Flygtningenævnets baggrundsmateriale

Bilagsnr.:	**323**
Land:	Diverse emner
Kilde:	ECRE
Titel:	The Rights of Refugees and Asylum Applicants With Disabilities
Udgivet:	31. december 2023
Optaget på baggrundsmaterialet:	23. maj 2024

THE RIGHTS OF REFUGEES AND ASYLUM APPLICANTS WITH DISABILITIES

ARTICLE 26 OF THE EU CHARTER OF FUNDAMENTAL RIGHTS AND BEYOND

DECEMBER 2023

ecre
European Council
on Refugees and Exiles

Co-funded by
the European Union

TABLE OF CONTENTS

I. INTRODUCTION

In every situation of forced migration, a person experiences different challenges that are associated both with the displacement itself and with their personal circumstances. When disability is one of those personal circumstances, the capacity of a displaced person to cope is affected in ways that can be unpredictable, invisible and varied.

The experience of disability itself is determined by characteristics that can complicate protection and care efforts. Disability can be exacerbated by physical and psychological distress and it can be invisible. When a third country national navigates a reception system, enters an asylum procedure or attempts to access rights as a beneficiary of international protection, the interaction of disability with the asylum environment can undermine the person's resilience and hinder their access to protection.

In addition to the challenges that disability inherently presents, the policy and legal approach to the issues of refugees and asylum applicants with disability[1] in Europe does not always take heed of the singularity of their experience and needs. When the focus of the discourse is on displacement, disability is included in the umbrella term of vulnerability which aims to protect all individuals but may fail to address the diversity of impairment and relevant needs. Conversely, in strategies that aim to improve the lives of persons with disabilities in general the specific situation of displacement often receives a cursory mention.

A. THE INTERSECTION OF DISPLACEMENT AND DISABILITY IN EUROPEAN POLICIES AND LAWS

In respect of disability-related policies, the lack of concrete measures addressing the needs of displaced persons in strategies developed by the European Union and the Council of Europe is indicative of the difficulties in ensuring targeted action on the subject. The EU's 2010-2020 Disability Strategy made no mention of displaced persons[2] while the 2021-2030 Strategy promised a more inclusive approach but only made general commitments.[3] Despite these commitments, the Commission's communication on the New Pact on Migration and Asylum does not contain any reference to disability[4] while civil society actors working on the rights of persons with disabilities have criticised it for failure to include specialised protection measures.[5] The EU Action Plan on Integration and Inclusion 2021-2027[6] includes more references to migrants with disabilities but has received similar criticism.[7]

Similarly, the Council of Europe Disability Strategy (2017-2023) states that a comprehensive approach to the integration and inclusion of migrants, refugees and asylum seekers with disabilities is needed at national and local levels but does not provide for any specific measures or actions to achieve it.[8] Despite the organisation's rich work on the rights of children, women and older people with disabilities[9] and the focus on

1. The terms "refugees and asylum seekers or applicants with disabilities", "migrants with disabilities" and "displaced persons with disabilities" are used interchangeably throughout the text for the purposes of describing the intersection of disability and displacement in general, as well as due to the lack of distinction between the terms in policy documents and communications by international and regional bodies and actors. Where an ad hoc distinction between the terms must be made, particularly when legal provisions require it, it will be accompanied by a relevant clarification.
2. European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM/2010/0636 final.
3. European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Union of equality – Strategy for the rights of persons with disabilities 2021-2030, Publications Office, 2021.
4. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final.
5. European Disability Forum and Mental Health Europe, A missed opportunity: How Europe can better protect migrants with disabilities and mental health problems, 18 December 2020, available at: https://www.edf-feph.org/a-missed-opportunity-how-europe-can-better-protect-migrants-with-disabilities-and-mental-health-problems/;

   European Disability Forum, EDF input to the European Commission's Pact on Migration and Asylum, available at: https://www.edf-feph.org/content/uploads/2021/12/edf_input_new_pact_on_migration_and_asylum.pdf.
6. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Action plan on Integration and Inclusion 2021-2027, COM/2020/758 final.
7. European Disability Forum, EDF input to the European Commission's Pact on Migration and Asylum, available at: https://www.edf-feph.org/content/uploads/2021/12/edf_input_new_pact_on_migration_and_asylum.pdf
8. Council of Europe, Human Rights: a Reality for All, Disability Strategy 2017-2023, para. 70.
9. See Council of Europe, Publications on the rights of persons with disabilities, available at: https://www.coe.int/en/web/disability/publications; Adopted texts, available at: https://www.coe.int/en/web/disability/adopted-texts

different types of discrimination,[10] a more focused analysis of the intersection of displacement and disability is missing.

Nevertheless, several specialised actors have recognised the importance of a more detailed approach to the subject and have engaged in more focused work. Their findings point to a significant need for disability-sensitive protection. In a conclusion dedicated to the intersection of displacement and disability, UNHCR underlines that the needs of persons with disabilities are often overlooked in the context of humanitarian emergencies.[11] In this line, the UN Refugee Agency has developed a series of resources to facilitate relevant actions.[12] Similarly, the EU's Fundamental Rights Agency (FRA) has published a thematic overview of the situation of migrants with disabilities noting, *inter alia*, the lack of formal identification procedures and relevant data, the incidence of undetected impairments, the limited access to non-emergency healthcare and issues with access to assistive devices.[13]

In a similar vein, the Committee on the Rights of Persons with Disabilities (CRPD Committee), the body that monitors the implementation of the Convention on the Rights of Persons with Disabilities[14] (CRPD) which has been ratified by the EU,[15] has singled out the precarious situation of migrants, refugees and asylum applicants with disabilities in the Union as an issue that requires more protective measures and consistent reporting. In the initial review of the EU by the CRPD Committee, the latter urged the Union to mainstream disability in its migration and asylum policies noting the use of detention in arrangements that do not ensure appropriate support and reasonable accommodation and the lack of accessible information and communication tools that hamper access to procedures.[16] In the list of issues to be examined during the next review of the EU, the Committee further invited the Union to report on the situation of migrants and refugees with disabilities and to provide information on measures taken to ensure inclusiveness and accessibility of persons with disabilities in migration and refugee policies.[17] The list includes a request for information on the Union's commitment to provide data on beneficiaries of humanitarian action disaggregated by impairment. A 2021 study by the European Parliament concluded that there are considerable gaps in the implementation of the 2015 CRPD concluding Observations including a lack of disability mainstreaming in migration and refugee policies.[18]

In the domain of law, a series of legal instruments contain provisions that are relevant for displaced persons with disabilities in Europe although they do not always address the intersection of the two experiences. In EU law, the Charter of Fundamental Rights of the EU (CFREU)[19] contains several relevant articles: Article 26 stipulates that the Union recognises and respects the right of persons with disabilities to integration and participation in the life of the community while Article 21 includes disability as a prohibited ground of discrimination. The prohibition of situations that violate dignity and/or amount to inhuman or degrading treatment, under Articles 1 and 4 respectively, may also be relevant in the context of displacement and disability.

More relevant provisions can be found in EU secondary law, particularly the legislative instruments that comprise the Common European Asylum System. Article 21 of the recast Reception Conditions Directive (RCD)[20] imposes an obligation on Member States to consider the specific situation of vulnerable persons, including persons with disability. Similarly, the recast Asylum Procedures Directive (APD) recognises the need of special procedural guarantees for certain applicants, including those with disabilities.[21] Lastly, the

10. Council of Europe, Human Rights: a Reality for All, Disability Strategy 2017-2023, paras 42-48; see also the roundtable on the subject during the 5th Meeting of the Ad Hoc Committee of Experts on the Rights of Persons with Disability (CAHDPH) in 2017, available at: https://www.coe.int/en/web/disability/5th-cahdph-meeting
11. UNHCR, EXCOM Conclusions on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, No. 110 (LXI), 12 October 2010.
12. UNHCR, Persons with disabilities, available at: https://www.unhcr.org/persons-disabilities.
13. FRA, Thematic focus: Migrants with disabilities, available at: https://fra.europa.eu/en/content/thematic-focus-migrants-disabilities
14. UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106.
15. The Convention entered into force on 22 January 2011; See, European Commission, EU ratifies UN Convention on disability rights, IP/11/4, Brussels, 5 January 2011, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_11_4
16. Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, paras. 34 and 35.
17. Committee on the Rights of Persons with Disabilities, List of issues prior to submission of the second and third periodic reports of the European Union, CRPD/C/EU/QPR/2-3, 20 April 2022, paras. 6 and 12.
18. European Parliament, Study on The implementation of the 2015 Concluding Observations of the CRPD Committee by the EU, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 700.321, December 2021.
19. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.
20. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013, p. 96–116.
21. Recital 29, 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 (recast), OJ L 180, 29.6.2013, p. 60–95.

recast Qualification Directive (QD) require Member States to consider the situation of persons with disability when they implement the provisions relating to the content of international protection generally and specifically in healthcare.[22]

As regards Council of Europe legal standards, the European Convention on Human Rights[23] does not include specific provisions but Article 3 (prohibition of inhumane and degrading treatment), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) are directly relevant. The Court has produced a significant body of case law on disability albeit with few cases focusing on the intersection with displacement.[24] The European Social Charter[25] is another Council of Europe instrument of pertinence as Article 15 enshrines the right of persons with disabilities to independence, social integration and participation in the life of the community and is the basis for the aforementioned Article 26 CFREU.[26]

Lastly, as noted above the CRPD is a crucial instrument of international law and the only international human rights treaty of universal reach that focuses on the protection of persons with disabilities and establishes an internationally agreed definition. According to Article 1 CRPD, "*persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*." This social model of disability represents an important legal advancement which will be discussed in more details in the following section.

