

Research Article

PERSONAL STATUS OF WAR-RELATED MIGRANTS. WHAT IS RELEVANT TO DETERMINE THE APPLICABLE LAW?

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ABSTRACT

Background: Determining the law applicable to a personal statute is important for regulating family and inheritance relations with a foreign element and civil status issues. Its determination may depend on the circumstances of the individual's life. This article aims to analyse the extent to which the actual circumstances of war-related migrants' lives (e.g. their migrant status, length of stay in a particular country) affect the determination of the law applicable to their personal status.

Methods: To achieve the research objectives, comparative, historical and analytical methods were employed. The paper relies on the preparatory materials to the Convention Relating to the Status of Refugees of 28 July 1951, as well as on the relevant works on the interpretation of the provisions of the Convention, personal statute, understanding of the concept of 'habitual residence' and the relationship between private international law and migration law. It compares the approaches of national laws to determine the law applicable to a personal statute. To clarify the concept of 'refugee's domicile', the English doctrine is employed. In addition, certain provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights are analysed to examine the issue of which State's law applies to rights related to marriage.

Results and conclusions: It has been found that migration status does not affect the determination of the law applicable to a personal statute. If a conflict-of-laws rule is formulated in a way that requires an analysis of the circumstances of a migrant's life, factors may include employment opportunities, knowledge of the language, family or business ties and his or her wish to stay in that country. The law applicable to the personal status of some war-related migrants may be determined based on the Convention Relating to the Status of Refugees of 28 July 1951. For this purpose, they do not need refugee status. However, they must meet the refugee criteria mentioned in the Convention. Thus, the law applicable to the personal status of persons with subsidiary or temporary protection may also be determined based on the Convention. When determining the law applicable to personal status based on the Convention, it is advisable to use a broad understanding of the concept of 'personal status'.

If a migrant's intention to stay in the country to which he or she fled is realistic, it can be considered a factor, indicating that he or she has a domicile in that country. In the absence of a choice of law made by the parties of a particular relationship, the issues covered by the personal statute of a war-related migrant who does not meet the refugee criteria mentioned in the Convention can be governed by the law of the state with which such a migrant has the closest connection at the time when the relevant issue is brought before the court.

1 INTRODUCTION

At the close of 2022, the global count of refugees, including individuals in refugee-like situations and others in need of international protection, reached 34.6 million refugees.¹ A significant number of this population has fled armed conflict,² and during their journey, they encounter several legal challenges, particularly relating to their personal status.

Personal status can have a narrow (substantive) and a broad (formal) meaning.³ In a former sense, it covers a certain range of issues or legal categories.⁴ In a latter sense, it includes connecting factors that provide for the application of the law of the state of nationality of a particular natural person or the law of his or her habitual residence.⁵ Some authors distinguish between the concepts of personal status and personal law. Following this approach, a personal status is understood as 'a set of legal matters relating to the natural person.'⁶ In other words, it 'describes that person's position in the legal order.'⁷ Unlike a personal statute, a personal law '... refers to a body of rules.'⁸ The scope of issues covered by a personal statute (or scope of personal law) can also be understood differently. In this regard, a distinction is made between extensive and narrow models. The extensive model implies that personal statute covers (or personal law applies to) the civil status and legal capacity of natural persons, as well as family and succession relations.⁹ The narrow model means that personal statute covers (or personal law applies to) only the civil status of individuals.¹⁰ In this article, the term 'personal status' is understood substantively, i.e. as a range of issues that are closely related to a person (civil status, family and inheritance relations).

- 1 United Nations High Commissioner for Refugees, *Global Trends: Forced Displacement in 2022* (UNHCR 2023) 14 <<https://www.unhcr.org/global-trends-report-2022>> accessed 26 October 2023.
- 2 *ibid.*
- 3 Marie-Luisa Loheide, *Status Privatus und Status Politus im Internationalen Migrationsrecht* (Verlag Ernst und Werner Gieseking 2022) 68.
- 4 *ibid.*
- 5 S Lorenz, 'EGBGB Art 5 Personalstatut' in W Hau and R Poseck (eds), *Beck'sche Online-Kommentare* (68th edn, CN Beck 2023) <<https://beck-online.beck.de/Bcid/Y-400-W-BECKOKBGB-G-EGBGB-A-5>> accessed 26 October 2023.
- 6 Alfonso Luis Calvo Caravaca and others, 'Natural Person' in AL Calvo Caravaca and J Carrascosa González (eds), *European Private International Law* (Granada 2022) 71.
- 7 Anatol Dutta, 'Personal Status' in J Basedow and others (eds), *Encyclopedia of Private International Law*, vol 2 (Edward Elgar Pub 2017) 1346.
- 8 G Tedeschi, "'Personal Status" and "Statut Personnel"' (1969) 15(3) *McGill Law Journal* 452.
- 9 Calvo Caravaca and others (n 6) 73-4.
- 10 *ibid* 74-5.

