

LUCIA BAKOŠOVÁ*

Crossing Slovak Borders: Border Defence and Illegal Migration

- **ABSTRACT:** *Since the establishment of the Slovak Republic in 1993, it has faced migration flows that have had a considerable effect on the protection of Slovak state borders (internal and external), the legal regulation of illegal migration, and the provision of international protection to those in need. The aim of this study is to analyse the role, competence, and procedures of relevant Slovak authorities regarding border defence and illegal migration, and the related possibility of detaining foreigners. Apart from illegal migration, this study analyses situations in which an illegal migrant claims to be a refugee in the course of the procedure. The analysis focuses primarily on the relevant Slovak legislative acts, mainly the Act on Asylum, the Act on the Residence of Foreigners, and the Act on the Police Force, as well as the subsequent jurisprudence of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic, which also reflects on the applicable European Union legislation, as well as international treaties in the analysed areas.*
- **KEYWORDS:** the Slovak Republic, border defence, illegal migration, foreigner, asylum seeker, detention

1. Introduction

The Slovak Republic (hereinafter 'SR'), has faced challenges in protecting its state borders and managing migration, both legal and illegal, ever since its establishment in 1993. The most notable migration flows in the SR are associated with the Yugoslavian War (1991–2001), the 2015 migration flows as a result of the Syrian civil war, and recently, the flow of Ukrainian citizens seeking refuge from Russian Federation's aggression since February 2022 or the 2022–2023 migration flows of

* Ph.D., researcher, Institute of International Law and European Law, Faculty of Law, Pavol Jozef Šafárik University in Košice, lucia.bakosova@upjs.sk, ORCID: 0000-0001-9403-5092.



citizens from Syria and other countries. Although, there is a considerable amount of illegal migrants crossing the Slovak state borders, the SR has never become the main destination for third-country nationals and even the outbreak of the migration crisis in the European Union (hereinafter 'EU') has not changed the dominantly transit character of the state.¹ The same is true for the current migration flow, when almost all illegal migrants move to Austria or Germany for family reunification. Migration, as such, significantly influences the politics of states and has the temporary and long-term potential to change the population structure of individual countries. To protect Slovak state borders, especially the external border with Ukraine, and to combat illegal migration, the SR adopted numerous legal acts in this area, which are analysed in this study. As a Member State of the EU and the Schengen Area,² SR's legislation and jurisprudence reflect the Schengen³ and asylum aquis,⁴ as well as international treaties in which it is a contracting party.⁵

1 Bolečeková and Olejárová, 2018, p. 229; Bolečeková and Olejárová, 2017, p. 577.

2 The SR is a Member State of the European Union since 1 May 2004 and a Member State of the Schengen Area since 21 December 2007.

3 Schengen aquis consists of a set of rules and legislation that ensures the proper functioning of the Schengen Area. It regulates the abolishment of border controls at the internal borders of the Member States and aims to strengthen border controls at the external borders. The main documents are Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Convention implementing the Schengen Agreement of 14 June 1985 and Schengen Accession Agreements. Furthermore, the Schengen aquis is formed, that is, by Regulation (EU) No. 2016/399 setting out the Schengen Borders Code, Regulation (EU) No. 2017/2225 of the European Parliament and of the Council of 30 November 2017 amending Regulation (EU) No. 2016/399 as regards the use of the Entry/Exit System, Regulation (EC) No. 810/2009 establishing the EU's Visa Code, Regulation (EU) No. 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard.

4 Asylum aquis consists of a set of rules and legislation on asylum procedure within the European Union. The main documents are Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Directive 2013/3/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; and Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

5 For instance, Convention relating to the Status of Refugees (1951) and Protocol relating to the Status of Refugees (1967), International Covenant on Civil and Political Rights,

This study examines the role, competence, and procedures of relevant Slovak authorities regarding border defence, particularly the protection of the external border with Ukraine and illegal migration. Apart from illegal migration, this study analyses the situation in which an illegal migrant claims to be a refugee in the course of the procedure and what the implications are. The analysis focuses on relevant Slovak legislative acts, mainly Act No. 480/2002 Coll. on Asylum⁶ and Act No. 404/2011 Coll. on Residence of Foreigners,⁷ Act No. 171/1993 Coll. on Police Force, as well as national strategies for migration and integrated border management. This study particularly focuses on the subsequent jurisprudence of the Supreme Court of the SR and the Constitutional Court of the SR, which also reflects on the applicable EU legislation and international treaties in the analysed areas. The rest of this paper is divided into two main chapters. In the first chapter, we point out which Slovak authorities are competent to protect Slovak internal and external borders, the technical and procedural means that are used to protect the borders, and the current challenges in border defence. In the second chapter, we focus on illegal migration and the provision of international protection. Particular focus is placed on the possibility of detention of an illegal migrant and situations in which an illegal migrant claims to be a refugee in the course of the procedure.

2. Border defence in the Slovak Republic

The SR borders five states: Czechia, Poland, Ukraine, Hungary, and Austria. After joining the EU and subsequently the Schengen Area, the SR has a 97.8-kilometre external land border with Ukraine and an external air border on three Schengen airports in Bratislava, Košice, and Poprad. The protection of borders is carried out in compliance with Schengen *acquis* and it includes activities that should prevent illegal crossing of the SR's external land and air borders. However, border protection must not prevent entitled persons from accessing the existing forms of international protection (asylum and subsidiary protection). The main domestic legislative acts regulating border defence are Act No. 404/2011 Coll. on Residence of Foreigners, Act No. 171/1993 Coll. on Police Force, and internal instructions from the Ministry of Interior. The Act on the Residence of Foreigners regulates, among others, the scope of police force activities for the provision of border control of SR borders, the area of residence of foreigners in the SR territory, and conditions for

European Convention of Human Rights and Fundamental Freedoms (1950), Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000), Protocol against the Smuggling of Migrants by Land, Sea, and Air (2000).

