents and case law of another organization

The Constitutional Court of the Slovak Republic regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU. Where appropriate, it compares the facts of specific cases and underlines the details that lead to different conclusions.⁵⁹

59 | To interpret Article 5 (1) and (4) ECHR, the Constitutional Court analysed the relevant judicature of the European Court of Human Rights in its decision Ref. No. I. ÚS 365/2015 of 26 August 2015 (*Sanchez-Reisse v. Switzerland*, Application No. 9862/82, from 21. 10. 1986; *Bezicheri v. Italy*, Application No. č. 11400/85, from 25. 10. 1989; *Chachal v. United Kingdom*, Application No. 22414/93, from 15. 11. 1996; *Agnissan v. Denmark*, Application No. 39964/98 from 4. 10. 2001; *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, from 22. 9. 2009; *Saadi v. United Kingdom*, Application No. 13229/03, from 29. 1. 2008; *Gündoğru v. Austria*, Application No. 33052/96, from 6. 3. 1997; *Longa Yonkeu v. Latvia*, Application No. 57229/09, from 15. 11. 2011; *Shishkov v. Bulgaria*, Application no. 38822/97 from 9. 1. 2003; *Amuur v. France*, Application No. 19776/92 from 25. 6. 1996, *Z.N.S. v. Turkey*, Application no. 21896/08 from 19. 1. 2010). Moreover, the Court referred to the judgement of the CJEU of 30 May 2013, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, C-534/11, ECLI:EU:C:2013:343.

In its decision Ref. No. II. ÚS 480/2014 of 12 February 2015, the Constitutional Court considered the case-law of the ECtHR (*C.G. and others v. Bulgaria*, Application no. 1365/07, 24 July 2008; *Jeunesse v. the Netherlands*, Application no. 12738/10, 3 October 2010) and of the CJEU (Judgement of the CJEU from 4. 6. 2013, *ZZ v Secretary of State for the Home Department*, C-300/11, ECLI:EU:C:2013:363).

In its decision Ref. No. II. ÚS 264/09 of 19 October 2010, the Constitutional Court referred to ECtHR cases *Singh v. the Czech republic* (Application no. 60538/00, 25 January 2005), *Ali v. Switzerland* (Application no. 24881/94, 5 August 1998) and *Agnissan v. Denmark* (Application no. 39964/98, 4. October 2001).

In its decision Ref. No. PL. ÚS 15/2020 of 15 March 2023, the Constitutional Court emphasized the nature of the EU law expressed in the judicature of the Court of Justice of the European Union (for references, see section 2 of this article).

In the reasoning of decision Ref. No. III. ÚS 110/2011 of 31 May 2011, the Constitutional Court relied on the opinions and statements of international human rights bodies when responding to the applicant's claims concerning the negative situation of asylum seekers in Greece. The Constitutional Court referred to reports of the Norwegian Helsinki Committee⁶⁰ and intervention of the Commissioner for Human Rights of the Council of Europe submitted to the European Court of Human Rights regarding asylum seekers in Greece.⁶¹

It can be derived from decision Ref. No. II. ÚS 264/09 of 19 October 2010 that the Constitutional Court pays attention to the judicature of other States. The Court stated: 'It is clear from comparative jurisprudence...' However, the individual references to the case law of other countries are rare. There is one major exception: the judicature of the Czech courts. The Constitutional Court in its decision Ref. No. II. ÚS 264/09 of 19 October 2010 stated that comparatively, perceiving the similarity of the legislation, the Czech cases decided by the Supreme Administrative Court are worthy of consideration.⁶² Moreover, to characterize the term 'detention', it turned to the Czech Constitutional Court.⁶³ In decision Ref. No. II. ÚS 480/2014 of 12 February 2015, the Slovak Constitutional Court considered another decision of the Czech Highest Administrative Court.⁶⁴ The only situation with reference to other countries' case law was when the Constitutional Court recommended the general courts take as inspiration the Hungarian request for a preliminary ruling of 27 January 2021 (Fővárosi Törvényszék) in case C-159/21.⁶⁵

5. Conclusion

The judicature of the Slovak Constitutional Court concerning migration and refugee affairs after the accession of the Slovak Republic to the EU has been diverse and covers several important issues. Bearing in mind the aims of this article, three conclusions are drawn from the case law.