If migration is of a cross-border nature, regulation of issues related to the personal status of migrants will require the determination of applicable law. The content of rules defining the law applicable to a personal statute of international treaties, the EU law and national legislation of certain states indicates that the applicable law depends on the circumstances of the migrant's life.

Art. 12 of the Convention Relating to the Status of Refugees of 28 July 1951 (hereinafter - Convention),¹¹ which defines the law applicable to the personal status of refugees, is usually indicative here (since it can be applied if a person can be considered as a 'refugee'). In other cases, the determination of applicable law may depend on whether the war-related migrant has habitual residence in a particular country (see e.g. Art. 26 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter - Regulation 2016/1103),¹² Art. 8 of the Council Regulation (EU) № 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter - Regulation 1259/2010),¹³ Art. 21 (1) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter - Regulation 650/2012)¹⁴).

Therefore, this paper aims to analyse the extent to which the circumstances of life of war-related migrants affect the determination of the law applicable to their personal status. To achieve this goal, Part II sheds some light on what migration statuses war-related migrants may obtain in the country to which they have fled. Since Art. 12 of the Convention contains a special conflict-of-laws rule that determines the law applicable to the personal law of refugees, Part II of this paper also focuses on whether this article should apply only to persons with refugee status or it can also be applied when it comes to determining the law applicable to the personal law of a migrant with a migration status other than refugee status. Part III of this paper deals with the circle of issues that should be governed by the law chosen based on Art. 12 of the Convention, i.e., the scope of the personal statute. It also explains how the 'law of the country of domicile' and the 'law of the country of residence' to which Art. 12 of the Convention refers can be determined. Part IV of this paper explores how the

11 Convention Relating to the Status of Refugees (adopted 28 July 1951) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees>> accessed 26 October 2023.

12 Council Regulation (EU) 2016/1103 of 24 June 2016 [2016] OJ L 183 <<http://data.europa.eu/eli/reg/2016/1103/oj>> accessed 26 October 2023.

13 Council Regulation (EU) 1259/2010 of 20 December 2010 [2010] OJ L 343 <<http://data.europa.eu/eli/reg/2010/1259/oj>> accessed 26 October 2023

14 Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 [2012] OJ L 201 <<http://data.europa.eu/eli/reg/2012/650/oj>> accessed 26 October 2023.

law applicable to the personal status of migrants not covered by Art. 12 of the Convention can be defined. The paper relies on the preparatory materials to the Convention and on the relevant works on interpreting the provisions of the Convention, personal statute, understanding of the concept of 'habitual residence' and the relationship between private international law and migration law. It compares the approaches of national laws to determine the law applicable to a personal statute. To clarify the concept of 'refugee's domicile', the English doctrine is employed.

2 MIGRANT STATUS OF WAR-RELATED MIGRANTS AND CONFLICT-OF-LAWS RULES APPLICABLE TO THEIR PERSONAL STATUS

People fleeing the war can acquire different migrant statuses, or they may be waiting for a status in the country to which they flee. Their migrant status may not change at all for some time if, for example, they have the right to enter the state to which they fled without a visa and stay there for a certain period of time without obtaining any special permission.

The law applicable to the personal status of persons considered as 'refugees' is determined according to Art. 12 of the Convention. Its application may result in the determination of the law applicable to the personal status of a migrant differently than if it were defined on the basis of the national law of a particular country. This will occur when a national conflict-of-laws rule determines the law applicable to a refugee's personal status not as the law of the country in which he or she is domiciled (as provided for in Art. 12 of the Convention) but in some other way (e.g., Art. 5 of the Introductory Act to the German Civil Code will result in the application of the law of the country of person's nationality).

In the case of a person with a refugee status, the answer to the question of which conflict-of-laws rule applies to determine the law applicable to his or her personal status depends on how a legal system of a particular state correlate the rules of international treaties and national law. In this regard, it should be noted that today, many states legally or recognise the priority of international law over domestic law,¹⁵ although doing so in different ways.¹⁶ If the personal statute is understood to cover family and inheritance law, the question may arise as to which conflict of laws should be used to determine the law applicable to the relevant relationship: the rules of EU regulations or the rules of the Convention. Taking into account the fact that war-related migrants usually flee to the EU from third countries, the

15 C Economides, 'The Relationship between International and Domestic Law: Report' (1993) 6 Science and Technique of Democracy <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(1993\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)006-e)> accessed 26 October 2023.