Although the Convention does not contain specific provisions on the situation of migrants with disabilities, Article 11 requires States Parties to take all necessary measures to protect persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters. The CRPD Committee's General Comments, which will be analysed further below, have interpreted other articles of the CRPD with reference to the situation of migrant and asylum-seeking persons with disabilities.

Against this background of insufficient policies, weak protection measures and interconnected legal instruments, this legal note aims to analyse and interpret the EU legal standards on the rights of asylum applicants and beneficiaries of international protection with disabilities. In this context, the normative framework of the analysis will comprise the three aforementioned CEAS Directives relating to asylum procedures, reception and qualification. The geographical scope of the note will focus on EU Member States.

The first section of the analysis will focus on the legal nature and applicability of Article 26 CFREU through its drafting history and the case law of the Court of Justice of the EU (CJEU). The second section of the analysis will seek to apply the article in situations involving the rights of asylum applicants and refugees including by reference to the provisions of the CRPD as an international law instrument that is relevant in the EU legal order (due to its ratification by all EU Member States and the EU itself[27]) and can qualify the concepts contained in Article 26. The last section of the analysis will consider the role of Article 5 of the CRPD and Article 21 CFREU in the protection of asylum applicants and refugees with disabilities against discrimination. Finally, the conclusions will summarise the findings on the examined legal standards.

22. Articles 20 (3) and 30 (2), 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 (recast), OJ L 337, 20.12.2011, p. 9–26.
23. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).
24. See, for example, the non-exhaustive compilation by the Court of relevant case law in European Court of Human Rights, Press Unit, Factsheet – Persons with disabilities and the ECHR, April 2023, available at: https://www.echr.coe.int/documents/d/echr/FS_Disabled_ENG.
25. Council of Europe, European Social Charter (revised) (ETS No. 163).
26. Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.
27. See above, n. 15; For the ratification history of each Member State, see the UN Treaty Body Database, Ratification Status for CRPD - Convention on the Rights of Persons with Disabilities, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD

II. ANALYSIS

A. THE NATURE AND APPLICABILITY OF ARTICLE 26 IN THE EU LEGAL ORDER

i. The history and context of the provision

Article 26 CFREU stipulates that the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The article represents a significant and innovative addition to the Union's fundamental rights order and has no equivalent in the European Convention on Human Rights. Despite the importance of the article as a specific guarantee towards the rights of persons with disabilities, its application and interpretation are not straightforward, particularly in the context of asylum. Several factors must therefore be taken into account when analysing the provision and its role in the protection of persons with disabilities.

First, located in Chapter III (Equality), Article 26 states that the Union recognises and respects the rights of persons with disability to benefit from integration and participation measures. Although it *does* recognise a right for everyone with a disability, the wording differs from the one used in the provisions of Chapter II (Freedoms) which begin with the phrase "Everyone has the right to […]." This different formulation may indicate that the direct invocation of this right by individuals may not be as straightforward in practice as with other rights of the Charter. The CJEU case law that will be analysed further below confirms this understanding.

However, the lack of extensive litigation on the basis of Article 26 could mean that opportunities for direct invocation could be presented in the future if the circumstances of a case allow it. It has been noted, in the context of the similarly worded Article 25, that the provision may allow individuals to challenge a failure to comply with "the principle of respect" contained therein.[28] The possibility to rely on the article in such a situation would also explain the recognition of rights both in Article 25 and in Article 26. If the rights of persons with disabilities and the principle to respect them are there, any failure to do so should be able to form the subject of a challenge by the individual concerned. Although this may be difficult, given the current state of CJEU jurisprudence, it cannot be entirely excluded. The distinction between rights and principles therefore remains unclear; until the CJEU fully clarifies their relationship, different theories about the justiciability of the latter are possible.[29]

Second, the history of fundamental rights in the EU is marked by an initial lack of recognition of persons as holders of rights outside the economic context of the Single Market.[30] In this line, during the drafting of the Charter the protection of vulnerable groups was considered on the basis of their social rights and their access to the employment sector.[31] The drafting history of Article 26 itself reveals certain aspects of the legal rationale that may explain the institutions' perception of the provision in the EU legal order, as seen in the Commission's strategies above and the case law of the Court of Justice of the EU. The discussion on this new article was initially conducted with a focus on social and professional integration and later evolved to consider the promotion of positive measures to ensure equal access to Charter rights.[32] The labour and social-specific rationale of the article is also evident in the two provisions that are referred to as the basis for its conception, namely Article 15 of the European Social Charter and Point 26 of the Community Charter of the Fundamental Social Rights of Workers.[33]

In this historical context, it is not difficult to understand the difficulty in conceiving Article 26 as a provision that can be relevant in the context of asylum. While it may be easy to refer to it in the context of migration, its connection with the situation of asylum applicants and beneficiaries of international protection is less straightforward, as the latter are often not perceived as workers and their labour position may be less

28. Peers, S., Hervey, T. K., Kenner, J., Ward, A., & Aalto, P. (2021). The EU Charter of Fundamental Rights: A Commentary, 25.35, p. 736.
29. Koen Lenaerts (2012). Exploring the Limits of the EU Charter of Fundamental Rights, European Constitutional Law Review, 8, pp 375403 doi:10.1017/S1574019612000260, pp. 400-401.
30. Augenstein, D. (2013). Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law. German Law Journal, 14(10), 1917-1938. doi:10.1017/S2071832200002571.
31. Palmisano, G., Making the Charter of Fundamental Rights a Living Instrument, Brill Nijhoff, 10.1163/9789004291850, pp. 167-168.
32. *Idem*, pp. 183-184.
33. Council of Europe, European Social Charter (revised) (ETS No. 163); Community Charter of the Fundamental Social Rights of Workers (9 December 1989).

favourable in the short term than that of other migrants[34]. Academic research has reported that the article was left out of the recitals of the CEAS Directives because the Commission did not see a connection between integration and asylum applicants.[35]

Despite this perception, employment is an important and legally relevant concept in the context of asylum, not least because the RCD and the QD contain provisions securing access to the labour market for asylum applicants and beneficiaries of international protection respectively. The difference in the provisions lies in the temporary nature of the legal status following an asylum application, as opposed to the long-term nature of the legal status that is associated with the granting of international protection. Nevertheless, the provisions enshrine a right to work under specific conditions and, insofar as asylum applicants and refugees with disabilities are concerned, this right must be considered to include discrimination-free occupational integration.

Third, the majority of disability-related cases that the CJEU has examined involved labour situations,[36] particularly those falling under the scope of the Employment Equality Directive.[37] In the area of asylum, there is a lack of cases invoking Article 26, or generally addressing disability rights. This lack may reflect litigation that does not engage with this specific provision or may be related to the general use of the vulnerability approach of the CEAS as discussed above. Regardless of the reason, the Court has not had the chance to elaborate on EU law standards on measures facilitating other forms of integration for asylum applicants and beneficiaries of international protection with disabilities. Specific guidance is therefore unavailable.

