

THE ROMANIAN LEGISLATIVE FRAMEWORK ON IMMIGRATION¹

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Abstract

This paper critically discusses the legal framework pertaining to the status of foreigners and migration and highlights several of the challenges related to adapting the existing legislation to the requirements imposed by the adhesion to the European Union and the need to incorporate the *acquis* into the national legislation.

Statistics seem to demonstrate that emigration rather than immigration is (still) characteristic for nowadays Romania. This situation is likely to change in the near future. However, one cannot put too much emphasis on the importance of the accession of Romania to EU with regard to the external border of the Community. The defence of borders and the predominance of “security” over the protection of human rights, particularly those affecting nationals of third countries², were inspiring not only the policies of the European Commission³ or regulations of the European Council⁴, but also the Romanian legislation. The following presentation attempts to demonstrate the high degree of harmonisation of the Romanian legislative framework with EU relevant *acquis*.

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I. Introductory remarks

To start with, differences are challenging; from this perspective, aliens represent a challenge for both inhabitants of any country and its authorities. For a country, which 15 years ago came out of a repressive political regime with little if any contact with the exterior world, Romania now has a relatively highly elaborated legislation on foreigners and migration.

In a nutshell, the recent history of the relevant legislation starts with Law n°25/1969, which was repealed only in 2001 through Law n°123/2001, a normative act not fully compliant with important parts of the EU *acquis*. As a result, only one year after, a new legal framework was in place; Emergency Ordinance of the Government n°194/2002⁵ concerning the legal regime of foreigners in Romania is a remake of the initial law, better formulated and with substantial improvements. This did not prevent it from being constantly revised and adapted to the moving target of the EU *acquis*. Indeed, the serious legislative instability noticed in Romania lately can be justified, to some extent, by the accession process to EU, as well as by the economic transition. But to the date, this legal act remains the general framework relevant for the phenomenon of migration in Romania.

Special regulations, which derogate from this general framework, refer to EU citizens on one hand and asylum seekers and refugees on the other. Both these categories of regulations were either adopted for the first time (those pertaining to EU citizens) or entirely revised (those referring to asylum seekers and refugees) only very recently; it is, probably, too early to assess their effective implementation or practical consequences. A special mention has to be made with regard to the legal regime of refugees and asylum seekers, where a comprehensive work of codification and harmonisation with the ever evolving EU *acquis* has been achieved; therefore, practise with regard to these two categories of persons has been only marginally changed compared to the one before 2006.

However, one cannot put too much emphasis on the importance of the accession of Romania to EU with regard to the external border of the Community. The defence of borders and the predominance of “security” over the protection of human rights, particularly those affecting nationals of third countries⁶, were inspiring not only the

² Grainné de Burca, “Further development of citizenship in the European union”; in Reports for the 1st European Jurists Forum, Nuremberg, 2001, Helbing & Lichtenhahn, Basel, 2001, p.41 *et seq.*

³ Communication of the European Commission on a European immigration policy - COM (2000)757 and Communication of the European Commission on a common asylum procedure and status – COM (2000) 755.

⁴ E.g. Council Regulation 2725/2000 on EURODAC system or Council Regulation 539/2001 listing third countries whose nationals must be in the possession of a visa when crossing EU's external border.

⁵ Published in the Off.J. n°955/27.12.2002.

⁶ Grainné de Burca, “Further development of citizenship in the European union”; in Reports for the 1st European Jurists Forum, Nuremberg, 2001, Helbing & Lichtenhahn, Basel, 2001, p.41 *et seq.*

policies of the European Commission⁷ or regulations of the European Council⁸, but also the Romanian legislation. The following presentation attempts to demonstrate the high degree of harmonisation of the Romanian legislative framework with EU relevant *acquis*.

Nevertheless, as statistics seem to demonstrate, emigration rather than immigration is (still) characteristic for nowadays Romania. This situation is likely to change in the near future.

II. Statistics

According to EUROSTAT there are various concepts, definitions and data sources with regard to non-national population. For Romania, the concept of *aliens* includes those not having the Romanian citizenship while having a temporary residence on Romanian territory, which includes asylum seekers and alike, as well as stateless persons.

According to the data displayed by the Romanian National Institute of Statistics the net diminishing of the Romanian population has one root in the phenomenon of migration. (see Table 1) In that sense, it is remarkable that only in 2001 net migration shows a positive figure, most probably due to the fact that precisely that year Romania entered the Schengen Area and the efforts of repatriation and readmission of their own citizens by Romanian authorities have been serious and quite effective.

Official recent statistics (i.e. after 2004) are not available yet, but figures in Table 1 can be safely interpreted in the sense that after 2001 the trend seems to be again favourable to emigration rather than immigration. With regard only to immigrants, it is striking to see at what point figures decrease after 2001 (the immigration in 2002 represents roughly half of the immigration in 2001) and the tendency seems to be confirmed during the following two years. At the same time the administrative capacity of Romanian authorities to manage and accommodate migration flows has improved significantly over the few last years⁹ as to be able to cope with figures of such scale. Nevertheless, unofficial statistics for 2005 and 2006, belonging to the Ministry of Employment, Social Solidarity and Family, seem to detect a reverse of tendency, namely an increased interest in the Romanian offer of jobs for aliens living in the close neighbourhood of the new EU Eastern border. (see Table 3)

At practical level, border control - more specifically the East border of Romania - is one area where the monitoring of the European Commission has not stopped even after

⁷ Communication of the European Commission on a European immigration policy - COM (2000)757 and Communication of the European Commission on a common asylum procedure and status - COM (2000) 755.

⁸ E.g. Council Regulation 2725/2000 on EURODAC system or Council Regulation 539/2001 listing third countries whose nationals must be in the possession of a visa when crossing EU's external border.

⁹ According to Monitoring reports of the European Commission on Candidate Countries, particularly the ones referring to Romania, available at http://ec.europa.eu/enlargement/archives/romania/key_documents_en.htm

the accession date (1st of January 2007), as full implementation of Visa Information System (VIS) has not been achieved by Romanian authorities upon accession and installation of sophisticated equipment to detect forged and falsified documents in diplomatic and consular bags, particularly with regard to high-risk countries, has not been accomplished yet.