16 *ibid*, pars 3.2-3.5. In particular, there are states that prioritize international treaties over: - legislation in general, including the respective constitutions; - statutes (while some states provide for such priority only in relation to certain international treaties, for example, those relating to human rights). In some states, international treaties have equal legal force to laws. However, in these states, the priority of international treaties is recognized in fact, as actions are taken to prevent conflicts between the norms of international treaties and national legislation. In some states, some international treaties may have the same legal force as acts of the executive branch, thus ranking lower than the laws of that state.

Convention will take precedence over the provisions of the relevant EU regulations under Art. 351 of the Treaty on the Functioning of the EU¹⁷ and the provisions of the relevant regulations (see e.g. Art. 19 (1) of Regulation 1259/2010, Art. 62 (1) of Regulation 2016/1103, Art. 75 (1) of Regulation 650/2012).

In addition, it should be noted that some states have made reservations regarding the application of Art. 12 of the Convention. (e.g. Sweden has made a reservation according to which ‘to the effect that the Convention shall not modify the rule of Swedish private international law, as now in force, under which the personal status of a refugee is governed by the law of his country of nationality’.¹⁸ Under the reservation made by Israel, Art. 12 of the Convention shall not apply to it. Spain has reserved ‘its position on the application of Art. 12 (1) of the Convention’.¹⁹

In the case of a person who has a status other than refugee status, the answer to the question regarding the applicability of Art. 12 of the Convention will depend, among other things, on whether the concept of ‘refugee’ as used in the Convention can be extended to them.

In this regard, it should be noted that in addition to refugee status (as defined in Art. 1 of the Convention and Art. 1 of its Protocol), war-related migrants may acquire, for example, temporary protection status under the national legislation of a particular country that implements the EU Temporary Protection Directive.²⁰ They can also obtain subsidiary protection status, provided by national legislation of a particular country, based on 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 persons eligible for subsidiary protection, and the content of the protection granted (recast).²¹ War-related migrants can also acquire other statuses provided for by the national legislation of a particular country (for example, the right to asylum under Art. 16 of the Basic Law of the Federal Republic of Germany). They can also be waiting to receive one of these statuses.

From the point of view of private international law, it is important to ask whether a person’s migration status affects the determination of the law applicable to his or her personal status. It should be noted that the legislation of some countries allows determining the law

17 Treaty on the Functioning of the European Union of 13 December 2007 (consolidated version) [2016] OJ C 202 <<https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html>> accessed 26 October 2023.

18 ‘States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol’ (United Nations High Commissioner for Refugees (UNHCR), 2023) <<https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>> accessed 26 October 2023.

19 *ibid.*

20 The acts of national legislation implementing the Directive in certain countries can be found here: ‘National Legislation Implementing the EU Temporary Protection Directive in Selected EU Member States’ (European Union Agency for Fundamental Rights (FRA), 3 August 2022) <<http://fra.europa.eu/en/publication/2022/national-legislation-implementing-eu-temporary-protection-directive-selected-eu>> accessed 26 October 2023.

21 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 [2011] OJ L 337 <<http://data.europa.eu/eli/dir/2011/95/oj>> accessed 26 October 2023.

applicable to the personal statute with uncertain migration status based on Art. 12 of the Convention. An example is Art. 28 (4) of the Act of Czech Republic on Private International Law, which provides that: 'If someone is an applicant for granting international protection, an asylum seeker or a beneficiary of a subsidiary protection or is homeless under another law or international agreement, the personal status of such a person shall be governed by provisions of international agreements stipulating the legal status of refugees and the legal status of stateless persons.'²²

At the same time, the question concerning the possibility of application of Art. 12 of the Convention to persons without refugee status in other countries is not so clear. This is, in particular, the case of Germany. To settle this uncertainty, it was suggested to determine the law applicable to the personal status of persons with subsidiary protection or the right to asylum in Germany based on the Convention to equalise these persons' rights with those of refugees.²³ According to another viewpoint, Art. 12 of the Convention refers to refugees in a narrow sense and should not be extended to persons with other statuses.²⁴

Besides, there is no consensus on what conflict-of-laws rules should be applicable to determine the personal status of persons with temporary protection. It can be assumed that some authors will argue that the law applicable to the personal status of such persons should be determined based on Art. 12 of the Convention since it has already been offered to apply this Convention not only to persons with refugee status but also for those who have subsidiary protection status.²⁵ At the same time, it can be predicted that there will be authors who will deny the application of Art. 12 of the Convention to persons with temporary protection, since the point of view according to which this article concerns only refugees already exists.²⁶

In this regard, it is worth noting that the term 'refugee' in the Convention can be understood differently. According to a 'narrow' approach, this concept covers leaders of certain social groups who are subjected to personal persecution or only political activists.²⁷ The broad approach covers the so-called 'ordinary people' who are persecuted as representatives of a certain group or political activists as well as representatives of persecuted groups and victims of conflict and social violence.²⁸

22 Unofficial translation by Petr Bříza and Ondřej Trubač, 'Attorneys at Law' in J Basedow and others (eds), *Encyclopedia of Private International Law*, vol 4 (Edward Elgar Pub 2017) 3110.

