Asylum and Refugee Protection versus National Security ECHR jurisprudence concerning Romanian cases

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Abstract: *The article starts by shortly presenting the evolution of the European asylum and refugee law, moving afterwards to the Romanian law concerning migration policy and refugee protection in general and the national security as a ground to refuse asylum and refugee protection, in particular. After presenting theoretical aspects, the paper moves to practice, presenting the Romanian jurisprudence based on national security as a ground to refuse protection. The case-law of the European Court of Human Rights involving Romanian decisions based on national security is also taken into account. The article ends with comments, proposals and conclusions.*

Keywords: *asylum; refugee protection; national security; Romania.*
Framing subdomain: Human Rights and Humanitarian Law

I. Introduction. The European asylum and refugee law

Back in the 90`s, the abolition of the internal borders between the Member States had lead to a process of harmonisation of national rules on asylum and return procedures that continues in the present days. The first two treaties were the Schengen Implementing Convention [1] and the Dublin Convention [2]. Then, more documents were created and so the first Treaty on the European Union, the Maastricht Treaty was born [3] The Treaty was criticised because it referred to asylum purely as a 'matter of common interest' within the Third Pillar, so later on, in 1997, the Amsterdam Treaty moved asylum from the third pillar, a non-governmental one, to the first pillar, that of the European Community [4]. The establishment of a common European asylum system (CEAS) was mentioned by the Tampere Conclusions (1999) of the European Council [5], introducing for the first time this notion [6].

Under CEAS, more directives and regulations were born in a short period of time: Temporary Protection Directive [7], Reception Conditions Directive [8], Qualification Directive [9], Asylum Procedure Directive [10], 2003 Dublin Regulation [11], EURODAC Regulation [12].

In 2004 the Hague Programme on 'Strengthening Freedom, Security and Justice in the European Union' was set, according to which the aim of CEAS was the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. The foreseen procedure was to be based on the full and inclusive application of the Geneva Convention on Refugees [13] and other relevant Treaties [14] Three years later, the Lisbon Treaty [15]set new rules for CEAS as the EU acquired the power to adopt common, uniform standards on asylum. In 2008 the Council adopted the European Pact on Immigration and Asylum with the the objective of building 'a Europe of asylum' [16]. In the same year, the Return Directive was adopted [17] providing for common standards to be followed by Member States when returning irregular third-country nationals.

The CEAS institutional framework has been strengthened with the establishment of the European

Asylum Support Office (EASO). This new agency has the threefold mandate of 'supporting practical cooperation on asylum', providing 'support for Member States subject to particular pressure', and 'contribute[ing] to the implementation of the CEAS' [18].

Following the entry into force of the Lisbon Treaty a new Qualification Directive was adopted in 2011 [19], as well as a revised Asylum Procedures [20] and Reception Conditions Directive [21], a revised EURODAC [22] and Dublin Regulation [23]. In 2015, taking into account the migration crisis and the high number of asylum applications in Italy and Greece, EU adopted the first two Decisions on intra-EU relocation schemes to other Member States [24]. Last year, in 2017, the European Commission adopted two soft law instruments aimed at securing a more effective implementation of the EU's return policy: a Communication including a renewed Action Plan on return [25] and Recommendations.

II. The Romanian asylum and refugee law

As the Romanian law transposed the European norms on asylum, the legislator modified a couple of times the laws concerning the legal status of aliens and their forms of protection. First, the Law no. 15/1996 was repealed by Government Ordinance 102/2000 which was later abrogated by Law 122/2006, which is currently in force. Also, from the perspective of present article, Law no. 535/2004 on prevention and combating terrorism [26] presents interest and also Government Ordinance no. 194/2002 concerning the aliens regime, as well as Law 182/2002 concerning the access to public information.

Romanian law establishes for three forms of protection: refugee status, subsidiary protection and temporary protection. Refugee status is recognized, upon request, for the foreign citizen who, as the result of a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, as well as the stateless person who, being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Subsidiary protection can be granted to the foreign citizen or to the stateless person who does not fulfil the conditions to have refugee status recognized and regarding whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where he has his habitual residence, will be exposed to a serious risk, and who cannot or, due to this risk, does not wish the protection of that country.