60 | Norwegian Helsinki Committee (NHC), NOAS and Aitima, *Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece*, October 2009.

61 | Third-party intervention by the Council of Europe Commissioner for Human Rights under Article 36, para. 2, of the European Convention on Human Rights, Application No. 30696/09 *M.S.S. v. Belgium and Greece*, Strasbourg, 31 May 2010, CommDH(2010)22.

62 | The Constitutional Court analysed case-law of the Czech Highest Administrative Court: Kamran K. (Afganistán) proti Policii České republiky o zajištění cizince, rozsudek Nejvyššího správního soudu č. j. 1 As 12/2009-61 and D. D. proti Policii České republiky, Oblastnímu ředitelství služby cizinecké policie Ústí nad Labem, rozsudek Nejvyššího správního soudu č. j. 2 As 80/2009-66.

63 | Decision of the Constitutional Court of the Czech Republic Ref. No. PL. ÚS 10/08 of 12 May 2009.

64 | Ruslan K. (Ruská federace) proti Ministerstvu vnitra o udělení azylu, rozsudek Nejvyššího správního soudu č. j. 6 Azs 142/2006-58.

65 | Decision of the Constitutional Court of the Slovak republic Ref. No. PL. ÚS 15/2020 of 15 March 2023, para. 29, see above.

In 2015, the Constitutional Court implied that it has the power to decide on compliance of the national law with the primary EU law. However, the Court later introduced the 'self-restraining approach' to the exercise of its jurisdiction. In the case it decides that the challenged national law is not in accordance with the Constitution, it is in principle no longer necessary to further examine this inconsistency with EU law (despite the proposal). Remarkably, in 2023, the Court shifted course on its 'self-restraining approach' in a case related to migration and refugee matters. The applicability of the Charter of Fundamental Rights of the European was analysed and confirmed. However, the Constitutional Court did not deal with the proposed inconsistency of the national law with the Charter, but merely recommended the Supreme Court refer preliminary question to the Court of Justice of the EU. Afterwards, the Constitutional Court decided that the challenged national law is not consistent with the Constitution and ECHR (and it did not derive any consequences for the Charter). Thus far, the term 'constitutional identity' has rarely been used by the Constitutional Court, and it has never been used in relation to EU law. Therefore, the first conclusion is that the Slovak Constitutional court has not linked migration or asylum issues to the issue of constitutional identity in its case law.

The second conclusion relates to the material viewpoint. The case law of the Constitutional Court forms four key areas: i) fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment; ii) detention of foreigners; iii) an applicant's right to comment on evidence; iv) and right to respect for family and private life. Following is a summary of the relevant (flagship) judgments with a developmental arch (where possible).

1. The Slovak Constitutional Court contributed to increasing the protection for migrants and refugees in Slovakia when it emphasized the nature of the fundamental right not to be tortured or subjected to cruel, inhuman, or degrading treatment as an absolute guarantee. The Constitutional Court stated that if the applicant sought protection of his right enshrined in Art. 3 ECHR (and Art. 16 of the Constitution) and according to the ordinary court, such protection is not explicitly stipulated in the legal norms, it is the duty of the ordinary court to apply the standards of protection resulting from this article (and from the Convention).

2. The study of the case law showed the evolution in the interpretation of the right to liberty in relation to the detention of foreigners. The Constitutional Court developed two arguments of procedural character. First, it is clear from the essence of detention for the purpose of deportation that the restriction of personal freedom is tied to the purpose of detention. The conclusion regarding deportation will be reached in another proceeding, but the ordinary courts cannot ignore obvious facts that prevent deportation even when deciding on detention. If the person has applied for asylum, then the asylum proceedings must be considered part of the 'deportation proceedings'. In the case of an asylum seeker, the high probability of granting asylum (for example, obvious persecution of a foreigner for political, racial, or religious reasons), which would have been obvious at the time of the decision on detention, may constitute an obstacle to the foreigner's detention for administrative deportation. Second, the Constitutional Court emphasized the importance of the speed of the court's decision making when reviewing the

detention decision. Moreover, cases of the deprivation of liberty require periodic review of the justifiability of their continued duration.

