COMPLEMENTARY FORMS OF INTERNATIONAL PROTECTION IN THE EUROPEAN UNION AND IN SWITZERLAND

Petru-Emanuel ZLĂTESCU*

Abstract

The subsidiary protection under EU law and the temporary admission under the Swiss Federal Act on Foreign Nationals and Integration complete a legal gap in the field of international protection.

They introduce a system of protection for persons threatened by the most grave human rights infringements but who do not meet the strict requirements of the Geneva Refugee Convention for granting refugee status. At the core of international protection lays the refoulement prohibition.

There are two main pillars of protection against refoulement in public international law, which are of great importance: the refoulement prohibition under Art. 33 of the 1951 Geneva Convention and the human rights refoulement prohibition, derived from Art. 3 ECHR. Despite the common roots of complementary forms of protection, important differences can be noticed both in the nature of the two institutions and in their interpretation by the courts.

Aim of this paper is to portray the conditions under which complementary protection is granted and to emphasize their different embedment within the legal system.

Keywords: *Subsidiary Protection, Temporary Admission, Switzerland, Complementary Protection*

JEL Classification: [K 37]

1. Introduction

The main international instruments in the field of refugee law, the 1951 Geneva Convention and the 1967 New York Protocol, stipulated refugee status as the only form of international protection. (Epiney et al., 2008; Progin-Theuerkauf, 2014) According to the narrow refugee concept of the Convention, a refugee in the legal sense is only a person who meets the strict requirements of Article 1 of the Refugee Convention. (Lehnert, 2015, p. 3)

The grounds for inclusion in Art. 1 A No. 2 of the Refugee Convention is particularly restrictive. According to this article, a person must have left his or her home state due to well-founded fear of persecution based on certain personal characteristics, such as race, religion, nationality, membership of a particular social group or political conviction. Furthermore, this person must

* Research assistant, Institute for European Law.

not be able or willing to avail himself of the protection of his country of origin.

The protection of the Refugee Convention is thus based on an individual concept of refugee and leaves a large number of victims of the most serious human rights violations outside its scope. (Epiney et al., 2015; Lafrai, 2013, p. 27) For instance, persons fleeing war zones without being able to prove an individual persecution are not protected by Convention.

Although the EU is not a party to the Refugee Convention, the latter is of great importance for the Union's asylum system.

The transfer of asylum policy to the first pillar under the Amsterdam Treaty gave rise to the EU's first competences in the field of asylum law. (Velluti, 2014, 13) It was stipulated that a Common European Asylum System (CEAS) should be established on the ground of the Geneva Convention. This also led to the elimination of many ambiguities that arose in the interpretation of the Convention. (Bast, 2016)

The Treaty of Lisbon and the abolition of the three-pillar structure also extended the Union's powers in the field of asylum. The resulting second phase[1] of the CEAS intended to guarantee a uniform and efficient asylum procedure and a uniform protection status for asylum seekers, refugees and other persons in need of protection. (Rosenau & Petrus, 2018).

The Qualifications Directive[2] (QD) is one of the most important CEAS enactments. It is also regarded as the first instrument of international law which, in addition to refugee status, also establishes a complementary form of international protection under positive law. (Mc Adam, 2005) With the adoption of the first version of the QD in 2004, the international protection status at EU level was extended in accordance with the Tampere conclusions. The refugee status of the Geneva Convention was supplemented by a subsidiary protection status on the basis of ECtHR jurisprudence. (Marx, 2012, p. 495)

This is based on the principle of non-refoulement and serves to protect asylum seekers who, although do not fulfil the conditions for refugee recognition, would be seriously harmed if they were returned to their country of origin. (Bauloz & Ruiz, 2016, p. 240) Subsidiary protection is intended to supplement refugee status if the latter cannot be granted. (Progin-Theuerkauf & Hruschka, 2012).