Table 1. Net international migration

Years	Immigrants	Emigrants	Net international migration
1999	10078	12594	- 2516
2000	11024	14753	- 3729
2001	10350	9921	428
2002	6582	8154	- 1572
2003	3267	10673	- 7406
2004	2987	13082	- 10095

As to the country of origin, another feature of Romania's immigration can be easily detected: the major source of immigrants is the Republic of Moldova, neighbouring country where Romanian language is largely spoken. (Table 2)

Table 2. Immigrants by country of origin

<i>Country of origin</i>	<i>1999</i>	<i>2000</i>	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>	<i>TOTAL</i>
Austria	147	84	68	81	69	90	539
Canada	89	60	93	131	181	175	729
France	178	110	101	80	83	101	653
Germany	330	227	207	224	231	296	1515
Israel	117	57	101	108	148	185	716
Italy	73	70	81	91	112	163	590
Moldova	7789	9146	8682	5214	1881	1254	33966
USA	248	161	191	227	235	259	1321
Ukraine	446	649	396	66	39	19	1615
Hungary	272	173	111	62	56	68	742
Other countries	389	287	319	298	232	377	1911
TOTAL	10078	11024	10350	6582	3267	2987	

Interestingly enough, the myth with a certain circulation in Romania, namely that Italians represent the second largest community of aliens, is sharply contradicted by official figures. Also, despite another strong belief, the number of immigrants from Ukraine, also neighbouring country with a relatively strong Romanian minority, is not comparable with figures shown for Moldova. To be noted, the third in ranking comes Germany and not China, against another popular myth.

However, as usually, all these myths hold some truth. If that is the official situation with regard to the general immigration until 2004, according to a Study conducted under the auspices of the Ministry of Employment, Social Solidarity and Family during

2005 and 2006¹⁰ working migrants in Romania came from the following countries:

Table 3. Working immigrants by country of origin (unofficial statistics)

<i>Country</i>	<i>2005</i>	<i>2006</i>
Turkey	1.481	1.721
China	529	1.129
France	155	310
Germany	55	200
Italy	69	126
Greece	102	121
Lebanon	111	111
Rusia	53	73
Serbia	20	63
India	45	60

It is striking that countries of origin for the biggest numbers of working immigrants in Romania coincide with those which represent the origin of quite important numbers of working immigrants in EU member states, namely Turkey and China.

It is also significant that until the day of Romania's accession to EU Moldova remained the only country on the EU negative list for which Romania had not introduced a visa regime.¹¹ Moreover, an illegal interpretation of the Romanian law on citizenship, which prevailed for a certain time with relevant Romanian authorities, made possible for Moldovan citizens to acquire Romanian nationality in an accelerated procedure. This situation provoked justified worries in member states and EU institutions. The Romanian answer, namely the introduction of a visa regime with regard to Moldova, came with some delay also due to the fact that diplomatic relations with Moldova were marginally "stressed" by the visa issue.

On a short term, immigration has a clear tendency to rejuvenate the population (Table 4). This trend has also been noticed at EU level, where in 2006 statistics for the 25 showed a clear discrepancy between national with ages between 24 and 35 and immigrants with the same age.¹² At EU level the difference amounts roughly to 5-6 % of the total population, which is considerable. In Romania, given the small percentage of immigrants when compared to the total number of the population (approx. 0,3%) the rejuvenating effect, although obvious at the level of figures, is not quite noticeable in practise. If net migration is taken into account it is rather the opposite effect that shows. However, the largest group of population that comes to Romania, analysed by age group, is in the full working age (26 – 50 years old).

¹⁰ http://www.mai.gov.ro/Documente/Prima%20Pagina/STUDIU_migratie_2006_ultima_forma.pdf

¹¹ Furthermore, prior to the accession date, additional effort was needed on the Romanian side to ensure abolition of some 12 visa regimes for countries which were on the EU's positive list. This only happened during 2006. (Cf. Monitoring Report of the European Commission on Acceding Countries in 2006, available at http://ec.europa.eu/enlargement/archives/romania/key_documents_en.htm)

¹² EUROSTAT – Statistics in focus, "Population and social conditions", n°8/2006.

Table 4. Immigrants by age group

<i>Age</i>	<i>1999</i>	<i>2000</i>	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>
Under 18	1159	1743	1822	898	437	404
18 – 25	2110	1893	1772	1278	547	414
26 – 40	3377	3588	3427	2405	1140	1028
41 – 50	1834	2017	1802	1164	550	489
51 – 60	809	908	833	526	315	348
Over 60	789	875	694	311	278	304
TOTAL	10078	11024	10350	6582	3267	2987

Against this background, migration in Romania is rather a delicate issue from, at least, two perspectives: on one hand, the relatively strong emigration of Romanian nationals obliges authorities to cope with particularities of the newly discovered freedom of circulation inside EU and a dramatic decrease not only of the population, but also of available and qualified labour, on the other hand, immigration has the peculiarity of becoming almost a necessity for Romania, while posing a number of important questions with regard to the much needed protection of the area of security, liberty and justice in EU. While the administrative capacity of Romania in issues related to migration is constantly improving, the legislative framework now in place seems to be fully harmonised with relevant EU legislation and, albeit its complexity and baroque structure, proves to be quite effective.

III. Legislative framework

Immigrants come to Romania for various purposes: in the search of better life or in order to save their life or simply in order to change residence. Romanian legislation classifies them into three distinct categories, each with a specific legal regime: asylum seekers and refugees, citizens of EU member states and European Economic Area and common aliens, that is nationals of third countries if the European Union is taken as referential.

A. Legal regime of aliens

The general legislative framework of aliens in Romania - conditions for their entry, staying and residence on Romanian soil, as well as other rights of aliens in Romania - is provided by Emergency Ordinance of Government n°194/2002 with all changes, revisions and completions that is undertook over time. As already mentioned, legal instability is quite common in Romania and the legal regime of aliens is no exception to that rule:

- Law n°357/2003¹³ approved the Emergency Ordinance n°194/2002 and revised several of its articles, while introducing new regulations (mainly concerning

¹³ Published in the Off.J. n°537/25.07.2003.

harmonisation with EU *acquis* in the area of free circulation of labour force) and abrogating some other provisions (such as those referring to collective visas as a special type of visa, or the need to prove the quality of businessman for a person which is invited to Romania for business purposes, or the limitation to employ foreigners when autochthon labour force is available or the need for a foreigner who wants to prolong its stay in Romania to make the proof he/she has paid all duties, including those towards the State budget). On the other hand, the UNHCR Office in Bucharest welcomed the fact that this Law introduced judicial control on custody of aliens and included several provisions related to stateless persons. Furthermore, aliens taken into administrative custody and who apply for asylum would be immediately released (except persons declared undesirable or sentenced to expulsion for a crime committed in Romania).

