

Chapter 9 Graded Solidarity? The Social Rights of Refugees in EU law

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1 Introduction

Solidarity is an important value within the European Union, evidenced by its inclusion in Article 2 of the Treaty on the European Union and as title IV in the Charter of Fundamental Rights of the European Union. Solidarity has been described as the demand to ‘respond to the needs of others’¹ or the ‘readiness to share resources with others’.² Even though in the refugee context, the concept of solidarity is often used to refer to burden sharing between EU Member States as regards receiving refugees,³ it can, therefore, also refer to demands for fairness in the distribution of benefits.⁴ This chapter takes this latter approach and analyses the concept of solidarity within the European Union, as concretized as social rights to benefits.⁵ Granting social rights (eg social assistance, health care, housing) can be seen as an expression of our solidarity with one another:

‘Securing these rights will often require positive action by others, including the government. The need for such action is the reason social and economic rights are often called positive rights. Protecting them requires one to be actively committed to one’s fellow citizens in a way that positively supports their economic and social wellbeing. (...) Such support

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- 1 Sally J Scholz, ‘Solidarity as a Human Right’ (2014) 52 *Archiv des Völkerrechts* 49.
 - 2 Marianna Fotaki, ‘Solidarity in Crisis? Community Responses to Refugees and Forced Migrants in the Greek Islands’ (2022) 29 *Organization* 295.
 - 3 Martina Tazzioli and William Walters, ‘Migration, Solidarity and the Limits of Europe’ (2019) 9 *Global Discourse* 175; Micaela Del Monte and Anita Orav, ‘Solidarity in EU Asylum Policy’ (European Parliament, 2023).
 - 4 Andrea Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 213.
 - 5 cf Markus Kotzur, ‘Solidarity as a Legal Concept’ in Andreas Grimm and Susanne Giang (eds) *Solidarity in the European Union* (Springer 2017).

will itself require positive and reciprocal relationships among citizens and depend on the presence of a kind of social solidarity'.⁶

As regards refugees, EU legislation and case law has, through the years, established a variety of levels of social rights for different categories of refugees. This chapter aims to map the different levels of social rights for refugees in EU law, in order to gain more insight into the scope of and basis for this kind of solidarity in EU law. It will show how solidarity with refugees as crystallized in their social rights is highly conditional, and, at times, instrumental. It will also show how this kind of conditional solidarity as regards refugees' social rights increases as a response to crisis narratives.⁷

In line with this book's focus on the influence of the so-called 'refugee crisis' as one of the potential crises influencing the concept of solidarity in EU law, this chapter focusses on the social rights of refugees, and does not include the social rights of other kind of migrants, such as labour or family migrants. The chapter uses the term 'refugees' in a broad, and not necessarily legal, sense. The term 'refugees' in this chapter refers to all migrants who have fled their country of origin and have applied for protection in the EU. It does include, therefore, migrants whose asylum application has been rejected; asylum seekers who are still waiting for a final decision on their asylum application; beneficiaries of temporary and international protection; and refugees who have a long-term residence status in the EU. The term 'refugees' is used to refer to all these kinds of migrants together; whereas more specific terminology is used when a particular sub-category of refugees is discussed.

After discussing the concept of solidarity in the context of social rights a bit further in section 2, section 3 maps refugees' rights to social assistance and health care in EU legislation and case law. It shows how these rights, as laid down in legislation, increase if the legal ties of refugees with their country of residence strengthen, and how the Court of Justice through its case law tempers this 'incremental system' a bit. Section 4 analyses these rights from the perspective of solidarity and argues that different notions of solidarity can be discovered in this system of rights. Often, however, the solidarity with refugees displayed by these rights is highly conditional. This conditionality is further expanded in the more recent legislative proposals

6 David Hollenbach, 'A Relational Understanding of Human Rights: Human Dignity in Social Solidarity' (2022) 71 *Emory Law Journal* 1487.

7 On conditionality as an increasing instrument also of solidarity among Member States see Baraggia, in this volume.

issued by the European Commission as a response to the so-called refugee crisis in 2015, as discussed in section 5. In addition, this section shows how these proposals also limit the scope of solidarity with refugees by making it harder to reach and enter EU territory, and, therefore, to be able to come within reach of solidarity crystalized in social rights.

2 Solidarity and refugees' social rights

Title IV of the Charter of Fundamental Rights of the European Union is entitled 'solidarity'. This title includes rights such as the right of collective bargaining and action, the right to fair and just working conditions, the right to social and housing assistance and the right to health care. According to the preamble, solidarity is one of the 'indivisible, universal values' on which the Union is founded. Article 2 of the Treaty on European Union (TEU) includes solidarity as one of the values that prevail in the societies of the Member States and Article 3 TEU stipulates that the EU shall promote solidarity among the Member States and 'contribute to solidarity among peoples'. With regard to asylum and immigration more specifically, Article 67 of the Treaty on the Functioning of the European Union (TFEU) holds that a common policy needs to be based on 'solidarity between Member States' and Article 80 TFEU states that such policies need to be 'governed by the principle of solidarity' between the Member States. Accordingly, solidarity is an important concept within the EU in general, and within the field of asylum and immigration in particular.

However, as these different references to solidarity within primary EU law show, solidarity is not a clearly defined concept. While the Charter stresses the foundational value of solidarity and further crystalizes it in individual social rights, the TEU and TFEU mainly stress the need for solidarity among Member States. As has been explained in the introduction to this volume, the multifaceted use and indeterminate meaning is a general characteristic of the concept of solidarity, whether used as a social, political or legal concept.