It covers persons who are threatened by serious human rights violations but who cannot invoke any grounds for persecution within the meaning of the Refugee Convention. (Progin-Theuerkauf, 2014) With the revision of the QD, the legal status of persons eligible for subsidiary protection has been

[1] Recast version of the CEAS Acts 2011/2013.
[2] Directive 2011/95/EU.

significantly improved and largely aligned with the legal status of refugees. (Progin-Theuerkauf & Hruschka, 2012)

Although Switzerland is not a Member State (MS) of the EU, they are associated in many areas. Switzerland has also incorporated numerous legal acts of the Union in its national legal order.

The Dublin Association Treaty (DAT) is one of the most important association agreements between Switzerland and the EU. As part of the Bilateral Agreements II, the DAT is an international law agreement under which Switzerland is committed to adopt the existing and future Dublin acquis. (Art. 1 para. 3 DAT) This includes the Dublin III Regulation and the EURODAC Regulation, as well as their implementing regulations. However, the obligation to take over only covers procedural norms and not also substantive EU law, such as the Qualification Directive. (Caroni et al., 2014, p. 377) Thus, the Swiss legal system does not comprise the concept of subsidiary protection status in the sense of the QD. Certain difficulties could arise if a procedural norm refers to a substantive provision of the CEAS. (Progin-Theuerkauf & Hruschka, 2012).

For instance the Dublin III Regulations also applicable to applications for subsidiary protection, unlike the previous versions of the directive. (Lehnert. 2015) Despite these differences, Switzerland has a complementary form of international protection in the form of the temporary admission, which is based on the human rights refoulement prohibition. However, temporary admission does not represent an independent legal status, but a substitute measure for the unenforceable execution of the removal order. (Trummer, 2012)

2. The Non-refoulement Principle – The origins of subsidiary protection forms

2.1. Non-refoulement under international refugee law

The prohibition of refoulement lays at the heart of international protection. (Zlătescu, 2016) This principle restricts the sovereign right of the host country to determine the entry and residence conditions for aliens.

In international law, two main pillars of protection against refoulement are of great importance: the refoulement prohibition under Art. 33 Refugee Convention and the human rights refoulement prohibition, which is derived primarily from Art. 3 ECHR. (Fröhlich, 2011) Other convention guarantees also contain return prohibitions, but these do not enjoy the absolute character of Art. 3 ECHR. (Gordzielik, 2015, p. 248) Other international human rights instruments, such as the ICCPR[3] or the UN Convention against Torture[4] (CAT) also contain return prohibitions.

[3] Art. 7 ICCPR.

The refoulement prohibition under Art. 33 Refugee Convention is one of the most important guarantees of international refugee law. Part of the doctrine regards the prohibition of refoulement as a norm with ius cogens character. (Allain, 2001, p. 557) Article 33 of the Refugee Convention, however, has several limitations. First, its application is limited in personal terms to (potential) refugees within the meaning of Article 1 of the Refugee Convention. (Gordzielik, 2015, p. 242).

An individual threat to life or freedom on the basis of race, religion, nationality, membership of a particular social group or political conviction is required by Convention. (Nguyen, 2003, p. 418) Secondly, Article 33 of the Refugee Convention does not have an absolute nature. According to para. 2 of the same article, a refugee does not enjoy protection against expulsion if he or she constitutes a danger to the security of the country or to the general public.

2.2. Non-refoulement under international human rights law

A more comprehensive protection than art. 33 of the Geneva Convention is guaranteed by the refoulement prohibition of the international law of human rights. (Progin-Theuerkauf, 2014) Although neither the ECHR itself nor its protocols contain an explicit prohibition of deportation, such a prohibition was developed by the case-law of the Strasbourg courts to Art. 3 ECHR.[5]

The ECHR states that a violation of the prohibition of torture always occurs when a person is extradited or deported, although there are serious reasons to believe that the person is exposed to a substantial and real risk of being subjected to torture or another prohibited act in the country of destination.[6] In contrast to the Refugee Convention, the human rights prohibition of return does not imply an individual persecution. Even if a current and concrete danger must be made credible, it is sufficient if the person belongs to a group that is subject to systematic ill-treatment. (Fröhlich, 2011, p. 19)