6 The full name of the act is 'Act No. 480/2002 Coll. on Asylum and Amendment of Certain Acts.'

7 The full name of the act is 'Act No. 404/2011 Coll. on Residence of Foreigners and Amendment and Supplementation of Certain Acts.'

the entry or exit of foreigners into or out of the SR territory. Part two of the Act on the Residence of Foreigners (Articles 3–19) regulates border control, entry, and exit through external borders, as well as the refusal of entry. Most provisions refer to the Schengen Borders Code.⁸ The Act on the Police Force sets out, among others, the organisation of police force and its competences. Concerning the protection of state borders, a police officer is authorised under Article 17 and following articles⁹ to detain a person, request proof of identity, check travel documents and other accompanying documents of persons crossing the external border, and check facts related to crossing the external border. In accordance with Article 26 Paragraph 2, in the case of suspicion of committing a crime by a person crossing the external border, the police officer is entitled to search the person, things, and means of transport. The police officer also has the same power in cases of suspicion of committing an offence related to crossing the external border and an offence in the area of foreigners' stay on the territory of the SR.

■ 2.1. *Authorities operating in the framework of border protection*

The main authority in border defence is the Bureau of Border and Foreign Police of the Presidium of the Police Force (hereinafter 'the Bureau'). The Bureau was established on 1 April 2000 as a body with a nationwide scope to ensure control of the borders of the SR. It directly manages, methodically directs and controls the activity of its organisational components in the performance of tasks in the area of: (a) border controls,¹⁰ (b) the fight against illegal migration and smuggling, (c) risk analyses, (d) cooperation with the European Border and Coast Guard Agency (hereinafter 'Frontex Agency'), (e) analysis of travel documents, (f) residence regime of foreigners, (g) returns of foreigners, (h) expulsion of foreigners, (i) visa practice, and (j) to a limited extent in the area of asylum procedures¹¹ and the implementation of the Dublin Regulation.¹²

The Bureau, at the regional level, consists of four Directorates of Border and Foreign Police. In their direct subordination, the Border Control Department of the Police Force, Foreign Police Department of the Police Force, Mobile Unit of the Police Force, Asylum Department of the Police Force Humenné, and Mobile

8 Regulation (EU) No. 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

9 Arts. 18–26 of the Act on the Police Force.

10 For more details on border control by the Bureau, see chapter 2.2. Border Control and Border Surveillance on the External Border.

11 For more details on border control by the Bureau, see chapter 3.2. Detention of Asylum Seekers.

12 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Intervention Unit of the Police Force are established at the local level. The Bureau has direct authority over two departments of police detention for foreigners in Medveďov and Sečovce. Their main task is implementing the detention of nationals of third countries and their repatriation to their home countries or the countries from which they entered the SR. The National Anti-Illegal Migration Unit of the Office of the Border and Foreign Police of the Presidium of the Police Force is responsible for detecting and investigating cross-border criminal activities associated with illegal migration and human trafficking.¹³

The Bureau manages several information systems. One of the primary sources of information is the Migration and International Protection Information System (hereinafter ‘MIPIS’), which allows for the recording of foreign nationals’ events in a hierarchical resolution process within departments. Person identification is based on the parallel search and comparison of fingerprint data from multiple databases. Since its launch in 2010, MIPIS has been integrated with the Automated Fingerprint Identification System, the Automated European Fingerprint Identification System, and since 2015 with INTERPOL. The potential resulting from integration into the fingerprint information systems of the Bureau is planned for further development, primarily through integration into the Central Visa Information System and Schengen Information System. The MIPIS is a fundamental source of information on illegal migration. Based on recommendations from the Schengen evaluations of air and land borders in 2012 and 2013, access to data from the MIPIS was made available to all Police Force units through central inspection control. This contributes to improved cooperation within the Police Force and influences the development of the security situation. Given the above and the fact that the MIPIS was funded from EU funds, it is necessary to ensure the sustainable development of this information system and create conditions for flexible updates based on changes in the integrated information system, national and European legislation, and the ability to respond flexibly to tasks arising from application practices.¹⁴

■ 2.2. *Border control and border surveillance on the external border*

Border control in general consists of border checks conducted at border crossings and border surveillance carried out at the so-called ‘green border.’ On the one hand, their aim is to facilitate legitimate border crossings for *bona fide* travellers, and on the other hand, to prevent and detect cross-border criminal activities, particularly smuggling, human trafficking, and terrorism. The primary objective of border control is to verify the identity of individuals and other relevant information to allow entry into or exit from the territory of a Member State of the Schengen Area/EU. These checks may also cover means of transport and objects in

13 Úrad vlády Slovenskej republiky, 2022, p. 6.

14 Ibid., pp. 25–26.

the possession of persons crossing borders. As a fundamental rule, all individuals must undergo checks. According to Article 8 of the Schengen Borders Code, all persons shall undergo a minimum check to establish their identities based on the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate, by using technical devices and consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost, and invalidated documents; of the validity of the document authorising the legitimate holder to cross the border; and of the presence of signs of falsification or counterfeiting. Particular emphasis in the applicable legislation is placed on the entry/exit checks of third-country nationals who are subject to thorough checks. These checks comprise, among others, verification of the conditions governing entry and, where applicable, of documents authorising residence and the pursuit of a professional activity, possibly verification of the identity of the holder of the visa and authenticity of the visa.

According to Article 13 of the Schengen Borders Code, the primary objective of border surveillance is to prevent unauthorised border crossings, counter cross-border criminality, and take measures against persons who have crossed the border illegally. It is conducted through patrols, terrain monitoring, or other technical means. The utilisation of specific technical methods also depends on the nature and complexity of the terrain. The border surveillance system on the external border of the SR with Ukraine is implemented through a combination of personnel and technical resources. In accordance with Article 10 of the Act on the Residence of Foreigners, a police department is allowed, when performing border control in an area close to the external border, to place and use technical devices and equipment intended for border control, which identify and document unauthorised external border crossings or prevent unauthorised external border crossings.

