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Data: 22/11/2026 12:58:38

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Did the Court of Justice Open a Gateway to Europe for Refugees? Analysis of the Judgment of the Court of Justice of the European Union in *EZ v. Bundesrepublik Deutschland* (C-238/19)

Czy Trybunał otworzył uchodźcom bramę do Europy? Analiza wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie EZ przeciwko Republice Federalnej Niemiec (C-238/19)

ABSTRACT

In the judgment in question, the Court of Justice of the European Union (CJEU) for the first time ever carried out such broad interpretation of Article 9 (2) (2) (e) of Directive 2011/95/EU in the context of non-formalized refusal to perform military service by a young Syrian who escaped from his country of origin. The paper analyses the impact of the CJEU judgment on the functioning of the guarantee of the right to conscientious objection to military service within the EU asylum law. It also asks two key questions. First, in the light of the analysed judgment, should any potential Syrian conscript who in reality does not support the government (non-opportunist) and who evades military service be granted protection? Secondly, do all Syrian conscripts who join the army make themselves subject in the future to automatic exclusion from protection?

Keywords: protection; refugees; Directive 2011/95/EU; right to conscientious objection to military service; CJEU

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Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

INTRODUCTION

In the EZ judgment commented herein,[1] the Court of Justice of the European Union (CJEU) interpreted Article 9 (2) (e) of the Directive2011/95/EU[2] (in conjunction with Article 9 (3) of Directive). This provision stipulates for a form of persecution that is admissible in qualification for international protection which here involves "prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12 (2)".

Following the 2015 migration crisis, we have been observing specific legislative stagnation and draft regulations under the Common European Asylum System (CEAS) submitted in 2016 are still waiting to be approved.[3] Failure to make full use of the provisions of Directive 2001/55/EC[4] also becomes important in the context of the discussed judgment as this directive could be applied in the event of a massive influx of persons seeking international protection. Unfortunately, despite the Arab Spring crisis or the 2015 migration crisis, EU institutions did not decide to launch protection mechanisms for specific groups of persons.

Therefore, what we are left with is to ask whether the case law of the CJEU may become a protection instrument and a real source of directives for proceedings before national authorities in cases which cannot be regulated by specific provisions of EU law either due to the EU legislator's tardiness or due to shortcomings in the implementation of acts of law.

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[1] Judgment of the CJEU of 19 November 2020 in *EZ v. Bundesrepublik Deutschland* (C-238/19), ECLI:EU:C:2020:945, hereinafter: C-238/19 or the EZ.

[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), hereinafter: the Directive 2011/95/EU or the Qualification Directive.

[3] For example, see Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels, 13.7.2016, COM(2016) 466 final.

[4] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212/12, 7.8.2001).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

ANALYSED UNION'S LAW

In the judgment in question, the CJEU for the first time ever interpreted Article 9 (2) (e) of the Qualification Directive so broadly. According to the provisions of the Qualification Directive: "Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of (…) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12 (2)".[5] Moreover, pursuant to Article 9 (3) there must be a connection between the reasons mentioned in Article 10 of this Directive and the acts of persecution as qualified in para. 1 of this Article[6] or absence of protection against such acts. The said Article 10 of the Qualification Directive specifies the basis for assessing persecution. It includes the notions of race, religion, nationality, membership in a specific social group, and political opinion understood in particular as "the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant".[7] The applicant may effectively invoke Article 9 (2) (e) only where performance of military service was to result in exclusion from international protection under Article 12 (2) of the Qualification Directive. According to this provision, exclusion from granting a refugee status occurs when there are serious concerns that the applicant "committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes", when he committed a serious non-political crime outside the host country prior to obtaining protection or is "guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations".

[5] Article 9 (2) (e) of Directive 2011/95/EU.

[6] According to Article 9 (1) of Directive 2011/95/EU: "In order to be regarded as an act of persecution within the meaning of Article 1 (A) of the Geneva Convention, an act must: a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)".

[7] Article 10 (1) (e) of Directive 2011/95/EU.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

FACTS AND PROCEEDINGS AT THE NATIONAL LEVEL

A national court of the Federal Republic of Germany referred a question to the CJEU for a preliminary ruling. A Syrian national born in 1989, Mr. EZ, was the party in the proceedings. He fled Syria after he had graduated from the University of Aleppo in 2014 so as to avoid compulsory military service which was deferred for him until February 2015. As rightly noted by Advocate General in her opinion, Syria operates a system of two-year compulsory military service for male Syrian nationals aged 18 and over.[8] Pursuant to the report of the Independent International Commission of Inquiry on the Syrian Arab Republic, the basis for performance of military service lies in constitutional provisions.[9] Women are not required to perform military service, though they may volunteer to serve. Syrians who evade compulsory military service face statutory prison sentences for terms of up to five years and also, as emphasized by Advocate General, "execution as a result of such recruits being placed on hazardous assignments in front-line operations without being given any prior military training".[10]

Mr. EZ obtained subsidiary protection in Germany, but he appealed against this decision claiming that he should have been granted a refugee status as his return to Syria would entail a risk of persecution.[11]

German law implements provisions of the Qualification Directive in *Asylgesetz* (Asylum Law).[12] The national court concluded that the case law of German courts has no established line of judicial decisions concerning Syrian conscripts. In consequence, it decided to suspend the proceedings and to refer five questions to the CJEU for a preliminary ruling.

[8] Opinion of Advocate General Eleanor Sharpson delivered on 28 May 2020, Case C-238/19 *EZ v. Bundesrepublik Deutschland*, represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees), ECLI:EU:C:2020:404, para. 25, hereinafter: opinion in C-238/19.

[9] United Nations Human Rights Council, Human rights situations that require the Council's attention, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council, Thirty-fourth session, 27 February – 24 March 2017, A/HRC/34/64, 2 February 2017. According to the report, "The Constitution of the Syrian Arab Republic in its Article 46 states that 'Compulsory military service shall be a sacred duty and is regulated by a law' for all men over the age of 18 years".

[10] Opinion in C-238/19, para. 22.

[11] The Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge) thought to the contrary, claiming that applicant EZ will not face persecution should he return to Syria. See para. 15 of the judgment in the case of EZ. As noted by Advocate General in her opinion in C-238/19, para. 19, "the Bundesamt took the view that there was no causal link between the act of persecution and a reason for persecution in his case".

[12] Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

QUESTIONS REFERRED AND THE COURT'S RULING

In its preliminary observations to the judgment in the EZ case, the CJEU pointed out that it is necessary to interpret the provisions of Article 9 (2) (e) of the Qualification Directive in the light of general scheme of the directive, on the basis of legal definitions of a refugee (Article 2 of the Qualification Directive) and persecution (Article 9 of the Qualification Directive) functioning within the CEAS.

The CJEU reformed and decided to examine the first two questions jointly, aiming to establish whether in a situation where a national law (like in Syria) does not formally provide for the right to conscientious objection to performance of military service, can exercising such a refusal with the aim to apply Article 9 (2) (e) be acknowledged by the conscript's actual fleeing the country of origin and without any formal action on his part.[13] The CJEU recognized that such interpretation is not contrary to the analysed provision of the Directive.