3. An interesting developmental arch in the Constitutional Court's judicature was illustrated concerning the applicant's right to comment on evidence related to the security interest of the State in the proceedings according to the Act on asylum and Act on residence of foreigners. In 2012, the Constitutional Court stated that the basis for the decision of the competent authorities (asylum, residence) must be clear from the files of the administrative authorities and courts, even without an explicitly stated reason in their decision. However, later, in 2015, the Constitutional Court limited the scope of the applicant's right to comment on evidence when they are classified documents. Finally, in 2016, the Constitutional Court established that if due to the security of the state, the person concerned cannot be notified of the reasons forming the basis of decisions under the Act on the residence of foreigners and Act on asylum, a judicial review of such decisions from the perspective of the protection of the rights and legally protected interests of such a person cannot be effective, cannot be a sufficient guarantee against the possible arbitrariness of a competent state authority, and cannot realistically fulfil the fundamental right to judicial protection, and the right to a fair trial. This conclusion was confirmed in 2023 in the context of asylum and subsidiary protection proceedings. The relevant facts should be made available to the applicant to the necessary extent. Here, at least the substance of the reasons relating to public security, which form the basis of decisions under the challenged legislation, should be clarified in a way that considers the necessary confidential nature of intelligence information.

4. The Constitutional Court has had several opportunities to explain the application of the rules on (permanent, temporary) residence where they coincide with the right to respect for family and private life. On one hand, the Court recognizes that the criteria resulting from Art. 8 (2) ECHR require a proper legal assessment of the denial of a permanent residence permit and whether it can be considered in the given case as an interference with the applicant's right to respect for family life. On the other hand, in principle, there is no legal right to the granting of residence, and the Slovak state authorities have wide discretion in this regard. The legislator balanced the constitutionally protected value of state security and constitutional procedural rights, or the right to protect family life, emphasizing the security of the state. However, when balancing the applicant's private interest in the protection of his private and family life and the public interest in the protection of public order, or of the internal security of the state, whether the interferences of the state (public authority) are justified and necessary must be examined.

Finally, the study showed that the Slovak Constitutional Court regularly refers to the case law of the European Court of Human Rights and of the Court of Justice of the EU. One case was identified where the Court relied on the opinions and statements of international human rights bodies (Norwegian Helsinki Committee and Commissioner for Human Rights of the Council of Europe). The references to the case law of other countries are rare, with the exception of the Czech judicature, likely due to similarities in legal systems (historically one legal system before the separation of the republics).

Bibliography

Aláč, M. (2020) 'Ingerencia Slovenskej informačnej služby do konania o azyle v kontexte judikatúry Ústavného súdu' in Košičiarová, S. (eds.) *Aktuálne otázky azylového práva II. Zborník príspevkov z medzinárodnej vedeckej konferencie*. Trnava: Právnická fakulta Trnavskej University v Trnave, pp. 15–31.

Balog, B. (2022) *Materiálne jadro Ústavy. Ústavný systém v pohybe*. Bratislava: Wolters Kluwer.

Baraník, K. (2020) *Ústava na hviezdnom nebi. Vzťah Ústavy Slovenskej republiky k medzinárodnému právu*. Praha: Leges.

Baraník, K. (2021) 'Article 7' in Orosz, L., Svák, J. et al. (eds.) *Ústava Slovenskej republiky. Komentár. Zväzok I*. Bratislava: Wolters Kluwer, pp. 74–104.

Benko, R. (2018) 'K postaveniu Charty základných práv Európskej únie v právnom poriadku Slovenskej republiky' in Orosz, L., Grabowska, S., Majerčák, T. (eds.) *VI. ústavné dni*. Košice: UPJŠ v Košiciach, pp. 244–260.

Berdisová, L. (2021) 'Medzinárodnoprávna doktrína Slovenskej republiky' in Brösl, A., Holländer, P., Příbelsky, P. (eds.) *Ústavné právo Slovenskej republiky*. 4th edn. Plzeň: Aleš Čeněk, pp. 109–112.