23 P Mankowski, 'Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration' (2017) 1 IPRax 40.

24 Stefan Arnold, 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention in Kontext des Internationalen Privatrechts' in Ch Budzikiewicz und andere (hrsg), *Migration und IPR* (Nomos 2018) 46.

25 Mankowski (n 23).

26 Arnold (n 24) 46.

27 Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protokoll' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokoll: A Commentary* (OUP 2011) 51.

28 *ibid.*

Regardless of which approach is employed, key characteristics of ‘refugee’ are listed in Art. 1 of the Convention. That is, ‘refugees’ in the meaning of the Convention are always persons who ‘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 [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it’.

Thus, the migration status of a person is not important for the application of Art. 12 of the Convention. The essential is whether a person is subjected to persecution referred to in Art. 1 of the Convention in the country of his or her nationality or former habitual residence. In other words, Art. 12 can be applied not only to persons with refugee status but also to persons with other migration statuses whose situation meets the characteristics specified in Art. 1 of the Convention.

To that end, it should be mentioned that some authors emphasise that in the situation with Ukrainian refugees, it is not so important to interpret Art. 12 of the Convention as to think about the relevance of its application to them (as it will mean that Ukrainian law will not govern the personal status of Ukrainian citizens although they are not fleeing persecution in their country and many of them want to return to Ukraine²⁹). Indeed, as long as Ukrainian refugees are not persecuted on the basis of race, religion, citizenship, membership in a particular social group or political opinion in Ukraine, there are no grounds for determining the law applicable under Art. 12 of the Convention.

3 PERSONAL STATUS ISSUES OF MIGRANTS COVERED BY THE CONVENTION

For migrants who fall under the conventional concept of ‘refugee’, it will be relevant to define it. As follows from a Study of Statelessness, which is called ‘precursor to the formulation of the 1951 Refugee Convention’³⁰ the drafters of the Convention intended to cover issues of ‘(a) A person’s capacity (age of attaining majority, capacity of the married woman etc.); (b) His family rights (marriage, divorce, recognition and adoption of children etc.); (c) The matrimonial regime in so far as this is not considered a part of the law of contracts; (d) Succession and inheritance in regard to movable and some cases to immovable property’³¹ with the term ‘personal status’.

29 Sabine Corneloup, ‘Migrants in Transit or Under Temporary Protection: How Can Private International Law Deal with Provisional Presence?’ (2023) 87(1) *RebelsZ* 60.

30 Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019) 11.

31 UN Economic and Social Council, *A Study of Statelessness*, United Nations, August 1949, Lake Success – New York E/1112;E/1112/Add.1 (UN Ad Hoc Committee on Refugees and Stateless Persons 1949) <<https://www.refworld.org/docid/3ae68c2d0.html>> accessed 26 October 2023.

However, in practice, different Contracting States have various understandings of the issues covered by the 'personal statute' referred to in Art. 12 of the Convention. The differences arise, for example, as to whether inheritance issues are covered by it.³²

It should also be noted here that there are differences in whether the concept of 'personal statute' in Art. 12 of the Convention should be interpreted autonomously or whether the Contracting States have the right to interpret it differently.³³ One doctrinal proposal is that 'personal refugee status' should encompass the elements listed in a Statelessness Study; the extension of the scope of Art. 12 to matters not listed in the Study should be left to the discretion of the States Parties.³⁴

The answer to the question regarding the circle of issues, covered by 'personal status' mentioned in Art. 12 of the Convention, depends on the method of interpretation of international treaties used and the extent to which the chosen method allows the use of preparatory materials. However, in any case, it is necessary to keep in mind the reasons for the creation of this article, which were to exclude the application of the law of refugee's nationality³⁵ (which usually means the law of a state from which the person is fleeing). Therefore, a broad understanding of personal status in Art. 12 of the Convention (i.e., the inclusion of all the issues mentioned in the Stateless Study) is justified, as it minimises the possibility of applying the law of the state from which the person fled to the issues covered by the personal statute.

Another important question in the application of Art. 12 (1) of the Convention is the interpretation of the terms 'country of domicile' and 'country of residence'. The drafters of the Convention did not have a consensus on how the concept of domicile should be understood, but all agreed that the term was vague.³⁶ In addition, it was noted that it is difficult to define this concept specifically for refugees since it tends to be related to what a person considers his or her home,³⁷ which in the case of refugees can be challenging.