The CJEU emphasized that the applicant cannot be requested to formalize his refusal to perform military service if the country of origin does not speculate for such refusal in its domestic regulations.[14] By merely attempting to formalise such refusal the applicant would, in the CJEU's opinion, face repressions.[15] However, the fleeing of the country of origin itself so as to avoid military service cannot, in the CJEU's opinion, be deemed as real refusal to perform military service for the purposes of qualification to international protection. When assessing the true nature of the refusal, the national authority must take into account information about the country of origin, evidence provided for by the applicant and his individual situation.[16]

Next, the adjudicating panel addressed the question of whether performance of military service will entail commission of crimes or acts referred to Article 12 (2) of the Qualification Directivesince the armed forces of the country of origin repeatedly and systematically commit crimes and acts under Article 12 (2), where a conscript refuses to do his military service in a conflict and does not know what tasks he would be deployed for in the future.[17] The CJEU agreed with that.

The CJEU, on the basis of information about the country of origin, decided that in the case of Syria it is highly plausible that the conscript will commit such acts. Entering the universal field of interpretation of Article 9 (2) € of the Qualification Directive, the CJEU emphasized that it is for the national authorities alone to assess, under the supervision of the courts, whether the performance of military service

[13] C-238/19, para. 26.
[14] C-238/19, paras 28 and 29.
[15] C-238/19, para. 29.
[16] C-238/19, para. 31.
[17] Thus, a conscript who evades military service, in the case of EZ – in Syria, cannot be entirely sure whether or not he will be deployed to do tasks that meet requirements of crimes under Article 12 (2).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

by an applicant would necessarily or, at least, very probably lead that applicant to commit the crimes referred to in Article 12 (2) of the Qualification Directive.[18]

The fourth question of the national court concerned the need for a connection between the reasons of persecution mentioned in Article 10 of the Qualification Directive and the acts of prosecution referred to in Article 9 (2) (e). The CJEU gave an affirmative answer, emphasizing that the question must be answered in light of the intention of the EU legislature. Pursuant to Article 9 (3) of the Qualification Directive, "there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in para. 1 of this Article or the absence of protection against such acts".

As the CJEU gave an affirmative answer to the referring court's fourth question, it moved on to investigating whether existence of a connection between the reasons of persecution and forms of persecution, such as prosecution and punishment for refusing to perform military service, may be deemed proven since refusal to perform one's military service results in prosecution and punishment. The CJEU thus interpreted Article 9 (2) (e) in conjunction with Article 9 (3) and Article 10 of the Qualification Directive.[19] However, the answer to the question referred by the national court is negative.

Admittedly, the CJEU emphasized that "in many situations, refusal to perform military service is an expression of political opinions", yet it may also result for reasons other than the five reasons for persecution mentioned in Article 10 of the Qualification Directive. Advocate General also noticed this in her opinion, pointing out that objections to being conscripted may be based on opportunism, a wish to devote oneself to professional career or may result only from the fear of risks associated with military service. Such motivation, according to Advocate General, excludes the possibility of the applicant falling within the scope of the directive.[20] Thus, national authorities that conduct refugee proceedings must assess relevant applications on an individual basis.

Moreover, as noted by the CJEU, the very definition of a refugee under Article 2 (d) of the Qualification Directive means that a refugee is a person who leaves his country or origin "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality", i.e. for reasons referred to in Article 10 of the Qualification Directive. Failure to examine their connection with the likelihood of experiencing various forms of persecution would lead to a breach of a legal order of the Directive, the CEAS, Geneva Convention and would become a precedence for a universally applied definition of a refugee. The CJEU

[18] C-238/19, para. 34.
[19] C-238/19, para. 45.
[20] Opinion in C-238/19, para. 67.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

emphasized, that "the EU legislature did not intend to make it more difficult (…) to obtain refugee status, [but] it took the view that that reason for persecution [is] related, as a general rule, to at least one of the five reasons for persecution conferring entitlement to refugee status".[21]

The CJEU aptly noted that the applicant may find it difficult to present proof for the connection between the reasons and forms of persecution that he would necessarily or, at least, very probably experience in the country of origin due to refusal to perform military service[22] and it cannot be assumed that it is for the applicant only to prove the connection between the reasons and forms of persecution.[23] Moreover, as emphasized by Advocate General, evading conscripts are usually relatively young adults and thus may put forward "less sophisticated reasoning" than more mature persons.[24]

According to the CJEU one cannot deny that there is a strong presumption that refusal to perform military service under the conditions set out in Article 9 (2) (e) relates to one of the five reasons set out in Article 10 of the Qualification Directive.[25] However, it is a rebuttable presumption and assertions of the party in the proceedings must be assessed in the taking of evidence.

[21] C-238/19, para. 58.

[22] See M. Lippman, *The recognition of conscientious objection to military service as an international human right*, "California Western International Journal" 1990, vol. 21(1) Article 3, p. 33. The author speaks about the difficulties in the taking of the evidence "As was observed during the 1967 debate in the Consultative Assembly of the Council of Europe, 'until someone invents a truth machine' it will remain difficult to evaluate the claimant's alleged opposition to war".

[23] C-238/19, para. 54. It is worth referring here to the Note on Burden and Standard of Proof in Refugee Claims, pursuant to which "Facts which need to the 'proved' are those which concern the background and personal experiences of the applicant which purportedly have given rise to fear of persecution and the resultant unwillingness to avail himself/herself of the protection of the country of origin" – United Nations High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998. See also J. Chlebny, *Ochrona sądowa w sprawach dotyczących osób ubiegających się o nadanie statusu uchodźcy – doświadczenia i perspektywy*, "Miscellanea Iuris Gentium, Cracoviae A.D. MMIV" 2004, no. 7, pp. 19–33.

[24] Opinion in C-238/19, para. 81. See also regarding "credibility" T. Kelly, *The legalization of human rights and the protection of torture survivors: Asylum, evidence and disbelief*, [in:] *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United Stated*, eds. M.-B. Dembour, T. Kelly, London–New York 2012, p. 193.

[25] C-238/19, para. 57. It is worth invoking here AG's opinion as confirmation of the adopted presumption. In para. 57 of her opinion, AG states that "objection to military service necessarily implies a degree of conflict of values between the authorities and the person who objects".

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

ASSESSMENT OF THE JUDGMENT

1. The role of the judgment in facilitating the prospective applying for the international protection in EU by Syrians

The analysis of the judgment discussed produces two key questions. First, in the light of the analysed ruling, should any potential Syrian conscript who in reality does not support the government (non-opportunist) and who evades military service be granted international protection? Does, therefore, the judgment open a gateway to fortress Europe for young Syrians?

These questions involve another issue that is worth looking into as a side note to this commentary. Human rights scholars and commentators have been postulated for a few decades now that the right to conscientious objection to military service should be recognized. M. Lippman postulated that this right, deriving from the right to conscientious objection, be recognized as an international human right.[26] It is worth asking a side question: Does the EZ judgment contribute anything to this discussion?