To perform border surveillance effectively, four levels of control are utilised on the external land border. The first level involves the deployment of technical means in the immediate vicinity of the external border. The second level is implemented through physical checks conducted by officers of the Border and Foreign Police Units stationed near the border. The third level is ensured by monitoring vehicles and officers from the specialised Mobile Intervention Unit of the Border and Foreign Police Directorate in Sobrance. The fourth level of control involves coordinating with other Police Force units (particularly Public Order and Traffic Police) to secure cooperation in border control. Currently, over two-thirds of the external border with Ukraine is secured by a camera chain system that records and evaluates unauthorised crossings. Automation and extensive deployment of technical resources for border surveillance significantly reduce the need for

personnel to guard the “green border.” However, it is necessary to ensure the maintenance and renewal of this system in the upcoming years.¹⁵

In December 2022, the SR adopted the National Strategy for European Integrated Border Management for the years 2023–2026 and the establishment of the Steering Committee for the Implementation of European Integrated Border Management (hereinafter ‘National strategy 2023–2026’). Under the National strategy 2023–2026 a steering committee for the implementation of European integrated border management was created to monitor, coordinate, and update the performance of individual tasks, in which the ministries of the interior, finance, foreign affairs, labour, and social affairs, as well as the Office for Personal Data Protection, will be represented.¹⁶ In accordance with the National strategy 2023–2026, the SR should increase the deployment of experts for operational activities organised by the Frontex Agency and contribute more personnel to the Standing Corps of the European Border and Coast Guard or actively participate in international activities aimed at combating illegal migration. The intensification of cooperation with countries of origin of illegal migrants and anticipation of risky situations in the areas of smuggling and human trafficking is one of the key tasks of this strategy.

3. Illegal migration in the Slovak Republic

Illegal crossing of the Slovak state border or illegal entry into the territory of the SR is sanctioned within the limits of national law, which reflects the transposed legal acts of the EU as well as international standards on this matter. Under the Slovak Criminal Code, the illegal crossing of a state border in the SR is not considered a crime. Under Article 116 Paragraph 1 of the Act on the Residence of Foreigners, a foreign national commits an offence in the area of border control if (a) they unlawfully cross the external border, (b) they intentionally avoid or refuse to undergo border control when crossing the external border, or (c) they present a foreign travel document, another document authorising the crossing of the external border, or a visa that does not belong to them during border control. However, this article does not apply to a foreigner who has submitted an asylum application immediately upon entering the territory of the SR or to a victim of human trafficking. For an offence under the aforementioned article, a fine of up to 1,600 euros may be imposed.¹⁷

According to ‘Statistical overview of legal and illegal migration of foreigners in Slovakia: 2022,’ there was a considerable increase in documented illegal

¹⁵ *Ibid.*, pp. 8–9.

¹⁶ *Ibid.*, p. 5.

¹⁷ For the list of all the offences and fines see Art. 116 of the Act No. 404/2011 Coll. on Residence of Foreigners and Amendment and Supplementation of Certain Acts.

migrants in 2022 (11,242) in comparison to 2021 (1,769). Most illegal migrants were identified during their illegal stay in SR territory. Only a fraction (549) were caught at the external border. The prevailing numbers of illegal migrants were from Syria (9,160), Ukraine (594), and Marroco (560).¹⁸ The 2022–2023 migration flow is still intensive. From 1 January to 31 May 2023 the Police Force registered 7,183 foreigners for secondary transit migration. At the time of writing, the weekly average numbers for the last five weeks were already above the limit of 655 detected migrants on this secondary transit migration, and a further increase is anticipated. Regarding the measures adopted in the current migration flow, most are applied in the area of the Slovak-Hungarian border. In particular, border controls and border surveillance have been strengthened, and members of the Police Force have been dispatched to Hungary to strengthen external border controls as well as to the operation of the Frontex Agency.¹⁹

Migration issues primarily fall under the auspices of the Ministry of the Interior, which implements its agenda in the field of migration and asylum mainly through two bodies—the Migration Office and the Bureau of Border and Foreign Police of the Presidium of the Police Force; the Ministry of Foreign and European Affairs, and the Ministry of Labour, Social Affairs, and Family,²⁰ which establishes legal norms and determines legal regulations for employing foreign nationals, sets up criteria for the entry of different categories of foreign nationals into the Slovak labour market, including conditions for granting work permits, establishing legal norms regarding social care for foreigners, asylum seekers, repatriated persons, and Slovaks living abroad.²¹ Since the role and competences of the Bureau were mostly analysed in the previous chapter, we focus only on its role and competences during an asylum procedure. In asylum proceedings, the relevant units of the Bureau carry out initial actions related to the acceptance of a foreigner's declaration requesting asylum or subsidiary protection. In proceedings that take responsibility for examining an asylum application, the Bureau performs tasks related to ensuring the transfer of the foreigner to the state that has taken responsibility for examining the asylum application. The Bureau, as the sole unit within the Ministry of the Interior of the SR, is responsible for implementing so-called 'Dublin transfers'. This includes planning transportation, including air transportation, communication with the relevant authorities of the receiving Member State, ticketing arrangements, provision of escorts and, if necessary, medical personnel, and handing over Dublin applicants for international protection to the competent authorities in the responsible Member State. Similarly, all necessary actions

18 Prezídium Policajného zboru, 2022, pp. 27–28.

19 Šimko, 2023.

20 For more information on competences of the mentioned Ministries, see Arts. 3–19 of the Act No. 575/2001 Coll. on the Organisation of Government Activities and the Organisation of the Central State Administration.

21 Bachtíková et al., 2012.

are performed when a foreigner is received on the territory of the SR within the framework of the Dublin procedures.²² The Bureau also cooperates closely with the Frontex Liaison Officer based in Bratislava, and regularly provides information on cases of illegal migration in the SR in the form of structured statistics and analytical descriptions. The Bureau and its organisational units are responsible for the execution of forced returns.