Temporary protection is offered in case of a massive flux of displaced persons [27].

Law 122/2006 foresees general principles, procedural guaranties, rights and obligations of the participants in these procedures which come with the protection forms, the grounds for refusal, the annulment of the protection, etc. The procedure of granting a form of protection is administrative, followed or not by a judicial one. The administrative body which takes the decision is the Immigration Office, body which also stands in trial in case the administrative procedure is followed by the judicial one. The procedure can be accelerated or regular.

The accelerated procedure takes place in case of manifestly unfounded applications, or applications of people who, through their activity or membership to a certain group, are a threat to national security of public order in Romania, but also in case of applications of people who come from a safe country of origin. During the administrative procedure, a specialized person conducts an interview and if that person considers there are grounds for accelerated procedure, after analysing the protection request, a decision is issued in 3 days. The applicant can, in case of rejection, to lodge an appeal to a first instance court in term of 7 days, and can remain on Romanian territory until the appeal is decided. The court pronounces a decision within 10 days and either accepts the appeal and retains the case in regular procedure, either rejects the appeal and maintains the decision of the Immigration Office, the decision being irrevocable. In this latter case, the decision of returning is issued and the refused applicant must leave Romania immediately.

The regular procedure takes a longer. The administrative body takes a decision in 30 days, term which can be prolonged up to 6 months. In particular cases the term can be suspended and the procedure can

take up to 9 months.

In case of rejection of protection, against the decision may be lodged a complaint at the first instance court in 10 days. The procedure takes up to 30 days. Only one term can be given for lack of defence and only for good reasons. The court may admit the complaint or may reject it. The decision may be appealed in 5 days, and has suspensive effect, the appellant having the right to remain in Romania until a definitive decision. The appeal is tried by the Tribunal, the second instance court, the administrative contentious section. If the appeal is dismissed, the applicant has to leave Romania immediately or in 15 days, as foreseen by law.

III. National security as a ground to refuse international protection. Law on terrorism

Law 122/2006 foresees the grounds of exclusion from refugee status or other form of protection: reasons to believe that the applicant has committed a crime against peace and humanity, a war crime or another offence defined according to the relevant international treaties or instruments that Romania has signed, or has committed a serious common law offence outside Romania, before being admitted to Romanian territory, or has committed deeds which are contrary to the goals and principles of United Nations Organization Charter, or has instigated or was accomplice to committing the above mentioned crimes. Furthermore, protection is not recognized for foreign citizens or stateless persons who planned, facilitated or took part in committing terrorist acts. Apart of these reasons, article 28 foresees an extra ground for refusing subsidiarity protection, namely, if there are serious reasons to believe that foreign citizen and stateless persons are a danger to Romania's public order and national security. In case of the applicant of temporary protection Article 141 para.1 letter b) foresees as a ground of refusal serious reasons to believe that he/she is a danger to national security. Concerning the danger to public order, this is assumed only if that person was convicted for a very serious crime.

If the protection was offered by the Romanian authorities and later, it is discovered that one of the cases indicated above was applicable, the protection is cancelled. The procedure is administrative and may be followed by a judicial one in case a complaint is lodged at the first instance court. In case of cancellation of protection or refusal of protection, or a person being declared undesirable, the alien or stateless person should leave Romanian territory. In case of further stay, a decision of returning is issued [28]. The decision may be appealed at the Court of Appeal in 10 days or 3 days in case of undesirable persons. The Court pronounces a definitive decision in 30 days or 5 days in case of undesirable persons.

According to Romanian law [29] a person is declared undesirable if he committed any acts against national security or there are reasonable grounds to believe that he is involved in activities which are a danger for national security or public order. The request is made by the Prosecutor near the Court of Appeal in Bucharest which pronounces a decision in 10 days. The trial takes place in closed session and is mainly based on classified information offered by the secret services. The decision may be appealed at the High Court of Cassation and Justice in 10 days and is not suspensive, meaning that meanwhile the alien should be returned. In order to avoid imminent prejudice, in some cases, where very well reasoned grounds are presented, the High Court may upheld the returning until it reaches a decision. The trial takes place in an urgent procedure [30].