Finally, the Court's engagement with Article 26 CFREU has been minimal so far. In its examination of arguments relating to disability rights the Court has primarily relied on the CRPD and EU secondary law rather than the CFREU.[38] Twenty-eight cases appear in the Court's Curia database that include the CRPD whereas 10 cases appear when the criteria include Article 26.[39] Although this difference could partly reflect the provisions that were invoked by the parties during the proceedings, or the topic of the case which may be broader than Article 26 and therefore only makes the CRPD relevant, there is in any case only scarce engagement with Article 26.

ii. Article 26 in the case law of the EU Court of Justice

In the judgments where the Court has engaged with Article 26, it has clarified certain aspects of the article's applicability. Its reasoning in *Glatzel*,[40] offers the most detailed analysis of the provision and its application. In this case, the Court noted that Article 26 becomes relevant when a legislative act of the EU implements the principle contained therein; in such cases, the Court can rely on Article 26 to interpret and review the legality of the act.[41] In *Glatzel*, the act in question was the Driving License Directive[42] and its minimum requirements relating to eyesight. According to the Court, the various provisions in that directive concerning the situation of persons with disability indicated that it was implementing the principle of Article 26 and the latter was therefore relevant for the examination of the case.

The Court has clarified that Article 26 recognises the right of persons with disabilities to benefit from integration measures and enshrines the principle of integration.[43] However, the latter is unable to confer a right on individuals which they can directly invoke and does not require the EU to take specific measures. The above reasoning reflects the content of Article 51 (1) of the Charter according to which there is a

34. Cunniffe, Emily Nura, Non-Economic migrants as workers: assessing the right to work for asylum applicants, Florence : European University Institute, 2020, EUI, LAW, LLM Thesis - https://hdl.handle.net/1814/69151; See also, Migration Policy Group & Bertelsmann Stiftung, From Refugees to Workers Mapping Labour-Market Integration Support Measures for Asylum Seekers and Refugees in EU Member States Volume II: Literature Review and Country Case Studies, p. 14, 03 October 2016, available at: https://shorturl.at/gsLRZ
35. Clara Straimer (2011) Between protection and assistance: is there refuge for asylum seekers with disabilities in Europe?, Disability & Society, 26:5, 537-551, DOI:10.1080/09687599.2011.589189.
36. Ferri, D. (2020), The Unorthodox Relationship between the EU Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination, European Constitutional Law Review, 16(2), 275-305. doi:10.1017/S1574019620000164, p. 282.
37. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.
38. See Ferri D., above n. 36, pp. 286-292.
39. Court of Justice of the EU, InfoCuria, available at: https://curia.europa.eu/juris/recherche.jsf?language=en. The search criteria used were "Convention on the Rights of Persons with Disabilities" and "Article 26 of the Charter" respectively.
40. Court of Justice of the EU, Judgment of 22 May 2014, Glatzel, C-356/12, ECLI:EU:C:2014:350.
41. *Idem*, 74-75.
42. Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast) (Text with EEA relevance), OJ L 403, 30.12.2006, p. 18–60
43. Glatzel, above n. 40, paras. 77-78.

difference between rights and principles in the Charter insofar as the former must be respected while the latter must be observed. Despite this differentiation, the Article clearly establishes an obligation for such measures to be adopted albeit without specifying the nature of those measures.

Similarly, in *Komisia za zashtita ot diskriminatsia*,[44] the Court noted the existence of different provisions in the Employment Equality Directive[45] relating to the situation of persons with disability, particularly those concerning reasonable accommodation, and stated that those provisions must be read in the light of Article 26. The Court determines the applicability and interpretative relevance of Article 26 by first examining whether the legislative act in question contains provisions that aim to implement the principle of that article, namely that of the integration of persons with disabilities with measures that ensure their independence, social and occupational integration and participation in the life of the community.

The above reasoning reflects the requirements of Article 52 (5) of the Charter that clarify the application of principles. According to this provision, principles may be implemented by legislative and executive acts taken by EU institutions and bodies, as well as by acts of Member States when they implement EU law, and shall be judicially cognisable only in the interpretation of those acts and in the review of their legality. According to the Explanations relating to the Charter, the principles become significant for the Courts when the acts that implemented them are interpreted or reviewed.[46]

For the purposes of defining whether a specific principle has been implemented under Article 52 (5), the Court appears to examine the act under review and any references therein to the principle and its content. As noted above, in *Glatzel* the Court simply referred to the different provisions of the Directive under review which explicitly aimed to facilitate the issuance of driver's licences to persons with a disability and concluded that that act was indeed implementing Article 26. That implementation, however, might be more complicated when the act under review does not include extensive, multiple or direct references to the content of an article which contains a principle. In *Kamberaj*, the Court took a broader approach and noted that the act under review, the Directive 2003/109 on long term residence, stated that it respected the fundamental rights and observed the principles of the Charter and went on to conclude that Member States must comply with the principle contained in Article 34 of the Charter when they determine the social security/assistance measures under that Directive.[47]

In addition to the need to define which acts implement a principle, Article 52 (5) also calls for a decision on which acts can be interpreted or reviewed under the Charter principles. Although the Court's case law has been less informative in this respect, Advocate General Cruz Villalón provided an extensive analysis of the nature of the acts that can be interpreted or reviewed on the basis of the Charter principles in his Opinion in Case C-176/12.[48] Noting the need to maintain the effectiveness of Article 52 (5) and Article 27 (which was the principle under review in that case), the Advocate General stated that these acts do not only include the legislative acts giving specific expression to a principle but also those implementing acts that go beyond the substantive and direct expression of the principle.[49] Using the example of a specific provision of the French Labour Code relating to the calculation of staff numbers in undertakings to ensure worker representation, he considered this to be "[…] *an important element in the formulation and practical implementation of the 'principle' in Article 27 of the Charter*" noting, inter alia, the potential of that rule to infringe the content of the principle enshrined in Article 27.[50]

B. APPLYING ARTICLE 26 CFREU TO SITUATIONS INVOLVING THE RIGHTS OF ASYLUM APPLICANTS AND BENEFICIARIES OF INTERNATIONAL PROTECTION

When contemplating the applicability of Article 26 in the context of asylum, it is important to address the requirements of Article 52 (5) vis-à-vis the main legislative acts that currently comprise the CEAS. Due to the Court's limited engagement with the Charter principles, particularly that of Article 26, the interpretative

44. CJEU, Judgment of the Court (Second Chamber) of 21 October 2021, TC and UB v Komisia za zashtita ot diskriminatsia and VA, Case C-824/19, ECLI:EU:C:2021:862.
45. Employment Equality Directive, above n. 37.
46. Explanations to the Charter, above n. 26.
47. CJEU, Judgment of 24 April 2012, Kamberaj, Case C-571/10, ECLI:EU:C:2012:233, paragraphs 79 and 80.
48. Opinion of Advocate General Cruz Villalón, Association de médiation sociale, C-176/12, Delivered on 18 July 2013, ECLI:EU:C:2013:491.
49. *Idem*, paragraph 70.
50. *Idem*, paragraph 72.

approach is far from established in its jurisprudence. Nonetheless, the main case that has extensively elucidated on Article 26, i.e., *Glatzel*, does not appear to allow for an extensive application of the principle as it denied any enforceable right and connected the applicability of the article with the act under review. Indeed, the case has faced criticism for restricting the impact of the principle[51] while others contend that there is possibility to interpret the principle more expansively.[52]

Despite the limited and limiting elements one can gather from the Court's jurisprudence, Article 26 is still part of the Charter and as a principle both the Union and the Member States must observe it and promote its application in line with Article 51 (1) CFREU. Even if the article does not create a directly enforceable right for a person with disability, Member States are required to construe their domestic legal order in disability matters in line with this principle and must ensure that the provisions they establish in this respect are applied. This is no different in cases where those provisions are part of national legislation implementing EU asylum law.

Attempting an interpretation based on the Court's reasoning in *Kamberaj*, the CEAS Directives do implement elements of Charter principles insofar as they all contain similar recitals to the one that the Court focused on in that case. Recitals 35, 60 and 16 of the RCD, the APD and the QD respectively state that the Directives observe the principles of the Charter. Moreover, as noted above, all three Directives contain specific provisions recognising the need to consider the specific situation of asylum applicants and refugees with disabilities; the QD contains even more specific provisions relating to access to healthcare. Drawing from the analysis by Advocate General Cruz Villalón, these provisions can be considered to constitute an important element in the practical implementation of the principle in Article 26. Article 26 can be considered relevant and applicable in the interpretation and review of the CEAS Directives, as well as of all those acts that Member States have taken to implement them.

The applicability of Article 26 in situations involving the rights of asylum applicants and refugees with disabilities[53] entails important positive consequences in respect of their protection as the provision offers tailored guarantees (independence, social and occupational integration, participation in the life of the community). By applying that article, the provisions of the CEAS Directives that enshrine an obligation for special protection measures for persons with disability can be interpreted in a manner that is comprehensive, open to individualisation and disability-sensitive.