A useful distinction that has been made by philosophers is between solidarity *among* and solidarity *with*.⁸ According to the former, solidarity is linked to social groups, it describes a special relationship of unity and

8 O'Neill 1996 and Miller 2017 referred to in Andrea Sangiovanni and Juri Viehoff, 'Solidarity in Social and Political Philosophy' in Edward N Zalta and Uri Nodelman (eds)

mutual indebtedness within a group. This is also referred to as ‘exclusionary ingroup solidarity’.⁹ According to the latter, solidarity is a unilateral concept, where reciprocity is not required. You can act in solidarity with someone, for example a victim of a natural disaster or members of an underprivileged group, also if that (group of) person(s) does not act in solidarity with you.¹⁰ This is also called ‘inclusionary outgroup solidarity’.¹¹ Solidarity *among* is based on membership to a particular social group, whereas solidarity *with* is reaching out to the needs of others. In both cases, the concept of solidarity can be seen as a universalist concept, emphasizing responsibility for others as human beings, based on our common humanity, or as a closed, particularistic concept, based on the idea of a clearly defined community demarcated by social boundaries.¹²

Establishing whether someone falls within the relevant in- or outgroup is, however, not always enough for solidarity to materialize. Solidarity, especially as regards the welfare state, can be highly conditional. Van Oorschot has identified that criteria of deservingness are often used by the general public if they adopt a more conditional form of solidarity as regards access to the welfare state. Based on large-scale survey research, van Oorschot has identified the following five criteria that the general public, independent of gender, age or class, uses for assessing a person’s deservingness of welfare; the so-called CARIN-criteria:

1. control: poor people’s control over their neediness, or their responsibility for it: the less control, the more deserving;
2. need: the greater the level of need, the more deserving;
3. identity: the identity of the poor, ie their proximity to the rich or their ‘pleasantness’; the closer to ‘us’, the more deserving;
4. attitude: poor people’s attitude towards support, or their docility or gratefulness: the more compliant, the more deserving;

The Stanford Encyclopedia of Philosophy (Summer edn 2023) <https://plato.stanford.edu/archives/sum2023/entries/solidarity/> accessed 6 March 2024.

- 9 Marit Hopman and Trudie Knijn, ‘Understanding Solidarity in Society: Triggers and Barriers for In- and Outgroup Solidarity’ in Mara A Yerkes and Michèle Bal (eds) *Solidarity and Social Justice in Contemporary Societies* (Palgrave Macmillan 2022).
- 10 Sangiovanni and Viehoff (n 8).
- 11 Hopman and Knijn (n 9).
- 12 Fotaki (n 2); Markus Quandt and Vera Lomazzi, ‘Solidarity: A European Value?’ in Regina Polak and Patrick Rohs (eds) *Values – Politics – Religion: The European Values Study* (Springer 2023) in David M Rasmussen and Alessandro Ferrara (eds) *Philosophy and Politics – Critical Explorations*.

5. reciprocity: the degree of reciprocation by the poor, or having earned support: the more reciprocation, the more deserving¹³

Research has shown that these criteria are not only used by the general public but can also be identified in judicial reasoning about access to welfare.¹⁴

Accordingly, the scope and mode of solidarity expressed to refugees as regards their access to social benefits is influenced by many different notions of solidarity. Social rights of refugees can be seen, in line with the EU Charter on Fundamental Rights, as solidarity crystalized, and can be based on both solidarity among members and solidarity with an outgroup, depending on the definition of the ingroup. If the ingroup is 'fellow humans', 'members of society' or 'residents in a country', then granting social rights to (some) refugees could be seen as a form of (exclusionary) ingroup solidarity, a form of solidarity among members. However, if the ingroup is conceptualized as citizens or nationals of a country, then granting social right to refugees is a form of solidarity with outsiders. In both cases, the scope of solidarity can be universal (i.e. based on our common humanity) or particular (i.e. based on membership to a particular social (inside or outside) group, and in both cases, the mode of solidarity can be conditional (i.e. based on deservingness).

In addition, granting social rights to refugees can be seen, in line with the TEU and TFEU, as forming part of solidarity among Member States. This is a form of particular, ingroup solidarity among states, that could be conditional on rule compliance by states. Granting social rights to refugees

13 Wim JH van Oorschot, 'Who Should Get What, and Why? On Deservingness Criteria and the Conditionality of Solidarity among the Public' (2000) 28 *Policy and Politics* 33; Wim JH van Oorschot, 'Making the Difference in Social Europe: Deservingness Perceptions Among Citizens of European Welfare States' (2006) 16 *Journal of European Social Policy* 23. The relevance of these criteria for assessing person's deservingness of welfare, especially the criteria of control, reciprocity and need, is also confirmed by qualitative research (Tijds Laenen, Federica Rossetti, and Wim JH van Oorschot, 'Why Deservingness Theory Needs Qualitative Research. Comparing Focus Group Discussions on Social Welfare in Three Welfare Regimes' (2019) 60 *International Journal of Comparative Sociology* 190).

14 Gareth Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25 *Journal of European Public Policy* 1442; Lieenke Slingenberg, 'Deservingness in Judicial Discourse. An Analysis of the Legal Reasoning Adopted in Dutch Case Law on Irregular Migrant Families' Access to Shelter' (2021) 20 *Social Policy and Society* 521.

is an important element of the common European asylum system, that can only properly function if the level of social rights for refugees among the different member states is harmonized. Accordingly, granting social rights by EU Member States can also be based on solidarity with other Member States, that are providing such rights to refugees, in addition to or instead of on solidarity with refugees. Seen in this way, it fits a conception of solidarity as ‘joined action’, that can be described, as explain in the introduction to this volume, as an *appel* to mobilize for certain positions. Member States jointly agree on providing social rights to refugees, in order to pursue the common good of a common European asylum policy.

This chapter will examine how all these different notions, scopes and modes of solidarity meet and compete in EU law on refugees’ access to social rights, and to what extent crisis narratives change that. To that end, the next section will first map the social rights of refugees in EU law.