Next we will present a couple of ECHR decisions finding violations of the Convention and afterwards some domestic jurisprudence following these decisions, to find out if there are some changes at national level.

IV. ECHR Jurisprudence concerning Romanian Cases

IV.1. ***The Lupsa Case. Application no. 10337/04 [31]. Violation of Article 8. Decision from 2006.*** The Applicant, Mr. Lupsa a Yugoslavian citizen, came in Romania in 1989. He lived in Romania for fourteen years and, in 1993, set up a Romanian commercial company whose main activity was roasting and marketing coffee. He also learnt Romanian and cohabited with a Romanian national from 1994 [32]. On 2 October

2002 the applicant's girlfriend, who was visiting him in Yugoslavia, gave birth to a child. A few days later the applicant, his girlfriend and the baby returned to Romania. On 6 August 2003 the applicant, who had been abroad, came back to Romania unimpeded by the border police. The next day, however, border police officers came to his home and deported him. On 12 August 2003 the applicant's lawyer lodged an application with the Bucharest Court of Appeal against the Aliens Authority and the public prosecutor's office at the Bucharest Court of Appeal for judicial review of the deportation order against the applicant. The only hearing before the Bucharest Court of Appeal was held on 18 August 2003. The representative of the Aliens Authority provided the applicant's lawyer with a copy of an order of 28 May 2003 of the public prosecutor's office at the Bucharest Court of Appeal in which, at the request of the Romanian Intelligence Service and in accordance with Government Emergency Ordinance no. 194/2002 on the rules governing aliens in Romania, the applicant had been declared an "undesirable person" and banned from Romania for ten years on the ground that there was "sufficient and serious intelligence that he was engaged in activities capable of endangering national security".

The applicant alleged that the deportation order against him and his exclusion from Romanian territory infringed his right to respect for his private and family life secured in Article 8 of the Convention. The Court held that since the applicant had indisputably integrated into Romanian society and had a genuine family life, his deportation and exclusion from Romanian territory put an end to that integration and radically disrupted his private and family life in a way which could not be remedied by the regular visits from his girlfriend and their child. Accordingly, the Court considered that there has been an interference in the applicant's private and family life.

The Court held that a person subject to a measure based on national security considerations must not be deprived of all guarantees against arbitrariness and in this particular case, it observed that no proceedings were brought against the applicant for participating in the commission of any offence in Romania or any other country. Apart from the general ground mentioned above, the authorities did not provide the applicant with any other details. The Court notes, furthermore, that, in breach of domestic law, the applicant was not served with the order declaring his presence to be undesirable until after he had been deported. Thus, the Court concluded that the interference with his private life was not in accordance with "a law" satisfying the requirements of the Convention. The Court found a violation of Article 8.

IV.2. ***The Geleri Case. Application No. 33118/05. Violation of Article 8. Violation of Article 1 of Protocol No. 7 [33]. Decision from 2011.*** The Applicant, Mr. Geleri, was a Turkish national who lived in Chisinau (Moldova). At the relevant time, he was lawfully resident in Romania. He had been granted political asylum in 1998, a decision that was upheld by a final decision in 2001. In 2003 he married a Romanian national, with whom he had a daughter in 2005. He was an associate in two commercial companies. By an order of 21 February 2005, the prosecutor at the Bucharest Court of Appeal declared Mr Geleri persona non grata and banned him from entering Romania for ten years, on the ground that "sufficient and reliable information indicates that he [was] engaged in activities posing a threat to national security". On 23 February 2005 this order was communicated to Mr Geleri without further explanation and he was expelled to Italy on the same day. On 28 February 2005 Mr Geleri's lawyer challenged the expulsion order before the Bucharest Court of Appeal. By a final decision of 3 March 2005, the Bucharest Court of Appeal dismissed that challenge as unfounded. In particular, it held that the evidence forming the basis of a decision declaring an alien persona non grata on the ground of national security could not in any circumstances be communicated to the person in question, since that information was classified as secret by the law. The appeal court added that the Constitutional Court's case-law had confirmed that that rule was in accordance with the Constitution. In April 2005 the Romanian Office for Refugees withdrew Mr Geleri's refugee status.