- Law n°482/2004¹⁴ for the revision and completion of the Emergency Ordinance of the Government n°194/2002 introduced the concepts of “resident” and “permanent resident” (referring to foreigners having a temporary or permanent residence permit) and slightly adjusted the legal regime of visas and conditions for residence on Romanian soil while creating a special regime of visas for family members of Romanian citizens and providing a framework for the return to the country of origin of nationals of third countries, particularly in cooperation with other EU member states. Other amendments concerned the possibility to appeal in front of courts return measures and orders to leave Romania, with suspensive effect.
- Emergency Ordinance of the Government n°113/2005¹⁵ for the change and completion of the Emergency Ordinance n°194/2002 introduced a specific provision regarding immigration policy and its necessary coordination with the one of EU. At the same time, amendments were brought to the legal regime of residents and return measures developed in cooperation with other member states of the European Union.
- Law n°306/2005¹⁶ for the approval of Emergency Ordinance n°113/2005 with some changes and completions revised again the legal regime of visas and residence on Romanian soil.
- Finally, Law n°56/2007¹⁷ for the revision and completion of Emergency Ordinance of Government n°194/2002 created the National Centre for visas, revised the legal regime of the procedure of granting visas on basis of invitation and entirely changed the legal regime of family reunification, visas for studies, permanent stay and removal from Romanian soil. Mention has to be made that these last four issues came as part of a larger package of legislative and administrative measures meant to prevent an massive influx of third country nationals, particularly of citizens of the Republic of Moldova, into EU space.

¹⁴ Published in the Off.J.n°1116/27.11.2004.

¹⁵ Published in the Off.J.n°658/25.07.2005.

¹⁶ Published in the Off.J.n°962/31.10.2005.

¹⁷ Published in the Off.J.n°201/26.03.2007.

A part this general law, number of other pieces of legislation provide for specific legal regimes of certain categories of aliens (non-accompanied children or abused women) and for human rights and other forms of protection granted to aliens on Romanian soil.

In a nutshell, the relevant legislative framework in force nowadays refers to both aliens and stateless persons and provides them with the following rights (article 3 of Emergency Ordinance 194/2002):

- aliens who have entered and/or reside legally in Romania enjoy the general protection of their persons and wealth (article 18 of the Constitution¹⁸),
- they enjoy freedom of circulation and may freely establish their residence on Romanian soil,
- only aliens with legal residence and domicile in Romania can benefit of social security in the same conditions as Romanian citizens,
- minor aliens attending the Romanian educational system have access without any restriction to all forms of education and vocational training,
- aliens who possess a document issued by the Authority for Aliens have the right to check the accuracy of the personal data registered and require corrections where needed.

Aliens and stateless persons who have entered Romania legally have the following obligations (article 4 of Emergency Ordinance 194/2002):

- to respect Romanian legislation,
- to observe the interdiction to organise political parties or similar organisations on the Romanian soil and to participate in or organise meetings or other manifestations which infringe upon public order or national security; they also cannot finance such organisations or manifestations,
- to respect the purpose for which the right to entry on Romanian soil or to remain on it was granted to them and to leave the Romanian territory as soon as this permission expires
- to obey legal regime of the Romanian border and accept control from competent authorities.

1) Conditions for entry on Romanian territory

Entry on the Romanian territory may be permitted to aliens complying with the following conditions:

- they hold a valid border crossing document accepted by the Romanian State;
- they hold a Romanian visa or, if the case may be, a valid stay permit;
- they present documents that justify the purpose and conditions of their stay and which prove the existence of appropriate means both for their support during

¹⁸ Article 18 provides: «Aliens and stateless persons who are resident in Romania shall enjoy general protection of person and wealth as guaranteed by the Constitution and other laws. The right to asylum shall be granted and withdrawn under the terms of the law, in accord with international treaties and conventions to which Romania is a party.»

the interval of their stay, and for the return to the state of origin or for the transit to another state where there is the certainty that they shall be allowed to enter. In the case of aliens who transit the Romanian territory, it is certain that their entry on the destination state is allowed or that they will leave the Romanian territory;

- they were not forbidden from entering Romanian territory;
- they do not pose threats to the national defence and security, public order or health.

Aliens may be faced with a decision of rejection to entry the Romanian territory, already at the border, if found in one of the following situations:

- they do not meet any of the previous conditions,
- they are signalled by international organisations to which Romania is a party, as well as by institutions specialised in combating terrorism, to finance, organise or support in any possible way or commit terrorism acts;
- there are indications that they are part of organised criminal groups with transnational character or which support, through any means, the activity of these groups;
- there are serious reasons to consider that they have committed criminal offences or took part in committing criminal offences against peace and humanity, war crimes or crimes against humanity, provided in the international conventions to which Romania is party;
- they committed criminal offences during other stays in Romania or abroad against the Romanian State or a Romanian citizen;
- they introduced or tried to illegally introduce other aliens on the Romanian territory;
- they previously unjustifiably breached the purpose declared upon obtaining the visa.

Romanian authorities accept as border crossing the following types of documents:

- passports, travel titles, sailor books or other similar documents;
- travel documents of refugees issued under the Geneva Convention of 1951 regarding the status of refugees and travel documents issued to aliens who were granted conditioned humanitarian protection;
- travel documents of stateless persons issued by the states where they have their domicile.

A part these, based on reciprocity or unilaterally decided by Romanian authorities, identity cards and similar documents may be accepted for a list of states established by decision of the Government (EU and EEA citizens).

2) *Visa regime*

The visa regime is entirely harmonised with the relevant EU legislation. General conditions for granting Romanian visas are:

- compliance with all conditions for entry on Romanian territory, together with proofs;
- no reason for entry ban on Romanian territory;
- no sentence abroad for offences incompatible with the purpose for which the visa is requested;
- validity of the travel document that exceeds by 6 months the validity of the visa, with an exception for emergency or humanitarian cases.