The main authority active in the analysed area is the Migration Office of the Ministry of Interior of the SR (hereinafter 'Migration Office').²³ The Migration Office is a professional division of the Ministry of the Interior acting in the area of asylum and integration of refugees and foreigners who were provided subsidiary protection and in the field of documentation and foreign cooperation to this extent.²⁴ The main tasks performed by the Migration Office are: (1) development of the national asylum policy, (2) decision-making in administrative procedures related to granting asylum, (3) analysis of information about asylum seekers' countries of origin, and (4) establishment of asylum facilities. Through non-governmental organisations (currently the Slovak Humanitarian Council), it also provides supplementary care for asylum seekers and participates in the integration of persons granted international protection. The Migration Office consists of the Director of the Migration Office, Procedural Department,²⁵ Organisation and Legal Department,²⁶ Migration and Integration Department,²⁷ Dublin Centre,²⁸

22 Úrad vlády Slovenskej republiky, 2022, p. 12.

23 The Migration office was established by Resolution No. 501 of the Government of the SR on 13 July 1993.

24 Regulation No. 39/2015 of the Ministry of Interior of the Slovak Republic on the Organisational structure of the Ministry of Interior of the Slovak Republic.

25 This department is in charge of asylum-related administrative procedures and carries out comprehensive activities in this respect. Its responsibility is to ensure compliance of the asylum procedure with the national principles of the migration policy, EU legislation, and international agreements and treaties in this regard, to which the SR has acceded and is bound.

26 This department prepares draft legislation governing asylum matters and is involved in the transposition of EU legislation in this field into national law. Additionally, responsibilities of this department include legal representation of the Ministry before courts in international protection matters. It also performs activities of filing, personal data protection, confidential information protection, statistics and electronic data processing.

27 This department cooperates with competent government authorities, local governments, and non-governmental organisations to integrate beneficiaries of international protection into society, in particular, accommodation, employment, social security, and education, including the preparation, implementation and coordination of projects involving asylum matters. The department provides methodological guidance, and it manages and supervises social work at asylum facilities.

28 The Dublin Centre performs the specific function of a national access point for the Slovak Republic, which is in charge of the implementation of the Dublin Regulation, aiming to determine which EU Member State is responsible for examining an application for international protection lodged by an asylum seeker or a third-country national without a permit to reside in the territory of the Slovak Republic.

Department of Documentation and International Cooperation, and Asylum²⁹ Facilities Unit.³⁰

The main legal document, apart from the EU asylum aquis and international treaties,³¹ applicable to illegal migration is the Act on the Residence of Foreigners. Illegal migrants who are detained by the police on the territory of the SR are brought to the foreign police department of the Police Force on the basis of authorisation under the Act on the Residence of Foreigners, where a person's security check will be carried out in the information systems of the Ministry of the Interior of the SR to evaluate the security risk of detained persons and their stay on the territory of the SR. Subsequently, they go through dactyloscopic prints and photo identification procedures. Since 2010, all illegal migrants have been registered in the MIPIS.

Under Article 61a of the Act on the Residence of Foreigners, a third country national who is staying in the SR territory without authorisation, may remain in the SR territory for the: (a) duration of obstacles to administrative expulsion according to Article 81; (b) provision of institutional care related to urgent health care; (c) duration of quarantine measures; (d) time of execution of detention, substitution of detention, execution of a custodial sentence, or execution of house arrest; (e) period to exit the country according to Article 83(1); (f) duration for the reasons specified in Article 84(4); (g) detention according to Article 88 or Article 88a, or obligation imposed regarding alternatives to detention; this does not apply if the asylum seeker is entitled to stay in the territory of the SR according to special regulation or; (h) preparation and execution of administrative expulsion or return according to a special regulation, unless this is a third country national according to (g).

■ 3.1. *Detention of foreigners*

A common practice in states when a foreigner crosses the state border illegally, or is residing in a state illegally is detention. The Act on the Residence of Foreigners regulates the conditions under which a foreigner or asylum seeker may be detained as well as the length of detention and alternatives to detention. It is

29 This department is responsible for documenting activities and providing information and analysis about countries of asylum seekers' origin. It is in charge of the Migration Office's activities related to international cooperation, including tasks resulting from the SR's membership in the EU and cooperation with the European Asylum Support Office.

30 This unit manages, coordinates, and supports the asylum facilities, the integration centre, and the transit centres at the international airports. It is fully in charge of the reception of asylum seekers. Additionally, it fulfils tasks resulting from the 'Agreement between the Government of the SR, UNHCR, and IOM concerning the humanitarian transfer of refugees in need of international protection through the Slovak Republic.' It cooperates with relevant international and non-governmental organisations, governmental authorities, and local governments focusing on refugee issues. Ministry of Interior of the Slovak Republic, 2018, p. 6.

31 See footnote No. 4.

important to note that the term “detention” is not defined in the Act. In established jurisprudence,³² the Supreme Court of the SR defines this term as follows:

Detention of a foreigner means restriction or, depending on the nature, length, consequences, and method of detention, even deprivation of his liberty. It is therefore a very sensitive interference with one of the most important rights of an individual. Such an intervention can only be permissible under strictly defined conditions, defined not only by the Act on the Residence of Foreigners but above all by the constitutional order of the SR. According to Article 8(1) of the Charter of Fundamental Rights and Freedoms,³³ personal freedom is guaranteed. According to Article 8(2) of the Charter, no one may be deprived of his freedom other than for the reasons and in the manner established by law.³⁴

Furthermore, the jurisprudence of the Supreme Court and the Constitutional Court of the SR reflects the international obligations of the SR under the European Convention on Human Rights, Article 5(f),³⁵ the International Covenant on Civil and Political Rights, Article 9,³⁶ and the Charter of Fundamental Rights of the European Union, Article 6.³⁷ All the aforementioned legal documents prohibit arbitrary deprivation or limitations of personal freedom.³⁸

In accordance with Article 88(1) of the Act on the Residence of Foreigners, a police officer shall be entitled to detain a third-country national: a) subject to administrative expulsion proceedings in order to ensure his/her departure to the country pursuant to Article 77(1) if 1. there is a risk he/she would escape; or 2. the third-country national avoids or prevents the preparation process of his/

32 For instance, see the Judgment of the Supreme Court of the SR on 13 August 2014, Case 1 Sza 23/2014; Judgment of the Supreme Court of the SR on 6 February 2015, Case 1 Sza 5/2015; Judgment of the Supreme Court of the SR on 30 March 2016, Case 10 Sza 8/2016.