3 Mapping refugees’ social rights in EU law: an incremental system

3.1 General overview

In order to better understand the solidarity expressed by refugees’ social rights in EU law, this section maps and compares the rights of refugees as regards social assistance and housing laid down in EU legislation and resulting from CJEU case law. For the purposes of this chapter, the term ‘social assistance’ refers to benefits to meet basic needs (eg food, clothing, shelter), provided in kind or as financial allowances. This section first maps these rights as formulated in legislation. After that, the rights will be analysed and compared in their context, and case law about these rights will be discussed.

The social rights of refugees are laid down in different EU legislative instruments that have been developed over time, with the first instrument adopted in 2001 and the most recent (recast) one in 2013, and by different actors (i.e. by Council, with the European Parliament as consultee, or by Council and European Parliament in co-decision). There are currently five relevant applicable legislative instruments containing social rights for refugees, each applying to a specific category of refugees:

- 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 Mem-

ber States in receiving such persons and bearing the consequences thereof;

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals;
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection;
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast);
- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

The term ‘solidarity’ is mentioned in the preamble of three of them,¹⁵ but it refers in all these cases to solidarity among Member States,¹⁶ not to solidarity with refugees. However, although not explicitly labeled as an expression of solidarity, all instruments provide social rights to refugees. For refugees who are eligible for a long-term residence status (usually after five years of legal residence), for refugees who apply for or are granted with temporary or international protection and for rejected asylum seekers, EU legislation provides for the following access to and level of housing, social assistance and health care:

15 Recital 7, 9 and 20 of Council Directive 2001/55/EC; Recital 9 of Directive 2011/95/EU; and Recital 2 and 5 of Directive 2013/33/EU.

16 The recitals refer explicitly to solidarity between Member States or to the Stockholm Program ‘which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity’. In this program, the concept of solidarity is used to refer to the objective of ‘sharing of responsibilities and solidarity between the Member States’ (see para. 6.2.2. of ‘The Stockholm Programme. An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ C115/01.

	Housing	Social assistance	Health care
Rejected asylum seekers – Directive 2008/115/EC			
<i>General</i>	X	X	X
<i>During voluntary departure or postponement of removal</i>	X	X	Emergency health care and essential treatment of illness ¹⁷
Asylum applicants – Directive 2013/33/EU	Housing that provides an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health ¹⁸	Food, clothing and a daily expenses allowance that provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health ¹⁹	Necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders ²⁰
Beneficiaries of temporary protection – Directive 2001/55/EC	Access to suitable accommodation or, if necessary, receive the means to obtain housing ²¹	Necessary assistance in terms of social welfare and means of subsistence ²²	Medical care that includes at least emergency care and essential treatment of illness ²³
Beneficiaries of international protection – Directive 2011/95/EU			
<i>Subsidiary protection</i>	Access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories ²⁴	Core benefits at the same level and under the same eligibility conditions as nationals ²⁵	Access to health-care under the same eligibility conditions as nationals ²⁶
<i>Refugee status</i>	Access to accommodation under equivalent conditions as other third-country na-	The necessary social assistance as provided to nationals ²⁸	Access to health-care under the same eligibility

17 Article 14(1)(b).

18 Article 2(g) and 17(2).

19 Article 2(g) and 17(2).

20 Article 19(1).

21 Article 13(1).

22 Article 13(2).

23 Article 13(2).

24 Article 32(1).

25 Article 29(2).

26 Article 30(1).

	Housing	Social assistance	Health care
	nationals legally resident in their territories ²⁷		conditions as nationals ²⁹
Long-term residents – Directive 2003/109/EC, as amended by Directive 2011/51/EU	Equal treatment with nationals as regards procedures for obtaining housing ³⁰	Equal treatment with nationals as regards core benefits ³¹	Equal treatment with nationals as regards access to goods and services and the supply of goods and services made available to the public ³²

NB. Most directives have additional specific provisions for vulnerable migrants or migrants with special needs.

This table shows, at first sight, a clear increase in rights if the legal ties of refugees to the country of residence strengthen. Rejected asylum seekers have no access to social rights. However, if their removal is officially postponed, on the basis of personal, practical or legal reasons, and, as such, their legal ties to the territory slightly increase, they are entitled to emergency health care. Asylum seekers are entitled to an adequate standard of treatment, which may, if provided as financial allowances, be at a lower level than the general social assistance level for nationals.³³ Beneficiaries of temporary protection are entitled to the ‘necessary social assistance’ and beneficiaries of international protection and long-term residents are entitled to equal treatment with nationals as regards (core benefits of) social assistance.

The table also shows that there is a distinction between absolute rights and relative rights. The rights for (rejected) asylum seekers and beneficiaries of temporary protection are laid down in an absolute manner; they are entitled to these provisions irrespective of the rights of nationals in the Member State concerned. The rights of beneficiaries of international protection and of long-term residents are, to the contrary, contingent on the

27 Article 32(1).

28 Article 29(1)).

29 Article 30(1).

30 Article 11(1)(f).

31 Article 11(4).

32 Article 11(1)(f).

33 Article 17(5) of Directive 2013/33/EU.

rights of other residents in the particular Member State, such as national or legally residing non-nationals.