The latest revision of the Romanian legal framework left untouched the legal regime of airport transit visas, transit visas and diplomatic visas, while it massively changed the short stay visas based on invitation and long term visas for professional activities, studies and family reunification. Harmonisation with EU legislation concerning convenience marriages has also been ensured. In short, all these revisions were made as to directly translate into the Romanian law the specific provisions of the relevant EU *acquis*.

Another novelty introduced at the latest revision of the legal framework is the National Centre for Visas. Short term and long term visas can only be issued by diplomatic and consular mission of Romania with *ex ante* approval of this new institution and the opinion of the Authority for Aliens in those cases where a special protocol between the two authorities makes it compulsory.

Rejection of a request for short term visa cannot be appealed, neither administratively nor in court, as it represents an expression of the sovereignty of the state.

3) *Conditions for staying on Romanian territory*

Aliens with temporary stay permits may remain on Romanian territory only until the expiry of their visa and, in any case, up to 90 days in an interval of 6 months calculated from the date of their first entry. Any alien with a continuous stay of longer than 10 days is bound to declare himself/herself to the competent police authority.

An interdiction to leave Romania may be issued for aliens who are charged, accused or sentenced in criminal cases. This administrative measure is revoked *de iure* if the concerned alien may prove that he/she is no longer subject of any such criminal proceedings.

As for permanent residence on Romanian territory a mere translation of the relevant EU provisions ensures full compatibility of Romanian legislation with the *acquis*. The same applies for the return and removal of aliens from the Romanian territory, as well as expulsion.

A special mention has to be made with regard to the clause of “equal treatment” (article 74 of the EO 194/2002 as revised in 2007) which reads: “Aliens holding a right to permanent stay are treated on an equal footing with Romanian citizens with

regard to:

- access to labour market, including work and employment conditions, independent economic activities as long as the activity does not involve, even occasionally, the exercise of public authority;
- access to all forms and levels of education and vocational training, including scholarships;
- equivalence of studies and recognition of diplomas, certificates and professional qualifications;
- social security, social protection and assistance;
- assistance within the system of public health;
- deductions from the tax on the global income;
- access to goods and public services, including access to lodging;
- freedom of association at trade unions and professional organisations.”

4) *Protection of aliens on Romanian territory*

The last revision of the Emergency Ordinance n°194/2002 compiled the protection regime in one normative act and abrogated the myriad of provisions in various other legal documents. A part the general protection already mentioned a few special provisions have survived in special laws. Among them, Law n°272/2004 on the protection and promotion of child's rights¹⁹ (which came into force only on the 1st of January 2005) is applicable to stateless and non-national children, including those seeking and/or benefiting from a form of protection according to the refugees law. In all cases, the leading principle is the best interest of the child on a equal footing with national Romanians. Protective measures for separated children from their families lies with the General Directorate for Social Assistance and Child Protection, under the same regime as for Romanian children.

Law n°203/1999 on work permits, with further amendments and additions²⁰, has been successively adapted in order to make it compliant with the continuously evolving legislation pertaining to foreigners in Romania and with provisions included in bilateral agreements concluded in the area of labour force exchanges. Currently, main characteristics of this legislative framework include (i) corroboration between the legal regime of foreigners in Romania and legal norms regulation work permits; (ii) general obligation for all foreigners who have legal residence in Romania to register at the Office for Labour Force Migration and (iii) multiplication of types of work permits as to better adapt them to the reality. According to the types of activities developed by foreigners in Romania there are work permits for permanent workers, for cross-border workers, for posted workers, for seasonal workers, for trainees and sportsmen, and individual work permits (for seasonal activities).

¹⁹ Published in the Off.J. n° 557/23.06.2004.

²⁰ Government Emergency Ordinance n°130/2005, published in the Off.J. n°892/5.10.2005.

5) Implementation of the legislation

Despite numerous adjustments in order to tune it better with the *acquis communautaire* and to allow for a more efficient implementation, the legislative framework pertaining to aliens was not spared challenges, practise being the main check for any normative act. As it happens, some of the provisions of this legal framework were challenged in front of the Constitutional Court. As such, this is a proof that free access to justice is indeed (not only formally) recognised and effectively enforced in Romania to the benefit of all natural and legal persons, as required by article 21 of the Constitution, despite claims suggesting that foreigners are discriminated in this area against Romanian citizens²¹. But, if this is not the case with regard to the free access to justice, it may well be with regard to a different aspect, that the Constitutional Court did not seem eager to recognise.

Number of decisions²² of the Court dealt with article 93 of the Emergency Ordinance n°194/2002 which provides for public custody of foreigners in case they have been declared undesirable or they cannot be expelled or returned in their country of origin immediately. Article 93 defines public custody as “a measure to restrict free circulation imposed by a magistrate”. Foreigners have constantly complained that this represents illegal detention; a magistrate decides public custody, but not as a consequence of a criminal act, therefore it cannot be considered a mere equivalent of a lawful preventive detention.

The Constitutional Court has constantly rejected such allegations on the ground that public custody is not a preventive measure taken in the course of a criminal case and it is not organised in police sections or detention places, but in specially designed centres, where the regime is not one of detention. Furthermore, the Emergency Ordinance provides for an administrative measure, but which is taken by a magistrate, which makes it compliant with the constitutional requirement of article 53 making possible the restriction of the exercise of some fundamental rights for the protection of some others. Even though claimants have argued that although, in accordance with the Romanian Constitution, the legislator is free to organise the legal regime of foreigners found to be illegally residing on Romanian soil, it has to do so “in such a

²¹ See the decision of the Constitutional Court n°171/22.03.2005, published in the Off.J.n°388/9.05.2005, in which the claimant argued that the Emergency Ordinance n° 194/2002 does not provide for two degrees of jurisdiction in front of courts if a foreigner, would have to appeal against an administrative decision. The Court answered that the rule of two degrees of jurisdiction is made compulsory by article 5 of the European Convention on Human Rights only in criminal cases; for the rest each legislator is free to regulate court procedures as deemed appropriate. The existence or not of two degrees of jurisdiction does not have consequences on the free access to justice, which is a different matter; this is even more obvious since in the precise situation where a denial of this fundamental right was claimed, the case brought in front of courts did make it up to the Constitutional Court.