The right to conscientious objection to military service[27] is defined as "objection to such service" which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives".[28] Such an objection is not confined to absolute conscientious objectors (pacifists), that is, those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases [partial or selective objection to military service]".[29]

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[26] M. Lippman, *op. cit*. See also H. Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Berlin–Heidelberg 2009, pp. 1–18.

[27] For historical regulation in the area of the right to conscientious objection to military service, see J.B. Schroeder, *The Role of Jehovah's Witnesses in the emergent right of conscientious objection to military service in international law*, "Kirchliche Zeitgeschichte" 2011, vol. 24(1), p. 174; J. de Sousa e Brito, *Political minorities and the right to tolerance: The development of a right to conscientious objection in constitutional law*, "BYU Law Review" 1999, vol. 2(6). See also S. Lynd, *Someday they'll have a war and nobody will come*, "Peace and Change" 2011, vol. 36(2), pp. 156–171.

[28] United Nations Human Rights Council, Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 12 November 2014, HCR/GIP/13/10/Corr. 1, p. 1.

[29] *Ibidem*. For a selective right to conscientious objection to military service, see A. Yiannaros, *Refusing to kill: Selective conscientious objection and professional military duties*, "Journal of Military Ethics" 2018, vol. 17(2–3), p. 109.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

As Advocate General noted in her opinion on the EZ case, a right to refuse to act contrary to one's conscience is recognised, though not defined in international law and applies to all personal, political, philosophical, and moral convictions.[30] This right is universally derived from Article 18 of the International Covenant on Civil and Political Rights; according to its para. 1: "Everyone shall have the right to freedom of thought, conscience and religion".[31] UN activity for codification of the right to conscientious objection can also be found in the 1993 Human Rights Committee General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18).[32] The Human Rights Committee states in said General Comment that despite the fact that the Covenant does not explicitly refer to a right to conscientious objection, the Committee believes that such a right can be derived from Article 18.[33] Similarly, human rights scholars and commentators believe that there is a "recent and well-established trend in the international community to interpret the right to freedom of thought, conscience and religion as encompassing the right to conscientious objection".[34]

[30] Opinion in C-238/19, para. 69. It is worth adding that legal scholars and commentators link this right to two kinds of objection: against "unlawful use of force [*jus ad bellum*]" and with regard to "the means and methods of warfare as regulated by international humanitarian law [*jus in bello*]". See United Nations Human Rights Council, Guidelines on International Protection…, para. 21.

[31] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. However, what is crucial, Article 8 of the Covenant prohibits forced and slave labour, though not recognizing "Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors" as such work (Article 8 (3) (c)). See also United Nations, Conscientious Objection to Military Service. Report prepared in pursuance of resolutions 14 (XXXIV) and 1982/30 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mr. Asbjern Eide and Mr. Chama Mubanga-Chipoya, members of the Sub-Commission, E/CN.4/Sub.2/1983/30/Rev.1, para. 43.

[32] Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18): 30/07/93, CCPR/C/21/Rev.l/Add.4, para. 11. For international activities for the recognition of the right to conscientious objection, see M. Bielecki, *Odmowa pełnienia służby wojskowej przez Świadków Jehowy jako realizacja klauzuli sumienia. Uwarunkowania prawno-historyczne*, "Studia z Prawa Wyznaniowego" 2016, vol. 19, pp. 107–128.

[33] See United Nations, *Conscientious Objection to Military Service*, New York–Geneva 2012, p. 10; J.B. Schroeder, *op. cit.*, pp. 176–179.

[34] K. Musalo, *Conscientious objection as a basis for refugee status protection for the fundamental right of freedom of thought, conscience, and religion*, "Refugee Survey Quarterly" 2007, vol. 26(2), p. 70. See also E.N. Marcus, *Conscientious objection as an emerging human right*, "Virginia Journal of International Law" 1998, vol. 38, p. 509; M.-F. Major, *Conscientious objection and international law: A human right?*, "Case Western Reserve Journal of International Law" 1992, vol. 24, pp. 349–378; eadem, *Conscientious objection to military service: The European Commission on Human Rights and the Human Rights Committee*, "California Western International Law Journal" 2001, vol. 32(1), pp. 1–38; Ö.H. Çınar, *Conscientious objection to military service*, [in:] *Conscientious Objection to*

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

The right to conscientious objection was only regulated on the regional level in two legal acts – in Article 12 (3) of the Ibero-American Convention on Young People's Rights[35] and in Article 10 (2) of the Charter of Fundamental Rights of the European Union ("The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right").[36] The CFR, pursuant to its Preamble, does not create new rights, but only reaffirms already existing rights.[37] The European Union and the Member States are obliged to observe its provisions. The Preamble of the Qualification Directive also reaffirms it in its Recital 16: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union".

When it comes to the material scope of guarantees under the CFR, it is worth emphasizing that fundamental rights from the point of view of the theory of law are the so-called general clauses and thus do not have "a rigid content", which allows for flexible interpretation of fundamental rights.[38] Thus, the right to conscientious objection has its basis in the EU primary legislation and may, in my opinion, be reinterpreted in an expanding way also as objection against military service – it is worth adding as a backing to this assertion that the CFR is called "work in progress" by fundamental rights scholars and commentators, therefore its interpretation is established by EU courts.[39]

Another argument for the functioning in the EU order of the right to objection to military service derived from the right to conscientious objection comes from the case law of the European Court of Human Rights (ECtHR) – despite the fact that the Union is still not a party to the Convention[40], according to Article 6 of the Treaty on European Union: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as

Military Service in International Human Rights Law, New York 2013; L. Hammer, *Selective conscientious objection and international human rights*, "Israel Law Review" 2002, vol. 36(3), pp. 145–169.

[35] See Regional Treaties, Agreements, Declarations and Related, *Convención Iberoamericana de Derechos de los Jóvenes*, October 2005, https://www.refworld.org/docid/4b28ef622.html (access: 10.2.2021).

[36] Charter of Fundamental Rights of the European Union (OJ C 202/391, 7.6.2016), hereinafter: the CFR.

[37] Sentence 5 of the Preamble. See also Articles 2 (3) and (4) and Article 53.

[38] E. Morawska, *Konstrukcja normatywna praw podstawowych Unii Europejskiej w Karcie praw podstawowych Unii Europejskiej*, [in:] *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, eds. C. Mik, K. Gałka, Toruń 2009, p. 53.

[39] A.M. Kosińska, *Cultural Rights of Third-Country Nationals in EU Law*, Cham 2019, p. 50; H. Izdebski, *Rola i miejsce Karty Praw Podstawowych w Unii Europejskiej w europejskiej filozofii praw człowieka*, [in:] *5 lat Karty Praw Podstawowych UE*, ed. A. Gubrynowicz, Warszawa 2006, p. 19. The Charter of Fundamental Rights is also called a "living instrument", which adequately illustrates its role in the law application process. See Ł. Bojarski, J.A. Hofbauer, N. Mileszyk, *The Charter of Fundamental Rights as a Living Instrument: Guidelines for Civil Society*, Rome–Warsaw–Vienna 2014.