3.2 Housing

Asylum seekers and beneficiaries of temporary protection are entitled to 'adequate' or 'suitable' housing respectively. This is an important absolute right, as even nationals do not usually have a right to actually obtain housing. Yet, the CJEU made clear that 'where a Member State has opted to provide the material reception conditions [for asylum seekers, LS] in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence *by enabling them to obtain housing, if necessary, on the private rental market*' (emphasis LS).³⁴ In addition, the reference to a dignified standard of treatment means, according to the CJEU, that housing cannot be withdrawn in case of violent behavior, not even for a few days. The Reception Conditions Directive authorizes Member States to withdraw reception benefits as a sanction for 'serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour'.³⁵ In *Haqbin*, however, the Court held that respect for human dignity requires 'the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity'.³⁶ A sanction that consists in the withdrawal, even if only a temporary one, of the material reception conditions relating to housing, food or clothing would be irreconcilable with these requirements, according to the Court. This has recently been confirmed by the Court in *TO*, where the Court added that the fact 'that the conduct to be sanctioned may be particularly serious and reprehensible cannot lead to a different conclusion'.³⁷

34 Case C-79/13 *Saciri* [2014] OJ C112/14, para 42.

35 Article 20(4) of Directive 2013/33/EU.

36 Case C-233/18 *Haqbin* [2019] OJ C211/16.

37 Case C-422/21 *Ministero dell'Interno v TO* [2022] OJ C368/12, para 41.

The quality of that housing leaves, however, more room for interpretation. Asylum seekers are entitled to housing ‘that provides an adequate standard of living’, which ‘guarantees their subsistence and protects their physical and mental health’ and beneficiaries of temporary protection are entitled to ‘suitable accommodation’. If Member States choose to provide housing in kind, the Reception Conditions Directive specifies that asylum seekers should be housed in premises used for the purpose of housing applicants at the border or in transit zones, in accommodation centers or in other premises adapted for housing applicants.³⁸ Indeed, the CJEU held that asylum seekers cannot ‘make their own choice of housing’.³⁹ If the housing capacities normally available are temporarily exhausted, the Directive authorizes Member States to house asylum seekers, for a period as short as possible, in premises that are not particularly used or adapted for housing applicants, such as tents or sport halls. Such facilities should, in any event, cover basic needs.⁴⁰ All this shows that asylum seekers are in any event entitled to a roof over their head. The same is true for beneficiaries of temporary protection.

If their request for international protection is rejected by a final decision, or if temporary protection ends, they are no longer entitled to housing under EU law, as they then fall under the scope of the Returns Directive. This Directive does not provide for housing or social assistance rights. This Directive does, however, provide for a right to emergency health care during the period of voluntary return or during the postponement of a return decision. In *Abdida*, the CJEU ruled that for seriously ill persons, this right is only effective if Member States also provide for, ‘in so far as possible’, their basic needs. ‘The requirement to provide emergency health care and essential treatment of illness (...) may, in such a situation [a third country national suffering from a serious illness, LS], be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned’.⁴¹ Accordingly, there is an ‘implied right’ for some kind of social assistance and housing for rejected asylum seekers, at least if they are seriously ill and their return

38 Article 18(1) Directive 2013/33/EU.

39 *Saciri* (n 34) para 43.

40 Article 18(9) Directive 2013/33/EU.

41 Case C-562/13 *Abida* [2014] OJ C65/13.

decision is postponed. This has, prudently, be confirmed by the Court in the more recent case of *B*.⁴²

As soon as their request for international protection is granted, beneficiaries of international protection no longer fall under the personal scope of an absolute right to housing. Still, they are entitled to access accommodation 'under equivalent conditions as other third-country nationals legally resident in their territories'. The same is true for migrants who have a long-term residence status, albeit for them the standard is 'equal treatment with nationals'. While this right to equal treatment could seem a standard that provides stronger protection as compared to the minimum standard for asylum seekers, this is not necessarily the case. As availability of social housing is scarce in many Member States, and nationals or other third-country nationals do generally not have a right to be actually provided with housing, this standard does not prevent homelessness. Formal equal treatment could then merely mean ending up on the same waiting list as other third-country nationals or nationals. While in some Member States, like the Netherlands, beneficiaries of international protection are allowed to remain in their asylum seeker reception centre until another form of housing is available, in other Member States, like Greece, persons with international protection status are evicted from their asylum seekers reception centres and often end up homeless on the streets.⁴³ Indeed, ECRE has observed that beneficiaries of international protection 'face an array of legal and practical obstacles which prevent them from effectively exercising the right to accommodation within a reasonable time and from moving out of facilities for asylum seekers. Notwithstanding the severe consequences for the individuals concerned, including destitution'.⁴⁴

42 Case C-233/19 *B v Centre public d'action sociale de Liège* EU:C:2020:757, para 34: 'it follows from the Court's case-law that certain guarantees pending return, which may include the provision of basic needs for the person concerned, must be provided, pursuant to Article 14(1) of Directive 2008/115, in situations where the Member State concerned is obliged to offer that person an appeal with automatic suspensive effect against a return decision taken against him or her, even if that person is staying illegally in the territory of the Member State in question'.

43 Refugee Support Aegean and Stiftung Pro Asyl, 'Beneficiaries of International Protection in Greece. Access to Documents and Socio-Economic Rights' (March 2022) https://rsaegrean.org/wp-content/uploads/2022/03/2022-03_RSA_BIP_EN.pdf accessed 6 March 2024.

44 European Council on Refugees and Exiles, 'Housing out of reach? The Reception of Refugees and Asylum Seekers in Europe' (March 2019) <https://reliefweb.int/report/w>

In *Ibrahim*, however, the Court seems to provide for the possibility that the situation of beneficiaries of international protection who cannot meet their basic needs is unlawful, under Article 4 of the Charter, *irrespective* of what nationals in that Member State receive. This case was about the question whether Member States can declare an asylum application inadmissible on the ground that the applicant has already been granted subsidiary protection in another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter. In addition, the question was whether the answer is the same where those granted such protection receive subsistence allowance that is markedly inferior to that in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State. The Court first repeats, with reference to other case law, that Article 4 of the Charter is violated if a beneficiary of international protection wholly dependent on State support, finds himself, ‘irrespective of his wishes and his personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity’ (italics LS).⁴⁵ The Court then adds, that this situation would also violate Article 4 of the Charter, if the person concerned is not treated differently from nationals of the Member State concerned.⁴⁶ Hence, even though under the legislation, beneficiaries of international protection are, merely, entitled to equal treatment with other legally resident third-country nationals as regards accommodation, the CJEU has established a minimum standard of treatment, including a place to live, that also applies to them.