In this case, the person concerned does no longer have to prove any personal factors.[7] In comparison to Art. 33 Geneva Convention, the personal scope of application of Art. 3 ECHR covers all persons and is not limited to refugees. Art. 3 ECHR also represents an absolute guarantee, from which the member states cannot derogate in times of emergency. (Reneman, 2012, p. 3; Saccucci, 2014) As a norm of mandatory international law, the human rights

[4] Art. 3 para. 2 CAT.
[5] ECtHR, No. 14038/88, *Soering v. UK*, 7.7.1989.
[6] ECtHR, No. 15576/89, *Cruz and others v Sweden*, 20.3.1991, marginal 69; ECtHR, No. 13163/87, *Vilvarajah and others v. UK,* 30.10.1991, marginal 107 et seq.; ECtHR, No. 22414/93, *Chahal v. UK*, 15.11.1996, marginal. 96 et seq.
[7] ECtHR, No. 70073/10 and 44539/11, *H. and B. v. UK,* 9.4.2013, marginal 91; FRA Handbook, 78.

prohibition of deportation protects all persons, irrespective of the commission of a criminal offence in the host state. (Spescha et al., 2015, p. 375) Extradition or expulsion is prohibited if a punishment or treatment incompatible with Article 3 ECHR is imminent in the country of destination. Furthermore, chain deportations are also prohibited.[8]

Indirect deportations or chain deportations are deportations to a third country which subsequently deports the person concerned to the persecuting country.[9] According to Art. 19 para. 2 of the Charter of Fundamental Rights of the EU, the prohibition of deportation is also a fundamental right of the Union. (Reneman, 2012, 3)

2.2.1. The Concretization of the human rights refoulement ban in the CEAS

Although the European Court of Human Rights has developed a comprehensive prohibition of refoulement in its case-law, the legal status of the person who may not be deported derives neither from the Convention nor from the jurisprudence. (Saccucci, 2014) There is therefore a protection gap for persons who are allowed to remain in the host state on the basis of the human rights prohibition of deportation, but who do not fulfil the conditions for refugee status. (Trummer, 2012) In order to solve this problem, the Tampere Programme established a subsidiary protection status. Designed in accordance with the most important international legal norms in the area of the prohibition of torture,[10] subsidiary protection status is intended to supplement refugee status so that there are no longer any legal gaps in international protection status.[11] According to the first version of the QD, subsidiary protection status was originally not treated as equivalent to refugee status. Due to its subsidiary character, the subsidiary status should preserve the primacy of the Geneva Convention and provide temporary protection.[12] (Progin-Theuerkauf& Hruschka, 2014) The legal status established by subsidiary protection was less favourable than that of refugee status. (Bauloz &Ruiz, 2016)

It was not until 2010 that the Stockholm Programme stipulated that the two forms of international protection, refugee status and subsidiary protection, should guarantee a uniform legal status. Although the new version of the QD from 2011 did not completely standardize the legal status of the two forms of protection, it did bring a significant improvement in the legal status of those eligible for

[8] SFH, Handbuch zum Asyl- und Wegweisungsverfahren, 242.
[9] ECtHR, No. 27765/09, *Hirsi Jamaa and others v. Italy,* 23.2.2012, marginal 146.
[10] Recital 34 Directive 2011/95/EU.
[11] Recital 6 Directive 2011/95/EU.
[12] COM(2001)510 final, no. 2.

subsidiary protection. (Progin-Theuerkauf & Hruschka, 2012; Balleix, 2013, p. 198) This improvement is reflected in all legal acts of the CEAS.

2.2.2. Concretization of the human rights refoulement ban in the Swiss legal system

As the Swiss legal order does not provide for subsidiary protection in the sense of the QD, persons whose asylum application has been rejected or who have been excluded from asylum must in principle be expelled. (Trummer, 2012) In the removal procedure, however, it must be officially examined whether the execution of this measure is not impossible, impermissible or unreasonable.[13] (Gordzielik, 2015, p. 239)

If technical, international law or humanitarian barriers stand in the way of enforcement, the persons concerned are temporary admitted until these obstacles have been overcome. (Caroni et al., 2014, p. 328)

