

THE ROLE OF THE FUNDAMENTAL RIGHTS AGENCY
IN IRREGULAR MIGRANTS' RIGHTS PROTECTION

*Anna Magdalena Kosińska**

1. INTRODUCTION

The present paper is an analysis of the role of the Fundamental Rights Agency (FRA) in the process of irregular migrants' rights protection. The paper presents the general idea of fundamental rights protection in the European Union with regard to particular provisions of the Charter on Fundamental Rights and Freedoms and gives a closer perspective on the situation of irregular migrants in the European Union. The article describes FRA's impact on the level of human rights protection in the European Union and analyses the activities of the Agency in the area of migration, especially irregular.

In recent years, we can observe that the situation in irregular migration as well as migration flows into the European Union remains unstable. A significant and tragic example of the need for enhancing the protection of irregular migrants is the accident of 3 October 2013 in which 2 boats with irregular migrants sank and about 400 people died. According to the data presented in the Joint declaration issued by Migreurop¹ and addressed

* Anna Magdalena Kosińska graduated in Art History from the John Paul II Catholic University of Lublin, Faculty of Humanities (MA in 2006) and holds a PhD degree in Law granted by the Law Faculty Council of the John Paul II Catholic University of Lublin in 2012 (PhD thesis: *Cultural Human Rights. Normative Regulation and Its Realization*). Her area of interest is legal regulations concerning culture and migration law. Since 2006 she has been cooperating with the Rule of Law Institute and since 2009 she has been the coordinator of the Voluntary Returns project. She is also a member of the Fundamental Rights Programme at the Rule of Law Institute.

to the Heads of State and Government ahead of the European Council summit, almost 16 000 people have died at the EU's external borders in the last 20 years.

During the summit, which took place on 24 and 25 October 2013, the European Council thoroughly discussed the problem of migration flows on the south borders of the European Union. The final statement on this issue can be found in Part V of the European Council Conclusions, entitled "Migration Flows."² Besides expressing the sorrow at the tragedy, the European Council presents three principles – prevention, protection and solidarity – on which future European Union activity in preventing irregular migration should be based. The goals to achieve in the short-term perspective are: stronger cooperation with migrants' countries of origin and with international organizations such as UNHCR or IOM as well as full implementation of the principle of solidarity between EU Member States. Moreover, to help resolve the problem on external borders, the Task Force for the Mediterranean was established, which is a group led by the Commission whose aim is to identify actions to be taken for more efficient use of EU instruments in this area.

The problem outlined above is a clear example of the continued need for the protection of irregular migrants' rights in the European Union and for better implementation of the fundamental principles existing in European law.

2. PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION – GENERAL PRINCIPLES

In the early years of integration, the main objectives of the Community concerned the economy rather than human rights protection.³ The key role in the latter area was given to the United Nations at the international level

¹ The document is available at: www.statewatch.org/news/2013/oct/eu-migreurop-declaration.pdf.

² European Council 24/25 October 2013 Conclusions, Brussels, 25 October 2013. Document available at: www.european-council.europa.eu.

³ M. Hoorspool, M. Humphreys, *European Union Law*, Oxford 2010, p. 156.

and to the Council of Europe at the regional one. In the late 1960s, however, it became obvious that reference to commonly accepted values such as fundamental rights, equality and human dignity is needed for better protection of rights deriving from the EEC Treaty and Community law. For this reason, in the justifications of its judgments the Court of Justice of the European Union introduced the concept of fundamental rights.⁴ The idea of their protection in the Community system was first mentioned in the *Stauder v. City of Ulm* case.⁵ In this judgment, the Court claimed that fundamental rights were enshrined in the general principles of Community law and protected by the Court. The doctrine of protection was further developed in subsequent judgments of the Court, in cases such as *Nold*,⁶ *Hauer*,⁷ and *Eifert*.⁸

The lack of a catalogue of rights was for a long time a deficiency for the system of protection. A significant moment in the development of FR protection was the adoption of the Charter of Fundamental Rights in 2000.⁹ Finally in 2009, the Charter of Fundamental Rights of the European Union became the primary source of law.¹⁰ The Charter does not create any new rights, and Article 52 paragraph 3 reads: “Insofar as this Charter contains rights which correspond to rights guaranteed by the Con-

⁴ Hoorspool, Humphreys, *European Union Law*, p. 158. Stressing the role of the ECJ in FR protection in the EU, Judge Mancini of the Court of Justice said: “*Reading an unwritten Bill of Rights into Community law is indeed the most striking contribution the court made to the development of a Constitution for Europe.*”

⁵ Judgment of the Court in Case 26/69.

