

# SUMMARY SHEETS : ARTICLE 18 ECHFR

## *“Right to asylum*

*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.”*

### Content and scope of the article

A right to asylum under article 18 EChFR sets out the general obligation of the Union and of its Member States to respect the rights of refugees under the [Convention Relating to the Status of Refugees](#) (1954, hence “Geneva Convention”) and its 1967 Protocol.

Article 18 is based on [Article 78 of the Treaty on the Functioning of the European Union](#) (formerly TEC article 63). This provision of EU primary law allows the Union to create a common policy on asylum, subsidiary protection, and temporary protection. The goal is to offer an appropriate protection status to third-country nationals who require international protection while ensuring compliance with the principle of non-refoulement as well as other international standards of protecting individuals in need.

This has been achieved with the gradual adoption of instruments establishing the [Common European Asylum System](#) (“CEAS”), a comprehensive normative framework of EU directives and regulations establishing common rules for granting international protection and temporary protection to third-country nationals in the EU.


Three issues are central to article 18 EChFR.

#### **Entitlement? To What and for Whom?**

The material scope of the right to asylum, as conveyed by the wording and the title of Article 18, is not immediately self-evident. A first question emerges: **What is asylum? And who is entitled to it?**

In international law, the institution of *asylum* is generally understood as a **provision of protection, by a host state within its territory, to foreign nationals facing acts of persecution in their country of origin**. The term “asylum” also takes center stage in the context of article 18 EChFR. And as it follows from the EU secondary legislation and the vast case-law of the CJEU, this term might have a similarly broad meaning.

First, Article 18 EChFR explicitly refers to the Geneva Convention, a cornerstone of international refugee law which defines the *refugee* status and what rights are to be



provided to such a person, including the core obligation of States not to return the individuals to a country where their life or freedom would be in danger (**the principle of *non-refoulement***).

Secondly, the CEAS instruments, in contrast to EU primary law (TFEU and ECHR) do not explicitly refer to any distinct “asylum” status. However, EU Asylum legislation (the so-called Qualification Directive) of CEAS fully incorporates the refugee status and the definition of refugee under the Geneva Convention into the EU Law, while adding two additional protection statuses to this setting:

(1) **the status of subsidiary protection**, which reflects EU Member States’ human rights obligation and responds to legitimate protection needs of individuals who do not meet the Geneva Convention criteria for refugee status. With the adoption of subsidiary protection status, EU law has effectively broadened the protection regime beyond standards set by the Geneva Convention. In other words, EU law has significantly extended protection to persons who are left out unprotected by the Geneva Convention. Refugee and subsidiary protection status are referred together within EU Asylum legislation as “international protection”.

(2) **the status of temporary protection**: established by the so-called Temporary Protection Directive, this status serves as a “group” protection instrument. It was first activated in 2022 as a response to the Russian aggression in Ukraine.


Article 18 is also noteworthy in its wording. No other human rights document, apart from the Universal Declaration of Human Rights, has ever articulated an individual's right to asylum. But even in the case of the Universal Declaration of Human Rights, the individual is only guaranteed the possibility to seek and enjoy asylum. The exceptionalism of Article 18 is also apparent when looking at other regional human rights instruments, as even the regionally significant European Convention on Human Rights (ECHR) contains no provision explicitly addressing asylum or refugee status.

### **Setting Out Procedural Norms: Filling the Gaps of International Law**

While the Geneva Convention remains the cornerstone of international refugee protection, on which EU asylum legislation is based, it lacks procedural standards for assessing individual applications for protection. This opens a wide gap of refugee protection in international law.

Consequently, the harmonization of common procedural standards represents a significant contribution of EU asylum legislation. The EU law and the instruments of CEAS provide a uniform procedure for granting international protection to applicants, alongside a uniform set of rights for applicants across all Member States, thereby filling a large gap emanating from international law.

Given the absence of internal borders within the Schengen area, the Common European Asylum System includes rules on the obligatory designation of the Member State responsible for examining each application for international protection. This arrangement prevents the phenomenon of “asylum shopping” whereby applicants for international protection might otherwise choose the Member State to examine their application. Instead, the so-called Dublin Regulation pre-determines the responsible



Member State. This setting also addresses the reverse issue of "refugees in orbit," a situation in which no state assumes responsibility for an asylum claim.

### **Non-refoulement as a Core Obligation of Asylum Law**

Finally, the core principle of non-refoulement cannot be separated from the right to asylum. Although non-refoulement is not explicitly mentioned within Article 18, it is included implicitly within Article 19 of EChFR. Yet, the principle of non-refoulement represents more than just an obligation of Member States. It forms the core element of the right to asylum and must be respected in all circumstances, while also showing some overlap to art.4 of EChFR.

Moreover, given the interdependence of asylum law with human rights law, the principle of non-refoulement has become an unconditional rule that cannot be restricted in any way. This principle is also observed by the various CEAS instruments establishing return measures (the so-called Return Directive).