It remains to be mentioned that only one of the three impediments, the impermissibility of removal, constitutes a concretization of the prohibition of refoulement within the meaning of the international law. Thus, temporary admission in the case of impermissibility of the enforcement is also ordered if the person concerned is a criminal offender or if he or she has caused the impossibility of removal himself or herself. (Spescha et al., 2015, p. 382) In this case the exclusion from the temporary admission would infringe the absolute prohibition of refoulement. (Gordzielik, 2015, p. 239) Contrary to the recognition of refugee status, in this case no individual danger to the person concerned must be proven. (Trummer, 2012) However, temporary admission is not a special legal institution under asylum law, but a figure of the general procedure under alien's law. (Spescha et al., 2015, p. 378)

In contrast to the subsidiary protection status of Union law, temporary admission does not represent a specific legal status of its own, but rather a mere substitute measure for the execution of a removal order. (Nguyen, 2003, p. 463)

3. Conditions for protection

3.1. EU Law

According to the legal definition[14], beneficiaries of subsidiary protection are third-country nationals or stateless persons who do not fulfil the conditions for refugee status but who have serious reasons to believe that they would be at real risk of suffering serious harm in case of a return to their country of

[13] Art. 88 para. 1 FNIA.
[14] Art. 2 (f) QD.

origin. (Thym, 2015) In addition, beneficiaries should not be able or willing to avail themselves of the protection of their country of origin.

The conditions for claiming subsidiary protection status are primarily determined by the international obligations of the Member States in the field of refugee law and by the case-law of the European Court of Human Rights. (Balleix, 2013, p. 195) In addition to the three alternative forms of serious harm within the meaning of Article 15 of the QD, the primacy of the Refugee Convention is another positive condition for an application for subsidiary protection. The absence of grounds for exclusion and termination according to Art. 17 or Art. 16 QD is regarded as a negative condition for granting protection.

3.1.1. Primacy of the Geneva Convention

Given the complementary nature of subsidiary protection status, the first condition for its granting is the inability to apply for refugee status.[15] (Progin-Theuerkauf & Hruschka, 2014) Although this condition is not explicitly mentioned in Art. 15 QD, it is part of the legal definition of subsidiary protection status according to Art. 2 lit. f of the latter.

The Executive Committee of the UNHCR also recommends that all forms of complementary protection be designed in such a way that they preserve the primacy of the Refugee Convention and strengthen international protection as a whole. If a person fulfils the conditions for refugee status and is granted subsidiary protection instead, this could lead to a violation of the MS' obligations under international law.

This would also give a less advantageous legal status to the person entitled to international protection, since the subsidiary protection still confers less rights despite the alignment of the two forms of protection by the revised QD. (Marx, 2012, p. 498) The subsidiary protection status thus also covers cases in which elementary human rights guarantees are seriously violated, but which have no connection with the persecution grounds of the Refugee Convention. (Tiedemann, 2015, p. 70)

3.1.2. Imposition or enforcement of the death penalty

The imposition or execution of the death penalty is one of the three circumstances entitling to the protection provided for in Article 15 of the QD. Even if the three forms of serious damage are generally applied as alternatives, an applicant may also invoke two or three bases of claim simultaneously. (Storey, 2016)

As in the case of Art. 15 lit. b of the QD, the serious damage in the form of the imposition or execution of the death penalty is inspired by the case law

[15] ECJ, C-604/12, N., 8.5.2014, marginal 30.

of the ECHR on Art. 2 and 3 ECHR and by the 6th Additional Protocol to the ECHR. (Cherubini, 2015, p. 205)

However, the way in which the death penalty is prepared and carried out may also constitute a violation of the prohibition of torture due to the disproportionality between the punishment and the act, the conditions of imprisonment or the personal circumstances of the person concerned, so that a cumulation of claims might arise between lit. a and lit. b of Art. 15 QD.[16]

3.1.3. Torture and inhuman or degrading treatment or punishment

This form of serious harm covers the most important cases of application of the refoulement ban under Article 3 ECHR. (Lafrai, 2013, p. 203) The protection of the ECHR, however, goes in certain respects further than that of the Qualification Directive and also covers cases of humanitarian protection[17] which are explicitly excluded from the scope of application of the QD.[18]