⁶ In the *Nold* case, the court stated that fundamental rights formed an integral part of the general principles of law and asserted: “The Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community,” Judgment of the Court in Case 4/73, *Nold v. Commission*.

⁷ Judgment of the Court in Case 44/79, *Hauer v. Land Rheinland-Pfalz*.

⁸ *Volker und Markus Schecke GbR (C-92/09)* and *Hartmut Eifert (C-93/09) v. Land Hessen*.

⁹ D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge 2011, p. 237.

¹⁰ The Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326/02, 26.10.2012.

vention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention” – which is clearly visible in the Explanations to the Charter.¹¹ The Charter reaffirms the general protection of fundamental freedoms and rights¹² and includes provisions that ensure protection for special vulnerable groups, e.g. migrants. Provisions concerning the currently discussed problem of irregular migration can be found in Articles 18 (Right to asylum) and 19 (Protection in the event of removal, expulsion or extradition).¹³

3. IRREGULAR MIGRATION WITHIN THE EUROPEAN UNION

Legal provisions concerning the phenomena of migration can be found in Title V of the Treaty on the Functioning of the European Union, “Area of Freedom, Security and Justice,” in its Chapter 2: “Policies on border checks, asylum and immigration.” Article 78 of the Treaty reaffirms the establishment of a common policy on asylum whereas Article 79 stresses that the common immigration policy goals to achieve are “the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.”¹⁴

¹¹ The possibility of accession of the Union to the ECHRFF was introduced into the TEU by Article 6 of this Treaty. Treaty on the European Union, consolidated version, Official Journal of the European Union C 326/01, 26.10.2012.

¹² The catalogue is divided into 6 Chapters: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights, Justice and General Provisions.

¹³ Explanations to the Charter reaffirm that Article 19 has the same meaning as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. See: *Explanations (*) relating to the charter of fundamental rights*, Official Journal of the European Union C 303/17, 14.12.2007.

¹⁴ Treaty on the Functioning of the European Union, consolidated version, Official Journal of the European Union C 326/47, 26.10.2012.

The problem of illegal migration is the subject of the so-called “return directive” (Directive 2008/115/EC).¹⁵ As stated in its Article 1, the directive “sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.” As can be seen, especially fundamental rights protection was underlined as the subject matter of this legislative act. By virtue of the principles that should be respected in the implementation process, Member States are obliged, under Article 5 of the Directive, to protect children’s rights, family life and the state of health of the person as well as respect the non-refoulement principle.

The definition of the irregular migrant is not an obvious one – such a person could be an individual who illegally crosses the border of the European Union as well as one who stays illegally in the territory of a Member State contrary to legal requirements or works without any permission.¹⁶

The European policy in the area of migration was set out in detail in the Stockholm Programme which is the programme defining the Union’s policy goals in the area of freedom, security and justice for the period 2010-2014.¹⁷ In the part of the document concerning illegal migration it was pointed out that the return policy “must be implemented with full respect for the principle of ‘*non-refoulement*’ and for the fundamental rights and freedoms and the dignity of the individual returnees.”¹⁸ In the draft report on the mid-term review of the Stockholm Programme that was published in July 2013, the European Parliament pointed out that through the ac-

¹⁵ Directive 2008/115 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, Official Journal of the European Union L 348/98, 24.12.2008. The postulate for the protection of the rights of third country nationals was expressed in Recital 24 of the Preamble to the Directive.

¹⁶ E. Guild, *Who is an irregular migrant* [in:] *Irregular migration and human rights: Theoretical, European and International Perspectives*, B. Bogusz, R. Cholewiński, A. Cygan, E. Szyszczak (ed.), Leiden/Boston 2004, p.3.

¹⁷ The Stockholm Programme — an open and secure Europe serving and protecting citizens, Official Journal of the European Union C 115/1, 4.5.2010.