In this regard, it is worth noting that in English law (which traditionally operates with the concept of domicile), it is believed that the key to determining the domicile of a refugee should be whether he or she intends to return to the country from which he or she fled if the situation in that country changes. However, the possibility of change should not be highly unlikely. Conversely, the intention to remain in the country of fleeing, even after changes in the refugee's home country, may be a ground for considering the country of fleeing as the place of domicile.³⁸

32 Loheide (n 3) 69.

33 *ibid.*

34 *ibid.* 72.

35 Axel Metzger, 'Juridical Status, Article 12' in A Zimmermann, J Dörschner and F Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 875.

36 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2018) 214.

37 *ibid.*

38 Dicey, Morris and Collins, *The Conflicts of Laws*, vol 1 (16th edn, Sweet and Maxwell 2022) 224.

At the same time, the above position of English law is only one of the possible ones. The truth is that the drafters of the Convention could not decide on how this term should be understood, and therefore, it was suggested that it should be determined by the country's courts that receive the refugee.³⁹ However, the intention of a migrant to stay in the country that granted him or her refuge seems to be an important factor in determining whether he or she has a domicile in that country if this intention is realistic. The realism of this intention will depend on whether the actual circumstances of the migrant's life allow them to stay in the respective country (for example, whether they meet the requirements of migration legislation that allow them to stay for a longer period in a particular country).

If the refugee's situation is such that his or her domicile cannot be determined, according to Art. 12 (1) of the Convention, his or her personal status should be submitted to the country of his 'residence'. In certain situations, however, this criterion is also not easy to use, as some refugees may be interpreted as not having a 'residence' (e.g., those in transit camps).⁴⁰

It is believed that in this case, the law of the country of transit should be applied since the main purpose of Art. 12 of the Convention is to prevent the subordination of personal statute issues to the law of the country from which the person fled.⁴¹ This idea deserves support since persons fleeing war may indeed not have a 'residence' in the sense of the state in which they are actually located and in which they need to settle the issue covered by the personal statute. In such a case, determining the state in which such a person has a residence as the state of his or her actual stay allows us to determine the applicable law and, therefore, to resolve the issue that needs to be resolved.

However, when determining the law applicable to the personal status of refugees, it is necessary to recall Art. 5 of the Convention,⁴² which is understood as allowing recourse to other conflict-of-laws rules not provided for in the Convention when they are more favourable to refugees,⁴³ as well as Art. 12 (2) of the Convention which enshrines the more general provision of Art. 5⁴⁴ that obliges Contracting states to respect the rights acquired by a refugee and related to his or her personal status, in particular, rights related to marriage.

39 Hathaway (n 36) 216.

40 *ibid.*

41 *ibid.*

42 According to Art. 5 of the Convention: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention".

43 There are cases when national courts have applied the law of the country of nationality rather than the law of the country of domicile of refugees, as it allowed to protect the rights covered by the personal statute. For example, in one case, the Belgian court did not apply Belgian law (the law of the refugees' country of domicile), but the law of their country of nationality, because, unlike Belgian law, it allowed them to register the surname of their newborn child in Belgium in accordance with their national law and traditions, which would not have been possible under Belgian law. Although the judge did not refer to private international law. The case is summarized in Jinske Verhellen, 'Cross-Border Portability of Refugees' Personal Status' (2017) 31(4) *Journal of Refugee Studies* 437.

44 *ibid* 438.

At the same time, the wording of Art. 12 (2)⁴⁵ allows for a derogation from this obligation if these rights violate their public policy.⁴⁶

Art. 12 (2) of the Convention resonates with Arts. 8 and 12 of the European Convention on Human Rights (hereinafter - the European Convention).⁴⁷ The first of which provides for the right to respect for private and family life while at the same time stipulating exceptions when the state may interfere with the exercise of this right. In particular, when the interference is “in accordance with the law and is necessary for a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” (Art. 8 (2) of the European Convention).

The second enshrines the right to marriage “according to the national laws governing the exercise of this right” (Art. 12 of the European Convention). The wording of Art. 12 of the European Convention, in fact, refers to the law applicable to the personal statute if the right to marriage is considered as its component. These articles of the European Convention have been subject to interpretation by the European Court of Human Rights.