### **CJEU Case Law**

**CJEU Judgment in Case C-556/17 (Alekszij Torubarov, June 29, 2019), request for a preliminary ruling by Pécsi Közigazgatási és Munkaügyi Bíróság.**

*Key words: full and ex nunc examination - right to an effective remedy in cases of an administrative „ping-pong“*

**CJEU Judgement in Case C-473/16 (F. v Bevándorlási és Állampolgársági Hivatal, June 28, 2018), request for a preliminary ruling by Szegedi Közigazgatási és Munkaügyi Bíróság.**

*Key words: particular social group – sexual orientation - persecution grounds and reasons - medical reports - credibility assessment)*

**CJEU Judgement in Cases C-411-10 and C-493-10 (Joined cases of N.S. v United Kingdom and M.E. v Ireland, December 21, 2011), references for a preliminary ruling from the Court of Appeal (United Kingdom) and the High Court (Ireland)**

*Key words: Dublin transfer - non-refoulment - safe third country - effective access to procedures and right to remedy*

**CJEU Judgement in Cases C-297-17, C-318-17, C-319-17 and C-438/17 (Ibrahim, March 19, 2019), requests for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany)**

*Key words: living conditions - infringements of the Qualification Directive - transfer to Member State who granted international protection*

**CJEU Judgement in Case C-528/11 (Halaf, May 30, 2013), request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria)**

*Key words: Determination of responsible MS for examining an asylum application - discretion - role of the Office of UNHCR*

**CJEU Judgement in Case C-181/16 (Gnandi, June 19, 2018), request for a preliminary ruling from the Belgian Council of State**

*Key words: Return of illegally staying third-country national - concept of illegal stay - authorisation to remain in MS - non-refoulement*

**CJEU Judgement in Case C-57/09 (*B and D*, November 9, 2010), request for a preliminary ruling from Bundesverwaltungsgericht- Germany**

*Key words: minimum standards for refugee status or subsidiary protection - exclusion - serious non-political crime - membership in terrorist organisation - right of asylum in national constitutional law*

**CJEU Judgement in Case C-673/19 (*M and Others v Staatssecretaris van Justitie en Veiligheid and T.*, February 24, 2021), request for a preliminary ruling from the Raad van State (Netherlands)**

*Key words: illegal stay - detention for the purpose of transfer to another MS, no return decision - forced transfer - refusal to comply with the order*

**CJEU Judgement in Case C-808/18 (*European Commission v Hungary*, December 17, 2020), action for failure to fulfil obligations**

*Key words: procedure for granting international protection - border procedure - procedural safeguards - detention - right to remain in territory*

## Highlights

The complexity of EU Asylum Law offers a number of unsettled issues that will continue to be considered by the CJEU in the future.

First and foremost, it should be noted that the CJEU has never expressed a precise view on the exact content of the right to asylum. Does Article 18 enshrine a genuine entitlement of the individual to asylum? What is the precise component of Article 18? All these questions remain unresolved by the CJEU, as the Court only provides partial guidance on these matters in its case-law.

Moreover, the content of Article 18 is usually perceived as being defined by the body of CEAS instruments. However, this view should be reconsidered given the primacy of the EChFR over secondary legislation. In practice, a critical lawyer should raise the following questions:

- ➔ Do the provisions of the various CEAS instruments comply with the right to asylum?
- ➔ Are Member States correctly applying the standards for refugees and individual applicants for international protection in accordance with the existing right to asylum?

Are the rights guaranteed by other provisions of the EChFR respected and properly implemented?

The adoption of the New Pact on Migration, a potential successor of the CEAS, adds another dimension to these questions as this potential revolution in EU Asylum Law will introduce several new challenges and opportunities to clarify the scope of Article 18.

## Strategic Questions for Lawyers

When invoking Article 18 in asylum cases, lawyers should critically analyze:

- **Scope of Protection:**
  - Does Article 18 guarantee an individual's absolute entitlement to asylum, or is its scope limited by CEAS standards?
  - How does the right to asylum interact with related Charter rights, such as human dignity (Article 1) and the prohibition of inhuman or degrading treatment (Article 4)?
- **CEAS Compliance:**
  - Are Member States adhering to the procedural and substantive standards established under CEAS, and are these standards consistent with Article 18?
  - Does national implementation respect the guarantees under the Charter, including procedural fairness and effective remedies (Article 47)?
- **Impact of New EU Policies:**
  - How will the New Pact on Migration reshape existing obligations under CEAS, and what opportunities does it present for invoking Article 18 in individual cases?

### Practical Guidance for Lawyers

1. **Leverage Charter Primacy:**
  - Always assess whether secondary EU legislation (CEAS) complies with Article 18 and related Charter provisions. Use the Charter as a higher standard of review where national or EU asylum rules fall short.
2. **Challenge National Practices:**
  - In cases where Member States fail to properly implement CEAS standards or restrict asylum protections, Article 18 provides a robust basis for legal challenge.
  - Example: Delays or unfair processing in asylum applications can be framed as violations of Article 18's guarantees.
3. **Anticipate Judicial Trends:**
  - While the CJEU has not fully defined the scope of Article 18, its case law continues to shape this right in critical ways. Lawyers must stay informed about emerging rulings, particularly those addressing:
    - Procedural guarantees for asylum seekers.
    - Obligations of Member States under the principle of solidarity.
    - Protections for vulnerable groups (e.g., children, LGBTQ+ applicants)

### Correspondence with other European/International instruments

- Universal Declaration of Human Rights, Article 14
- European Convention on Human Rights, Article 3

- 
- |                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"><li>• International Covenant on Civil and Political Rights, Article 7</li><li>• Convention Relating to the Status of Refugees</li></ul>                                                                                                                                                                                                                                                        |
| <b>Further readings</b>                                                                                                                                                                                                                                                                                                                                                                                                          |
| <ul style="list-style-type: none"><li>• Daniel Thym – <i>EU Immigration and Asylum Law</i></li><li>• Victoria Moreno-Lax- <i>Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law</i></li><li>• Laura Westra, Satvinder Juss - <i>Towards a Refugee Oriented Right of Asylum</i></li><li>• Cathryn Costello - <i>The Human Rights of Migrants and Refugees in European Law</i></li></ul> |

#### **Further readings**

- Daniel Thym – *EU Immigration and Asylum Law*
- Victoria Moreno-Lax- *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*
- Laura Westra, Satvinder Juss - *Towards a Refugee Oriented Right of Asylum*
- Cathryn Costello - *The Human Rights of Migrants and Refugees in European Law*