3.3 Social assistance

As regards social assistance, only persons with refugee status are entitled to full equal treatment with nationals. The Court clarified that the reference

orld/housing-out-reach-reception-refugees-and-asylum-seekers-europe accessed 6 March 2024.

45 Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim* [2019] OJ 187/13 para 90.

46 *ibid*, para 93.

to 'necessary social assistance' does not mean that Member States are authorized to grant persons with refugee status benefits which they consider sufficient to cover needs, but which are less than the benefits paid to their nationals.⁴⁷ For beneficiaries of subsidiary protection and long-term residents, equal treatment as regards social assistance may be limited to 'core benefits'. In *Kamberaj*, the CJEU stressed that this exception needs to be interpreted strictly and held that core benefits include in any case social assistance or social protection benefits 'which enable individuals to meet their basic needs such as food, accommodation and health'. The Court referred in this respect to Article 34 of the Charter, which stipulates that the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. According to the Court, it follows from this provision that if a certain benefit fulfils these purposes, it should be considered a 'core benefit'.⁴⁸ Accordingly, housing assistance that is meant to prevent housing costs from becoming an unreasonable burden and that is not designed to cover housing costs in full can also be considered a 'core benefit'.⁴⁹ However, it is ultimately for the national authorities to establish which benefits should be considered 'core benefits', taking into consideration the purpose of the benefit, the conditions subject to which it is awarded and the place of that benefit in the national system of social assistance.⁵⁰ Arguably, the same interpretation applies to the concept of 'core benefits' as regards beneficiaries of subsidiary protection.

Such core benefits should be provided on the basis of 'equal treatment with nationals' (long-term residents) or 'at the same level and under the same eligibility conditions as nationals' (beneficiaries of subsidiary protection). Contrary to housing, nationals usually have a subjective right to social assistance benefits in case of need, as a result of which this standard of equal treatment provides important protection to these migrants. A question that could arise is whether this equal treatment merely applies to the level of benefits, or also to the form of the benefits. Arguably, it means that such core benefits may only be provided in kind, or under a separate scheme, if the general social assistance scheme for nationals also allows for

47 Case C-713/17 *Ahmad Shah Ayubi* EU:C:2018:929.

48 C-571/10 *Kamberaj* [2012] OJ I74/12.

49 Case C-94/20 *KV* EU:C:2021:477.

50 *ibid.*, para 43.

this.⁵¹ This could, then, mean that beneficiaries of international protection and long-term residents cannot be provided with in kind social assistance benefits, provided in camps, which is a common policy for asylum seekers in Europe.

Similar to housing, the standard of social assistance for asylum seekers and beneficiaries of temporary protection is not defined in terms relative to the rights of others, but in absolute terms. For asylum seekers, the elements of social assistance that they are entitled to is explicitly stipulated in legislation: food, clothing and a daily expenses allowance. The standard is the same as for housing; such provisions must 'provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'. The Directive makes clear that Member States may grant less favourable treatment to asylum seekers compared with nationals as regards social assistance, as long as this standard is met.⁵² Beneficiaries of temporary protection are entitled to the much more general standard of 'necessary assistance in terms of social welfare and means of subsistence'. Even though formulated with less detail, this does not necessarily point at a substantial different standard as compared to the standard for asylum seekers.

The standard of health is the same for rejected asylum seekers whose removal is postponed, asylum seekers and beneficiaries of temporary protection. They are entitled to emergency care and essential treatment of illness. The only difference is that for asylum seekers essential treatment of 'serious mental disorders' is added. This can, however, also fall under the scope of the concept of essential treatment of illness. Also, beneficiaries of

51 Sometimes, general social assistance schemes do allow for provision in kind. For example, the Belgian Social Welfare Services Act, one of the two general social assistance schemes in Belgium, provides for assistance of 'material, social, medical or physiological nature' (Article 57 *Organieke wet betreffende de Openbare Centra voor Maatschappelijk Welzijn*). In the Netherlands, the general social assistance scheme contains a clause providing that a person is no longer eligible for general social assistance if that person is eligible for another kind of welfare scheme (known as a prior ranking benefit scheme or *voorliggende voorziening*) which can considered to be sufficient and suitable for the person concerned (Article 15 *Participatiewet*). This clause equally applies to nationals and non-nationals. Such a prior ranking benefit scheme does not have to provide persons with exactly the same kind of assistance as under the general scheme. The decisive criterion is whether the assistance provided under the special scheme is sufficient and suitable for the person concerned.

52 Article 17(5) Directive 2013/33/EU.

international protection and long-term residents are entitled to the same standard of health care: they are entitled to equal treatment with nationals.

3.4 An incremental system?

Hence, on the basis of the text of the Directives, EU law appears to provide for an ‘incremental system’,⁵³ where rights increase as soon as the legal ties with the country of residence strengthen. In this vein, rejected asylum seekers do, in general, not have a right to social assistance or housing benefits, but if their removal is officially postponed, as a result of which their legal ties to the territory strengthen a bit, they are entitled to emergency health care (including, as far as possible, basic needs, according to the CJEU); asylum seekers have a right to reception benefits that ensure an adequate standard of living, but that may be lower as compared to the social assistance benefits for nationals; and beneficiaries of international protection and long-term residents are entitled to equal treatment with nationals as regards social assistance.