For example, in the case *Z.H. and R.H. v. Switzerland* of 8 December 2015 (No. 60119/12)⁴⁸ two Afghan nationals entered a religious marriage in Iran. At the time of the marriage, the wife was 14 years old, and the husband was 18. Their asylum application in Switzerland was rejected because the Federal Office for Migration considered Italy to be the responsible state under the responsible state under Regulation No. 343/2003/EC (the “Dublin Regulation”). After the husband was expelled to Italy and the wife remained in Switzerland, where she, as a juvenile, was granted legal guardianship, the husband decided to appeal the rejection of his application and to obtain the right to asylum in Switzerland for family reunification. The appeal was rejected by the Federal Administrative Court, as it did not consider the couple to be a family and found the marriage to a 14-year-old underage to be a violation of Afghan law and incompatible with Swiss public policy. The couple turned to the European Court of Human Rights, claiming, among other things, that the failure to recognise their marriage and the husband’s expulsion to Italy had led to, inter alia, a violation of Art. 8 of the European Convention. However, the court did not find a violation of Art. 8 because it cannot be considered as obliging the recognition of a marriage entered into by a 14-year-old child. In addition, the court considered that the obligation to recognise such a marriage

45 Article 12(2) of the Convention provides that: “Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee”.

46 Verhellen (n 43) 438.

47 Council of Europe, *European Convention on Human Rights: as amended by Protocols nos 11, 14 and 15, supplemented by Protocols nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2021) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 26 October 2023.

48 *ZH and RH v Switzerland* App no 60119/12 (ECtHR, 8 December 2015) <<https://hudoc.echr.coe.int/eng?i=001-159050>> accessed 12 December 2023.

could not follow from Art. 12 of the European Convention, which refers to national law governing the exercise of the right to marriage.⁴⁹

The specific feature of this case is that the marriage was contrary to both the national law of each of the persons who entered into it and the public policy of the state in which they wanted to recognise it. However, even if the marriage did not violate their national law, it can be assumed that the court would still not consider it a violation of Art. 8 to refuse to recognise a marriage that is contrary to the public policy of the state where recognition is sought. (However, the marriage of these Afghan nationals was nevertheless recognised in Switzerland when the wife reached the age of 17, and both spouses were granted asylum in Switzerland).

4 LAW APPLICABLE TO A PERSONAL STATUS OF WAR-RELATED MIGRANTS NOT COVERED BY THE CONVENTION

The law governing the personal status (or certain issues covered by this concept) of war-related migrants who do not meet the refugee criteria within the meaning of the Convention may be determined on the basis of other international treaties (e.g., bilateral legal assistance treaties), the EU law, and national conflict-of-laws rules. It is not possible to dwell on the analysis of all the conflict-of-laws rules that could hypothetically serve as a basis for determining the applicable law to the personal status of war-related migrants in this paper so that we will focus on only some of them. In this regard, it should be mentioned that some conflict-of-laws rules subordinate the personal status (or certain issues covered by it) to the law of the country of the nationality of the person concerned (e.g. Art. 21 (1) of the Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters from 24 May 1993). Therefore, in some cases, the migration (including one from war) will not affect the law applicable to the personal statute as long as the person retains the nationality of the country of origin.

It will be more complicated to determine the law applicable to the personal status of war-related migrants in situations where the conflict-of-laws provision is formulated in such a way that its application requires analysis of not only a person's nationality but also other circumstances of his or her life. This is, for example, the case when a conflict-of-laws provision provides for the application of the law of the state of a person's habitual residence.

The situation is further complicated by the fact that some war-related migrants may be in transit for a long time (e.g. those who, having left their country of origin, are forced to stay

49 This certainly does not mean that national law cannot impose restrictions on marriage, however, “the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired”. Case of *B and L v the United Kingdom* App no 36536/02 (ECtHR, 13 September 2005) para 34 <<https://hudoc.echr.coe.int/eng?i=001-70136>> accessed 12 December 2023.

In addition, these restrictions must “meet the standards of accessibility and clarity required by the Convention”. Case of *Frasik v Poland* App no 22933/02 (ECtHR, 05 January 2010) para 89 <<https://hudoc.echr.coe.int/eng?i=001-96453>> accessed 12 December 2023.

in a country other than their desired destination for some reason⁵⁰). It was suggested that in the absence of a choice made by the person or persons concerned, the life situations of such migrants should be governed by the law of the country of their final destination, except in situations where the migrant is more closely connected to some other country.⁵¹ The suggestion regarding determining the law applicable to the personal status of migrants under temporary protection is the same.⁵² The only difference is that for a transit migrant, the country of destination is always a country other than the country of origin, while for a migrant with temporary protection, the country of destination and the country of origin are the same since most of them intend to return to it.⁵³

The idea that the persons concerned should have the right to choose the law applicable to their relations deserves full support since the possibility of such a choice is consistent with the private law nature of the relations covered by the concept of personal statute. The appropriateness of applying the law of the state of the migrant's final destination to such relations (in the absence of a choice of law by the persons concerned) raises certain doubts since such a country cannot always be determined with certainty. In our opinion, in the absence of a choice of law made by the parties concerned, the issues covered by the personal statute of a migrant in transit should be governed by the law of the state with which such a migrant has the closest connection at the time when the relevant issue is brought before the court. A migrant's real prospects for integration into such a country (ability to find a job, language skills, family or business ties) can be a determining factor for finding such a country.