However, in the absence of jurisprudence clarifying the content of those obligations under the CEAS or the content of Article 26 in scenarios outside the employment sector, the protection it can offer can be construed – and complemented – using other sources of law that are relevant and valid in the legal order of the EU. Due to its specialised focus and ratification by the EU and all Member States, the Convention on the Rights of Persons with Disabilities is the most appropriate legal instrument to support the interpretation of Article 26. The Court has followed a similar approach in *Milkova*, where it interpreted a provision of Directive 2000/78 (Equality Framework Directive) by combining the Charter (Articles 20 and 21) and the CRPD.[54] Similarly, the Court has recognised that, where the "wording" of EU secondary law is open to multiple interpretations, preference must be given to the interpretation that ensures that the provisions remain consistent with EU primary law, including any international agreements concluded by the Union.[55]

The European Social Charter is an equally relevant instrument, particularly Article 15 which inspired Article 26 CFREU, but the analysis of this legal note will not engage substantially with that provision, particularly due to the absence of asylum-specific comments and findings around that article by the European Committee on Social Rights.

The present analysis will therefore focus on the CRPD in order to identify relevant guarantees for asylum applicants and refugees with disabilities in general and in connection with the content of Article 26 CFREU.

51. A. Ward, The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang? (2018) Cambridge Yearbook of European Legal Studies, 20, 32-60.
52. C O'Brien, 'Driving Down Disability Equality? Case C-356/12, Wolfgang Glatzel v Friestaat Bayern' (2014) 21(4) Maastricht Journal of European and Comparative Law 723.
53. In this section, the terms asylum applicants and beneficiaries of international protection/refugees are used due to the focus of the analysis being on APD, RCD and QD. Other situations of displacement or migration do not form part of the present analysis.
54. CJEU, Judgment of 9 March 2017, Milkova, C-406/15, ECLI:EU:C:2017:198, paragraph 64.
55. CJEU, Judgment of the Court of 10 September 1996, Commission v Germany, Case C-61/94, ECLI:EU:C:1996:313

i. The Convention on the Rights of Persons with Disability[56]

The Convention on the Rights of Persons with Disability was adopted in 2006 and marked the first instrument of international human rights law dedicated to this subject, as well as the first international human rights treaty that the EU has acceded to. As mentioned above, the Convention has been ratified by all Member States of the EU and the EU itself. The European Union approved the Convention with Decision 2010/48/EC[57] and the Convention entered into force on 22 January 2011.

So far, the Convention has been interpreted by the CJEU in several cases but none of them concern asylum. However, its applicability in cases involving the CEAS legal instruments is not in question. Article 53 CFREU ensures that the level of fundamental rights protection in the EU will not be lower than that offered by international law instruments to which the Union or all the Member States are party. The CJEU has repeatedly recognised the obligation to interpret EU secondary law in accordance with international law, particularly when the provisions intend to give effect to an international agreement concluded by the Union.[58]

Regarding the relationship between the CRPD and EU law, the CJEU has clarified that the Convention's provisions are an integral part of the EU legal order.[59] When called to examine whether the provisions of the Convention have direct effect in EU law and can therefore permit the validity of the act of European Union law to be reviewed in the light of their content, the Court found that the Convention has a largely "programmatic" character and its provisions are not unconditional and sufficiently precise to allow direct effect.[60] However, given the primacy of international agreements over instruments of secondary law, the latter must be interpreted in a manner that is consistent with the content of the former.[61]

Following the Court's clear stance on the matter, the text of the Convention and its elaboration by the CRPD Committee through General Comments and individual communications become relevant in the examination of situations involving the rights of asylum applicants and refugees with disabilities. The requirements of protection set out in the aforementioned provisions of the APD, RCD and QD must therefore be read in the light of the Convention. General terms, such as "the specific situation of vulnerable persons", "special procedural needs", and "adequate healthcare" can be specified using the CRPD guarantees and standards.

ii. The definition of disability

The relevance of the Convention in the context of asylum begins with its definition of disability. As noted earlier in the text, Article 1 of the Convention stipulates that persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The definition is established on the basis of a social understanding of disability that does not only consider the impairments that a person may experience but also the interaction of those impairments with external elements that can constitute barriers affecting their enjoyment of rights and protection. Despite an initial strand of case law that focused on a medical understanding of disability,[62] the CJEU now accepts the same social model that the Convention has introduced.[63] The Advocate General's Opinion in *Glatzel* analysed the components of the definition of disability focusing not on the degree of deficiency but "on the end result occasioned by that deficiency in a given social context or environment".[64] The focus should therefore be on the consequence and not the impairment.

For asylum applicants and refugees with disabilities, the use of this definition entails important protection consequences. Due to their situation of flight and presence in a foreign country, they are highly likely to

56. ECRE would like to thank Rachel Murphy, Sixtine Schaffers, Jessica Weston and Oleksandr Khachaturian for their support in CRPD-related research. The support was provided in the context of their work for the "Human Rights and Migration Law Clinic at the Ghent University.
57. Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, p. 35–36
58. CJEU, Judgment of 7 December 2006, SGAE, C-306/05, ECLI:EU:C:2006:764, paragraph 35; Judgment of 14 July 1998, Bettati, Case C-341/95, ECLI:EU:C:1998:353, paragraph 20.
59. Glatzel, above n. 40, paragraphs 68.
60. CJEU, Judgment of 18th March 2014, Z., C-363/12, EU:C:2014:159, paragraphs 84-90.
61. Glatzel, above n. 40, paragraphs 69 and 70; CJEU, Judgment of 11th April 2013, HK Danmark, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 28-32.
62. L.B. Waddington, Saying all the right things and still getting it wrong: The Court of Justice's definition of disability and non-discrimination law, 2015, Maastricht Journal of European and Comparative Law, 22(4), 576-591.
63. Milkova, above n. 54, paragraph 36; HK Danmark, above n. 60, paragraph 38; Glatzel, above n. 40, paragraph 45.
64. Opinion of Advocate General Bot, delivered on 18 July 2013, Glatzel, Case C-356/12, ECLI:EU:C:2013:505, paragraph 35.

experience the interaction of certain impairments with various barriers more intensely than others. Thus, reception and asylum officials, healthcare providers and immigration officers must be aware of the possibility that what they perceive as absence of disability is in fact an experience of disability for the person navigating the new country. A disability-sensitive approach must be the basis of identification procedures conducted in the context of reception for these procedures to be able to ensure the protection that the Convention guarantees.[65]

In terms of accommodation, the set-up of refugee reception facilities may pose unique challenges. While normally a given impairment would not require special accommodation or assistive devices, it can be a prerequisite for persons to access to and ensure their well-being in reception centres. Access to healthcare can be affected by administrative and communication obstacles and can increase the needs of a person for specialised care. Similarly, information provision may not be as accessible to a refugee or asylum applicant with certain impairments as it would be to citizens of that country with the same impairments.

Lastly, the application of a social model of disability should inform procedures relating to the issuance of medical certificates on a person's (degree of) disability. Considerations related to the consequences of an impairment should be taken into account when a diagnosis is made and the latter should be accompanied by an explanation of the potential impact of the impairment in the life of the person. Similarly, when asylum and reception officers deal with a case where such a diagnosis has been made, they must assess the impact of the diagnosis on the procedures the person is undergoing or the benefits they are entitled to.

iii. Accessibility

The social understanding of disability is crucial to ensure that reception and asylum services and infrastructure are accessible for refugees and asylum applicants with disabilities before they need it, in line with the Committee's interpretation that considers accessibility an *ex ante* duty.[66] Under Article 9 of the Convention, this duty requires states to take necessary measures to enable persons with disabilities to access services and premises on an equal basis with others. The concept concerns the design and implementation of general measures that take into account the future use of a service, good or facility by a person with a disability. In *Nyusti and Takács v. Hungary*, the Committee underlined that *all services open or provided to the public* must be accessible to persons with disabilities in line with Article 9.[67]

According to the Committee, accessibility is a complex concept that encompasses the physical environment, transportation, information and communication and requires the provision of services to all persons with disability regardless of the type of impairment and without any distinction on any ground, including race, national or social origin, and legal or social status.[68] It is a general duty that must be discharged of during the design of a new service or facility or through the modification of existing services and facilities and is based on a set of standards that are implemented gradually.[69]

Premises, services and procedures designed for refugees and asylum applicants must therefore ensure accessibility for persons with disabilities belonging in that same group and they must do so by implementing physical, communication, information and transportation measures. This requirement must be met at all times, including during temporary or emergency reception arrangements, and encompass not only the accessibility of reception centres but also that of buildings housing the services they need.[70] Furthermore, the Committee addresses a general duty to states that receive a high number of asylum seekers, refugees or migrants.[71] The duty requires those states to establish formal, legally defined procedures to ensure persons with disabilities have access to reception facilities, psychosocial and legal counselling, support and rehabilitation in a manner that is sensitive to their disability, age and gender as well as culturally appropriate.