[40] Opinion 2/13 of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".[41] Moreover, under Article 52 (3) of the CFR: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

The ECtHR ruled on the right to refuse military service in the light of guarantees under Article 9 of the Convention[42] mainly in the case *Bayatyan v. Armenia* – the applicant requested a decision about violation due to the absence of provisions allowing him to perform alternative civilian service.[43] In its judgment, the ECtHR declared that interpretation of Article 9 of the Convention and its interpretation in conjunction with Article 4 of the Convention guaranteeing prohibition of forced labour must be changed.[44]

The right to conscientious objection to military service, therefore, may be reinterpreted in the system of EU law from the right under Article 10 of the CFR, from prohibition of forced labour under Article 4 of the CFR and from Article 3 of the CFR which guarantees the right to life.[45] Recognition of this right is also associated with the internationally-recognized right of every person to leave any country.[46] Such interpretation is on the one hand compliant with the scholarly characteristic of human rights whose source lies in human dignity and which are

[41] Article 6 (3) of the Treaty on European Union, consolidated version (OJ C 202, 7.6.2016, pp. 13–46), hereinafter: the TEU. Pursuant to Article 6 (2) of the TEU, the Union shall accede to the European Convention on Human Rights.

[42] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 13, 5 and 8 and supplemented by Protocol No. 2, Rome, 4.11.1950, ETS No. 5.

[43] See judgment of the ECtHR of 7 July 2011 in *Bayatyan v. Armenia*, Application no. 23459/03.

[44] See, i.a. decision of the European Commission of Human Rights of 2 April 1973 in *GZ v. Austria*, Application no. 5591/72; decision of the European Commission of Human Rights of 11 October 1984 in *N v. Sweden*, Application no. 10410/83; judgment of the ECtHR of 24 January 2006 in *Ülke v. Turkey*, Application no. 39437/98; judgment of the ECtHR of 12 June 2012 in *Savda v. Turkey*, Application no. 42730/05; judgment of the ECtHR of 7 June 2016 in *Enver Aydemir v. Turkey*, Application no. 26012/11; judgment of the ECtHR of 10 December 2017 in *Adyan and Others v. Armenia*, Application no. 75604/11. See also Council of Europe/European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights, Freedom of thought, conscience and religion (2020)*, updated on 31 August 2020, https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf (access: 16.2.2021); opinion in C-238/19, para. 69.

[45] Pursuant to Article 2 (1) of the CFR, "Everyone has the right to life". As noted in a 1982 UN Report, "Although it cannot be advanced as a legal argument, it must nevertheless be mentioned that there is a religious injunction in the biblical commandment 'Thou shall not kill'" (United Nations, *Conscientious Objection…*, para. 44). See also M.-F. Major, *Conscientious objection to military service…*, p. 5.

[46] V. Chetail, *International Migration Law*, New York 2019, p. 78.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

indivisible, interdependent and interrelated.[47] Their identification rests with the technical domain and the domain of legal scholarship and commentary and is in a way a need of a certain time.[48]

Does the judgment in question feature key expressions? Does it strengthen the views of legal scholars and commentators and the established line of judicial decisions? The judgment does not speak directly about a need to introduce such a right, but it evidences that in the practice of application of the law it is respected in the EU as a particular right of a specific social group, that is refugees. Absence of regulation in the CFR of the right to conscientious objection at the EU's general level does not diminish protection in the process of seeking international protection.

In my opinion, however, the need to recognize the right to conscientious objection to military service does exist. This results on the one hand from the system of CEAS directives and the established line of judicial decisions, and on the other from the need of the times and realities of globalized reality in which international community is set to live.

Legal scholars and commentators also present practical arguments concerning introduction of such a right,[49] especially that experience shows that its existence does not significantly affect the degree of refusal to perform military service.[50]

As noted by K. Musalo, who cited C. Bailliet, EU countries present a certain "type of schizophrenia" when it comes to the right to conscientious objection. On the one hand, the Council of Europe encourages adoption of appropriate protective instruments,[51] whereas the Qualification Directive itself includes provisions that protect this right to a smaller degree than recommended by the United Nations High Commissioner for Refugees (UNHCR),[52] which was criticised by the High Commissioner and the European Council on Refugees and Exiles. It is also worth adding that in my opinion the right to objection to military service in the CEAS system should be examined in the context of the term "human security", according to which rights and freedoms of an individual should take precedence over the state.[53]

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[47] T. van Boven, *Categories of Rights in International Human Rights Law*, [in:] *International Human Rights Law*, eds. D. Moeckli, S. Shah, S. Sivakumaran, Oxford 2010, p. 173.

[48] It was the case in, e.g., the development of rights of minorities – the so-called fourth generation human rights after the 1993 Vienna Conference. See R. Kuźniar, *Deklaracja Wiedeńska i Program Działania, przyjęta przez Światową Konferencję Praw Człowieka, Wiedeń 1993*, [in:] *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, ed. R. Kuźniar, Warszawa 2008, p. 437.

[49] M. Lippman, *op. cit*., pp. 5–6.

[50] *Ibidem*.

[51] For more, see A. Yiannaros, *op. cit*., p. 12.

[52] K. Musalo, *op. cit*., pp. 75–76; C.M. Bailliet, *Assessing jus ad bellum and jus in bello within the refugee status determination process: Contemplations on conscientious objectors seeking asylum*, "Georgetown Immigration Law Journal" 2006, vol. 20, pp. 1–40.

[53] L. Schuster, *Engendering Insecurity: The EU Asylum Regime*, [in:] *Security, Insecurity and Migration in Europe*, ed. G. Lazaridis, London–New York 2016, p. 102.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

Going back to questions asked earlier, should any potential Syrian conscript who in reality does not support the government (non-opportunist) and who evades military service be granted protection in the light of the analysed judgment?

In order to issue the preliminary ruling, the CJEU interpreted Article 10 of the Qualification Directive (which enumerates reasons of persecution) in conjunction with Article 9 Qualification Directive (which lists forms of this persecution). Thus far the established line of the CJEU's decisions had not had any judgments directly addressing the problem of refusal to do military service apart from the judgment in Shepherd which was invoked in the EZ case. The Shepherd case, however, concerned a US citizen, a member of military personnel, who deserted from the army stationed on the territory of Germany in order not to participate in further missions in Iraq and filed a request for international protection in Germany. In Mr. Shepherd's case the CJEU did not see a risk of persecution should he return to the USA, where he would face a prison sentence for desertion.[54] The CJEU held, however, that the right to refuse military service is afforded not only to soldiers on the front, but all military personnel, and the person claiming to be a refugee must have a well-founded fear of persecution for at least one of the five reasons listed in Article 10 of the Qualification Directive.[55] As the CJEU emphasizes in its case law, the risk must be sufficiently serious.[56] What is crucial, legal scholars and commentators do not see a fear of prosecution and of punishment for desertion stipulated for in a national law as persecution due to refusal to perform military service, which was confirmed in the Shepherd case.[57]

The basic problem that the CJEU examined in the EZ case was an answer to the question of whether existence of a connection between reasons for prosecution under Article 10 and its forms under Article 9 (2) (e) of the Qualification Directive may be deemed as proven due to the fact that the refusal results in persecution or punishment. The CJEU took a clear stand that there should be no automation in the framework of qualification to the refugee status,[58] and thus at the stage of refugee proceedings migration authorities must carefully examine the existence of a connection between reasons and forms of persecution. In the EZ case, the notion

[54] Judgment of the CJEU of 26 February 2015 in *Andre Lawrence Shepherd v. Bundesrepublik Deutschland* (C-472/13), ECLI:EU:C:2015:117, operative part of the judgment, para. 2.