The ECJ also confirmed in its case law that inhuman or degrading treatment as a result of the lack of suitable medical treatment options in the country of origin does not fall under the protection of Art. 15 lit. b QD as long as the person concerned is not arbitrarily excluded from treatment.[19]

3.1.4. Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

Unlike the first two alternatives of Article 15 QD, the scope of Article 15 lit. c QD does not correspond to the one of Article 3 ECHR. For this reason, lit. c must be interpreted autonomously and not in the light of the Convention.[20] The harm within the meaning of lit. c generally consists in the serious individual threat to the life or integrity of the applicant as a result of arbitrary violence and not in a specific act of aggression.[21] Thus, the risk of damage is of a general nature. The threat is considered serious if a certain degree of violence is achieved. (Storey, 2016) The use of force is arbitrary if it extends to persons, irrespective of their personal circumstances and identity.[22] The threat to the life or integrity of a civilian is sufficient to qualify for the protection of the provision. The threat is individual if a civil person would be

[16] ECtHR, No. 14038/88, *Soering v. UK*, 7.7.1989, marginal 104; UN HRC, no. 469/1991, *Chitat NG v. Canada,* 5.11.1993, marginal 16.1.
[17] ECtHR, No. 30240/96, *D. v. UK*, 2.5.1997, marginal 53.
[18] Recital (15) QD.
[19] ECJ, C-542/13, *M'Bodj*, 18.12.2014, marginal 41.
[20] ECJ, C-465/07, *Elgafaji,* 17.2. 2009, marginal 28.
[21] ECJ, C-465/07, *Elgafaji,* 17.2. 2009, marginal 33.
[22] ECJ, C-465/07, *Elgafaji,* 17.2. 2009, marginal 34.

at risk solely because of his or her presence in the territory of that State. (Ousmane & Progin-Theuerkauf, 2014)

In such a situation, it would be sufficient for the applicant to prove that he is a civilian. This gives Art. 15 lit. c QD its own scope of application. In contrast to Art. 15 lit. a and b of the QD, the danger is not a specific one, but rather a damage of a general nature. (Keller&Schnell, 2010) It should be mentioned, however, that dangers to which the population of a state is generally exposed can only constitute a serious harm in exceptional cases. (McAdam, 2005) Nonetheless, if the severity of the violence does not reach the required level, a specific danger can still be proven if the person concerned is exposed to this risk because of personal characteristics and is more affected than other civilians. (Velluti, 2015, p. 89)

The personal scope of application of Art. 15 lit. c QD is also limited to civilians. Furthermore, questions have arisen in the jurisprudence regarding the meaning of a domestic armed conflict. The concept of armed domestic conflict within the meaning of the QD deviates from the definitions of international humanitarian law and must be interpreted autonomously in EU law. (Progin-Theuerkauf & Hruschka, 2014) A precondition for its application is either a conflict between the regular armed forces of a state and one or more armed groups, or a conflict between armed groups.[23] However, the use of force by a single armed group is not sufficient to apply this provision.

A certain degree of organization of the armed forces or a minimum duration of the conflict are not prerequisites for the application of Art. 15 lit. c QD. Yet the level of violence must have reached such a degree that the person concerned would be exposed to a serious and individual threat to his life or integrity solely through his presence in the state if he were to return.

3.1.5. Lack of exclusion and termination grounds

Even if international human rights treaties such as the ECHR or the ICCPR have served as the most important source of inspiration for the development of the of Subsidiary Protection, the European legislator assumed that the subsidiary protection should not enjoy the same absolute character as the prohibition of torture under Article 3 ECHR.

If a ground for exclusion is applied, but at the same time torture or another prohibited act within the meaning of Art. 3 ECHR is imminent, the human rights prohibition of refoulement stands in the way of deportation and the person concerned can invoke the rights of Art. 14 (6) QD. (Progin-Theuerkauf, 2017) With the recast version of the QD, the grounds for exclusion from refugee status are also applied to subsidiary protection.

[23] ECJ, C-285/12, *Diakité*, 30.1.2014, marginal 28.