More specifically, accessibility under Article 9 requires States parties to identify and eliminate obstacles including in respect of buildings, roads, transportation and necessary facilities.[72] Similarly, authorities must

65. Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Addressing disabilities in large-scale movements of refugees and migrants, 2017, available at: https://www.ohchr.org/en/treaty-bodies/crpd/statements-declarations-and-observations
66. CRPD Committee, General Comment no. 2, CRPD /C/GC/2, 22 May 2014, para. 25.
67. CRPD Committee, Nyusti and Takács v. Hungary, Communication no. 1/2010, CRPD/C/9/D/1/2010, 9.4.
68. CRPD Committee, General Comment no. 2, CRPD /C/GC/2, 22 May 2014, para. 13.
69. General Comment no. 4, CRPD/C/GC/4, 25 November 2016, para. 6.
70. CRPD Committee, Concluding Observations on Malta, CRPD/C/MLT/CO/1, 17 October 2018, para. 17; in these Concluding Observations, the Committee expressed its concerns regarding the lack of accessibility of the reception centres and of the Office of the Refugee Commissioner.
71. CRPD Committee, General Comment No. 8, CRPD/C/GC/8, para. 73. (p).
72. General Comment no. 2, above n. 65, para. 17 (a).

remove any barriers to information, communications and other services, including electronic services and emergency services.[73] In this context, access to information and communication is essential: the Committee has noted that without such access persons with disabilities cannot enjoy freedom of thought and expression as well as other rights and freedoms.[74] In order to ensure that, states are required to promote live assistance and intermediaries, sign interpretation and other forms of appropriate assistance, including mandatory accessibility standards to guarantee access for persons with disabilities to new information and communication technologies.

In addition to reception-specific obligations, the Committee has elaborated on the obligations of states to ensure persons with disabilities remain safe during situations of risk and humanitarian emergencies under Article 11 of the Convention. In such situations, emergency services must remain accessible to persons with disabilities as a priority through measures that ensure physical access, efficient information and communication.[75] The Committee has expressed concerns over the absence of emergency accommodations for persons with disabilities living in refugee camps in the past.[76]

It should be noted that accessibility is an unconditional obligation: states cannot avoid ensuring accessibility by referring to the administrative or financial burden that may be associated with the necessary arrangements.[77] Where states decide to introduce measures that reduce the protection guaranteed by the Convention in response to an economic or financial crisis, they must demonstrate that such measures are "temporary, necessary and non-discriminatory and that they respect its core obligations."[78] Any measures that affect the minimum core obligations of the right to live independently within the community are prohibited.

iv. Integration through independent living and participation

Accessibility under Article 9 of the Convention is also related to the right of persons with disabilities under Article 19 to live independently and be included in the community, in the sense that the former is the precondition for the latter.[79] The aim of Article 19 to ensure independence and participation for every person with disabilities echoes the principle that Article 26 CFREU enshrines. On a normative basis, Article 19 seeks to ensure that persons with disabilities are seen as rights holders and encompasses different concepts such as independent living arrangements, inclusion in the community and personal assistance.[80] According to the Committee, the right must be effectively realised in different economic, social, cultural and political contexts without distinction on the basis of status, including migrant, asylum-seeking or refugee status.[81]

The inclusive nature of the article requires states to provide services of individualised or community support that are flexible enough to accommodate the requirements of the persons who need them, including by ensuring a sufficient number of qualified professionals that can provide solutions to the barriers that persons with disabilities face.[82] Community services include housing, transport, schools, shops and similar facilities and they must be within physical and geographical reach, affordable and gender, age and culturally sensitive.[83] These characteristics are of special importance when considered in the context of asylum applicants and refugees who may be accommodated outside city centres, with insufficient transport and limited income. The need for specialised personal assistance and guidance from lawyers, social workers, guardians or other actors is also relevant in this regard. Disability support services must equally be adapted to all persons regardless of national or ethnic origin.[84]

A similar approach has been taken by Advocate General Richard De La Tour in his interpretation of Article 26 CFREU. In his Opinion in *AP Assistenzprofis*, which concerned *inter alia* the issue of personal assistance services for persons with disabilities, the Advocate General referred both to Article 19 CRPD and Article 26 CFREU and noted "[…] *that persons with disabilities must be able to shape the service that will be provided to them and give instructions directly to the person providing assistance to them, which includes determining the*

73. *Idem*, para. 17 (b).
74. *Idem*, para. 21.
75. General Comment no. 4, above n. 68, para. 6.
76. CRPD Committee, Concluding Observations on France, CRPD/C/FRA/CO/1, 4 October 2021, para. 23.
77. General Comment no. 2, above n. 65, para. 25.
78. CRPD Committee, General Comment no. 5, CRPD/C/GC/5, 27 October 2017, para. 43.
79. General Comment no. 4, above n. 68, para. 6.
80. General Comment no. 5, above n. 77, paras. 3, 16 and 17.
81. *Idem*, paras. 8 and 23.
82. *Idem*, para. 28 and 32.
83. *Idem*, paras. 32-37.
84. *Idem*, para. 60.

selection criteria for their personal assistant and being actively involved in the process of hiring that assistant."[85]

Among these services, the challenge of access to education for refugees and asylum applicants with disabilities is self-evident. Multiple and varied barriers affect access to education for asylum-seeking children and youth.[86] In its interpretation of Article 24 of the Convention, the Committee has recognised that some groups are more at risk of exclusion from education than others, including persons with disabilities in humanitarian emergencies.[87] While the situation in a European host country is normally not one of humanitarian emergency, the situation of asylum applicants and refugees is often one of risk either due to the consequences of previous trauma and flight or due to the characteristics reception centres often present as temporary or emergency shelters.[88]

In addition, persons with disabilities can experience intersectional discrimination on the basis of their disability and, inter alia, legal status, ethnic origin, religion or language.[89] The educational environment must be designed in a manner that fosters inclusion and equality, including through accessible and affordable school transportation and learning materials in appropriate formats.[90] The obligation of acceptability requires states to create and implement education services respecting the requirements, cultures, views and languages of persons with disabilities while adaptability requires respect for the diverse needs of all learners.[91] Lastly, the Committee has clarified that Article 24 guarantees equal access to all types of learning, including vocational and tertiary learning, and requires the removal of linguistic and legal barriers.[92]

Access to employment is an important precondition for the independence and integration of refugees and asylum applicants regardless of whether they experience disability. As noted by the CJEU, "[…] *work clearly contributes to the preservation of the applicant's dignity, since the income from employment enables him or her not only to provide for his or her own needs, but also to obtain housing outside the reception facilities* […]."[93] In its interpretation of Article 27 of the Convention, the Committee attaches similar weight to employment stating that "[…] *it is essential to a person's economic security, physical and mental health, personal well-being and sense of identity*."[94] The CEAS Directives recognise a right to work both for asylum applicants and refugees: Article 15 of the RCD obliges states to provide access to the labour market no later than nine months following the application for asylum under certain conditions; Article 26 of the QD guarantees access to employment, employment-related education opportunities and social security systems under equivalent conditions as nationals.