¹⁸ *Ibidem*, Part 6.1.6. *Effective policies to combat illegal immigration.*

cession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms human rights protection will be strengthened but progress is still needed in the process of legislation adoption.¹⁹

An important document that illustrates the development in the area of EU migration policy is the 4th Annual Report on Immigration and Asylum (2012) prepared by the Commission in June 2013. According to the data it contains, there are 20.7 million third-country nationals living in the EU, which constitutes 4.1% of the total EU population.²⁰ In 2013 the Council adopted a significant document, “EU Action on Migratory Pressures – A Strategic Response.”²¹ Six crucial areas were determined in the document: “(I) Strengthening cooperation with third countries of transit and origin on migration management; (II) Enhanced border management at the external borders; (III) Preventing illegal immigration via the Greek-Turkish border; (IV) Better tackling of abuse of legal migration channels; (V) Safeguarding and protecting free movement by prevention of abuse by third country nationals and (VI) Enhancing migration management, including cooperation on return practices.”²² The most sensitive issue in the area of irregular migration policy is return policy. According to the Communication, 52.1% of all returns were voluntary ones, which is a success and a very hopeful piece of information in the light of the Union’s attempts to protect fundamental rights.²³

¹⁹ Draft report on the mid-term review of the Stockholm Programme (2013/2024(INI)), 11.7.2013. Document published on the website: www.europarl.europa.eu.

²⁰ Communication from the Commission to the European Parliament and the Council, 4th Annual Report on Immigration and Asylum (2012), Brussels, 17.6.2013, COM(2013) 422 final.

²¹ Council document 8714/1/12 REV 1. See: <http://register.consilium.europa.eu/pdf/en/12/st08/st08714-re01.en12.pdf>.

²² Ibidem.

²³ Part V.1.3 of the Communication from the Commission to the European Parliament and the Council, 4th Annual Report on Immigration and Asylum.

4. THE MISSION AND ACTIVITY OF THE FUNDAMENTAL RIGHTS AGENCY

The European Union Agency for Fundamental Rights was established by Council Regulation (EC) No 167/2008 of 15 February 2007.²⁴ The Agency is the successor of the European Monitoring Centre on Racism and Xenophobia, established by Council Regulation (EC) No 1035/97 of 2 June 1997.²⁵ First attempts to set up the Agency were taken during the Cologne Summit of the European Council in 1999.²⁶ In the conclusions from the meeting in the part entitled “Further development of the European Union” it was pointed out that “setting up a Union agency for human rights and democracy should be considered.”²⁷

In the doctrine, agencies established after 1997 are often called 3rd generation agencies and their aim is to support the Union’s policies in the situation of new civilizational threats.²⁸ One of them is the FRA – its objectives were specified in Article 2 of the Decision, and the main activity of the agency should be “to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights.” The particular tasks delegated to the agency are stated in Article 4 and include data collection, carrying out surveys, publishing opinions

²⁴ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, Official Journal of the European Union L 53/1, 22.2.2007.

²⁵ Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, Official Journal of the European Union L 151/1, 10.6.1997. The Centre had its headquarters in Vienna, and, in accordance with Article 2 of the Regulation, its aim was to “study the extent and development of the phenomena and manifestations of racism, xenophobia and anti-Semitism, analyse their causes, consequences and effects and examine examples of good practice.”

²⁶ Ł. Kułaga, *Agencja Praw Podstawowych Unii Europejskiej* [in:] *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, C. Mik, K. Gałka(ed.), Toruń 2009, p. 219.

²⁷ Document available at: http://www.europarl.europa.eu/summits/kol1_en.htm.

²⁸ A. Dumala, *Decentralizacja zarządzania w Unii Europejskiej – rola agencji wspólnotowych* [in:] *Unia Europejska – wielowymiarowość procesu integracji*, E. Lesiewicz (ed.), p. 42.

on specific thematic topics, annual reports, thematic reports and promoting dialogue with civil society.²⁹ As Gabriel Toggenburg mentioned in his article, the tasks of the Agency may be “subsumed under three major functions, namely data collection, the production of expert opinions, and the establishment of a communication strategy.”³⁰

The Agency’s activities are conducted on the basis of the Multiannual Framework that covers 5 years and determines the areas of the Agency’s activity.³¹ For better fulfillment of its activities, the FRA is supposed to cooperate with governmental organizations from Member States, the Organization for Security and Cooperation in Europe (OSCE) and Council of Europe.³²

5. FRA AND THE PROTECTION OF THE RIGHTS OF IRREGULAR MIGRANTS

Fundamental Rights Agency’s activity is based on the Multiannual Framework adopted by the Council on the basis of Article 5 of the Regulation.³³ The framework covers 5 years and determines the thematic areas of activity that must include the fight against racism, xenophobia and related intolerance and must be compatible with the Union’s priorities.

²⁹ Recital 19 in the Preamble to Regulation 168/2007 reads: “Recognizing the important role of civil society in the protection of fundamental rights, the Agency should promote dialogue with civil society and work closely with non-governmental organizations and with institutions of civil society active in the field of fundamental rights.” On the basis of Article 10 of the Regulation, the Fundamental Rights Platform was established as an instrument for the exchange of information between the FRA, NGOs and civil society.