²² E.g. decisions of the Constitutional Court n°182/22.04.2004, published in the Off.J.n°454/20.05.2004 or n°419/14.10.2004, published in the Off.J.n°1071/18.11.2004 or n°276/26.05.2005, published in the Off.J.n°546/28.06.2005.

way that it would ensure enough guarantees against arbitrary deprivation of liberty of any person” the Constitutional Court has constantly answered that the principles of clarity and precision of the law, as defined in the jurisprudence of the European Court of Human Rights, have been fully respected in this case. Thus, according to the ECHR jurisprudence, the principle of legality means not only the existence of a law, but also the fulfilment of some qualitative requirements. The quality of the law refers to its accessibility and precision, so that any risk of arbitrary can be avoided. At the same time, the law has to respect the principle of proportionality between the measure depriving one person of his/her liberty and the purpose to be attained. Or the Court has noticed that public custody is a measure taken against a special category of foreigners for a period of 30 days, with the possibility to prolong it up to a maximum duration 6 months, while for each prolongation a magistrate hears the person. The law does provide explicitly the conditions in which such a measure can be taken, the persons concerned, the court under the jurisdiction of which such cases fall, and the maximum period of time for which such a measure can affect a given person. Therefore, the law does respect all criteria established by the ECHR jurisprudence and it cannot be contrary neither to article 5 of the European Convention, nor to the Romanian Constitution.

However, at the thorough revision of the legal regime of aliens done in 2006 article 93 has been changed as to better tune it with constitutional guarantees for individual freedom²³, *i.e.* public custody is to be prolonged only for periods of maximum 30 days by the Court of Appeal through an irrevocable decision.

B) EU and EEA nationals

Albeit recent and with a limited scope of application, the legislative framework concerning EU and EEA nationals was no exception to the legal instability in Romania. Meant as an exception from the general legal regime of aliens in Romania, Law n°309/2004²⁴ concerning the free circulation on the Romanian territory of citizens of member States of the European Union and of the European Economic Area was supposed to be enforced starting with the effective date of accession, 1st of January 2007. In its final provisions, this law specifically enumerated all items of EU *acquis* with which Romanian legislation was thus harmonised – in fact the entire *acquis* adopted before December 2000 (cut-off date for the obligation of legal harmonisation within the accession process as negotiated in the Association Agreement) and the Directive on family reunification.

Despite the clearly expressed intention of Parliament, in 2005 Government decided otherwise and adopted Emergency Ordinance n°102/2005²⁵ concerning the free

²³ Article 23 of the Romanian Constitution on *Individual freedom* expressly mention in para.5 « During criminal proceedings preventive custody may only be ordered for 30 days at the most and extended for 30 days at the most each time, without the overall length exceeding a reasonable term and anyway no longer than 180 days. »

²⁴ Published in the Off.J.n°593/1.07.2004.

²⁵ Published in the Off.J. n°646/21.07.2005.

circulation on the Romanian territory of citizens of member States of the European Union and of the European Economic Area which entirely abrogated the previous law, but which also came into force only on the 1st of January 2007. This new normative act further harmonises national legislation with EU *acquis*, including the Directive 38/2004/CE on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States.

As already mentioned, it is too early to assess the actual enforcement of this normative act, but a brief presentation of its content will suffice to prove its compatibility with relevant EU *acquis*.

The new legal framework is applicable for the following categories of persons:

- a) EU and EEA citizens - persons who hold the citizenship of a European Union member state or the citizenship of Norway, Island and Liechtenstein;
- b) Family members of EU and EEA citizens - (i) spouse, (ii) direct descendents of the EU citizen or of the spouse, irrespective of their nationality, who are under the age of 21 or those who are in their care and (iii) direct ascendants of the EU citizen or of the spouse, irrespective of their nationality, who are in their care.
- c) Partner - person who lives together with the European Union citizen if the partnership is registered in accordance with the conditions laid down in the relevant legislation of the origin or provenience member state or, in case the partnership is not registered, the durable relationship can be duly attested.
- d) Dependents - any other family member, irrespective of his/her nationality, who is not covered by the definition of family member and who, in the origin or provenience country is in the EU citizen care, or is a member of the household of EU citizen, or, due to serious health grounds, requires personal care of the EU citizen.

1) Conditions for entry on Romanian territory

EU citizens can enter the Romanian territory without entry stamp from the Border Police upon presentation of (i) national identity document or (ii) passport or other valid document issued by the Romanian authorities for the European Union citizens. Family members of an EU citizen who are not European Union citizens are allowed to enter on Romanian territory upon presentation of a valid passport and an entry visa (granted on the basis of the accelerated procedure), except where the visa obligation has been repelled by Romanian authorities. However, if the family member is holder of a document attesting his/hers residence on the territory of another member state as family of a European Union citizen, he/she is exempt the requirement of obtaining entry visa.

2) Conditions for staying on Romanian territory

EU citizens who enter Romanian territory benefit of the *right of staying* for a period up to 3 months calculated from the date of entry. Family members of EU citizens, regardless their citizenship, who accompany or join them subsequently, enjoy the same right.

For a stay *longer than 3 months*, EU citizens have to register at the territorial branches of Authority for Aliens in one of the following situations:

- they carry out dependent or independent activities, according to the law;
- they have legal and regular means of support for themselves and for their family members, at least the guaranteed minimum income level in Romania and they have health insurance recognised by the national system of health and social insurances;
- they are registered at a private or public institution in Romania, accredited according to the law, having as main purpose educational or vocational training activities, they have health insurance recognised by the national system of health and social insurances and they declare under their own liability or confirm by other means of proof that they have means of support for themselves and for their family members at least at the guaranteed minimum income level in Romania;
- they are family members of a European Union citizen which fulfils one of the above-mentioned conditions.

Family members of an EU citizen who are not themselves EU citizens enjoy the same rights if they accompany or join subsequently the EU citizen who fulfils anyone of the above-mentioned conditions.