With regard to migrants with temporary protection, it is worth noting that even those authors who believe that most such immigrants wish to return home recognise that the situation may change over time.⁵⁴ This is confirmed by surveys of Ukrainian refugees (most of whom have temporary protection status) at the beginning of the war and now. In 2022, most Ukrainians who fled the war wanted to return to Ukraine.⁵⁵ However, the situation is changing over time, and the longer the war lasts, the more Ukrainians do not want to return to Ukraine.⁵⁶ Moreover, as of March 2023, the share of Ukrainian refugees who found work in a country that granted them temporary protection in some of these countries was 50% or more.⁵⁷

50 The reasons and examples of such migration are described in Corneloup (n 29) 50-3.

51 *ibid* 75.

52 *ibid* 72.

53 *ibid* 70.

54 *ibid* 63.

55 Herbert Brücker and others, 'Ukrainian Refugees in Germany: Evidence from a Large Representative Survey' (2023) 48 *Comparative Population Studies* 407; Anastasija Zanuda, 'Will Ukrainians Return Home' (*BBC News Ukraine*, 25 July 2022) <<https://www.bbc.com/ukrainian/features-62249591>> accessed 26 October 2023.

56 Herbert Brücker and others, 'Ukrainian Refugees: Nearly Half Intend to Stay in Germany for the Long Term' (2023) 28 *DIW Weekly Report* 204; 'How Many Ukrainians Plan to Stay in Poland: A Study' (*Gremi Personal*, April 2023) <<https://gremi-personal.com.ua/skilki-bizhenciv-ne-povernutsja-v-ukrainu-doslidzhennja/>> accessed 26 October 2023.

57 Vasco Botelho and Hannah Hägele, 'Integrating Ukrainian Refugees into the Euro Area Labour Market' (*European Central Bank, Eurosystem*, 1 March 2023) <<https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230301~3bb24371c8.en.html>> accessed 26 October 2023.

That is why one can only partially agree with the opinion that temporary protection lacks a close and stable link to the state of protection, and therefore, a person with temporary protection does not have habitual residence in the state of protection, as defined by for example, the Regulation 650/2012.⁵⁸

In our opinion, much depends on the time at which the habitual residence of a migrant enjoying temporary protection is examined. This is because their connection with the country that provides temporary protection will differ one or two months after entering it and after two years of staying there. The longer a migrant stays in the country of temporary protection, the stronger his or her ties to that country.

At the same time, one should agree with the opinion that the determination of habitual residence should not be dependent on the migration status of a person, which may be taken into account in determining habitual residence along with other circumstances of the case.⁵⁹ This is because migration status can alter as the living conditions of migrants change. Some of them may stay in the host country because they have found a job, started studying, or created a family with a person who has habitual residence in the host country. However, regardless of the grounds for staying, after the expiry of temporary protection, the nature of war-related migrant's residence will remain temporary for several years. In our opinion, this temporariness does not affect the determination of the law applicable to personal status if other circumstances of the case indicate that the person has a stable connection with the host state and the prospect of obtaining the right to permanent residence there.

5 CONCLUSIONS

The law applicable to the personal status of a war-related migrant is determined on the basis of Art. 12 of the Convention if he or she meets the refugee characteristics defined by this Convention. However, not only persons with refugee status but also holders of other migration statuses may satisfy refugee criteria set out by the Convention. In this sense, migration status does not affect the determination of the law applicable to a personal statute.

58 Corneloup (n 29) 63.

The term “habitual residence” is not defined in the Regulation 650/2012 and therefore requires interpretation, which should be done independently. Eva Lein, ‘Art 4 EuErbVO (Allgemeine Zuständigkeit)’ in A Dutta and J Weber (eds), *Internationales Erbrecht: EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR* (CH BECK 2016) 108. The interpretation of the concept of “habitual residence” in the EU law may differ depending on the category of cases it relates to. Paul Lagarde, ‘Article 21 General Rule’ in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 122. That is why paragraphs 23 and 24 of the Preamble to the Regulation 650/2012 provide for certain areas of analysis of the circumstances of the case to be carried out by the law enforcement authority in succession matters. It is widely believed that the state of the deceased's habitual residence is the state where the center of his or her vital interests is located. This will usually be the state where most of the property is located and where the deceased's main creditors are based. Paul Lagarde, ‘Introduction’ in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 30.