³⁰ Gabriel N. Toggenburg, *The role of the new EU Fundamental Rights Agency: Debating the “sex of angels” or improving Europe’s human rights performance?* European Law Review, Issue 3, 2008, p. 392.

³¹ See: Article 10 of Regulation 168/2007.

³² See: Articles 7, 8 and 9 of Regulation 168/2007.

³³ Article 5 of Regulation 168/2007 reads: “The Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt a Multiannual Framework for the Agency. When preparing its proposal, the Commission shall consult the Management Board.”

The Framework for the period 2007-2012 was determined in the Council Decision of 28 February 2008.³⁴ Among other things, the thematic interest of the Agency covered racism, xenophobia and related intolerance, discrimination, asylum, immigration and integration of migrants, as well as visa and border control. The framework was implemented in the daily activity of the Agency and expired in December 2012. The New Multiannual Framework was adopted by the Council in its Decision 252/2013/EU and covers the period 2013-2018.³⁵ The thematic areas within the Agency's scope of interest include discrimination, immigration and integration of migrants, visa and border control and asylum as well as racism, xenophobia and related intolerance.

FRA's activity is more precisely determined in its annual programmes, which are available documents and can be found on the FRA website. They briefly present previous actions and planned activities in a particular area, e.g., migration.³⁶

FRA's structure includes the Freedom and Justice Department, which works in the area of access to justice as well as asylum, migration and borders. The main activities of the FRA team are research and data collection, communication and raising awareness as well as providing assistance and expertise. In the area of migration, the FRA realizes its tasks through the projects that are implemented by the Freedom and Justice Department.³⁷

³⁴ Council Decision of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, Official Journal of the European Union L 63/14, 7.3.2008.

³⁵ Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights, Official Journal of the European Union L 79/1, 21.3.2013. Moreover, Article 3 of the Decision reads: "The Agency shall ensure appropriate cooperation and coordination with relevant Community bodies, offices and agencies, Member States, international organizations and civil society."

³⁶ For more information, see: FRA Annual Work Programme 2014, available at: <http://fra.europa.eu/en/about-fra/what-we-do/annual-work-programme>.

³⁷ Descriptions of ongoing projects are available here: <http://fra.europa.eu/en/research/projects>.

In recent years, the FRA has prepared very important reports and carried out research projects on the situation of third-country nationals in an irregular situation. A very significant one was the comparative report entitled “Fundamental rights of migrants in an irregular situation in the European Union,”³⁸ published in 2012 – it was probably the first such broad study in this field. It covers the issues of the labour market, housing, health, education and family life, additionally presenting legal regulations in Member States and at the EU level.

In the area of enhancing the awareness of the rights of third-country nationals, a significant publication is the Handbook on European law relating to asylum, borders and immigration published in 2013. Also worth mentioning are thematic reports: “Migrants in an irregular situation: access to healthcare in 10 European Union Member States,”³⁹ “Migrants in an irregular situation employed in domestic work,”⁴⁰ and a very current one, “Fundamental rights at Europe’s southern sea borders.”

On the basis of Article 7 of the Regulation, FRA’s mission is to cooperate with EU institutions and bodies. In the area of migration, the most crucial cooperation is that between the FRA and two other EU Agencies – EASO (European Asylum Support Office)⁴¹ and FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union).⁴²

³⁸ *Fundamental rights of migrants in an irregular situation in the European Union. Comparative report.* Luxembourg: Publications Office of the European Union, 2013.

³⁹ *Migrants in an irregular situation: access to healthcare in 10 European Union Member States.* Luxembourg: Publications Office of the European Union, 2011.

⁴⁰ *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States.* Luxembourg: Publications Office of the European Union, 2011.

⁴¹ Established by Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Official Journal of the European Union L 132/11, 29.5.2010.

⁴² Established by Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Official Journal of the European Union L 349/1, 25.11.2004.

The agreement between the FRA and FRONTEX was established on 26 May 2010.⁴³ In accordance with Article 1 of the agreement, the aim of the cooperation is to strengthen respect for fundamental rights in the field of border management. On the basis of Article 3, the FRA may offer its expertise to FRONTEX during joint operations on external borders. Another area of cooperation is human rights trainings offered to FRONTEX and border guards by FRA's experts; the trainings are dedicated to border guards (Articles 5 and 8) and the exchange of information (Article 6). Most crucial to FRA's activity in the area of irregular migrants' rights protection is Article 7 of the agreement, stating: "The Parties will collaborate with a view to ensuring that forced removals are carried out in full respect of fundamental rights, as well as in a humane and dignified manner." More precisely, FRA's duty is to offer its expertise and collaboration in the creation of independent mechanisms for return monitoring.