The grounds for exclusion from subsidiary protection are much more extensive than those of the refugee status. Art. 17 lit. b QD provides that the commission of a serious offence results in exclusion from subsidiary protection. However, in refugee law, where only non-political crimes lead to exclusion from protection, there is no such restriction for subsidiary status.

In comparison to the parallel provision in the field of refugee status, which gives the MS a margin of appreciation, Art. 17 para. 1 lit. d QD stipulates that a person must be excluded from subsidiary protection if he or she represents a danger to the society or to the security of the MS. (Marx, 2012, p. 605)

According to Art. 16 QD, the right to subsidiary protection lapses if the grounds for granting protection status have ceased to exist or have changed to such an extent that such status no longer appears necessary. The circumstances must have changed substantially and permanently.

In contrast to refugees, permanent settlement in the country of origin is not expressly provided for as a reason for extinction, but can serve as an indication of changed circumstances within the meaning of Art. 16 QD. On the other hand, mere entry and a short-term stay in the country of origin are not sufficient to qualify as grounds for extinction. (Marx, 2012, p. 613)

The MS are obliged to revoke the subsidiary protection even if the person entitled commits an act which would lead to exclusion from protection after his status has been granted. This refers to cases of subsequent delinquency that occurred after the date on which the right was granted.

The same legal consequence also threatens in the event that the person entitled makes false statements about facts which are decisive for the granting of his status, if he conceals such facts or if he uses false documents.

3.2. Prerequisites for temporary admission under Swiss law

Unlike Union law, temporary admission does not constitute a specific figure of asylum law. Rather, its scope of application extends to the entire field of aliens law. (Gattiker, 2018) Temporary admission serves to protect expelled foreigners. If it is determined during the asylum procedure that the applicant does not fulfill the requirements for granting refugee status, the competent authority issues a removal order. Thereby the person concerned is formally requested to leave the territory of Switzerland.

In the removal procedure, however, it is officially checked whether the removal is not impossible, inadmissible or unreasonable. (Trummer, 2018) If the answer to this question is in the affirmative, the State Secretariat for Migration (SEM) must take the alternative measure of temporary admission within the meaning of Art. 83 et seq. of the Federal Act on Foreign Nationals and Integration (FNIA). (Epiney et al., 2008)

This institution has the role of a complementary protection (but not of a subsidiary protection status) and grants the beneficiary a right of residence until the obstacle to enforcement expires. Due to the nature of temporary admission as a substitute measure, the person concerned cannot apply for temporary admission. He can only apply for the existence of the obstacles to enforcement to be established. (Illes, 2010) According to Art. 83 (1) FNIA, obstacles to enforcement are the impossibility, inadmissibility and unreasonableness of removal.

In the case of impossibility and unreasonableness, there must also be no grounds for exclusion from protection and no grounds for termination. In the case of the inadmissibility of the removal, this negative condition does not arise because it is an outflow of the human rights prohibition of refoulement, which has absolute validity. (Bolzli, 2015)

3.2.1. Impossibility of the removal

According to the legal definition of the removal impossibility, this occurs if the expelled foreigner cannot leave or be taken to his or her home country or a third country. This impossibility is to be understood as a technical obstacle to the enforcement of the expulsion. (Trummer, 2012) High demands are placed on the level of necessary impossibility.

These must be objective reasons of impossibility and not the lack of cooperation of the person concerned or bureaucratic difficulties. If, in addition, the person concerned makes it more difficult to enforce the removal order, no temporary admission should be ordered. In terms of time, the impossibility must have a certain duration in order to be recognized as such by the authorities. At the time the temporary admission is ordered, it must be clear that it will not be possible to enforce the removal order for the foreseeable future. (Nguyen, 2003, p. 467) Accordingly, the cases of impossibility are very rare in practice. (Gattiker, 2018) EU law does not recognize impossibility as a ground for protection.

This could also be due to the fact that the QD excludes humanitarian protection situations from its scope.