Berthotyová, E. (2017) *Zaistenie cudzincov. Judikatúra s komentárom súvisiacich ustanovení zákona o pobyte cudzincov*. Bratislava: Wolters Kluwer.

Breichová Lapčáková, M. (2020) *Nezrušiteľné ústavné princípy vo viacúrovňovom právnom systéme*. Košice: Univerzita Pavla Jozefa Šafárika, Šafárik Press.

Dobrovičová, G., Jánošíková, M., Mazák, J. (2016) 'Charta v konaní pred Ústavným súdom' in Mazák, J. (eds.) *Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 95–165.

Drgonec, J. (2017) *Ústavné právo procesné*. Bratislava: C.H.Beck.

Drgonec, J. (2018) *Ústavné právo hmotné*. Bratislava: C.H.Beck.

Drgonec, J. (2019) *Ústava Slovenskej republiky. Teória a prax*. Bratislava: C.H.Beck.

Káčer, M., Neumann, J. (2019) *Materiálne jadro vslovenskom ústavnom práve. Doktrinálny disent proti zrušeniu sudcovských previerok*. Praha: Leges.

Kresák, P. (2014) 'Reštriktívny formalizmus, ako dôvod zužovania ochrany ľudských práv a slobôd v rozhodovacej činnosti Ústavného súdu SR' in Orosz, L., Majerčák, T. (eds.) *Ochrana ľudských práv a základných slobôd ústavnými súdmi a medzinárodnými súdnymi orgánmi – III – Ústavné dni*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach: Právnicka fakulta, pp. 194–211.

Mazák, J., Jánošíková, M. (2015) 'Charta základných práv EÚ v konaní o súlade právnych predpisov: Zatiaľ rutina namiesto doktríny', *Právny obzor*, 98(6), pp. 590–601.

Orosz, L. (2020a) *Teória ústavy a ústavné systémy demokratických štátov*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Šafárik Press.

Orosz, L. (2020b) 'Ústavný systém Slovenskej republiky a ochrana ústavnosti po 30. januári 2019' in Szakács, A., Hlinka, T. (eds.) *Princíp právneho štátu ako súčasť materiálneho jadra ústavy. Bratislavské právnické fórum 2020*. Bratislava: Univerzita Právnická fakulta Univerzity Komenského v Bratislave, pp. 19–28.

Orosz, L., Svák, J. (eds.) (2022) *Ústava Slovenskej republiky. Komentár. Zväzok II*. Bratislava: Wolters Kluwer.

Orosz, L., Svák, J. et al. (eds.) (2021) *Ústava Slovenskej republiky. Komentár. Zväzok I*. Bratislava: Wolters Kluwer.

Patakyová, M. (2020) 'K aktívnej legitímácii verejného ochrancu práv v konaní o súlade právnych predpisov pred Ústavným súdom podľa čl. 125 ods. 1 Ústavy' in Orosz, L., Grabowska, S., Majerčák, T. (eds.) *Ústavná a zákonná úprava konania pred súdnym orgánom ochrany ústavnosti v štátoch V4 – VIII – Ústavné dni*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 39–57.

Šipulová, K., Steuer, M. (2023) 'From Minimalism to the Substantive Core and Back: The Slovak Constitutional Court and (the Lack of) Constitutional Identity' in Kovács, K. (ed.) *The Jurisprudence of Particularism: National Identity Claims in Central Europe*. Oxford: Hart Publishing, pp. 81–104; <https://doi.org/10.5040/9781509960156.ch-003>.

Steuer, M. (2019) 'Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky)' in Grote, R., Lachenmann, F., Wolfrum, R. (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford: Oxford University Press; <https://oxcon.oup.com/display/10.1093/law-mpeccol/law-mpeccol-e803>.

Štiavnický, J., Steuer, M. (2020) 'The Constitutional Court of the Slovak Republic. The Many Faces of Law-Making by Constitutional Courts with Extensive Review Powers' in Florczak-Wątor, M. (ed.) *Judicial Law-Making in European Constitutional Courts*. 1st edn. London: Routledge. pp. 183–200; <https://doi.org/10.4324/9781003022442-10>.