The Court noted firstly that Mr Geleri's expulsion and the prohibition on his entering the territory of Romania had infringed both his "private" and "family" life. In Mr Geleri's case, the Court focused its attention on whether the measures imposed were "in accordance with the law". The Bucharest Court of Appeal had conducted a purely formal examination of the expulsion order. In addition, the court of appeal had been provided with no further explanation with regard to Mr Gelari's alleged offences, so that it had been unable to go beyond the prosecution service's allegations in verifying whether the Applicant genuinely

posed a danger to national security or public order. Thus, the Court found the measures imposed on Mr Geleri did not guarantee him a minimal degree of protection against arbitrariness. It followed that the interference in his right to respect for his family and private life had not been in accordance with a "law" that met the requirements of the Convention. The Court found a violation of Article 8. Further, the Court noted that the authorities had not provided Mr Geleri with the least indication of the offences of which he was suspected and which were the basis for the finding that he posed a threat to national security. In those circumstances, the procedural guarantees to which Mr Geleri was entitled had not been respected and there had been a violation of Article 1 of Protocol No. 7.

IV.3. ***The Abou Amer Case. Application No. 14521/03. Violation of Article 8. Decision from 2011*****.** The first applicant, Mr Fahed Youseef Abdalla Abou Amer, was a stateless person of Palestinian origin who was born in Egypt. The second applicant was Mrs Ana-Maria Abou Amer, his wife, a Romanian national [34]. The first applicant was granted refugee status by the Romanian authorities in 1998, along with his father and brothers. In 2000 he married the second applicant. Their daughter was born in 2001 and acquired Romanian nationality at birth. At the date of the facts, the applicant was legally residing and working in Romania. In March 2003 the applicants and their daughter visited family in Egypt. Meanwhile, on 25 March 2003, at the request of the Romanian Intelligence Service and in accordance with Government Emergency Ordinance no. 194/2002 on the rules governing aliens in Romania, the prosecutor at the Bucharest Court of Appeal issued an order in which the first applicant was declared an "undesirable person" and banned from Romania for ten years on the ground that there was "sufficient and serious intelligence" that he was "engaged in activities capable of endangering national security". A decision to take him into public custody until his deportation was possible was issued. On 6 April 2003, in the morning, when the applicants and their daughter returned to Romania, the first applicant was served with the order of 25 March 2003 and the decision of 28 March 2003 and prohibited from leaving the airport and entering Romania. He was informed of the reasons for that interdiction and asked to leave the territory immediately.

He tried to fly to Zurich but he was denied access, so he returned to Romania where he was kept in the airport's transit zone. According to the applicant's statements he was placed in the airport's basement, in a room without heating, with only a thin cover to protect him from the cold. There was no bathroom. He had access to a toilet but had to be escorted there. Food was scarce and of poor quality. His wife was not allowed to see him or to send him clothes and food. However, he was visited by a representative of the Romanian Council for Refugees and by a doctor. His lawyer challenged the prosecutor's order of 25 March 2003 before the Bucharest Court of Appeal. He argued that he had not done anything that would harm national security and that the order had disrupted his family life. 8 April at 9.45 a.m. the authorities tried to repatriate the applicant to Egypt, which also refused him access to the territory and returned him to Romania on 9 April. The authorities kept him in the transit area while they attempted to get him a visa for Egypt. On 11 April 2003 the Bucharest Court of Appeal stayed the execution of the prosecutor's order of 25 March 2003, pending the outcome of the proceedings for its annulment. The decision to take the applicant into public custody remained operative.

On 14 April 2003 the applicant was transferred to the Otopeni Centre where he claimed he was held in similar conditions to those in the airport. He stated that he had been allowed contact with his wife, who had brought him food and clothes. Upon transfer he had received an information note in English explaining the reasons he was being taken into public custody in the Centre, namely, that his request for refugee status had been denied, that an order for expulsion had been issued against him and that he had been declared "undesirable" on Romanian territory. He was also informed that the custodial measure would remain in place until travel documents were obtained and the return formalities completed.