[55] C-472/13, para. 25. See also United Nations, *Conscientious Objection…*, p. 79.

[56] See judgment of the CJEU of 7 November 2013 in *Minister voor Immigratie e Asiel v. X and Y and Z v Minister voor Immigratie en Asiel* (C-199/12 to C-201/12), ECLI:EU:C:2013:720.

[57] United Nations, *Conscientious Objection…*, p. 74.

[58] The CJEU addressed the connection between a reason and a form of persecution in, i.a., judgment of 5 September 2012 in *Bundesrepublik Deutschland v. Y and Z* (C-71/11), ECLI:EU:C:2012:518, and in judgment of 2 December 2014 in *A and Others v. Staatssecretaris van Veiligheid en Justitie* (C-148/13 to 150/13), ECLI:EU:C:2014:2406.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

of political reasons[59] under Article 10 of the Qualification Directive was crucial as one of other reasons for persecution and the CJEU interpreted it for the purpose of application of Article 9 (2) (e). It is worth quoting here Advocate General's extensive discussion on understanding a political opinion, who emphasized that having opinions contrary to the activity of the state (here: Syrian state) may be considered as a political opinion under Article 10 of the Qualification Directive. It is similar if there is no alternative for military service, where national authorities may recognize evasion of service as an expression of a political opinion.[60]

Therefore, one needs to ask what practical consequences for refugee proceedings in which applicants invoke Article 9 (2) (e) will the EZ judgment have. Will it truly allow thousands of young Syrians to obtain international protection in the EU and in consequence, by legal analogy, will it be applied to third-country nationals who are drowning in internal conflicts similar to the one we are dealing with in Syria?

While not doubting the validity of the preliminary ruling which excludes automatic protection granting as contrary to CEAS principles, one needs to note what follows. On the one hand, the CJEU in its ruling included certain directives which may facilitate qualification of international protection to applicants in a situation similar to the one of Mr. EZ. First, in para. 57 of the judgment the CJEU emphasized that there is a strong presumption that refusal to perform military service under the conditions set out in Article 9 (2) (e) of the Qualification Directive relates to one of the five reasons set out in Article 10 of the Qualification Directive. Moreover, the CJEU also supported the opinion of Advocate General affirming that an applicant may not always be able to substantiate his or her claim with documentary evidence,[61] which somehow makes it easier for applicants to prove the risk of persecution. This Directive is also linked with a UNHCR guideline providing that all doubts in proceedings qualifying to the refugee status must be adjudicated to the benefit of the applicant.[62] Thirdly, in para. 32 of the judgment the CJEU reaffirmed that in the light of Article 9 (2) an applicant may refuse military service in a non-formal-

[59] Pursuant to UNHCR guidelines, political opinion should be defined in a broad manner. "The political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns 'any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged'. Moreover, it covers both the holding of an actual political opinion and its expression, political neutrality as well as cases where a political opinion is imputed to the applicant even if he or she does not hold that view. The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view" (United Nations Human Rights Council, Guidelines on International Protection…, para. 51).

[60] Opinion in C-238/19, paras 75 and 79.

[61] C-238/19, para. 55 and opinion in C-238/19, para. 70.

[62] Principles and modes for establishing refugee status according to the Convention relating to the Status of Refugees of 1951 (UNTS, vol. 189, p. 137) and its additional Protocol of 1967 (UNTS, vol. 606, p. 267).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

ized way (e.g., fleeing the country), where the law of the country of origin does not provide for the possibility of refusing to perform military service. Finally, the CJEU believed that general information about migrants' country of origin, that is Syria, leaves no doubts as to application of Article 9 (2) (e).[63]

On the other hand, in its judgment the CJEU exemplified arguments for rejecting automatic assessment of applications and the need to assess each applicant's situation individually[64]. In para. 50 of the judgment the CJEU expressly emphasized that there is no presumption of existence of at least one of the five reasons of persecution under Article 10 when applying Article 9 (2) (e) and existence of such a connection must each time be established by an examination carried out by national authorities.[65] This examination should also include the fact of existence of applicant's real intent to evade military service – the mere absence of a formalised refusal to perform military service in the country of origin cannot be deemed as giving such refusal when the applicant leaves the country. He must have a real intent to evade military service which results from his political opinions. It is inadmissible that the applicant should exercise the option of invoking Article 9 (2) (e) opportunistically even though he left the country of origin without a specific intent to evade conscription but only, e.g. for work purposes. The CJEU obliges national authorities to carefully examine the motivation and personal situation of the applicant.[66] Thus, as much as the assessment of the situation in Syria does not raise doubts, such doubts may be triggered by an applicant's personal motivation and it must be analysed in detail for the purposes of qualification to the refugee status. Advocate General expressly emphasized in her opinion that "there is no scope for automaticity in the assessment of any application for refugee status".[67]

As results from Advocate General's opinion, the German court which referred the question for a preliminary ruling feared it would experience an influx of Syrian refugees if automatic qualification to protection under Article 9 (2) (e) were to be recognized.[68] The investigated judgment in no way opens Europe's gate to young Syrians, recognizing than national migration authorities must assess each application individually and in-depth.[69] It is, nevertheless, a certain wicket for persons in need of such protection due to political views that do not overlap with the Syrian government's views and due to a fear of persecution. Directives on handling

[63] C-238/19, para. 37.

[64] See J. Chlebny, *Postępowanie w sprawie o nadanie statusu uchodźcy*, Warszawa 2011, pp. 260–264.

[65] C-238/19, para. 50.

[66] *Ibidem*, para. 31.

[67] Opinion in C-238/19, para. 61.

[68] *Ibidem*, para. 54. For German domestic regulations on the possibility to avoid military service, see A. Yiannaros, *op. cit*., p. 8.

[69] See opinion in C-238/19, para. 90, last sentence.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

refugee proceedings given to national authorities may to a large degree facilitate such proceedings, especially if the taking of evidence involved circumstantial evidence. Fears of a massive influx of young Syrians are also dispelled by limited possibilities of transfer from the territory of Syria to the European Union, which is proven by the judgment in case X and X.[70] What we are left with is to believe that the EZ ruling, contrary to the X and X case, will at least flag up the need for humanitarian treatment of persons needing protection, even if these are numerous, not individual cases.