Despite the *de lege* provision of the right, access to employment for refugees and asylum seekers presents legal and practical challenges across the world and in the EU.[95] Where these persons also experience disability, the challenges multiply and intensify. The Committee has emphasised the disproportionate adverse effects of intersectional discrimination on the realisation of the right to work and incudes the refugee, migrant or asylum-seeking population among the common intersecting layers of identity.[96] Access to just and favourable conditions of work and a safe and healthy work environment must be guarantees for all persons with disabilities including migrants.[97] For the effective exercise of this right, states are required to take measures to eliminate discrimination both on the basis of disability and other identities.[98]

85. Opinion of Advocate General De La Tour, delivered on 13 July 2023, J.M.P. v AP Assistenzprofis GmbH, Case C-518/22, ECLI:EU:C:2023:587, paragraph 63.
86. ECRE, The Right to Education for Asylum Seekers in the EU, Policy Note, March 2023, available at: https://ecre.org/wp-content/uploads/2023/03/Policy-Note-Accessing-to-Education-for-Asylum-Seekers-in-the-EU-March-2023.pdf
87. General Comment no. 4, CRPD/C/GC/4, 25 November 2016, para. 6.
88. Segarra, H. (2020). The Reception of Asylum Seekers in Europe: Exclusion through Accommodation Practices. In M. Jesse (Ed.), European Societies, Migration, and the Law: The 'Others' amongst 'Us' (pp. 213-229). Cambridge: Cambridge University Press. See also the CRPD Committee's connection of refugee and migration crises with Article 11 in its Concluding Observations on Hungary, CRPD Committee, Concluding Observations on Hungary, CRPD/C/HUN/CO/2-3, 20 May 2022, para. 22.
89. General Comment no. 4, above n. 68, para. 13.
90. *Idem*, paras. 22 and 23.
91. *Idem*, para. 25 and 26.
92. *Idem*, para. 38.
93. CJEU, Judgment of 14 January 2021, Joined cases C-322/19 and C-385/19, KS and Others v The International Protection Appeals Tribunal and Others, ECLI:EU:C:2021:11, paragraph 69.
94. General Comment No. 8, above n. 70, para. 3.
95. European Parliament, Labour market integration of asylum-seekers and refugees, Briefing, 22 June 2022, available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690651; Refugees International, the Center for Global Development, and Asylum Access, 2022 Global Refugee Work Rights Report, 28 July 2022, available at: https://www.cgdev.org/publication/2022-global-refugee-work-rights-report
96. General Comment No. 8, above n. 70, para. 22.
97. *Idem*, paras. 26 and 29.
98. *Idem*, above n. 74, para. 58.

C. DISCRIMINATION AGAINST REFUGEES AND ASYLUM APPLICANTS WITH DISABILITIES: THE ROLE OF ARTICLE 5 CRPD AND ARTICLE 21 CFREU

Throughout the previous section, the issue of intersectional discrimination was briefly mentioned in the context of its effects on the enjoyment of other rights enshrined by the CRPD. The following section will analyse in more detail the relevant guarantees against discrimination, as identified by the CRPD Committee in its interpretation of Article 5 of the Convention. The analysis will be complemented by a brief overview of the applicability of Article 21 CFREU in situations involving unequal access to rights for refugees and asylum applicants.

i. Article 5 CRPD: inclusive equality through intersectionality[99] and reasonable accommodation

Article 5 of the Convention prohibits disability-based discrimination and guarantees equal and effective legal protection against discrimination on all grounds. The provision formulates equality and non-discrimination as rights but the Committee has clarified that they are also principles and interpretative tools for every right enshrined in the Convention.[100] The prohibition includes both *de jure* and *de lege* discrimination in its direct and indirect form.[101] Evidently, migration policies that appear neutral but can be implemented only through the exclusion of persons with disabilities are in violation of this provision.[102]

Among the Committee's numerous declarations addressing various forms of discrimination, one of particular significance to the rights of asylum applicants and refugees is the concept of intersectional discrimination. This form of discrimination occurs when a person with disability suffers discrimination due to their disability in combination with other identities, including language, ethnic or other status.[103] The Committee has qualified this declaration with a particular sensitivity and openness towards the experience of refugees and asylum applicants with disabilities. The obligation to protect persons against "*discrimination on all grounds*" requires a consideration of the intersection of different grounds including those relating to the migrant, refugee or asylum status of a person or "*a combination of any of those grounds or characteristics associated with any of those grounds.*"[104] Assessing the problem of discrimination in the context of Article 11, the Committee has emphasised that *"internationally displaced persons with disabilities and/or refugees with disabilities often lack equal access to basic necessities, such as water, sanitation, food and shelter*."[105]

Lastly, the Committee pays particular attention to the situation of refugee and asylum-seeking women and girls with disabilities. The discrimination that women and girls with disabilities face in education, economic opportunities, social interaction and justice is compounded for refugees, migrants, and asylum seekers with disabilities.[106] Women refugees and asylum applicants may face additional barriers in accessing healthcare, particularly regarding sexual and reproductive health.[107] In emergency situations, women with disabilities are at increased risk of sexual violence and less likely to be able to benefit from appropriate care or justice services.[108]

Reasonable accommodation

The Convention enshrines reasonable accommodation in Article 5 as an essential component of equality and non-discrimination. In addition, the definition of disability-based discrimination under Article 2 of the Convention includes the denial of reasonable accommodation, an aspect of reasonable accommodation that the Committee emphasises often, as it will be shown below. In addition to considering it a form of discrimination, the Committee's contribution to the development of this concept is important as it goes beyond the understanding of reasonable accommodation as an employment-specific concept. Under EU law, the concept is recognised in Article 5 of the Employment Equality Directive while the CJEU has only analysed it in work-related cases and with a certain reluctance in following the more open interpretation of

99. In the context of the present analysis, the term "intersectionality" refers to situations that involve multiple and interconnected identities (e.g., race, class, gender, disability) which may apply to an individual and create overlapping, additional or mutually reinforcing systems of disadvantage or discrimination.
100. General Comment no. 6 on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para. 12.
101. *Idem*, para. 13.
102. *Idem*, para. 18.
103. *Idem*, para. 19.
104. *Idem*, para. 21.
105. *Idem*, para. 44.
106. CRPD Committee, General comment No. 3 (2016) on women and girls with disabilities, CRPD/C/GC/3, 25 November 2016.
107. *Idem*, para. 39.
108. *Idem*, para. 49.

the CRPD Committee.[109]

An important distinction should be made from the outset. Whereas accessibility relates to groups, the concept of reasonable accommodation relates to individuals. Persons with disabilities who have reasons to request measures of reasonable accommodation can do so regardless of whether the state has fulfilled its accessibility duty by designing and implementing other general measures.[110] As an *ex nunc* duty, reasonable accommodation must be provided from the moment a person needs it to enjoy their rights in a particular context.[111]

In this line, the Committee recognises the concept of reasonable accommodation as a means of ensuring accessibility for an individual with a disability in a particular situation.[112] Special consideration must therefore be given to the intersection of disability and displacement when an authority is considering a request for reasonable accommodation. A request for reasonable accommodation is evaluated through "*a contextual test that involves an analysis of the relevance and the effectiveness of* the accommodation and the expected goal of countering discrimination."[113] It should be noted, however, that unlike accessibility this duty exists only if implementation will not constitute an undue burden on the provider.

In the asylum context, specialised measures might be necessary and important during status determination procedures, insofar as applicants with disabilities need specific arrangements to navigate the process and explain their claims, such as sign language interpretation, noise or colour-free environments, simplified instructions and questions, frequent pauses. Without these elements, the right to independent living is not effectively realised. In this respect, the Committee has recognised that access to justice, legal aid and advice might require "*reasonable and procedural accommodation*" so that persons with disabilities can enforce their right to live independently.[114] The Committee established an important distinction between procedural accommodations and the concept of reasonable accommodation clarifying that the former cannot be limited on the basis of proportionality considerations (i.e., the undue burden test of the reasonable accommodation concept).[115] In the same line, law enforcement officers must be aware of and trained in addressing the complexities of intersectionality beyond the impairment of the person.[116] The APD allows for similar procedural modifications to ensure equal and effective access to asylum procedures, including for persons with disability.[117]

Requests for reasonable accommodation may also arise in the context of material reception conditions, for example, in respect of access to specialised or prioritised healthcare, specific living arrangements, assistive devices or mobility support. The duty to provide reasonable accommodation will depend on the context and the circumstances of the person. The Committee has emphasised the need for procedural safeguards, accessibility and reasonable accommodation for asylum seekers and refugees with disabilities at border crossings and in reception and accommodation facilities.[118] Examining the reception situation in various countries, the Committee has condemned the lack of disability-specific support in the reception context;[119] the absence of individualised support to detainees;[120] the unequal access to disability support and schemes (including assistive devices, care and information).[121]

The Committee refers to the workplace or school as the main examples of a context that may require reasonable accommodation measures to ensure a person's individual circumstances will not impede the enjoyment of their rights. This is particularly important for asylum applicants and refugees with disabilities who need to access work or education and are already at a disadvantage due to the consequences of their flight or due to their current living arrangements. In addition to the general guarantees on access to education and work mentioned above, special attention might be warranted to persons experiencing disability and displacement in unique ways either due to a rare form of disability or due to an intense

109. Gyulavári, T. Recent CJEU case law on 'reasonable accommodation' at work: towards the recognition of a new discrimination form. ERA Forum (2023).
110. General Comment no. 4, above n. 68, para. 29.
111. General Comment no. 2, above n. 65, para. 26.
112. *Idem*, para. 26.
113. General Comment no. 4, above n. 68, para. 28.
114. General Comment no. 5, above n. 77, para. 66.
115. General Comment no. 6, above n. 99, para. 51.
116. *Idem*, para. 55.
117. Recital 29 and Article 24.
118. CRPD Committee, Concluding Observations on Hungary, CRPD/C/HUN/CO/2-3, 20 May 2022, para. 37; CRPD Concluding Observations on Estonia, CRPD/C/EST/CO/1, 5 May 2021, para. 36.
119. CRPD Committee, Concluding Observations on Germany, CRPD/C/DEU/CO/2-3, 3 October 2023, paras. 15, 41 and 55.
120. CRPD Committee, Concluding Observations on Greece, CRPD/C/GRC/CO/1, 29 October 2019, para. 15.
121. CRPD Committee, Concluding Observations on Cyprus, CRPD/C/CYP/CO/1, 8 May 2017, para. 15.

combination of physical and mental challenges.