33 Charter of Fundamental Rights and Freedoms was adopted by Constitutional Act No. 23/1991 Coll., which was adopted by the Federal Assembly of the Czech and Slovak Federative Republic on 9 January 1991. After the disintegration of the Czech and Slovak Federative Republic (1992), the Charter of Fundamental Rights and Freedoms became an integral part of the Constitution of the Slovak Republic.

34 Judgment of the Supreme Court of the SR on 30 March 2016, Case 10 Sza 8/2016.

35 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

36 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

37 Everyone has the right to liberty and security of person.

38 Berthotyová, 2017, p. 108.

her administrative expulsion to be executed; b) for the purpose of execution of the administrative expulsion or of the order for expulsion; c) for the purposes of his/her transfer or preparation thereof under a special regulation³⁹ if there is a significant risk of him/her escaping; or d) for the purpose of his/her return under an international treaty⁴⁰ if he/she has illegally crossed the external border or is residing illegally in the territory of the SR.

Administrative expulsion, in accordance with Article 77 of the Act on the Residence of Foreigners, is a decision of the police department that a foreigner does not have or has lost the entitlement to stay in the SR territory and is obliged to leave the SR territory with the option of determining the time by which he/she has to depart back to his/her country of origin, country of transit, or any third country, which the third-country national voluntarily decides to return to and which would accept him/her or to the territory of a Member State in which he/she has been granted the right of residence or provided with international protection. A decision on administrative expulsion shall also include the country into which the foreigner was expelled if such a country could be defined. In its decision on administrative expulsion, the police department may place an entry ban into the SR territory or the territory of all Member States. Similarly, according to Article 15(1) of the Return Directive 2008/115/EC, Member States may only detain a third-country national whose removal is in progress to prepare the return or carry out the expulsion, particularly in cases where there is a risk of absconding or the said third-country national is evading the preparation of the return or the execution of the expulsion, or otherwise obstructing it. Detention may only be resorted to if other less coercive measures cannot be applied effectively in the specific case.⁴¹ The risk of escape, avoidance, or obstruction in the process of preparing for the execution of administrative expulsion must always be assessed individually in proceedings concerning the detention of a foreigner. The conclusion regarding the risk of escape cannot be justified by generalising the previous behaviours of other foreign nationals.⁴²

The only requirement for the application of Article 88(1) b) of the Act on the Residence of Foreigners is an enforceable decision of administrative expulsion or penalty of expulsion. Therefore, there are no specific legal requirements related to the risk of flight or the risk of evading or obstructing deportation. The lack of regulation of detention criteria for deportation makes it more difficult to prioritise

39 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

40 For instance, Council Decision 2007/839/ES of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of person.

41 Judgment of the Supreme Court of the SR from 15th July 2015, Case 10 Sza 6/2015.

42 Judgment of the Supreme Court of the SR from 13th August 2014, Case 1 Sža 23/2014.

voluntary departure because the police department will only grant a third-country national the option of voluntary departure when it is proven that there are no grounds for detention, according to Article 88 of the Act on the Residence of Foreigners.⁴³ It is within the full power of the police department to decide whether to provide the third-country national with the option of voluntary departure or to implement the decision and order a detention. The legislation does not contain a sufficient framework to limit the authority of the police department to order detention without justified reasons, such as the need to prevent flight or evasion, or to hinder the execution of deportation.⁴⁴

Detention under Article 88(1) c) of the Act on the Residence of Foreigners is based on Article 28(2) of the Dublin III Regulation which states that a Member State may detain a third-country national to ensure the transfer procedure if there is a significant risk of absconding. As for the application practice in the SR, the interpretation of “transfer procedure” used in the Dublin III Regulation allows for detention for this purpose even before the issuance of the return decision. In practice, the detention of third-country nationals awaiting transfer to another Member State under the Dublin III Regulation is possible after their apprehension on the territory of the SR, once it is established that transport to another Member State under the Dublin III Regulation can be applied. In accordance with the Dublin III Regulation, detention during the transfer procedure cannot exceed 3 months until the execution of the transfer of the third-country national from the territory of the SR. Another criterion justifying detention on this ground is the requirement of a significant risk of absconding. The legal regulation does not specifically explain when the risk of absconding becomes significant. One indication may be that the third-country national already has a record in the EURODAC system, indicating that they have fled from another Member State. This can be understood as evidence of a significant risk of further absconding.⁴⁵

Detention under Article 88(1) d) of the Act on the Residence of Foreigners is associated with the return of a foreigner based on a readmission agreement. Regarding the rights and interests of the individual, return based on readmission is understood in the general context of administrative expulsion proceedings. Therefore, as stipulated in Article 6(1) of the Return Directive 2008/115/EC, an individual decision on administrative expulsion must be issued to end the irregular stay of a third-country national in the territory of the SR. However, it is debatable whether the mentioned norm really regulates a special reason for detention or whether it should be sufficient to apply it in the execution of the decision on administrative expulsion, according to Article 88(1) b) of the Act on the Residence of Foreigners.⁴⁶