The right to a residence longer then 3 months on Romanian territory can be prolonged upon request. However, the Authority for Aliens can check the fulfilment of all legal requirements and, in case of non-compliance, may issue an *order to leave* the Romanian territory. This order does not include the interdiction of entry on Romanian territory at a later stage.

EU citizens and their family members, irrespective of their nationality, who have a continuous legal residence on Romanian territory of more than 5 years may benefit of *permanent residence*.

Documents attesting residence on Romanian territory are:

- a) for a *residence longer than 3 months*: the registration certificate for European Union citizens (issued on the day of submission of the application) and/or the residence card for family members who are not European Union citizens.
- b) for the *permanent residence*: permanent residence card for European Union citizens and/or permanent residence card for family members who are not European Union citizens.

Carrying for the accuracy of its public finances, the Romanian legislator provided that “all documents issued to European Union citizens and their family members are handed over only after their holders have covered (i) the costs of issuing those documents, (ii) the cost for the procedures as well as, if the case may be, (iii) other fees and taxes established under the provisions of law, which are also applicable to Romanian citizens”.

3) *Rights of EU citizens and their family members*

EU citizens and their family members enjoy the same rights and obligations as Romanian nationals, with the exception of political rights for Parliament and the

President of Romania. A part the constitutional provisions of article 16²⁶ and 18 EU citizens are subject also to article 57²⁷ and enjoy some specific rights, as follows:

- Article 16 – *Equality of rights* – After Romania’s accession to the European Union, citizens of the EU who satisfy the requirements set out in an organic law shall have the right to elect and be elected to the local public administration bodies.
- Article 44 – *Right to private property* – para.2 maintains a certain limitation for foreigners and stateless persons to acquire private property on Romanian land, but only until accession to EU; from that moment on foreigners and stateless persons may become owners of land in Romania «*only under the terms that may arise from Romania’s accession to the EU or from other international treaties to which Romania is a party, on the base of reciprocity, in accordance with an organic law as well as by way of statutory inheritance*».

Transitional and equivalent measures have been adopted with regard to family members of EU citizens which are not citizens of EU members states²⁸, while through Law n°344/2006²⁹ freedom of circulation of trans-national services and workers has been fully implemented in the Romanian legislation.

However, EU citizens and their family members can be subject to some specific restrictions.

To start with, Romanian authorities may restrict the exercise of the right of free movement on Romanian territory by the European Union citizens or their family members only on grounds of public order, national security or public health through one of the following measures: (i) ban on entry on Romanian territory, (ii) removal from the Romanian territory, (iii) declaration as undesirable or (iv) expulsion.

The ban on entry is a measure to be taken in case EU citizens or members of their families do not present the documents for passing the border or if there are serious grounds to believe they represent a serious and current threat for public order, national security or public health. The ban has to be communicated immediately at the border by border police within a written document, together with its reasons. Such measures can be appealed to the specialised administrative court, which shall rule its decision following an examination in court chamber according to the emergency procedure. However, the decision of the court is definitive and irrevocable and such legal procedures do not suspend the enforcement of the ban.

²⁶ Article 16 – Equality of rights – in para.1 guarantees equality in front of laws only to Romanian citizens, while para.3 makes a condition of the Romanian citizenship for holding public functions or dignitary positions, whether civil or military.

²⁷ Article 57 – exercise of rights and freedoms – introduces as fundamental obligations the general principles of *bona fidae* and *neminem laedere*, as follows: «All Romanian citizens, foreigners and stateless persons must exercise their constitutional rights and freedoms in good faith and without encroaching on the rights and freedoms of others».

²⁸ Through a revision of Law n°203/1999 regarding work permits (re-published in Off.J.554/17.06.2004) national treatment already provided for all EU citizens has now been extended to their family members.

²⁹ Published in the Off.J.n° 636/24.07.2006.

Removal from the national territory may be decided only on medical grounds and is to be carried out through literally escorting the EU citizen or its family member to the border cross point by the specialised staff of the Authority for Aliens. Such measure can be ordered only by the Authority for Aliens upon written request from the specialised institutions within the Ministry of Public Health on the basis of medical investigations carried out by the concerned person within no more than 3 months from the entry on Romanian territory.

One of the numerous revisions³⁰ which affected Emergency Ordinance n°102/2005 prior to its actual coming into force, introduced a novelty in the area of limits to be inflicted upon the right of residence of EU citizens and their family members, namely such persons can benefit of the right to residence or permanent residence only “as long as they do not become an excessive burden to the Romanian social security system”. Any EU citizen receiving such a notification to leave Romanian territory is compelled to obey within 30 from its reception under escort from the Authority of Aliens, otherwise he/she will be taken in public custody until the measure is implemented. Orders to leave Romania cannot be issued against EU citizens and members of their families who carry out dependent or independent activities or who have credible perspectives to get an employment in the nearest future. Any orders to leave Romania can be appealed before specialised administrative courts which issues a final and irrevocable decision.

EU citizens or their family members may be declared undesirable only if they have already performed or there are serious indications that they intend to perform activities that would endanger national security and public order. This measure is to be shall be decided by the Court of Appeal of Bucharest, upon request of the appointed prosecutor from the Prosecution Department affiliated to the above-mentioned court. Public custody may also apply. Any such measure can be appealed at the Bucharest Court of Appeal within 5 days from notification, but challenging is in front of the Court does not suspend its enforcement. The Court has to issue a final and irrevocable decision within 3 days from the filling of the case.

Expulsion may be ordered under conditions provided by the Criminal Code and Criminal Procedure Code against any EU citizen or family member who committed a crime on Romanian territory.

³⁰ The Emergency Ordinance n°102/2005 has been revised, completed and successively approved as follows: via Law n°260/2005 for the approval and completion of EO n°102/2005, via Government Ordinance n° 30/2006 for the revision and completion of EO n°102/2005, via Law n°500/2006 for the approval of the GO n° 30/2006 for the revision and completion of EO n°102/2005. As already mentioned, to the legal instability somewhat inherent to a transition country also acceding to EU Romania has added the peculiarity that changes and revisions to various laws are rarely accompanied by re-publications of those normative acts, which makes their enforcement a nightmare both for those directly concerned and for public authorities.