2. The judgment's significance for possible exclusion of young soldiers from international protection

The second key question that springs to mind after reading the examined judgment is whether all Syrian conscripts joining the army make themselves subject in the future to automatic exclusion from protection?[71] Hypothetically this would mean a mass exclusion affecting a huge number of people.

Pursuant to Article 9 (2) (e) of the Qualification Directive, one can refuse to perform military service "where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12 (2)".

The above-mentioned Article 12 of the Qualification Directive provides a basis for exclusion from protection.[72] According to 12 (2): "A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations".

Therefore, does the statement of reasons to the judgment show that each potential conscript is very likely to commit acts listed in Article 12 (2)?

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[70] Judgment of the CJEU of 7 March 2017 in *X and X v. État belge* (C-638/16 PPU), ECLI:EU:C:2017:173.

[71] For exclusion, see N. Mole, *Asylum and the European Convention on Human Rights: Human Rights Files No. 9 (revised)*, London 2003, p. 15 ff.

[72] In the 1951 Refugee Convention the basis for exclusion is stipulated for in Article 1F of the Convention (Convention Relating to the Status of Refugees done at Geneva on 28 July 1951, UNTS, vol. 189, p. 137); V. Chetail, *op. cit*., p. 171.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

In the case of persons such as Mr. EZ Article 12 (2) (a) and (c) are applicable.[73] In the opinion of Advocate General, the catalogue of acts that the conscript is likely to commit must be further narrowed down to only include Article 12 (2) (a).[74] Moreover, the Advocate General believes that it is very unlikely for the conscript to achieve such a military level as to be prosecuted for crimes against peace – in effect, his possible future liability is further narrowed down to the likelihood of committing a war crime or a crime against humanity.[75]

When assessing the situation in Syria, the CJEU recognized that given the war crimes repeatedly and systematically committed by the Syrian army, including the units composed of conscripts, "as was widely documented according to the referring court, it appears that it is highly plausible that a conscript would be led, regardless of his or her field of operation, to participate, directly or indirectly, to commit the crimes in question, which it is for the referring court to verify".[76]

The likelihood of conscripts committing such acts was confirmed by the CJEU in para. 2 of the operative part of the judgment in the EZ case. Therefore, the judgment is consistent with the established line of the CJEU's decisions – in the Shephard case too, the adjudicating court declared that Article 9 (2) (e) also includes a situation in which the applicant for a refugee status is able to prove that it is highly likely that such crimes will be committed.[77]

Assessment of the situation in Syria still leaves no doubt as to existing violations of human rights – most recent reports of the Independent International Commission of Inquiry on the Syrian Arab Republic point to horrific violations of civilians' rights and commission of war crimes by the Syrian army.[78]

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[73] Pursuant to Article 1 (1) of the Charter of the United Nations, "the Purposes of the United Nations are (…) to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace (…)". See Charter of the United Nations, signed on 26 June 1945, in San Francisco, 1 UNTS XVI.

[74] Opinion in C-238/19, para. 31. On the inside it needs to be emphasized that already in its judgment in joined cases B and D the Court stated that "exclusion from refugee status pursuant to Article 12 (2) (b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State" – para. 2 of the operative part of the judgment of the CJEU of 9 November 2010 in *Bundesrepublik Deutschland v. B and D* (C 57/09 and C 101/09), ECLI:EU:C:2010:661.

[75] C-238/19, paras 32 and 33.

[76] *Ibidem*, para. 37.

[77] C-472/13, operative part of the judgment, para. 1, third indent.

[78] United Nations Human Rights Council, *Rampant human rights violations and war crimes as war-torn Idlib faces the pandemic UN Syria Commission of Inquiry report*, 7 July 2020, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26044&LangID=E (access: 16.02.2021); United Nations Human Rights Council, *UN Commission of Inquiry on Syria: No clean hands – behind the frontlines and the headlines, armed actors continue to subject civilians to horrific*

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

The CJEU emphasizes in the judgment that at the stage of proceedings qualifying to international protection, the assessment of the situation in the applicant's country of origin rests with national authorities. Therefore, there is a need to ensure uniform assessment of the situation in countries of origin at the EU level. When it comes to Syrian matters the *acte eclair* doctrine should be applied, whereas for other countries of origin, apart from applying analogy when assessing a third-country situation, using European Union Agency for Asylum's information about these countries as basis is invaluable[79] – this should help to harmonize the legal interpretation of cases and the established line of national courts' decisions.

Therefore, does the judgment in EZ close the possibility of applying for international protection to young Syrian conscripts? It seems that it does partially – for people who got voluntarily recruited to the Syrian army (which triggers a presumption that they do share the views of Syrian authorities and support their political activity), as long as they are not able to produce reliable counter-evidence demonstrating, for example, that they were recruited through deceit or by force or acted under a threat. However, it seems that here the taking of evidence should not be in any case based on circumstantial evidence and that the applicant should be able to present credible documents or witness testimony relating to the circumstances invoked.

Moreover, where an applicant who qualifies for exclusion from international protection proves with high likelihood that should he return to Syria he will be at risk of inhuman treatment under Article 4 of the CFR (Article 3 of the European Convention on Human Rights), as a rule expulsion of such a person will not be possible due to the obligation to observe the non-refoulement principle by Member States,[80] also worded in Article 21 of the Qualification Directive.[81] In light of the

and increasingly targeted abuse, 15 September 2020, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26237&LangID=E (access: 16.02.2021).

[79] See reports on migrants' countries of origin in European Union Agency for Asylum, *COI Publications*, https://easo.europa.eu/information-analysis/country-origin-information/country-reports (access: 16.2.2021).

[80] The Court expressed its view on applicability of the non-refoulement principle in the judgment of 24 June 2015 in *H.T. v. Land Baden-Württemberg* (C-373/13), ECLI:EU:C:2015:413, sentence one of the operative part of the judgment.

[81] It was already emphasized in the opinion of Advocate General on the *Lounani* case, who believed that "where Article 12 (2) of the Qualification Directive applies, that does not necessarily imply that the person concerned may be returned to his country of origin (or indeed elsewhere) if, for example, the prohibition against torture or his right not to be subjected to inhuman or degrading treatment or punishment are at risk of being violated. The Member States remain subject to the obligation to respect the principle of non-refoulement in accordance with their international obligations" (opinion of Advocate General Eleanor Sharpston delivered on 31 May 2016, C-573/14 *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, ECLI:EU:C:2016:380, para. 34). See also S.E. Lauterpacht, D. Bethlehem, *The scope and content of the principle of non-refoulement. Opinion*, [in:] *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, eds. E. Feller, V. Turk, F. Nicholson, New York 2005, p. 90.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

Qualification Directive, derogation from the non-refoulement principle is only possible where a given third-country national would be a danger to the security of the Member State.[82] The right to protection against inhuman treatment is absolute and cannot be subject to limitation or derogation. As it is impossible to enforce an expulsion decision or legalise the foreigner's stay there is a high risk that such a person may fall into a legal limbo. Granting a residence permit on humanitarian grounds is a solution in such cases.[83]

In the case of Syrians there is a minute chance that the political situation will stabilise in the near future while their return home and effective reintegration are not very likely.[84]

CONCLUSIONS

In my opinion, the investigated ruling is very important for applications for international protection examined by migration authorities of Member States. Data made available by the European Union Agency for Asylum shows that in 2019 80,205 applications for international protection were filed and that the recognition rate was 90%.[85]

First, the judgment includes a specific algorithm of proceedings in cases of young Syrians in which individual assessment of the case is a priority, even though the CJEU emphasizes that the actions of the Syrian army meet the requirements of exclusion from protection under Article 12 of the Qualification Directive.[86] Judgment in the EZ case, therefore, does not open a gateway to Europe (which the national court feared when referring the question for a preliminary ruling) but only a wicket to be used by non-opportunists who in reality want to escape the Syrian regime. Secondly, the judgment opens up the possibility to apply legal analogy to third-country nationals who seek international protection and the situation in their countries of origin is similar to the one in Syria. Thus, national courts who hear

[82] See C-373/13, para. 42.