3.2.2. Inadmissibility of the removal

Pursuant to Art. 88 para. 3 FNIA, removal is not permitted if Switzerland's obligations under international law conflict with it. This means that, on the one hand, the refugee refoulement prohibition under Art. 33 Refugee Convention and, on the other hand, the human rights refoulement prohibition are anchored in domestic law. (Nguyen, 2003, p. 469)

These can be asserted at any stage of the procedure. Because of the merely declaratory effect of refugee recognition, not only recognized refugees

who have been granted asylum can invoke the prohibition of deportation, but also asylum seekers and refugees who have not been granted asylum. (Caroni et al., 2014, p. 329)

Refugees who have not been granted asylum are persons who meet the requirements for refugee status, but who are affected by an asylum exclusion reason pursuant to Articles 53 and 54 FNIA (e.g. criminal offences). Temporarily admitted refugees enjoy all the rights of the Refugee Convention.[24] In the light of Article 3 of the ECHR, any person on Swiss territory who is a potential refugee is protected by Article 88 para 3 FNIA, irrespective of status and thus irrespective of individual persecution. (Bolzli, 2015) Inadmissibility may also result from other guarantees under international law. Due to its practical relevance, the right to a fair trial and the right to private and family life should also be mentioned in this context.

A refoulement ban derived from Art. 6 ECHR could be applied if criminal proceedings are imminent in the home country which do not comply with the procedural guarantees of Art. 6 ECHR.[25] Within the scope of protection of Art. 8 ECHR, the claim must primarily be asserted in the administrative procedure under aliens law for the granting of a residence permit. (Caroni et al., 2014, p. 330)

3.2.3. Unreasonable removal

In contrast to the two other alternatives of Article 83 para. 1 FNIA, this expulsion impediment is strongly motivated by humanitarian considerations. (Bolzli, 2015) The wording of Art. 83 para. 4 FNIA as an optional provision further shows that, in comparison to the cases of inadmissibility, there is no claim under international law to the assumption of unreasonableness. (Nguyen, 2003, p. 472) The discretion of the authority, however, relates only to the facts of the case and not also to the legal consequence. If the specific threat was affirmed and there are no grounds for exclusion, temporary admission must be ordered. (Illes, 2010) According to Art. 83 para. 4 FNIA, unreasonableness exists if the foreigner concerned is exposed to a situation such as (civil) war, general violence or medical emergency in the country of origin and would thus be specifically endangered. (Gattiker, 2018) However, an individual threat does not have to be proven. Serious violence's in the country of origin may be sufficient to assume a concrete danger. (Trummer, 2012) Only serious cases in which special medical assistance is so necessary that without it a considerable deterioration of the health situation would occur are classified as medical emergencies.[26]

[24] SFH, Handbuch zum Asyl- und Wegweisungsverfahren, 388.
[25] Ruling of theSwiss Federal Administrative Court, BVGE 2014/28, 3.7.2014, recital 11.5.
[26] Ruling oft he Swiss Federal Administrative Court, BVGer D-4612/2009, 19.12.2013, recital 4.2.3.

According to the Swiss Federal Administrative Court, the urgently needed therapy must be indispensable to guarantee a dignified existence.[27] The safeguarding of the best interests of the child can also constitute an obstacle to enforcement in this sense. In assessing the best interests of the child, it is above all the personality of the child and of the circumstances, such as, his degree of integration, that are decisive. (Illes, 2010) Other situations not expressly mentioned in the law may also lead to a relevant endangerment and thus to the unacceptability of the execution of the removal order. In practice, combinations of different and, in part, social and economic reasons are also important.

The prospects for integration in the home state and the existing relationships there must be taken into account. Unreasonableness is thus a humanitarian reason in the broader sense and thus a general clause. Despite these humanitarian reasons and the fact that the QD does not grant subsidiary protection on humanitarian grounds, situations are thinkable which could be subsumed under both Art. 15 lit. c QD and Art. 83 para. 4 FNIA. An example of this could be refugees who flee violence and whose mere presence in the territory of their home state would lead to the actual danger of suffering serious harm. Under Art. 83 para. 4 FNIA this would be regarded as a general unreasonableness of the removal execution, so that the temporary admission would have to be ordered. (Caroni et al., 2014, p. 331)

In Union law, dangers of a general nature according to the *Elgafaji* jurisprudence of the European Court of Justice may also entitle a person to subsidiary protection according to Art. 15 lit. c QD.[28]

3.2.4. Exclusion grounds

Even if the positive preconditions for granting temporary admission are met, the person to be admitted may be affected by a ground for exclusion and thus not be entitled to protection pursuant to Art. 83 et seq. FNIA. However, grounds for exclusion can only be applied in the case of unreasonableness and impossibility and not also in the case of inadmissibility, because this constitutes an implementation of the absolute human rights prohibition of refoulement of Art. 3 ECHR into national law.