C) Refugees and asylum seekers

The Romanian Constitution, adopted through referendum on the 8th of December 1991, provides in article 18 – *Aliens and stateless persons* for a «right to asylum», as follows:

«Aliens and stateless persons who are resident in Romania shall enjoy general protection of person and wealth as guaranteed by the Constitution and other laws.

The right to asylum shall be granted and withdrawn under the terms of the law, in accord with international treaties and conventions to which Romania is a party.»

Through Law n°46/1991³¹ Romania ratified the Geneva Convention and the New York Protocol and a first Law dealing with the status of refugees was adopted already in 1996. However, the need to harmonise the domestic legislation with the EU *acquis* pointed at some flaws of that law and led to the adoption of the Government Ordinance n°102/2000 concerning the legal status and regime of refugees³². Until its re-publication in the Off.J.n°1136/1.12.2004 this normative act has undertake an impressive number of changes and revisions:

- Law n°323/2001³³ approved Government Ordinance n°102/2000 with changes mainly concerning the enforceable nature of first level court decisions,
- Government Ordinance n°13/2002³⁴ amended provisions pertaining to the social assistance granted (number of calories per person to be provided for free etc.),
- Government's Emergency Ordinance n°76/2003³⁵ revised the deadline for submitting appeals against decisions taken by first degree courts (30 days instead of 10);
- Law n°467/2003³⁶ approved Government's Emergency Ordinance n°76/2003,
- Government Ordinance n°43/2004³⁷ for the change and completion of the Government Ordinance n°102/2000 revised again the entire legal act in order to make it compliant with evolving EU *acquis* and to adapt it to some of the critics formulated by the UNHCR Office to Bucharest,
- Government Ordinance n°44/2004³⁸ concerning the social integration of foreigners who acquired a form of protection in Romania represents the implementing act for article 39 of the initial Government Ordinance providing that "*the Ministry of Interior through the National Refugee's Office together with the Ministry of Labour*

³¹ Published in the Off.J.n°148/17.07.1991.

³² Initially published in the Off.J.n°436/3.09.2000.

³³ Published in the Off.J.n°342/27.06.2001.

³⁴ Published in the Off.J.n°82/1.02.2002.

³⁵ Published in the Off.J.n°640/9.09.2003.

³⁶ Published in the Off.J.n°835/25.11.2003.

³⁷ Published in the Off.J.n°92/31.01.2004.

³⁸ Published in the Off.J.n°93/31.01.2004.

and Social Security shall initiate and run special programmes for the social and professional integration of aliens who acquired refugee status”,

- Law n°176/2004³⁹ approved this last Government Ordinance with some changes.

Finally, Law n°122/2006⁴⁰ codified⁴¹ this “baroque” legal framework and further improved it via providing extensive possibility of family reunification for persons granted subsidiary protection and temporary humanitarian protection, introduction of additional safeguards related to minors and vulnerable groups, enhancement of confidentiality principle and introduction of principles and guarantees of the asylum procedure as a separate chapter.

In a nutshell, the main features of the legal regime of foreigners or stateless persons in need of a form of international protection in Romania are:

- three types of protection:
 - I. refugee status – limited to persons who fulfil the refugee definition of article 1 of the Geneva Convention,
 - II. conditioned humanitarian protection – limited to persons who do not meet that standard but a) who have perpetrated deeds for which they may face the death penalty in their country of origin or b) they risk being subject to torture or inhuman or degrading treatment or c) they may be exposed to dangers of a kind that threaten their life, physical integrity or freedom on the account of their belonging to a category of disadvantaged or vulnerable persons,
 - III. temporary humanitarian protection – can be granted to persons coming from and during armed conflict areas in which Romania is not involved. The law fails to specify that this form of temporary protection is intended to operate as a practical device in the event of a mass influx of displaced persons, rather than to be accorded as a separate status for individuals fleeing from a situation of armed conflict.
- the status of refugee can be granted, upon request, also to wife/husband and minor children – however, the right to family reunification is not automatic, each member of the family having to submit an application *in personam*;
- refugee status cannot be granted to a foreigner or stateless person who has committed a crime against peace and humanity or who committed serious non-political crimes

³⁹ Published in the Off.J.n°467/25.09.2004.

⁴⁰ Published in the Off.J. n°428/18.05.2006 and already rectified and re-published in the Off. J. n° 68/29.01.2007.

⁴¹ The new piece of legislation abrogates all previous legal acts, including Methodological Norms pertaining to the enforcement of the Emergency Ordinance n°102/2000, and explicitly enumerates all pieces of EU *acquis* with which it is harmonised, namely Council Directive 2001/55/CE on minimal standards for temporary protection in case of massive flux of persons, Council Directive 2003/9/EC on minimal standards for receiving asylum seekers; Council Directive 2003/86/CE on family reunification, and Council Directive 2004/83/EC on minimal standards for third country nationals or stateless persons in need of international protection.

outside Romania prior to his/her admission or who has committed acts contrary to the purposes and principles of the UN charter,

- manifestly unfounded applications shall cause accelerated procedures. These last ones are defined as situations where it appears to be “a lack of well-founded fear of persecution in the country of origin”, or an error was induced when granting the status of refugee in Romania,
- voluntary repatriation is encouraged,
- all persons benefiting of a form of protection can enjoy all socio-economic assistance granted for free by the Romanian State,
- withdrawal of the status of refugee is possible whenever a foreigner has voluntarily returned into his/her country of origin or the country where he/she has resided before entering Romania or when the reasons for granting this status have ceased to exist or when there are justified reasons pertaining to public interest, national security or public order.

All aliens granted with a form of protection in Romania have access to the following rights: (i) right to employment and accommodation; (ii) access to medical and social assistance, (iii) right to education, cultural orientation, counselling in the same conditions as Romanian citizens. They are also entitled to education under identical conditions as Romanian citizens, but only those who decide to take special integration programmes benefit of classes of Romanian language. Recognised refugees and individuals granted subsidiary protection benefit on equal footing of access to accommodation and other forms of assistance. Furthermore, the legislation provides for an exhaustive list of persons with special needs and who are entitled to additional assistance: handicapped persons, elderly, unaccompanied minors, victims of torture, single-parent families with minor children.

Special integration programmes are organised by Romanian authorities for aliens that were granted a form of protection on Romanian territory. However, according to the law, attending the integration programme is not compulsory for foreigners.