The applicant contested his taking into public custody before the Bucharest Court of Appeal. He also complained that the conditions in the transit zone were inadequate for a long period of detention. On 21 April 2003 the Bucharest Court of Appeal annulled the decision of 28 March. The Authority for Foreigners appealed. In a decision of June 4, 2003 the Bucharest Court of Appeal upheld the prosecutor's order of 25 March 2003, on the grounds that the measure had been taken in conformity with Ordinance no.194 and that the applicant had not proved the contrary. It also rejected the applicant's argument based on the right to

family life, as it considered that the fact that he was married did not exonerate him from complying with the law and that the order did not interfere with his family life. The decision was final. On 3 June 2003 the applicants, who had found out through their own means about the possibility of being granted entry to Sweden, left for Sweden with their daughter.

The applicant lodged a complaint to the ECHR. He complained that the conditions in which he had been held in the airport facilities and in the Otopeni Centre contravened the requirements of Article 3 of the Convention. The Court noted that the applicant did not lodge any specific complaint with the authorities – courts, the airport or Otopeni Centre administration, or the representatives of the Romanian Council for Refugees – about the conditions of his detention. He thus failed to allow the State authorities the opportunity to address the alleged flaws he described in his application to the Court. Thus, it found the complaint manifestly ill-founded and rejected it.

The first applicant complained also that he was held in custody despite his expulsion being clearly impossible and that he had no effective remedy by which to challenge the legality of his detention. He relied on Article 5 of the Convention. The Court found the complaint manifestly ill-founded and rejected it as it considered the length of the measure did not exceed that reasonably required for the purpose pursued. The applicant was detained for about two months and chose to leave for Sweden. Concerning his right to an effective remedy, the Court noted that the applicant did have the opportunity to challenge the custodial measure and participated in the proceedings for the extension of the measure.

Both applicants complained, under Article 8 of the Convention, that their family life had been compromised by the prosecutor's order to deport the first applicant and to ban him from Romania for ten years; they had been forced to leave Romania in order to be able to continue a family life and had had to leave their respective families behind. The Court noted that the applicants' decision to leave Romania was not taken freely, it came as a result of the first applicant being declared an "undesirable person" and being banned from Romania by the prosecutor's order of 25 March 2003, and therefore it constituted an interference with the applicants' family life. The Court found a violation of Article 8. It held that the Court of Appeal confined itself to a purely formal examination of the prosecutor's order. Not only did it fail to seek the prosecutor's reasons for declaring the applicant an "undesirable person", but it went further and placed on the first applicant the burden of proving that he had not been involved in any activities threatening national security. Such proof seems impossible to produce, notably when the first applicant was not informed of the concrete suspicions against him.

IV.4. ***The S.C. Case. Application No. 9356/11. Violation of Article 5 (1) (f). Decision from 2015*** **[35].** The applicant was a Turkish national who claimed asylum in Romania in 2009, having entered using a transit visa. Prior to his arrival in Romania, he had been convicted in Turkey for various offences in relation to encouraging young people to enlist with the PKK and served a prison sentence from 2003-2005. He was convicted of the same offence in 2007, and sentenced to six years and three months imprisonment, in a judgement that was later upheld by the Supreme Court. On 31 July 2009 his asylum claim was held to be unfounded due to the applicant's lack of credibility. In 2010 while the applicant's asylum appeal was pending, following the request of the Romanian Intelligence Services, the prosecutor submitted a proposal to the Bucharest Court of Appeal to declare the applicant to be an undesirable person, impose on him a 15 year entry ban on grounds of national security, and order his detention in a special centre. This was based on classified documents which indicated that the applicant was involved in terrorist-related activities. The applicant did not appear at the hearing, despite receiving summons, and did not put in a defence. The Court of Appeal granted the prosecutor's request, finding that the classified material proved that the applicant was involved n activities likely to jeopardise national security.

The applicant was arrested on the same day and transferred to a centre for foreigners where he was served with the Court of Appeal decision. He was informed that no longer had leave in Romania and that he would be expelled by escort. He was served with another decision informing him of his detention in accordance with national law. His challenge to the execution of the Court of Appeal judgement was dismissed as unfounded by the High Court which noted that despite his pending asylum application, the applicant could be declared undesirable and an expulsion order made where national security issues were at

stake. The rejection of the applicant's asylum claim became final in February 2011. He remained detained at the centre for foreigners until his transfer to Turkey in May 2011. The applicant complained that his detention in the centre for foreigners constituted an illegal deprivation of liberty, and that he had not had an effective opportunity to challenge his detention in the centre for foreigners, contrary to Article 5 ECHR.