43 Berthotyová, 2017, p. 127.

44 Ibid., pp. 127–128.

45 Berthotyová, 2017, pp. 139–140.

46 Berthotyová, 2017, pp. 149–150.

Likewise, the Act on the Residence of Foreigners states the rights of detained third-country nationals as well as the conditions at detention centres.⁴⁷ It is important to note, that the provisions mentioned below are *mutatis mutandis* applicable to detained asylum seekers. The police department is obliged to ensure that the third-country national is advised immediately after his/her detention, and in the language he/she understands: (1) the reasons for detention, (2) the possibility of notifying the consulate of the country of his/her nationality about his/her detention, (3) the possibility of notifying any of his/her close persons and his/her legal representative about his/her detention, and (4) the possibility of examining the legality of the detention decision. As for the rights of detainees, for instance, they are entitled to a continuous eight-hour period of sleeping and two walks per day in the specified area, each lasting at least one hour. A third-country national younger than 18 years of age shall be entitled to three walks per day, one in the morning and two in the afternoon. A third-country national younger than 18 years of age is entitled to access education and leisure-time activities. Vulnerable persons and families with children have access to psychological and social services and counselling and crisis interventions. A third-country national may lodge requests and complaints with the public authorities of the SR, which shall be immediately sent by the police department.

3.1.1. *Maximum lengths of detention*

Article 88(4) of the Act on the Residence of Foreigners establishes maximum lengths of detention. A third-country national may be detained for the time as reasonably necessary, but not for more than six months. The police department is authorised to repeatedly extend the detention of a third-country national during this period, with the total time of detention not exceeding six months. If it is anticipated that, in spite of the necessary steps taken to execute the administrative expulsion or the order for expulsion of the third-country national, the execution will be prolonged because of poor cooperation of the third-country national or due to a failure of the consulate to issue an emergency travel document within the period of time in the first sentence, the police department may decide, even repeatedly, to extend the period of detention, where the total period of extension may not exceed 12 months. The detention period may not be extended to families with children or vulnerable people. A third-country national is detained on the date of the detention decision. Due to the transposition of the Return Directive 2008/115/EC, the maximum duration of detention, which was previously 180 days, has been extended to a maximum of 18 months. Decisions on detention and its extensions are made by a competent police authority that can be directly reviewed by a court. Based on the Administrative Procedure Code, a detained foreigner can file an administrative lawsuit under Article 221 and the following articles of

⁴⁷ See Arts. 90–100 of the Act on the Residence of Foreigners.

Act No. 162/2015 Coll. Administrative Procedure Code. In accordance with Article 88(5) of the Act on the Residence of Foreigners, the police department shall issue a detention decision forthwith to the third-country national and they shall place him/her in the facility.

As concluded by the Supreme Court of the SR in Case 10 SZa 23/2015, detention is lawful only when its purpose persists throughout the period. If the competent authority justifies the specified duration of detention with demonstrable facts that justify the determined period as the time necessary for the detention of a foreigner, its decision is in accordance with the law in terms of determining the duration of detention.⁴⁸ The detention facility is obliged to immediately release a third-country national from detention if: (a) the purpose of detention has ceased, based on a valid court decision; (b) the detention period has expired; (c) the decision on detention has lost its validity due to the person being included in a program for the support and protection of victims of human trafficking; and (d) the third-country national has provided a monetary guarantee to the account of the Police Force based on a decision of the police authority, which amounts to an alternative measure in accordance with Article 89 of the Act on the Residence of Foreigners.⁴⁹

3.1.2. *Alternative methods of detention*

In addition, it is important to mention Article 89 of the Act on the Residence of Foreigners, which provides for alternative methods of detention. According to EU law, all alternatives must be exhausted first, and detention should be the last resort unless they cannot be effectively applied based on an individual assessment of each case.⁵⁰ Detention should only occur after full consideration of all possible alternatives or when monitoring mechanisms fail to achieve a lawful and legitimate purpose. Article 8(4) of the recast directive obliges Member States to establish rules in their national legislation that regulate alternatives to detention. Alternatives to detention include (a) reporting obligations, such as the obligation to report to the police or immigration authorities at regular intervals; (b) surrender of passports or travel documents; (c) residence requirements such as the obligation to stay at a specific address; (d) release on bail with or without guarantee; (e) requirements for a guarantor; (f) release into the care of a social worker or within a social care plan involving a community care team or a team of mental health professionals; and (g) electronic monitoring such as electronic bracelets.⁵¹ However, Article 89 offers only two alternative methods: reporting the place of residence, or paying warranty deposits. The police department, acting in the

48 Judgment of the Supreme Court of the SR on 11 December 2015, Case 10 SZa 23/2015.

49 Berthotyová, 2017, pp. 198–199.

50 Art. 8(2) of the recast Reception Conditions Directive 2013/33/EU, Art. 18(2) of the Dublin III Regulation, Art. 15(1) of the Return Directive 2008/115/EC.

51 Berthotyová, 2017, p. 191.

matter of administrative expulsion, is authorised to impose alternative measures instead of detaining a third-country national. Although the introductory sentence of Article 89(1) refers to a police department acting in the matter of administrative expulsion, this provision applies to all grounds for detention under Articles 88 and 88a (detention of asylum seekers), even when the third-country national is not the subject of administrative expulsion proceedings.⁵²

From the decision of the administrative authority regarding detention under Article 88, it is necessary to trace why the competent authority did not resort to the application of alternative forms of detention. If the reasoning of the decision of the administrative authority (regarding detention under Article 88(1) d) of the Act on the Residence of Foreigners) includes arguments and evidence as to why it was not possible to utilise less restrictive measures (under Article 89(1) of the Act on the Residence of Foreigners) and it was necessary to proceed directly with the detention of the foreigner, and the claims of meeting the conditions for imposing less restrictive measures could not stand based on the behavior and passivity of the foreigner in creating conditions for the possibility of using less restrictive measures, the objection of insufficient examination of alternative forms of detention cannot challenge the legality of the decision of the administrative authority regarding the detention of the foreigner.⁵³

■ 3.2. *Detention of asylum seekers*

An amendment to the Act on the Residence of Foreigners that took effect on 1 January 2014 added the provision of detention of asylum seekers. Under Article 88a(1) of the Act on the Residence of Foreigners, a police officer is entitled to detain an asylum seeker if the purpose of detention cannot be achieved by any less severe means: a) in order to check or verify his/her identity or nationality; b) in order to ascertain the facts that constitute the basis of his/her application for granting asylum, which could not be obtained without detention, especially if there is a risk of absconding; c) in the case of a third-country national detained under Article 88(1) a) or (1) b) who applied for asylum if there is reasonable suspicion that he/she applied for asylum in order to delay or frustrate his/her administrative expulsion; d) if it is necessary due to a threat to national security or public order; or e) for the reason stipulated in Article 88(1) c).