59 Corneloup (n 29) 70.

If the law applicable to the personal status of a war-related migrant is determined based on Art. 12 of the Convention, a broad understanding of personal status is justified, as it allows to exclude more issues from the scope of the law of the state from which the migrant fled.

Whether a war-related migrant has a domicile in the country of destination, in the meaning of Art. 12 of the Convention, depends on whether the migrant intends to stay in that country after the end of the war in the country from which he or she fled and whether such a stay is realistic. The law of migrant's residence in the meaning of Art. 12 of the Convention is the law of the state of his or her actual stay. If a connecting factor that determines the law applicable to a personal statute is formulated in a way that requires an analysis of the circumstances of the migrant's life, they may include employment opportunities, knowledge of the language, family or business ties and his or her wish to stay in that country. The non-permanence of a person's migration status does not affect the law applicable to the personal status of a war-related migrant.

REFERENCES

1. Arnold S, 'Der Flüchtlingsbegriff der Genfer Flüchtlingskonvention in Kontext des Internationalen Privatrechts' in Budzikiewicz Ch und andere (hrsg), *Migration und IPR* (Nomos 2018) 25.
2. Botelho V and Hägele H, 'Integrating Ukrainian Refugees into the Euro Area Labour Market' (*European Central Bank, Eurosystem*, 1 March 2023) <<https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230301~3bb24371c8.en.html>> accessed 26 October 2023.
3. Břıza P and Trubač O, 'Attorneys at Law' in Basedow J and others (eds), *Encyclopedia of Private International Law*, vol 4 (Edward Elgar Publishing 2017) 3110.
4. Brücker H and others, 'Ukrainian Refugees in Germany: Evidence from a Large Representative Survey' (2023) 48 *Comparative Population Studies* 395, doi:10.12765/CPoS-2023-16.
5. Brücker H and others, 'Ukrainian Refugees: Nearly Half Intend to Stay in Germany for the Long Term' (2023) 28 *DIW Weekly Report* 204.
6. Calvo Caravaca AL and others, 'Natural Person' in Calvo Caravaca AL and Carrascosa González J (eds), *European Private International Law* (Granada 2022) 69.
7. Corneloup S, 'Migrants in Transit or Under Temporary Protection: How Can Private International Law Deal with Provisional Presence?' (2023) 87(1) *RebelsZ* 46.
8. Dicey, Morris and Collins, *The Conflicts of Laws*, vol 1 (16th edn, Sweet and Maxwell 2022).
9. Dutta A, 'Personal Status' in Basedow J and others (eds), *Encyclopedia of Private International Law*, vol 2 (Edward Elgar Pub 2017) 1346.
10. Economides C, 'The Relationship Between International and Domestic Law: Report' (1993) 6 *Science and Technique of Democracy* <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(1993\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)006-e)> accessed 26 October 2023.

11. Einarsen T, 'Drafting History of the 1951 Convention and the 1967 Protokoll' in Zimmermann A, Dörschner J and Machts F (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokoll: A Commentary* (OUP 2011) 40.
12. Foster M and Lambert H, *International Refugee Law and the Protection of Stateless Persons* (OUP 2019).
13. Hathaway JC, *The Rights of Refugees under International Law* (CUP 2018).
14. Lagarde P, 'Article 21 General Rule' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 120.
15. Lagarde P, 'Introduction' in U Bergquist and others, *EU Regulation on Succession and Wills: Commentary* (Verlag Dr Otto Schmidt KG 2015) 20.
16. Lein E, 'Art 4 EuErbVO (Allgemeine Zuständigkeit)' in Dutta A and Weber J (eds), *Internationales Erbrecht: EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR* (CH BECK 2016) 108.
17. Loheide ML, *Status Privatus und Status Politus im Internationalen Migrationsrecht* (Verlag Ernst und Werner Gieseking 2022).
18. Lorenz S, 'EGBGB Art 5 Personalstatut' in Hau W and Poseck R (eds), *Beck'sche Online-Kommentare* (68th edn, CN Beck 2023) <<https://beck-online.beck.de/Bcid/Y-400-W-BECKOKBGB-G-EGBGB-A-5>> accessed 26 October 2023.
19. Mankowski P, 'Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration' (2017) 1 IPRax 40.
20. Metzger A, 'Juridical Status, Article 12' in Zimmermann A, Dörschner J and Machts F (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protokoll: A Commentary* (OUP 2011) 863.
21. Tedeschi G, "Personal Status" and "Statut Personnel" (1969) 15(3) McGill Law Journal 452.
22. Verhellen J, 'Cross-Border Portability of Refugees' Personal Status' (2017) 31(4) Journal of Refugee Studies 427, doi:10.1093/jrs/fex026.

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