The vagueness of some of the provisions, however, also leaves room for an interpretation that is not in line with this incremental system. This is particularly true for the Temporary Protection Directive, under which beneficiaries of temporary protection are entitled to ‘the necessary social assistance’ and ‘suitable housing’, which leaves a lot of room for interpretation. Arguably, this leaves room to provide them with the same provisions as asylum seekers, even though they are, contrary to asylum seekers, already found to be eligible for a protection status. Likewise, the concept of ‘core benefits’, used in the legislation to limit Member States’ obligations towards beneficiaries of subsidiary protection and long-term residents, could leave room for providing them with the same provisions as asylum seekers.

In addition, especially the case law of the CJEU revealed another way in which this ‘incremental system’ has been nuanced. The CJEU has used the concept of ‘basic needs’ to establish a minimum standard of treatment that is the same for all different categories of refugees. From *Haqbin* it appears that the CJEU defines ‘basic needs’ as ‘a place to live, food, clothing and personal hygiene’. Such basic needs should be provided ‘as far as possible’ to irregular migrants who are seriously ill and whose return is postponed;

53 cf James C Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021) 174.

it should be guaranteed for asylum seekers under all circumstances, even if regular housing capacities are temporarily exhausted or if there is a legitimate ground for reducing reception conditions (eg in case of sanctions); it should be guaranteed for beneficiaries of international protection, irrespective of whether they are treated the same as nationals; and it serves as a means to interpret the concept of 'core benefits' for the social assistance of beneficiaries of subsidiary protection and long-term residence status.

4 Refugees' social rights in EU law: an expression of solidarity?

If we use refugees' social rights as a proxy for measuring the degree of solidarity with refugees expressed in EU law, what picture does emerge? As explained in section 2, solidarity is a multifaceted concept. I believe different notions of solidarity are visible in EU law on refugees' social rights and these can function as a relevant explanatory tool.

The EU legislator in particular has used membership criteria, mainly in the form of legal status, to provide social rights. Through the adoption of different instruments for different categories of refugees, based on their legal status, and stipulating a particular level of social rights in each of these instruments, the legislator clearly envisaged solidarity to increase on the basis of a stronger degree of belonging to the national community. This fits a conception of solidarity *among* members, where the ingroup is defined in legal residency terms. The full exclusion of rejected asylum seekers from the scope of social rights shows that the EU legislator did not adopt a universalist version of solidarity.

The difference between the different standards of treatment laid down in the various EU instruments could be explained using the distinction between solidarity *among* and solidarity *with*. It could be argued that the absolute rights provided to asylum seekers and beneficiaries of temporary protection display a conception of solidarity *with* a particular outgroup. This unilateral kind of solidarity does not require reciprocity or symmetry, which ties in with the rights provided to these groups of refugees, that can provide stronger protection than available for nationals. For beneficiaries of international protection and long-term residents, on the other hand, their rights are contingent on the rights of other legally resident migrants or nationals. This could indicate a notion of solidarity *amongst* members of a particular ingroup, which requires a much more symmetric relationship

between the members. Granting these refugees with the same rights as nationals fits this more reciprocal notion of solidarity.

In line with this, there are more instances of conditional solidarity as regards the outgroup. For asylum seekers and, to a lesser extent, beneficiaries of temporary protection, Member States are allowed to make access to social benefits conditional on their deservingness in terms of need, attitude and control. For both asylum seekers and beneficiaries of temporary protection, Member States may make provision of social assistance conditional on their need. They are only entitled to material reception benefits or social welfare and means of subsistence if they do not have sufficient resources themselves. Moreover, for asylum seekers, access to material reception benefits can be conditional on their residence in assigned reception centres, on their compliance with house rules and reporting obligations and on their non-violent behavior.⁵⁴ This is a clear example of how responsibility for neediness and absence of compliant behavior is used as a basis to deny welfare eligibility. As indicated in section 2, control and attitude are two factors that the general public uses to establish welfare deservingness. Withholding or reducing benefits from asylum seekers based on their absence from the assigned place of residence or on violating the house rules, fits these deservingness factors. It also shows how conditionality risks to transform into a punitive tool. It raises the question whether this kind of conditional solidarity is still about solidarity, aimed at collective responsibility for taking care of the more vulnerable members of the (in or out) group. Rather, it may be a form of social control, aimed at the maintenance of law and order and effective migration control.⁵⁵ Indeed, as I have argued elsewhere, EU law leaves a lot of room for Member States to use refugees' social rights as an instrument of migration control, by deterring future refugees and facilitating effective asylum procedures and return.⁵⁶

When the Court of Justice had to interpret the possibility to withdraw benefits as a sanction for violent behavior, and concluded that complete withdrawal is not possible, the reasoning did not, however, clearly fit any of the deservingness criteria. Instead, the Court of Justice emphasized, with reference to the Charter of Fundamental Rights, the requirement to ensure

54 See for example articles 7 and 20 of Directive 2013/33/EU.

55 Tiina Likki and Christian Staerklé, 'A Typology of Ideological Attitudes Towards Social Solidarity and Social Control' (2014) 24 *Journal of Community & Applied Social Psychology* 406.

56 Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014).

full respect for human dignity. It did not link this to the specific (temporary and insecure) membership status of asylum seekers. The Court, therefore, seems to rely more on universalistic notions of solidarity in this case, in order to limit the conditional solidarity expressed in Member States' policies.

For beneficiaries of international protection and long-term residents, conditional solidarity is only allowed in so far member states also apply this conditionality towards other legally resident migrants or their own nationals. Interestingly, however, here the CJEU seems to rely on deservingness criteria for widening the mode of solidarity for deserving refugees. As discussed above, the CJEU ruled that depriving beneficiaries of international protection of the possibility to meet their basic needs, even if they are treated the same as nationals, can be unlawful. Yet, the Court stressed that it would only be unlawful if the beneficiary of international protection would end up in a situation of extreme material poverty 'because of his or her particular vulnerability, irrespective of his or her wishes and personal choices.' Hence, the reasoning of the Court seems to be based on need, and, therefore, fits a conception of conditional solidarity based on deservingness.