[83] European Commission, *Humanitarian protection*, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/humanitarian-protection_en (access: 17.2.2021).

[84] For more, see K. Koser, *International Migration: A Very Short Introduction*, New York 2016, p. 78. National authorities came to different conclusions in *H.T.*, in which they pursued revocation of a residence permit for a Kurdish refugee and requested that he return to Turkey – see case C-373/13.

[85] European Union Agency for Asylum, *Situation of Asylum in the European Union: 2019 overview*, https://easo.europa.eu/asylum-trends-easo-asylum-report-2020 (access: 17.2.2021).

[86] It is worth noting here that the judgment in question fits within the case-law trend in which the CJEU "is gradually strengthening the protection of fundamental rights of asylum seekers in the EU". See P. Sadowski, *A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments*, "European Journal of Legal Studies" 2019, vol. 11(2), p. 64.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

similar cases will be able to use the *acte eclair* doctrine as a basis and they will not have to refer questions to the CJEU for a preliminary ruling but will independently recognize the case, which will contribute to speeding up refugee proceedings.

REFERENCES

Literature

Bailliet C.M., *Assessing jus ad bellum and jus in bello within the refugee status determination process: Contemplations on conscientious objectors seeking asylum*, "Georgetown Immigration Law Journal" 2006, vol. 20.

Bielecki M., *Odmowa pełnienia służby wojskowej przez Świadków Jehowy jako realizacja klauzuli sumienia. Uwarunkowania prawno-historyczne*, "Studia z Prawa Wyznaniowego" 2016, vol. 19.

Bojarski Ł., Hofbauer J.A., Mileszyk N., *The Charter of Fundamental Rights as a Living Instrument: Guidelines for Civil Society*, Rome–Warsaw–Vienna 2014.

Boven T. van, *Categories of Rights in International Human Rights Law*, [in:] *International Human Rights Law*, eds. D. Moeckli, S. Shah, S. Sivakumaran, Oxford 2010.

Chetail V., *International Migration Law*, New York 2019.

Chlebny J., *Ochrona sądowa w sprawach dotyczących osób ubiegających się o nadanie statusu uchodźcy – doświadczenia i perspektywy*, "Miscellanea Iuris Gentium, Cracoviae A.D. MMIV" 2004, no. 7.

Chlebny J., *Postępowanie w sprawie o nadanie statusu uchodźcy*, Warszawa 2011.

Çınar Ö.H., *Conscientious objection to military service*, [in:] *Conscientious Objection to Military Service in International Human Rights Law*, New York 2013, **DOI: https://doi.org/10.1057/9781137366085_3**.

Hammer L., *Selective conscientious objection and international human rights*, "Israel Law Review" 2002, vol. 36(3), **DOI: http://doi.org/10.1017/S0021223700018008**.

Izdebski H., *Rola i miejsce Karty Praw Podstawowych w Unii Europejskiej w europejskiej filozofii praw człowieka*, [in:] *5 lat Karty Praw Podstawowych UE*, ed. A. Gubrynowicz, Warszawa 2006.

Kelly T., *The legalization of human rights and the protection of torture survivors: Asylum, evidence and disbelief*, [in:] *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United Stated*, eds. M.-B. Dembour, T. Kelly, London–New York 2012.

Koser K., *International Migration: A Very Short Introduction*, New York 2016, **DOI: https://10.1093/actrade/9780198753773.001.0001**.

Kosińska A.M., *Cultural Rights of Third-Country Nationals in EU Law*, Cham 2019, **DOI: http://doi.org/10.1007/978-3-030-30154-5**.

Kuźniar R., *Deklaracja Wiedeńska i Program Działania, przyjęta przez Światową Konferencję Praw Człowieka, Wiedeń 1993*, [in:] *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe*, ed. R. Kuźniar, Warszawa 2008.

Lauterpacht S.E., Bethlehem D., *The scope and content of the principle of non-refoulement. Opinion*, [in:] *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, eds. E. Feller, V. Turk, F. Nicholson, New York 2005, **DOI: https://doi.org/10.1017/CBO9780511493973.008**.

Lippman M., *The recognition of conscientious objection to military service as an international human right*, "California Western International Journal" 1990, vol. 21(1).

Lynd S., *Someday they'll have a war and nobody will come*, "Peace and Change" 2011, vol. 36(2), **DOI: https://10.1111/j.1468-0130.2010.00687.x**.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

Major M.-F., *Conscientious objection and international law: A human right?*, "Case Western Reserve Journal of International Law" 1992, vol. 24.

Major M.-F., *Conscientious objection to military service: The European Commission on Human Rights and the Human Rights Committee*, "California Western International Law Journal" 2001, vol. 32(1).

Marcus E.N., *Conscientious objection as an emerging human right*, "Virginia Journal of International Law" 1998, vol. 38.

Mole N., *Asylum and the European Convention on Human Rights: Human Rights Files No. 9 (revised)*, London 2003.

Morawska E., *Konstrukcja normatywna praw podstawowych Unii Europejskiej w Karcie praw podstawowych Unii Europejskiej*, [in:] *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, eds. C. Mik, K. Gałka, Toruń 2009.

Musalo K., *Conscientious objection as a basis for refugee status protection for the fundamental right of freedom of thought, conscience, and religion*, "Refugee Survey Quarterly" 2007, vol. 26(2).

Sadowski P., *A Safe Harbour or a Sinking Ship? On the Protection of Fundamental Rights of Asylum Seekers in Recent CJEU Judgments*, "European Journal of Legal Studies" 2019, vol. 11(2).

Schroeder J.B., *The Role of Jehovah's Witnesses in the emergent right of conscientious objection to military service in international law*, "Kirchliche Zeitgeschichte" 2011, vol. 24(1), **DOI: https://doi.org/10.13109/kize.2011.24.1.169**.

Schuster L., *Engendering Insecurity: The EU Asylum Regime*, [in:] *Security, Insecurity and Migration in Europe*, ed. G. Lazaridis, London–New York 2016.