Other protection measures are foreseen in separate laws. For instance, the Law on the guaranteed minimum income provides that refugees are eligible for guaranteed minimum income under the same conditions as Romanian nationals. Furthermore, Law n°116/2002 on preventing and combating social marginalisation⁴², which guarantees basic rights such as the right to work, to health insurance and education, is also applicable to refugees. Refugee and asylum-seeking children have the right to the State child allowances. Law n°76/2002 on unemployment insurance and active employment measures⁴³ explicitly entitles refugees and persons granted humanitarian protection to benefit from assistance provided for by this piece of legislation, including the right to unemployment insurance, the right to vocational training and the right to job search assistance under the same conditions as nationals.

⁴² Published in the Off.J. n°193/21.03.2002.

⁴³ Published in the Off.J. n°10376.02.2002 and revised last time through Government's Emergency Ordinance n°144/2005, re-published published in the Off.J. n°969/1.11.2005.

As for the procedure, applications must be submitted as soon as the person has entered the Romanian territory, at the state border control point or as soon as events that may cause fear of persecution have occurred. Practically, applications can be lodged in various places, such as Border Police, National Refugee Office, Aliens police, customs, custody centres and accommodation centres and they will be automatically forwarded to the National Refugee Office by fax. The application form is uniform and the first step consists in bringing the application for a brief interview comprising identity control, fingerprints, personal circumstances and travel route and travel documents. Shortly after, the applicant is called for a comprehensive interview performed by a decision-maker with an interpreter.

An application cannot be rejected simply on the ground of delayed submission, but unjustified delay together with other elements can be taken into consideration when assessing its credibility. The responsibility to analyse applications for refugee status and to adopt administrative decisions on such applications rests exclusively with the eligibility (decision-maker) officers. Therefore, the border police or other authorities where such applications may be posted cannot assess the applications or decide on expulsion (deportation) in any way during the entire procedure. Safeguards for effective protection against *refoulement* are clearly ensured under the ordinary (standard) procedure to deal with applications.

The first instance to judge and decide over an application is the National Refugee Office through eligibility officers. The second phase always takes place in front of independent courts, of first level (*judecătorie*) and then of second level (*tribunal*). Appeals can be submitted in relatively short deadlines and have suspensive effect. Once a court decision to reject an application becomes final and irrevocable the foreigner shall be compelled to leave Romania within 15 days from the notification, except for the case when the accelerated procedure is enforced and the foreigner must leave the territory without any delay.

Implementation of these new legal provisions only started, therefore it is too early to provide an accurate assessment. However, based on previous practise⁴⁴, it can be safely estimated that fairness of judicial emergency procedures will continue to be an important grievance in front of ordinary courts and Constitutional Court. At the same time, granting an international protection at the border or under the accelerated administrative procedure foreseen by the law will also continue to be challenged by virtually all potential beneficiaries of a special form of international protection. On the other hand, the high efficiency of the Romanian authorities in handling cases of asylum seekers and refugees is shown by statistics: 96% of files receive a final solution within less than a month. For the remaining 4% delays are caused by the lack of authorised interpreters for rare languages or by the need of further and deeper investigations. Another important indicator of efficiency is the rate of admission of

⁴⁴ See our report « Asylum and migration in Romania » in « Las fronteras de la ciudadanía en Espana y en la Union Europea », coord.M.A.Wilhelmi, M.I.Dausa, D.M.Malapeira, S.R.Ranz, Documenta Universitaria, 2006, Girona, p.431.

requests of asylum, whereby the National Office for Refugees reported 46 cases of approval, which represents 11,5% admission only in the administrative phase of the procedure.⁴⁵ In all fairness, it has to be mentioned that, according to practise established under the previous legal regime, the judiciary phase of the procedure does not significantly improve the admission rate of requests for asylum.

IV. Concluding remarks

Following Romania's accession to EU the new approach of Romanian authorities towards migration seems to copy the general attitude already prevailing at the level of EU institutions, namely: "Migration is a process that needs management and not a problem that needs solutions". In this context, the declared objective of Romanian authorities is to "maximise positive effects of migration, while diminishing negative effects", particularly those of illegal migration on Romanian citizens and, implicitly, on EU citizens as well. Close coordination with EU institutions, particularly with the European Commission, as well as good institutional connections in various member states have helped, over time, Romanian authorities to cope with the important challenges posed by migration and improve both their legislative framework and administrative capacity. However, EU accession has found Romania not entirely well prepared with regard to future tendencies in a global labour market which keeps changing and adjusting very rapidly to fluctuations beyond the mere borders of EU.

Already during the past two years (2006 and the beginning of 2007) the Romanian labour market has been confronted with an acute lack of qualified workers against a general trend of migration of Romanian working population in some EU member states. According to a study conducted by the Ministry of Labour, Social Solidarity and Family in 2006 in 2010 "Romania will face important deficits in technicians, maintenance of machines and assimilated, qualified agricultural workers, artisans, and more generally un-qualified workers"⁴⁶. Already in November 2006 jobs available for more than 3 months (chronically un-occupied) were available in constructions, hotels and restaurants, energy and other public services, personal services, financial consultant, real estate agent etc. Against this background, the Office for the Migrations of Labour Force issued 2.716 work permits in 2005 and 7.992 work permits in 2006, out of which approximately 31% are re-new-als. Only in 2006 the increase in issued work permits amounts to 66%, which is more than significant and yet not enough to complete an already ailing internal labour market.

All these figures seem to point in the same direction: Romania has increasingly become a final destination country for immigrants rather than a transit territory. This tendency is coupled with the also consistent migration of Romanian citizens

⁴⁵ http://www.mai.gov.ro/Documente/Prima%20Pagina/STUDIU_migratie_2006_ultima_forma.pdf

⁴⁶ http://www.mai.gov.ro/Documente/Prima%20Pagina/STUDIU_migratie_2006_ultima_forma.pdf

abroad, be it temporary or as a final decision. Although compared to the total active population of Romania (approximately 9,7 billion people) the number of immigrants legally employed barely represents 0,58% there are no reasons to believe this ration will not dramatically change in the near future. However, the impact of migration on the Romanian labour market might simply be a highly beneficial one, given the general trends noticed by public authorities.

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