5 The influence of crisis

The foregoing sections mapped the social rights provided to refugees in EU law and analyzed the different notions of solidarity that are visible in this part of EU law. This section will examine to what extent these notions of solidarity are influenced by a crisis narrative. As has been discussed in the introductory chapter of this volume, a crisis can be both a threat to and an opportunity for solidarity. What role has it played as regards solidarity crystallized in refugees' social rights?

When the number of asylum applications in the European Union peaked in 2015, more and more people, especially the media,⁵⁷ started to refer to the situation as a 'refugee crisis'. This became, eventually, mainstream terminology, adopted by many governmental and non-governmental organizations. The European Commission referred to the 'migration crisis in

57 Myria Georgiou and Rafal Zaborowski, 'Media Coverage of the "Refugee Crisis": A Cross-European Perspective' (Council of Europe 2017) available: <https://edoc.coe.int/en/refugees/7367-media-coverage-of-the-refugee-crisis-a-cross-european-perspective.html> accessed 6 March 2024.

the Mediterranean', when it presented its 'European Agenda on Migration' in May 2015.⁵⁸

But also before 2015, situations as regards asylum seekers were referred to as crisis, for example the 'reception crisis' in Belgium between 2008 and 2012.⁵⁹ In that period, all reception centers in Belgium were full, as a result of which newly arriving asylum seekers were not provided with accommodation, but with financial benefits instead. Reports indicate that in 2009 more than 2.700 asylum seekers were not provided with accommodation and were often obliged to live on the streets. In 2010 this number was 6.284.⁶⁰ Among those asylum seekers was the Saciri family. They applied for asylum in October 2010, and were only provided with a place in a reception centre in January 2011 after the reception agency was ordered to do so by court. In the meantime, they were eligible for financial benefits, and tried to find housing on the private rental market but were unable to pay the rent. Legal proceedings in the end reached the CJEU. In addition to ruling that the provision of housing needs to be guaranteed by Member States (see above), the CJEU ruled in this case that saturation of the reception networks is 'not a justification for any derogation' from meeting the minimum standards laid down in the Reception Conditions Directive. Accordingly, the Court does not leave room for Member States to use a crisis situation as a justification for not meeting their obligations under current EU law. The question is, however, whether crisis narratives are used as a reason to change these obligations.

In the European Agenda on Migration,⁶¹ presented by the European Commission in 2015, the emphasis was clearly on solidarity among Member States, with proposals for a temporary distribution system and a resettlement scheme for persons in need of protection. The Commission did,

58 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration' (Communication, 13 May 2015) COM(2015)240 final.

59 European Migration Network, 'The Organisation of Reception Facilities in Belgium. Focussed Study of the Belgian National Contact Point for the European Migration Network (EMN) in Cooperation with the Federal Agency for the Reception of Asylum Seekers (FEDASIL)' (August 2013) https://www.emnbelgium.be/sites/default/files/publications/be_ncp_emn_focussed_study_on_reception_version_30_august_2013.pdf accessed 6 March 2024.

60 Centrum Voor Gelijkheid van Kansen en Racismebestrijding, 'Jaarverslag Migratie 2010' (April 2011), 54.

61 European Commission (n 58).

however, also propose to make some changes as regards refugees' access to social rights. As part of this agenda, the Commission published a proposal for a recast of the Reception Conditions Directive in 2016.⁶² When explaining the purpose of the recast, the Commission held:

'The migratory crisis has exposed the need to ensure greater consistency in reception conditions across the EU and the need for Member States to be better prepared to deal with disproportionate numbers of migrants. There are wide divergences in the level of reception conditions provided by the Member States. In some Member States, there have been persistent problems in ensuring adherence to the reception standards required for a dignified treatment of applicants, while in others the standards provided are more generous. This has contributed to secondary movements and has put pressure on certain Member States in particular.'

Accordingly, the Commission referred to the crisis in order to emphasize the need for more solidarity among Member States, not for more solidarity with refugees. In line with this, two of the main aims of the proposal are to 'further harmonize reception conditions in the EU' and 'reduce incentives for secondary movements'. This will reduce reception-related incentives for applicants to move irregularly to and within the EU, and it will contribute to a fairer distribution of applicants, according to the Commission. The proposal does, therefore, not necessarily aim to improve the reception standards for asylum seekers within the EU. The Commission did not propose to change the required level of material benefits and health care. It did propose, however, to allow Member States to make access to full reception benefits conditional on attending compulsory integration measures and on being present in the Member State that is responsible for examining the asylum application. In addition, it proposed to increase the possibilities for Member States to make the provision of full benefits conditional on actual residence in an assigned place. Accordingly, the Commission proposed to allow Member States to make solidarity with asylum seekers more conditional in order to meet purposes of migration control.

Another element of the 2015 European Agenda on Migration is a proposal for a Regulation on the qualification for international protection. In this proposal, the Commission did not propose any major changes as regards

62 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. Laying Down Standards for the Reception of Applicants for International Protection (Recast)' (Proposal, 13 July 2016) COM(2016)465 final.

refugees' social rights. As regards social assistance, the relevant standard of treatment remains equal treatment with nationals and Member States remain allowed to limit the assistance of beneficiaries of subsidiary protection to core benefits. The Commission did propose, however, to allow Member States to make access to certain social assistance conditional 'on the effective participation of the beneficiary of international protection in integration measures'. As regards housing, the Commission proposed to add that refugees are entitled to equal treatment with other third-country nationals legally resident in the territories of the Member States 'who are in a comparable situation'. Accordingly, both the scope and the mode of solidarity with refugees as regards social benefits are slightly reduced in this Commission proposal.