The Court noted that the applicant's detention fell within the scope of article 5(1)f) as he was being detained pending expulsion. However, detention would cease to be lawful if expulsion proceedings are not prosecuted with due diligence. The applicant was detained for eight months and three weeks on the order of the Court of Appeal after it declared him to be an undesirable person, pending his expulsion. The reason given by the authorities to explain the duration of detention was the processing of applicant's pending asylum application, which the Court found not to be excessive given the complexity of the claim put forward which was given thorough and detailed examination. However this procedure did not justify the deprivation of the applicant's liberty for three months following the final rejection of his asylum application in February 2011. The Government provided no explanation for this period and did not indicate what steps were taken to remove the applicant from Romanian territory as quickly as possible. The Court held that Article 5(1)f) had been violated.

IV.5. ***The N. M. Case. Application No. 75325/11. Violation of Article 5 para 4. Decision from 2015*** **[36].** N.M. was an Afghan national whose claim for asylum was rejected by the Romanian Immigration Office and later by the Bucharest Tribunal on grounds of a lack of credibility and evidence that he risked ill-treatment at the hands of the Taliban if sent back to Afghanistan. On 16 December 2010, the applicant was declared an "undesirable person" in the Romanian territory for fifteen years, on the grounds of his involvement in activities likely to jeopardize national security. He was placed in Otopeni detention centre pending removal following an order by the Court, of which he was not informed since it was sent to the refugees' centre of Arad where he was no longer living. He later lodged an appeal against the Court of Appeal's decision in front of the High Court. This was subsequently refused by the latter on account that he had not respected the procedural time limits for presenting his appeal.

At the ECHR he argued that more articles from the Convention were violated. Firstly, he argued that the conditions from the centre of Otopeni constituted inhumane treatment. The Court noted that the applicant had been in contact with his lawyer and an interpreter, had permanent access to his mobile phone and had not complained that the length of isolated detention had led to a degradation of his physical or mental health. According to the Court, therefore, the threshold for an Article 3 violation had not been met.

N.M. also claimed that Article 5 para 4 was violated as the High Court showed excessive rigidity by declaring the appeal to not have been lodged on time, taking into account that the decision was delivered to an address that was no longer his. The Court agreed and concluded a violation of Article 5 para 4, on the grounds that Romanian Office of Immigration could and should inform the Court of Appeal of the execution of the judgment delivered on the same day and change the applicant's address, to ensure that communication of that judgment was correctly made and the applicant's right of appeal was effective.

V. Romanian Jurisprudence concerning national security as a ground to refuse asylum and refugee protection after the above presented ECHR decisions

V.1. ***The Z.S., Z.Y., L.N and Z.S Case*****.** On 20 December 2012 the Court of Appeal in Bucharest pronounced the Sentence no. 7228/2012 admitting the Prosecutor's request to declare Z.S., Z.Y., L.N and Z.S persona non grata based on documents classified as secret of state according to which the four persons were involved in activities dangerous for national security. The documents were not presented to the four persons or to their lawyers. The trial took 2 days. The Court admitted the request for the exception of constitutionality which was invoked by the four persons, arguing that the their right to free movement was infringed. That was not suspensive of effect though. The four persons were put in custodial detention for up to 18 months until their removal from Romanian territory.

Against the sentence, the four aliens lodged an appeal at the High Court of Cassation and Justice. The High Court pronounced the decision no. 258/18.01.2013 [37] rejecting the appeal. It stated that the

critique concerning the too expedite procedure, is not founded because the law provides for an urgent procedure in such cases. Furthermore, the fact that the sentence did not contain details concerning the reasons they were declared undesirable persons but simply stated that according to the secret documents there were reasons to believe they were a danger to national security, was not a founded reason for appeal. The High Court said that on the contrary, the judge from the Court of Appeal had the obligation not to divulge the information. Also the mere fact that the Court of Appeal rejected the request to postpone the trial in order for the aliens to prepare their defence, was not a reason to appeal, as two days were sufficient for the aliens to get into contact with a translator and get to know the accuses which were brought against them. The High Court considered that the fact that the aliens were living in Romania for 20 years, that they had families with children, did not represent a reason to consider their declaration as persona non grata as a violation of Article 8 of European Convention of Human Rights.