Through the amendments to the FRONTEX Regulation in 2011, the Consultative Forum for the Agency was created to support FRONTEX Management Board with knowledge and expertise. The Members of the Forum are 15 organizations⁴⁴ known for their activity as migrants' rights defenders, the FRA being one of them.

The other Agency whose cooperation helps enhance the level of fundamental rights protection is EASO. The agreement between EASO and FRA was concluded in June 2013.⁴⁵ The planned cooperation is divided

⁴³ Cooperation Arrangement between the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and the European Union Agency for Fundamental Rights, 26.5.2010; full text available at: <http://fra.europa.eu/en/cooperation/eu-partners/eu-agencies>.

⁴⁴ Members of the Forum: Amnesty International European Institutions Office, Caritas Europa, Churches' Commission for Migrants in Europe, Council of Europe, European Asylum Support Office, European Council for Refugees and Exiles, European Union Agency for Fundamental Rights, International Catholic Migration Commission, International Commission of Jurists, International Organization for Migration, Jesuit Refugee Service, OSCE Office for Democratic Institutions and Human Rights, Platform for International Cooperation on Undocumented Migrants, Red Cross EU Office, and the UNHCR. Information available at: <http://www.frontex.europa.eu/partners/consultative-forum/general-information>.

⁴⁵ Working agreement between the European Asylum Support Office and the European Union Agency for Fundamental Rights, Strasbourg, 11 June 2013, available at:

into 4 areas: permanent support, operational support, analysis support and horizontal cooperation. In the document, the parties decide that bilateral cooperation will consist in the exchange of training tools (Article 3) and best practice exchange (Article 4). The parties will also support each other in information gathering and data analysis (Articles 8 and 9). Consultation activities cover the participation of the EASO in the FRA's Fundamental Rights Platform⁴⁶ and FRA's participation in the EASO Consultative Forum (Article 12). For better implementation of the agreement, contact points were established (Article 16).

Another area of FRA activity is the cooperation with NGOs to better protect the rights of vulnerable groups and enhance the social awareness of the problems at the European level. The legal basis for the Agency's cooperation with the third sector is Article 10 of the Regulation, reading: "The Agency shall closely cooperate with non-governmental organizations and with institutions of civil society, active in the field of fundamental rights including the combating of racism and xenophobia at national, European or international level." Such cooperation is organized through the Fundamental Rights Platform (FRP), which gathers NGOs from all MS interested in the area of Fundamental Rights Protection. The FRP runs its independent e-platform, where crucial information regarding its activity is published.⁴⁷ Every year, the Platform organizes an annual meeting in Vienna, which is a unique opportunity for human rights defenders to meet and share their experience.

6. CONCLUSIONS

As can be observed in the presented FRA's activity, seen in the light of EU migration policy and current problems in this area, the Agency provides significant added value to the protection of irregular migrants' rights.

First of all, its activity raises awareness of the problem – the data published in reports and studies has unique value and provides specialized

<http://fra.europa.eu/en/cooperation/eu-partners/eu-agencies>.

⁴⁶ Established on the basis of Article 10 of Regulation 168/2007.

⁴⁷ For more information, see: <http://fra.europa.eu/en/cooperation/civil-society>.

information. Moreover, thanks to its website and special service dedicated to individuals – “Charterpedia” – access to basic information on human rights protection in the EU is easier than ever.⁴⁸

What is innovative is the activity of the Fundamental Rights Platform – thanks to the exchange of information between its members, protection level is gradually enhanced and the group of beneficiaries to be protected is better known in each Member State.

Finally, the general impact of actions taken in practice is very significant. The cooperation with two crucial Agencies in the area of migration – FRONTEX and EASO – strengthens the protection given to the migrants.

SUMMARY

The present paper is an analysis of the role of the Fundamental Rights Agency (FRA) in the process of irregular migrants’ rights protection. The paper presents the general idea of fundamental rights protection in the European Union with regard to particular provisions from the Charter on Fundamental Rights and Freedoms and gives a closer perspective on the situation of irregular migrants in the European Union. The article describes FRA’s impact on the level of human rights protection in the European Union and analyses the activities of the Agency in the area of migration, especially irregular.

⁴⁸ See more at: <http://fra.europa.eu/en/charterpedia>.