Also, the proposal for a recast of the Return Directive is linked to the European Agenda on Migration.⁶³ This proposal was issued in 2018 but does not propose to change anything as regards migrants' (very limited) access to social rights.

As it turned out to be impossible to reach a compromise on all the legislative proposals of the European Agenda on Migration, the European Commission presented a new pact on Migration and Asylum in 2020. According to the Commission:

Since the refugee crisis of 2015–2016, the challenges have changed. Mixed flows of refugees and migrants have meant increased complexity and an intensified need for coordination and solidarity mechanisms. The EU and the Member States have significantly stepped up cooperation on migration and asylum policy. Member States' responses to the recent situation in the Moria reception centre have shown responsibility-sharing and solidarity in action.

So, again, the Commission emphasized here, as in other parts of the communication, the need for solidarity among Member States, and not the need for solidarity with refugees. The Commission only mentions the need for solidarity with others when it refers to the need to demonstrate solidarity with third states hosting refugees. Accordingly, the display of solidarity in

63 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. On Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)' (Proposal, 12 September 2018) COM(2018)634 final.

this new pact is reserved for states; individuals should receive 'protection', according to the Commission.

Even though the Commission wanted to make a 'fresh start' with this new pact, the pact builds on the progress made and the commission urges to adopt the Recast Reception Conditions Directive, the Qualification Regulation and the Recast Returns Directive as soon as possible. As regards long-term residents, the Commission issued a proposal for recast of the Directive in 2022.⁶⁴ For this group of migrants, the commission proposed to extend their equal access to social assistance, by removing the possibility for Member States to limit such access to 'core benefits'. This fits the proposal's aim of strengthening the rights of long-term residents. Hence, other than with regard to asylum seekers and beneficiaries of international protection, the Commission proposed to somewhat increase the scope of solidarity with refugees who have become long-term residents in the EU. This fits the idea of an incremental system, as discussed in section 3.4, and it could be seen as an indication that the relevant 'in-group' is rather narrow, only including refugees who have established a rather settled status.

In December 2023, negotiations about the new pact seem to be close to an end.⁶⁵ Key elements of this pact are screening procedures, mandatory border procedures and increased detention, making it harder to physically and legally enter the territory of the EU. The EU response to the so-called refugee crisis in 2015 is, therefore, not to increase solidarity with refugees as regards their social rights, with the exception of a small increase in the social rights of long-term residents. To the contrary, the response is to make it harder for people to reach EU territory, and for those that manage to reach it, to limit their freedom of movement as much as possible and using access to social benefits as an instrument for that purpose.

64 European Commission, 'Proposal for a Directive of the European Parliament and of the Council. Concerning the Status of Third-Country Nationals who are Long-Term Residents (Recast)' (Proposal, 27 April 2022) COM(2022)650 final.

65 Statewatch, 'Tracking the Pact: Human Rights Disaster in the Works as Parliament Makes "Significant Concessions" to Council' (*statewatch.org*, 6 December 2023) <https://www.statewatch.org/news/2023/december/tracking-the-pact-human-rights-disaster-in-the-works-as-parliament-makes-significant-concessions-to-council/> accessed 6 March 2024.

6 Conclusion

Social rights for refugees in EU law are not framed in terms of solidarity. The legal instruments that include such rights only refer to solidarity between Member States as regards burden sharing and, to that end, preventing so-called ‘secondary movements’ of refugees. Nevertheless, in line with the EU Charter on Fundamental Rights, social rights could be seen as solidarity crystalized, as concrete elements of solidarity with refugees and/or among fellow (legal) residents, members to the community or human beings.

This chapter showed that, analyzed in this way, the concept of solidarity can function as an explanatory tool to clarify the distinction between absolute rights, for applicants for international protection and beneficiaries of temporary protection on the one hand, and relative rights for beneficiaries of international protection and long-term residents on the other. This distinction sometimes results in a situation where refugees with stronger legal ties to the country of residence are less well off, especially as regards their right to housing, than refugees with weaker, or more temporary legal ties. If we analyze this from the perspective of solidarity we can, however, see how the scope of solidarity for these two groups is different. EU law displays solidarity *with* the former group and is based on solidarity *among* long(er) term legal residents.

This chapter also showed how solidarity with refugees as regards their social rights is highly conditional. Only deserving refugees receive the full package of social rights. The social rights of refugees who do not reside at their assigned place or who do not participate in integration courses can be curtailed. And only refugees who would otherwise face severe destitution are entitled to social rights irrespective of the rights provided to nationals. This conditionality of solidarity with refugees is increased in the more recent legislative proposals, which were drafted as a response to the so-called refugee crisis in 2015. On the basis of these proposals, Member States will have even more possibilities to use the social rights of refugees, especially those of asylum seekers, as an instrument of migration control, for example by making access to these rights conditional on meeting strict residence restrictions. These proposals, therefore, impact the *mode* of solidarity with refugees.

In addition, even though the different proposals of the New Pact on Migration and Asylum do not propose to limit the level of refugees’ social rights, they also affect the *scope* of solidarity with refugees, by making it

more difficult to reach and enter the territory of the EU, and, therefore, by limiting membership to the relevant (in- or out)group for displaying solidarity with(in).

These proposals, therefore, clearly emphasize control over refugees, and limit the degree of solidarity with refugees in EU law, as expressed in their social rights. Crisis narratives have, therefore, mainly functioned as a threat to solidarity with refugees in EU law, not as an opportunity. The Court of Justice has, so far, done the opposite. As this chapter shows, its case law on refugees' social rights clearly prioritizes (conditional) solidarity, in line with the EU Charter on Fundamental Rights, over Member States' wish to use these rights as an instrument of social control. It remains to be seen whether the CJEU will stick to this approach if the new pact enters into force.