V.2. ***The A.B.C.D.E.F.G Case*** **[38].** On 31 March 2015 the Court of Appeal in Bucharest pronounced the Sentence no. 904/2015 partly admitting the Prosecutor's request to declare A. B. C. D. E. F. and G undesirable persons. It based the decision on secret documents which were presented to the six persons` lawyer, as he had special authorization requested by law. They appealed the decision arguing that there was no criminal investigation against them, and they they were not involved in terrorist activities. Four of them had the right to stay in Romania and 2 of them had the right to reside in France. They also argued that they were involved in economic activities and that they had families. On 25 of May the High Court pronounced Decision no. 2152 rejecting the appeal. The High Court said that the first instance decision was correct. From the secret information resulted that the aliens were involved in activities qualified as terrorists by Romanian law. There were reasons to believe that they belonged to a radical ideology and were involved in activities of indoctrination and radicalism which were dangerous for the society. Furthermore, Romanian law does not foresee as a condition for declaring a person undesirable, conduction of criminal investigation for that person. Contrary to the appellants who argued that the Court did not administrate the evidence, but simply took the information from secret services, the High Court considered that the first instance analysed in detail the situation concerning each person.

V.3. ***The S.A. Case*** **[39].** On 29 August 2016 the Court of Appeal in Bucharest was noticed by the Prosecutor's request to declare S.A. undesirable person for 10 years as the office got information from the secret services according to which S.A. was involved in terrorist activities, supporting extremists organizations from home region. The trial was fixed for the next day, on 30 August 2016. S.A. was present, he had no lawyer but an interpretor was present. S.A. asked for a term to hire a lawyer to prepare his defence as it was for the first time he heard about the accuses and no information was available as it was secret. He said he was not involved in any of the activities he was accused of. His request was rejected. It was explained to him that in case of admission of the Prosecutor's request he had the right to appeal in 10 days, enough time for him to hire a lawyer and ask for the upheld of the returning decision. The Court pronounced the decision the same day. It admitted the request and declared S.A persona non grata for 10 years. S.A. lodged an appeal.

V.4. ***The H.R.S.H. Case.*** On 31 August 2016 the Court of Appeal in Bucharest was noticed by the Prosecutor's request to declare H.R.S.H. undesirable person for 10 years The term was fixed for next day, the 1st of September 2016. H.R.S.H was present, he had no lawyer but an interpretor was present. The Court explained H.R.S.H. that the prosecutor requested his declaration as undesirable person for 10 years because based on secret documents, that he could not see, the office considered him as a danger to national security, as he was involved in terrorist activities. H.R.S.H. declared that the allegations were false, that he had been an engineer – professor for 25 years and that he was awaiting to defend his Ph.D. thesis in Romania. After that he was planning to return to his home country, Irak. The Court of Appeal pronounced the decision the same day [40]. It admitted the request and declared H.R.S.H. undesirable person for 10 years.

V. 5. ***The B.O. Case.*** On 01 August 2017 the Romanian Secret Services asked the Office of the Prosecutor near the Court of Appeal Bucharest to refer to the competent Court in order to declare B.O undesirable person based on the secret documents put at the disposal of the prosecutor. In the same day, the Office of the prosecutor referred the case to Court requesting the declaration of B.O. as undesirable person

for 10 years arguing that according to the secret documents, B.O had been involved in terrorist activities. The trial took place the next day. B.O. was not present, nor was he represented by a lawyer. Based on the secret documents that nor B.O. have seen, nor his lawyer, in B.O.`s absence, the Court pronounced sentence in the same day [41]. The decision could be appealed. The decision of returning was executive though.