An asylum seeker may be detained for the time strictly necessary as long as the reasons referred to in para. 1 exist. The total time of detention of an asylum seeker under paras. (1) a), (1) b), (1) c), and (1) e) shall not exceed six months. Total time of detention of an asylum seeker under para. (1) d) shall not exceed 18 months.

⁵² Berthotyová, 2017, p. 192.

⁵³ Judgment of the Supreme Court of the SR, 30 September 2015, Case 10 SZa 13/2015.

In case an illegal migrant applies for asylum, in general, this will result in the termination of the detention and the police department will be obliged to release the foreigner from detention without undue delay; the reasons for the original detention of the foreigner will automatically disappear.^{54,55} Furthermore, the Supreme Court of the SR in Case 1 Sža 5/2013 stated that if the entry of such a foreigner into the territory of the SR without authorisation and his detention in the territory of the SR is connected with the intention to apply for asylum in the SR, it cannot be a reason for the detention of the foreigner.⁵⁶ Depriving or restricting personal liberty during the course of asylum proceedings cannot be considered compatible with the constitutional order of the SR, with Slovakia's international human rights obligations. Based on the current legal situation, it is also not in line with the provisions of the Return Directive 2008/115/EC.⁵⁷ From Article 22 Paragraph 1 of the Asylum Act, it follows that an asylum seeker is entitled to stay on the territory of the SR during the asylum procedure, unless otherwise specified by this law or a specific regulation.⁵⁸ However, Article 88(3) of the Act on the Residence of Foreigners states that lodging an application for granting asylum or the request of the third-country national for assisted voluntary return shall not be the reason for releasing the detained third-country national. If the police authority reaches the conclusion that the foreigners' request for international protection was submitted solely with the intention of delaying or even thwarting the execution of the decision on the expulsion of the foreigner, it may decide again, in accordance with Article 90(1) d) of the Act on the Residence of Foreigners, that the reasons for the previous detention persist despite the fact that the foreigner has applied for international protection.⁵⁹

3.2.1. *Asylum procedure in the Slovak Republic*

Proceedings under Act No. 480/2002 Coll. on Asylum are not affected by the detention of a third-country national. In accordance with Part II of the Act on Asylum, the asylum-granting procedure shall commence with the foreigners' statement at the competent police department⁶⁰ that he/she applies for granting asylum or provision of subsidiary protection on the territory of the SR. A preliminary issue that needs to be resolved in the asylum procedure at the very beginning is the determination of the country which, according to the rules in the Dublin Regulation, is responsible for assessing the asylum application. Once the statement under Article 3(1) is made or once the foreigner enters the territory of the SR in

54 Judgment of the Supreme Court of the SR, 27 August 2014, Case 10 Sža 29/2014.

55 Judgment of the Supreme Court of the SR, 2 September 2014, Case 1 Sža 30/2014.

56 Judgment of the Supreme Court of the SR, 3 May 2013, Case 1 Sža 5/2013.

57 Judgment of the Supreme Court of the SR, 13 August 2014, Case 1 Sža 24/2014.

58 Judgment of the Supreme Court of the SR, 13 August 2014, Case 1 Sža 24/2014.

59 Judgment of the Supreme Court of the SR, 15 July 2015, Case 10 Sža 6/2015.

60 See Art. 3(2) of the Act on Asylum, which sets the competent authorities to receive the statement that he/she is applying for the granting of asylum or subsidiary protection.

accordance with Article 4(6) (lodging the application), the police department shall take away the travel document of the applicant or another identification document and shall issue a receipt on confirmation to the applicant. In accordance with Article 3(6) of the Act on Asylum, the applicant is obliged to appear at the reception camp within 24 hours of lodging the application. Initial actions include medical examination and temporary accommodation (usually up to 30 days). During quarantine, the applicant may not leave the camp. In the reception camp, the applicant is registered, photographed, and issued an asylum-seeker card, which is used for identification during his stay in the SR. After lodging the application, an authorised employee of the Ministry shall conduct an entrance interview with the applicant.⁶¹ During the entrance interview, the applicant shall be obliged to provide truthfully and fully all the requested information necessary for a decision on the application to grant asylum. Asylum applications are assessed by the decision-makers in the Migration Office. During the applicant's stay in the camp, accommodation, food, emergency medical care, social and psychological counselling, pocket money, materials, and hygiene equipment are provided free of charge. Social activities are also available in the camps. The camp can only be left on the basis of a pass and only after the positive result of the health check-up has been announced. Currently, there is only one reception camp in the SR, in Humenné. The applicants are then transferred to a residential camp (Opatovská Nová Ves or Rohovce). Third-country nationals applying for asylum in the Department of Police Detention of Foreigners are not automatically placed in the reception camp. During the asylum granting procedure, applicants legally stay in the territory of the SR. Their movement within the SR is limited by their obligation to report to the residential camp or the Department of Foreigner's Police. Applicants interested in leaving the camp must apply for a short-term pass. It is issued by the camp's administrative staff for a maximum of one week. If the applicant is interested in living outside the camp, he/she must apply for a long-term pass to a decision-maker at the Migration Office.⁶² In accordance with Article 20 of the Act on Asylum, the Ministry shall decide within six months of commencing the procedure. This time limit may be repeatedly extended by a maximum of nine months if the decision on an asylum application requires the assessment of complex factual or legal issues, or if a large number of applicants have simultaneously submitted an asylum application and it is very difficult to decide within six months from the start of the proceedings, or if it is not possible to decide within six months from the start of the proceedings because of the applicant's lack of cooperation or other obstacles to assessing the asylum application. If necessary, for a proper assessment of the asylum application, the deadline may be further extended by a maximum of three months. The Ministry will inform the applicant in writing about the extension of the deadline