Regarding access to education, reasonable accommodation can be diverse and includes both material (e.g., interpreter or assistive technology, sign-based communication, printed products in alternative formats) and non-material (e.g., reducing noise, alternative evaluation methods, increased allocated time) measures.[122] Reasonable accommodation measures that take into account both the disability and the refugee or asylum-seeking status of a person are necessary for the provision of support that is effective and appropriate; in the event of the contrary, the denial of reasonable accommodation constitutes discrimination.[123] Similarly, in relation to the right to work and employment, the Committee has stated that the obligation of non-discrimination precludes the denial of reasonable accommodation and prohibits multiple and intersectional discrimination.[124]

Access to healthcare may be dependent on the provision of reasonable accommodation. The Committee considers that Articles 5 and 25 of the Convention entail a duty to prohibit and prevent discriminatory denial of healthcare to persons with disabilities.[125] This duty includes the prevention of violations of the right to access healthcare on the basis of free and informed consent and the right to have physical access to facilities and appropriate communication.

ii. Article 21 CFREU: an individual right to non-discrimination

Described as one of the founding values of the Union and a common value of all Member States,[126] the EU has a primary law obligation to combat discrimination in its policies and activities and to prohibit any occurrence of it on grounds of nationality under the Treaty on the Functioning of the European Union (TFEU).[127] The Charter of Fundamental Rights enshrines equality before the law and non-discrimination in Articles 20 and 21 respectively. Different instruments of secondary law are dedicated to the prohibition of discrimination for specific grounds (racial or ethnic origin) in different contexts under the Race and Ethnicity Equality Directive[128] or for a wide array of grounds (religion or belief, disability, age or sexual orientation as regards employment and occupation) in the specific context of employment under the Equality Framework Directive.[129]

Despite the abundance of legal provisions, the impact of the equality and non-discrimination guarantees in the EU asylum and migration law is limited. The prohibition of nationality-based discrimination under Article 18 TFEU does not apply in cases of third-country nationals as, according to the CJEU, "[*T]hat provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries*."[130] Similarly, the two Directives mentioned above contain common provisions (Article 3 (2) of both instruments) excluding from their scope any treatment based on nationality and precluding any interference of their provisions with the domestic migration laws of Member States or with any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Nevertheless, the Charter's provisions may offer a strong legal basis for pursuing cases of discrimination against refugees and asylum applicants with disabilities. Disability is among the prohibited grounds of discrimination, along with multiple other grounds, including race and ethnic origin. The wording of the provision suggests that the list is non-exhaustive ("any ground such as"). Article 21 (2), however, contains a separate prohibition of nationality-based discrimination which is placed "within the scope of application of the Treaties", a wording that reflects Article 18 TFEU and may arguably limit the possibility to use it for non-EU nationals. Despite this possible limitation, the Court has examined nationality as a suspect ground of discrimination in a case concerning the validity of the provisions of the previous Asylum Procedures

122. General Comment no. 4, above n. 68, para. 30.
123. *Idem*, para. 31.
124. General Comment No. 8, above n. 70, para. 64.
125. General Comment no. 6, above n. 99, para. 66.
126. Article 2, Consolidated version of the Treaty on European Union, Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.
127. Articles 10 and 18, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.
128. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–2.
129. Employment Directive, above n. 37.
130. CJEU, Judgment of 4 June 2009, Vatsouras, Joined Cases C 22/08 and C 23/08, ECLI:EU:C:2009:344, paragraph 52.

Directive[131] although it relied on the principle of non-discrimination as a general EU law principle without any reference to Article 21 (1) or (2).[132] It appears that when non-discrimination is invoked as a principle of EU law its reach may be wider.

According to the CJEU's case law, the principle of non-discrimination of Article 21 (1) is a "particular expression" of the principle of equal treatment which itself is a general principle of EU law.[133] The normative aspect of the principle requires that "[…] *comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified* […]."[134] In *Egenberger*, the Court clarified the relevant aspects of the applicability of Article 21 (1) of the Charter; according to the judgment, the prohibition of discrimination is mandatory as a general principle of EU law and its "[…] *sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law* […]."[135] National courts are therefore required to ensure the judicial protection of Article 21 and guarantee its effectiveness by disapplying any provisions of national law that contravene it.[136] In addition, the Court has stated that the prohibition of discrimination in the first paragraph of the article must be read in the light of other Charter articles that are relevant in the case under examination.[137]

It follows that there is possibility for Article 21 to be invoked in situations of possible discrimination – *de lege* or *de facto* – against asylum applicants and refugees with disabilities where those situations fall under the CEAS Directives. All three Directives include Article 21 among the Charter provisions that must be respected by Member States when they implement the provisions of the Directives.[138] The Qualification Directive requires Member States to respect their obligations under international law, particularly those that prohibit discrimination, when they implement its provisions.[139] More specific provisions oblige Member States to ensure equal treatment in procedures for recognition of qualification and to pay particular attention to the possibility of discrimination in the context of social assistance and accommodation.[140]

In addition to the case of nationality-based discrimination in the context of the APD mentioned above, the CJEU has also examined the possibility of discrimination in a case falling under the Qualification Directive. The latter was the subject of a preliminary reference before the CJEU in *Ibrahim Alo*, a case concerning the compatibility with the Directive of a national provision requiring beneficiaries of subsidiary protection who receive social assistance to reside in a specific area.[141] The Court noted that restricting the choice of residence for subsidiary protection status holders would create an untenable distinction between beneficiaries of international protection but found that the Directive did not prevent beneficiaries of subsidiary protection status from being subject to a residence condition for the purpose of promoting their integration where they are not in an objectively comparable situation with other third-country nationals.[142] Although the case's focus was non-discrimination, the Court relied on the relevant provisions of the QD without discussing Article 21.

These cases concerned situations of potential discrimination, yet the Court has not had the opportunity to review cases where that discrimination is the result of disability. An interesting analysis of the potential reach of Article 21 in such cases can however be found in opinions by the Court's Advocate Generals. In *Koushkaki*, a case concerning the application of the Visa code,[143] Advocate General Mengozzi stated that Member States are obliged to observe the principle of non-discrimination when they apply the relevant provisions establishing entry conditions and grounds for refusal.[144] The persons conducting the relevant procedure must not operate on the basis of "mere assumptions" but should properly consider "the personal and human context of the individual situation behind each application."[145]

131. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p. 13–34.
132. CJEU, Judgment of 31 January 2013, D. and A., C-175/11, ECLI:EU:C:2013:45, paragraph 71.
133. CJEU, Judgment of 5 July 2017, Werner Fries, Case C-190/16, ECLI:EU:C:2017:513, paragraph 29.
134. *Idem*, paragraph 30.
135. CJEU, Judgment of the Court (Grand Chamber) of 17 April 2018, Egenberger, Case C-414/16, ECLI:EU:C:2018:257, paragraph 76.
136. *Idem*, paragraph 82.
137. CJEU, judgment of 3 June 2021, GN, Case C914/19, ECLI:EU:C:2021:430, Paragraph 44.
138. Recital 16 QD, Recital 35 RCD, Recital 45 APD.
139. Recital 17, QD.
140. Article 28, Recital 45 and Article 32 respectively of the QD.
141. CJEU, Judgment of 1 March 2016, Ibrahim Alo, Joined Cases C-443/14 and C-444/14, ECLI:EU:C:2016:127.
142. *Idem*, para. 65.
143. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15.9.2009, p. 1–58.
144. Opinion of Advocate General Mengozzi, Delivered on 11 April 2013, Koushkaki, C-84/12, ECLI:EU:C:2013:232, paragraph 65.
145. *Idem*, paragraph 66.