VI. Conclusions. National security as a ground to refuse/to annul protection v. the right to a fair trial/the right to an effective remedy/the right to family and private life. Conclusions

One of the principles prescribed by the Romanian Constitution is `the right to information`, foreseen by Article 31 (1)(2): *`A person's right of access to any information of public interest shall not be restricted`* and *`The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.`* Furthermore, article 10 of the ECHR provides for freedom of expression which includes also the right to receive information. The access to public information is prescribed by Law 544/2001 which from the very beginning, in art. 1 foresees that the access to public information represents one of the fundamental principles characterizing the relation between individuals and authorities.

The access to information is not an absolute right, though. The exception is foreseen by Article 31 (3) of the Romanian Constitution according to which *`The right to information shall not be prejudicial to the measures of protection of young people or national security.`* Also, article 10 of ECHR foresees the limits of freedom of expresion: *`formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.`*

Therefore, there are cases when the access to public information may endanger national security or public safety. Consequently, the access to such information is allowed only to persons who have a special authorization. In Romania, the conditions of access to such information are foreseen by Law 182/2002. Article 7 (1) foresees that the authorization is given to persons who were verified priorly concerning their honesty and professionalism. In our opinion, the verification may take place by all means, including their interception, verification of the persons who the applicant is getting in contact with, or who is working with, etc. In 2008, the Constitutional Court declared the constitutionality of Law 182/2002` provisions requesting this special authorization, founding that the constitutional rights are not infringed [42] the access to justice is not blocked but simply conditioned by some procedural steps.

In 2014, once the Romanian New Criminal Procedure Code entered into force, the Law 182/2002 was modified, and the magistrates, among other persons (the President of Romania, members of the Parliament and Government, etc), do not need a special authorization, any more. Lawyers, were not included in this category. An important provision from the new criminal procedure code is foreseen in article 352 (11) and (12) providing that if in a criminal case the secret information is essential for solving the case, the court shall ask for the declassification of the documents, or changing the class of classification or shall ask the competent to permit the lawyer’s access to the documents. If the competent authority would deny, no conviction or other solution establishing the defendant’s guilt could be pronounced. Recently, the Constitutional Court found this provisions unconstitutional because the solution depended on some administrative body [43], and there was no judicial control. Therefore, in criminal proceedings it is the court which declassifies the documents or permits the defendant’s lawyer access to the secret documents essential for solving the case. If we interpret these dispositions in corroboration with the ones from Law 182/2002, we reach the conclusion that if a lawyer wants to see the secret documents to which the judge allows him, he must have a special authorization. If we consider the fact that article 352 (11) does not contain the term `according to the law`, we may reach the conclusion that the lawyer has access to documents solely on the court’s permission, having no need of special authorization. This would be the right approach considering that otherwise the principle of the equivalence of arms would be infringed, as the prosecutor would have

access without a special authorization, while the lawyer would need one [44].

Coming back to the cases where based on national security, an alien is declared persona non grata, mostly based on classified documents, we cannot wonder, how come in criminal proceedings, the legislator found a solution, a balance between the rights of the accused and national security, while in cases concerning aliens and their protection, there is no such solution?

In the latter case, the proceedings are urgent, sometimes very expedite, from one day to another, legal assistance from a lawyer is no mandatory, the access to secret documents is not allowed, and in mostly cases the court delivers a decision in the same day. There is no physical time to prepare a defence, to get in contact with a lawyer who holds a special authorization to access the classified documents, to pay the lawyer and bring documents or other proof in order to demonstrate why you did what you did, if you did it, and if what you did qualifies as a danger to national security. It is true that the aliens have the right to appeal the court's decision, but as we showed earlier, the decision of returning is enforceable immediately, and can only be adjourned if it is challenged separately. It is very difficult in such a short period of time, to find a lawyer, challenge it and prepare for the appeal.

In our opinion, the situation would be much easier if legal representation from a lawyer who has special authorization to access classified documents, would be freely granted and mandatory. In this way, once the court is noticed by the prosecutor's request, a lawyer from a special list at the court should be appointed. At the first term, the alien could ask for one single postponing in order to have a lawyer of his choice, otherwise, the court should allow the appointed lawyer to access the documents and prepare for the defence in a short but reasonable time.

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