61 An employee of the Migration Office.

62 Bachtíková et al., 2012, pp. 38–40.

for a decision regarding asylum application. Asylum is granted to an applicant who has a well-founded fear of being persecuted in his/her country of origin for reasons of race, ethnic origin, or religion, holding a particular political opinion or membership in a particular social group, and is unable or, owing to such fear, is unwilling to return to such a country, or is persecuted in his/her country of origin for exercise of political rights and freedoms. The Act on Asylum also regulates the granting of asylum on humanitarian grounds and for the purpose of family reunification. The Ministry shall grant subsidiary protection to an applicant to whom it did not grant asylum, provided there are good reasons to consider that the applicant would face a real risk of serious harm if returned to his/her country of origin.

■ 3.3. *Role of the courts of the Slovak Republic in migration cases*

On 1 June 2023 the judiciary was reformed in the SR. The decisions of the administrative authority on asylum, detention, and administrative expulsion can now be reviewed by two administrative courts in Bratislava and Košice.⁶³ In case of an appeal, the Supreme Administrative Court of the SR will review the administrative decision and the decision of the administrative court through a cassation complaint. Before the reform, decisions were reviewed by the Regional Courts in Bratislava and Košice, and in the case of an appeal, until 2021, the Supreme Court of the SR had jurisdiction.

Since the analysed agenda falls under the administrative judiciary, the procedure is regulated by the Administrative Court Procedure (Act No. 162/2015 Coll.) (hereinafter 'ACP'), which came into force on 1 July 2016. The ACP regulates administrative actions separately in the case of asylum, detention, and administrative expulsion in Articles 206–241 of the ACP. In an administrative action, the grounds of the action must be defined, from which it must be clear for what specific factual and legal reasons the plaintiff considers the contested statements of the decision or measures to be illegal. The plaintiff is obliged to be represented by a lawyer or non-governmental organisation that provides legal assistance to foreigners. In principle, the ACP does not grant a suspensive effect to an administrative action unless it further stipulates otherwise, or otherwise, stipulated by a special legal regulation.⁶⁴ Administrative actions on asylum have in accordance with Article 213 of the ACP suspensive effect, which means that the effects of the contested decision or measure of the public administrative body, and such a decision or measure, cannot be the basis for issuing subsequent decisions or measures.⁶⁵ The ACP introduced deadlines within which the court must decide

63 For more details, see Art. 17 of the Act No. 162/2015 Coll. Administrative Court Procedure and Act No. 151/2022 Coll. on the Establishment of Administrative Courts and on Amendments to Certain Acts.

64 Art. 184 of the ACP.

65 Berthotyová, 2017, p. 101.

on an administrative action. The length depends on the subject of the proceedings or the special circumstances that the court must consider when making a decision. This varies from seven to 90 days. With regard to the requirement for a speedy court decision, the Constitutional Court of the SR concluded that when the Supreme Court (currently the Supreme Administrative Court of the SR) decides on an appeal against the judgment of a regional court, and the applicable procedural rules allow for a meritorious (final) decision, it is its duty to prefer this method of decision before annulling the first-instance decision and returning the case for further proceedings.⁶⁶

4. Conclusion

Protecting state borders and preventing illegal migration remain pressing issues for many states, including the SR. The applicable legal framework is, to a great extent, influenced by EU norms and Schengen aquis. Regarding border protection, the main domestic act of the SR is the Act on the Residence of Foreigners, which regulates, among others, border control, entry and exit through external borders, refusal of entry, a variety of permitted stays for foreigners, and reasons for the detention of foreigners and asylum seekers. The main authority on border protection is the Bureau of Border and Foreign Police of the Presidium of the Police Force and its organisational units. Police officers are authorised to detain a person, request proof of identity, check travel documents and other accompanying documents of persons crossing the external border, and check facts related to crossing the external border. It is important to note that the Bureau has some authority in the asylum procedure, especially in carrying out initial actions related to the acceptance of a foreigner's declaration requesting asylum or subsidiary protection, as well as tasks related to ensuring the transfer of foreigners to the state that has taken responsibility for examining the asylum application. Regarding illegal migration, the SR currently faces a migration flow that requires taking measures at internal borders. The main legal act in this area is the Act on the Residence of Foreigners; however, if an illegal migrant applies for asylum, the Act on Asylum is applied. Furthermore, for the duration of the asylum procedure, the asylum seeker is considered a foreigner who legally stays in the territory of the SR. The Act on the Residence of Foreigners regulates the conditions under which foreigners or asylum seekers may be detained (mainly associated with administrative expulsion), as well as the length of detention (no more than 18 months) and alternatives to detention (reporting the place of residence or paying warranty deposit). Illegal migration issues primarily fall under the auspices of the Ministry of the Interior, which implements its agenda in the field of migration and asylum mainly through

⁶⁶ Finding of the Constitutional Court of the SR, Case II. ÚS 147/2013.

two bodies: the Migration Office and the Bureau of Border and Foreign Police of the Presidium of the Police Force. The Migration Office acts in the area of asylum, integration of refugees and foreigners who were provided subsidiary protection, and in the field of documentation and foreign cooperation. Finally, this study focuses on administrative actions that may be submitted to newly established administrative courts, as well as the specifics of the administrative actions within the asylum, detention, and administrative expulsion agenda.

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