The importance of this approach in cases of disability-based discrimination against refugees and asylum applicants is evident. As discussed in the previous section, the CRPD requires an approach to and definition of disability that is dynamic, sensitive and cognisant of the social barriers that may create it. Authorities conducting reception and asylum procedures, as well as all authorities which interact with beneficiaries of international protection, must be aware of the specific challenges that this group of persons face when compounded by disability. Conversely, asylum applicants and beneficiaries of international protection with disability may be able to challenge actions or omissions of the authorities that result from an absence of a disability-sensitive approach.

The Opinion of Advocate General Cruz Villalón in the aforementioned *Ibrahim Alo* case contains equally interesting arguments, particularly on the possibility of disability and immigration status to interact with each other in cases of intersectional discrimination. Although the judgment in that case did not engage with Article 21, the opinion contains an extensive consideration of the principle of non-discrimination under both Article 21 CFREU and Article 14 ECHR. It is clarified that Article 21 contains a non-exhaustive list of prohibited grounds and that immigration status may be recognised as one of them.[146] In support of this, the AG referred to Article 14 ECHR, which corresponds to Article 21 CFREU and must inform the latter's application in accordance with the Explanations relating to the Charter,[147] and the case law of the European Court of Human Rights (ECtHR).[148] Particularly in respect of the situation of international protection beneficiaries, he emphasised the absence of the element of free personal choice that is present in other types of migration status and considered that any differential treatment must be subject to a strict proportionality scrutiny.[149] The reasoning of the opinion can support situations amounting to discrimination where the person argues that their differential treatment is based both on their disability and their immigration status.

The obligation to interpret Article 21 CFREU in compliance with Article 14 ECHR allows the standards of the ECtHR jurisprudence to become relevant and applicable in situations where the rights of asylum applicants and beneficiaries of international protection with disabilities are concerned. While the examination of the relevant ECHR guarantees is not within the scope of this analysis, it is worth noting several relevant cases from the ECtHR anti-discrimination case law with interesting elements. When comparing nationality and immigration status as possible prohibited grounds of discrimination, the ECtHR has recognised that the proportionality test may be stricter when the discrimination is based on an immutable element (which is often the case for impairments and disability) rather than an element that involves personal choice (which can be the case for immigration status).[150] Nevertheless, in *Hode and Abdi*, the Court noted the absence of an element of choice in the refugee status when assessing discrimination on the basis of that particular immigration status.[151]

In the same line, the margin of appreciation accorded to the governments might be relatively wide according to the ECtHR when the subject matter of the discrimination case is of socio-economic nature.[152] However, in *Ponomaryovi,* where the case concerned the payment of school fees imposed on a foreigner without a permanent residence permit, the ECtHR stressed that education corresponds to a Convention right, serves broader societal functions and promotes the integration of minorities which is necessary to achieve pluralism in a democracy.[153] It went on to find that the differential treatment was not justified. Similarly, in *Anakomba Yula*, the ECtHR stated that the case concerned serious matters of family law and the decision would have a definitive impact on the family life of the applicant and others; therefore, "particularly compelling reasons were required to justify different treatment between persons who did not have a residence permit and those who did."[154] The refusal of legal aid due to the irregular status of the applicant was found to constitute unjustified differential treatment as such legal aid was available to EU citizens, citizens of countries covered by legal aid conventions and to people who wished to use it to regularise their residence.

Although the findings of the ECtHR in those cases were made in the specific context of each complaint, certain arguments can be drawn from the reasoning of the judgments that can be relevant for situations of discrimination against refugees and asylum applicants with disabilities to ensure states comply with the

146. Opinion of AG Cruz Villalón in Ibrahim Alo, above n. 140, paragraph 75.
147. An obligation that can also be found in Article 52 (3) of the Charter regarding the minimum equivalent protection for Charter rights that correspond to ECHR rights.
148. ECtHR, Bah v. The United Kingdom, Application no. 56328/07, 27 September 2011; ECtHR, Ponomaryovi v. Bulgaria, Application no. 5335/05, 21 June 2011.
149. Opinion of AG Cruz Villalón in Ibrahim Alo, above no. 140, paragraph 76.
150. Bah v. The United Kingdom, above n. 147, para. 47.
151. ECtHR, Hode and Abdi v. The United Kingdom, Application no. 22341/09, 6 November 2012.
152. Bah v. The United Kingdom, above n. 149.
153. Ponomaryovi v. Bulgaria, above n. 147, paras. 50 and 55.
154. ECtHR, Anakomba Yula v. Belgium, Application no. 45413/2007, 10 March 2009, para. 37.

obligations under Article 1 ECHR. First, where the immigration status implies an element of forced displacement, the proportionality requirements will be higher and only very strong ground will be able to justify differential treatment on that basis. Second, where the right at stake is one of the Convention rights and is liable to have serious impact on key aspects of the person's life, the margin of appreciation of states is narrower. Arguably, for an asylum applicant or a beneficiary of international protection with a disability, any impact of state measures on their ability to access rights and live with independence and dignity might require even stricter scrutiny. In this scrutiny, the guarantee of integration of minorities, recognised as a weighty factor by the ECtHR, will be an essential component.

Taking the above into consideration, it should be noted that the ECtHR's interpretation of the Convention provisions does not bar the CJEU from recognising a higher protection standard. The requirement of Article 52 (3) of the Charter only relates to minimum equivalent protection; more extensive protection can be provided under Union law.

III. CONCLUSION

Navigating the intricate intersection of EU law and the rights of asylum applicants and beneficiaries of international protection with disabilities presents different challenges for legal professionals. This legal note presented some of the difficulties associated with the application of Article 26 CFREU and analysed the potential for a more protective interpretation of current legal standards within the EU and the international legal framework. This potential can be tested before courts by lawyers representing asylum applicants and beneficiaries of international protection with disabilities with the aim of consolidating CRPD guarantees both in national and CJEU jurisprudence and addressing the intersectional challenges these cases present.

Following the above analysis of those standards, certain conclusions can be drawn:

- One of the current challenges is connected to the absence of CJEU case law on the applicability of Article 26, as well as of the CRPD, in the area of asylum. More disability-sensitive litigation may be able to lead to a more meaningful engagement with Article 26 and its interpretative potential. This would also lead to the clearer incorporation of CRPD standards in EU law in general and the EU asylum acquis more specifically. The role of national litigation is crucial in this respect as domestic judges implement EU law and ensure its correct application in Member States. They are also the actors that can identify legal issues in need of further clarification from the CJEU.
- Despite the lack of sufficiently clear jurisprudence, Article 26 can be used as an interpretative principle in the implementation of the CEAS to ensure the rights of refugees and asylum applicants with disabilities in reception, during asylum procedures and after qualification. When considering the application of Article 26, its content can be clarified through reference to the CRPD, a specialised and binding instrument of international law that has been ratified by the EU and the Member States.
- The CRPD standards are binding on the EU and its Member States when they implement EU law. The CRPD Committee has specified guarantees in a variety of situations that are applicable in the asylum context. Some of them are generally applicable to all persons with disabilities while others emphasise the need for specific attention for the rights of asylum applicants and refugees with disabilities, as persons at risk and due to the possibility for intersectional discrimination.
- The CRPD requires a disability-sensitive approach based on the social aspects of the experience in all reception, asylum and qualification procedures. When identifying people with a disability, providing them accessible services in general and reasonable accommodation in specific situations, authorities must assess the person's needs on the basis of a comprehensive evaluation that precludes assumptions, formalistic medical requirements and generalisations.
- The principle of non-discrimination is highly relevant in securing the rights of asylum applicants and beneficiaries of international protection with disabilities. Litigating against discrimination allows more specific and nuanced approaches to be followed, particularly in complex cases of intersectional or multiple discrimination or where the discrimination results from denial of reasonable accommodation when general disability-sensitive measures do not suffice.
- Litigation arguments can be drawn both from Article 5 CRPD and Article 21 of the Charter. The latter's direct applicability has been clarified by the Court and the cases discussed above reveal a brief glimpse of its potential in cases involving discrimination in the area of asylum.

Litigation advancing the rights of asylum applicants and refugees with disabilities is necessary to ensure compliance with existing standards, to challenge discriminatory perceptions, policies and practices and to promote specialised protection. However, it is equally important for the visibility of this group as rights holders. While their experience is often discussed in respect of their vulnerability, rights-based litigation can shift that perception to focus on their dignity, itself a Union founding value and a Charter right.