Sousa e Brito J. de, *Political minorities and the right to tolerance: The development of a right to conscientious objection in constitutional law*, "BYU Law Review" 1999, vol. 2(6).

Takemura H., *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders*, Berlin–Heidelberg 2009.

United Nations, *Conscientious Objection to Military Service*, New York–Geneva 2012.

Yiannaros A., *Refusing to kill: Selective conscientious objection and professional military duties*, "Journal of Military Ethics" 2018, vol. 17(2–3).

Online sources

Council of Europe/European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights, Freedom of thought, conscience and religion (2020)*, updated on 31 August 2020, https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf (access: 16.2.2021).

European Commission, *Humanitarian protection*, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/humanitarian-protection_en (access: 17.2.2021).

European Union Agency for Asylum, *COI Publications*, https://easo.europa.eu/information-analysis/country-origin-information/country-reports (access: 16.2.2021).

European Union Agency for Asylum, *Situation of Asylum in the European Union: 2019 overview*, https://easo.europa.eu/asylum-trends-easo-asylum-report-2020 (access: 17.2.2021).

United Nations Human Rights Council, *Rampant human rights violations and war crimes as war-torn Idlib faces the pandemic UN Syria Commission of Inquiry report*, 7 July 2020, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26044&LangID=E (access: 16.02.2021).

United Nations Human Rights Council, *UN Commission of Inquiry on Syria: No clean hands – behind the frontlines and the headlines, armed actors continue to subject civilians to horrific and increasingly targeted abuse*, 15 September 2020, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26237&LangID=E (access: 16.02.2021).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

Other sources

Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18): 30/07/93, CCPR/C/21/Rev.l/Add.4.

Opinion of Advocate General Eleanor Sharpston delivered on 31 May 2016, C-573/14 *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, ECLI:EU:C:2016:380.

Opinion of Advocate General Eleanor Sharpson delivered on 28 May 2020, Case C-238/19 *EZ v. Bundesrepublik Deutschland*, represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees), ECLI:EU:C:2020:404.

Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Brussels, 13.7.2016, COM(2016) 466 final.

United Nations, Conscientious Objection to Military Service. Report prepared in pursuance of resolutions 14 (XXXIV) and 1982/30 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Mr. Asbjern Eide and Mr. Chama Mubanga-Chipoya, members of the Sub-Commission, E/CN.4/Sub.2/1983/30/Rev.1.

United Nations High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998.

United Nations Human Rights Council, Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 12 November 2014, HCR/GIP/13/10/Corr. 1.

United Nations Human Rights Council, Human rights situations that require the Council's attention, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council, Thirty-fourth session, 27 February – 24 March 2017, A/HRC/34/64, 2 February 2017.

Legal acts

Asylum Act in the version promulgated on 2 September 2008 (Federal Law Gazette I, p. 1798).

Charter of Fundamental Rights of the European Union (OJ C 202/391, 7.6.2016).

Charter of the United Nations, signed on 26 June 1945, in San Francisco, 1 UNTS XVI.

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 13, 5 and 8 and supplemented by Protocol No. 2, Rome, 4.11.1950, ETS No. 5.

Convention relating to the Status of Refugees of 1951 (UNTS, vol. 189, p. 137) and its additional Protocol of 1967 (UNTS, vol. 606, p. 267).

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212/12, 7.8.2001).

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).

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 22/11/2026 12:58:38

Regional Treaties, Agreements, Declarations and Related, *Convención Iberoamericana de Derechos de los Jóvenes*, October 2005, https://www.refworld.org/docid/4b28ef622.html (access: 10.2.2021).
Treaty on European Union, consolidated version (OJ C 202, 7.6.2016, pp. 13–46).

Case law

Decision of the European Commission of Human Rights of 2 April 1973 in *GZ v. Austria*, Application no. 5591/72.
Decision of the European Commission of Human Rights of 11 October 1984 in *N v. Sweden*, Application no. 10410/83.
Judgment of the CJEU of 9 November 2010 in *Bundesrepublik Deutschland v. B and D* (C 57/09 and C 101/09), ECLI:EU:C:2010:661.
Judgment of the CJEU of 5 September 2012 in *Bundesrepublik Deutschland v. Y and Z* (C-71/11), ECLI:EU:C:2012:518.
Judgment of the CJEU of 7 November 2013 in *Minister voor Immigratie e Asiel v. X and Y and Z v Minister voor Immigratie en Asiel* (C-199/12 to C-201/12), ECLI:EU:C:2013:720.
Judgment of the CJEU of 2 December 2014 in *A and Others v. Staatssecretaris van Veiligheid en Justitie* (C-148/13 to 150/13), ECLI:EU:C:2014:2406.
Judgment of the CJEU of 26 February 2015 in *Andre Lawrence Shepherd v. Bundesrepublik Deutschland* (C-472/13), ECLI:EU:C:2015:117.
Judgment of the CJEU of 24 June 2015 in *H.T. v. Land Baden-Württemberg* (C-373/13), ECLI:EU:C:2015:413.
Judgment of the CJEU of 7 March 2017 in *X and X v. État belge* (C-638/16 PPU), ECLI:EU:C:2017:173.
Judgment of the CJEU of 19 November 2020 in *EZ v. Bundesrepublik Deutschland* (C-238/19), ECLI:EU:C:2020:945.
Judgment of the ECtHR of 24 January 2006 in *Ülke v. Turkey*, Application no. 39437/98.
Judgment of the ECtHR of 7 July 2011 in *Bayatyan v. Armenia*, Application no. 23459/03.
Judgment of the ECtHR of 12 June 2012 in *Savda v. Turkey*, Application no. 42730/05.
Judgment of the ECtHR of 7 June 2016 in *Enver Aydemir v. Turkey*, Application no. 26012/11.
Judgment of the ECtHR of 10 December 2017 in *Adyan and Others v. Armenia*, Application no. 75604/11.
Opinion 2/13 of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.

ABSTRAKT

W glosowanym orzeczeniu Trybunał Sprawiedliwości Unii Europejskiej (TSUE) po raz pierwszy dokonał tak szerokiej wykładni art. 9 ust. 2 lit. e dyrektywy 2011/95/EU w kontekście niesformalizowanej odmowy służby wojskowej dokonanej przez młodego Syryjczyka, który uciekł z kraju pochodzenia. Autorka analizuje wpływ wyroku TSUE na funkcjonowanie gwarancji prawa do podyktowanej sumieniem odmowy odbycia służby wojskowej w ramach unijnego prawa azylowego. Stawia również dwa kluczowe pytania. Po pierwsze, czy w świetle analizowanego wyroku każdy potencjalny syryjski poborowy, realnie niepopierający rządu (nieoportunista), uchylający się od służby wojskowej, powinien uzyskać ochronę? Po drugie, czy wszyscy syryjscy poborowi wstępujący do armii poddają się *in futuro* automatycznemu wykluczeniu z ochrony?

Słowa kluczowe: ochrona; uchodźcy; dyrektywa 2011/95/EU; prawo do podyktowanej sumieniem odmowy odbycia służby wojskowej; TSUE