Pursuant to Art. 83 para. 7 FNIA, the following are considered obstacles to execution: a conviction for a long-term prison sentence in Switzerland or abroad, the order of a criminal measure pursuant to Art. 59-61 or Art. 64 Swiss Criminal Code, the violation or threat of public safety and order in Switzerland or abroad in a substantial and repeated manner, the endangerment of security as well as the self-inflicted impossibility of enforcing removal due to one's

[27] Ruling of theSwiss Federal Administrative Court, BVGE 2011/50, 1.5.2011, recital 8.3.
[28] ECJ, C-465/07, *Elgafaji,* 17.2.2009, marginal 33.

own conduct. Pursuant to Art. 83 para. 7 FNIA, the following are considered obstacles to execution: a sentence of long-term imprisonment in Switzerland or abroad, the ordering of a criminal measure pursuant to Art. 59-61 or Art. 64 of the Swiss Criminal Code, the violation or threat of public safety and order in Switzerland or abroad in a substantial and repeated manner, the endangerment of security as well as the self-inflicted impossibility of enforcing removal due to one's own conduct.

Any imprisonment for more than one year shall be considered a long-term imprisonment.[29] Shorter sentences may not be added together.[30] Even if there is a longer-term penalty or another reason for exclusion, the exclusion from temporary admission and the removal order are not automatically issued. Rather, a proportionality check must be carried out taking into account the constitutional principles of the rule of law.

This consists of a weighing of interests in which the public interest in the removal is balanced against the private interest of the person concerned. (Bolzli, 2015) In addition to the nature and severity of the offence and fault, the proportionality test must primarily include the degree of integration of the person concerned and the disadvantages that his family would face in the event of removal. (Caroni et al., 2014, p. 337)

Conclusions

It is thus to emphasize, that both analyzed forms of complementary protection fill a legal gap in the field of international protection.

They introduce a system of protection for persons who do not meet the strict requirements for granting refugee status in the sense of the Geneva Convention, but who are still threatened by a serious danger in their country of origin. The two institutions share the same source of inspiration - the human rights prohibition of refoulement under Art. 3 ECHR.

However, both go further than the ECHR and grant a broader scope of protection. In the case of EU law, this was stated by the ECJ in its *Elgafaji* judgment on Art. 15 lit. c QD. Also in Swiss law, the scope of application of the inadmissibility of the enforcement of a removal decision according to Art. 83 para. 3 FNIA is much more comprehensive than the protection of Art. 3 ECHR and also covers the scope of application of other convention guarantees.

In addition to the inadmissibility of the execution of the removal order, however, Swiss law, unlike Union law, also contains the grounds of impossibility and unreasonableness.

[29] Ruling of the Swiss Federal Court, 135 II 377, E. 4.2.
[30] Ruling of the Swiss Federal Court, BGE 137 II 297, recital 2.3.

These are usually applied on the basis of humanitarian considerations. In contrast, under EU law, humanitarian considerations do not entitle to subsidiary protection.

In this sense, the protection of Art. 83 FNIA goes further than that of the QD.

Even if subsidiary protection has a narrower scope of application, it also grants benefits that are not foreseen by the Swiss Law. Above all, the subsidiary protection status represents a legal status itself, which has been aligned with the refugee status since the revision of the CEAS in 2011/2013. Temporary admission, in contrast, is merely a substitute measure for unenforceable removal decisions.

For this reason, the subsidiary protection status not only establishes a much stronger legal status for the person concerned, but also contributes to increased legal certainty.

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