



**Right to Asylum in the Republic of Serbia
The Belgrade Centre for Human Rights**

2012.



Series
Reports
19

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Reports

RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2012

Publisher

The Belgrade Centre for Human Rights
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Refuge on the Sixth Floor: Urban Refugees in Jordan. Jalal wanders through the corridor on the sixth floor. The tile floors are cold to the touch. UNHCR/ B. Sokol

Prepress and printing

Dosije studio, Belgrade

RIGHT TO ASYLUM IN
THE REPUBLIC OF SERBIA
2012

Belgrade Centre for Human Rights
Belgrade, 2013



The research and publication of this report were supported by the UNHCR..

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10. PSEA - Penal Sanctions Enforcement Act
11. CPT–Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

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3. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Sl. list SFRJ – Međunarodni ugovori i drugi sporazumi* 9/91)
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21. Administrative Dispute Act, *Sl. glasnik RS* 111/2009
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4. Judgments of the Pirot Misdemeanour Court I 5 Pr 1942/12, 1943/12 and 1944/12 of 8 September 2012
5. Judgments of the Pirot Misdemeanour Court 2 Pr 1307/12, 1306/12 and 1305/12 of 6 July 2012
6. Judgments of the Pirot Misdemeanour Court 1–5 Pr 1062/12 and 1063/12 of 10 June 2012

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2. No. 03/9–4–26–2326/11 of 20 December 2012,
3. and No. 03/9–26–17/12 of 6 December 2012.

Introduction

The Belgrade Centre for Human Rights has been implementing the project entitled “Providing Legal and Psychological Assistance to Asylum Seekers” since 2012 with the support of the United Nations High Commissioner for Refugees (UNHCR). The project aims to provide asylum seekers with adequate legal and psychological assistance and improve the legal regulations and practice of the state authorities involved in the asylum procedure.

Apart from directly extending legal aid to the asylum seekers, the BCHR team in 2012 also focussed its attention on raising awareness of this topic among the general public and the competent authorities, promoting new, adequate solutions to the identified problems, keeping precise statistical data on the number of asylum seekers and collecting information about their countries of origin.

The Report “*Right to Asylum in the Republic of Serbia 2012*” presents the data and information the BCHR team obtained directly, that is, during its field work, and through its research and perusal of the reports of other government and non-government organisations dealing with asylum in Serbia.

The right to asylum is guaranteed by the Constitution of the Republic of Serbia, the Serbian legislation and a number of international conventions. The fact that Serbia still lacks a functional asylum system although five years have passed since the Asylum Act came into effect (in 2008) is, however, concerning. Namely, it largely functions on the premise that Serbia is merely a transit zone through which asylum seekers pass on their way to one of the Western European countries. On the other hand, the safe third country concept, based on a decision of the Government of the Republic of Serbia designating all the neighbouring countries, as well as Greece and Turkey, as safe third countries, is still used to remove asylum seekers from Serbia without reviewing their applications on the merits. Given that most of the asylum seekers arrive in Serbia via Turkey, Greece and Macedonia, they are in practice disqualified from having their applications reviewed on the merits from the very start. There is no system in place that would facilitate the integration of people granted protection due to the lack of capacities for accommodating the asylum seekers. Large numbers of asylum seekers, including families with children, lived outside, around the Bogovađa Asylum Centre, in 2012. The fact that causes particular concern is that the presence of asylum seekers in Serbia is often misrepresented and used for politicking. Notably, the media often qualify the asylum seekers as a risk prompting citizens to stage protests when they find out that a new asylum centre will be built in their neighbourhood. All this indicates that the state authorities, above all the Ministry of Internal Affairs, the Commissariat for Refugees and Migrations, the courts, etc, must invest additional efforts in improving the asylum procedure and in building adequate capacities to accommodate the asylum seekers. Particular attention needs to be devoted to raising the awareness of and sensitising the public to deal with its intolerance of aliens.

The Report before you was prepared by: Bojan Gavrilović, Lena Petrović, Imola Šoroš, Sonja Tošković and Jovana Zorić, who were assisted by Vojislav Jakšić, Nikola Kovačević, Ivana Vukašević and Maša Vukčević.

Belgrade, April 2013

1. International Legal Framework

The Universal Declaration of Human Rights¹ is the first universal human rights document mentioning the right to asylum:

Article 14.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

The 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees² do not explicitly recognise the right to asylum, but they set out a series of rights and obligations arising from the right to be awarded the status of a refugee.

Under the Convention, the term “refugee” shall apply to any person 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Art. 1 A (2)).

The fundamental principles of international human rights law provide broader protection than the 1951 Convention and apply to all people in the territory of a state,³ regardless of their nationality, and thus, also to irregular migrants and asylum seekers. States are under the obligation not only to refrain from violating human rights, but also to ensure their respect and enjoyment, both in law and in practice, and to take measures to prevent human rights violations by third parties. Serbia is bound by numerous universal and regional international human rights protection treaties directly or indirectly relevant to protecting the rights of asylum seekers, notably: the International Covenant on Civil and Political Rights,⁴ the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶ the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁷ the UN Convention on the Rights of the Child,⁸ etc.

¹ The text of the Universal Declaration of Human Rights is available at <http://www.un.org/en/documents/udhr/index.shtml>.

² The Refugee Convention and Protocol are available at <http://www.unhcr.org/3b66c2aa10.html>.

³ A territory also includes airport transit zones. See the ECtHR judgment in the case of *Amuur v. France*, App. no 17/1995/523/609, of 25 June 1996. The states have the obligation to provide special protection to underage asylum seekers from the moment they try to enter its territory, see *UN Committee on the Rights of the Child (CRC)*, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, of 1 September 2005, CRC/GC/2005/6, paragraph 12, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

⁴ <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

⁵ <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

⁶ http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf.

⁷ <http://www.cpt.coe.int/en/documents/ecpt.htm>.

⁸ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

2. Right to Asylum in the National Legal Order

The right to asylum is enshrined in Article 57 of the Constitution of the Republic of Serbia⁹:

Any alien with reasonable fear of persecution based on his race, gender, language, religion, national origin, association with a group or his political opinions shall have the right to asylum in the Republic of Serbia.

The asylum procedure shall be governed by the law.

The Asylum Act governs in detail the asylum procedure and the rights and obligations of asylum seekers, refugees and people awarded subsidiary protection.¹⁰ Apart from the right to asylum, which comprises the right to refuge and the right to subsidiary (humanitarian) protection, the Act also provides for temporary protection, which is extended in case of a large-scale influx of people, when it is impossible to review individual asylum applications.¹¹ The General Administrative Procedure Act¹² and the Administrative Disputes Act¹³ apply to issues not regulated by the Asylum Act.

Although the Aliens Act¹⁴ does not apply in principle to aliens who applied for or were granted asylum in the Republic of Serbia, the provisions of this Act apply to family reunions of people afforded subsidiary protection¹⁵ (Art. 49, Aliens Act) and to the expulsion of aliens (Art. 57, Aliens Act).

The Migration Management Act¹⁶, which was adopted at long last in 2012, entrusts the accommodation and integration of people granted asylum or subsidiary protection to the Refugee Commissariat (Arts. 15 and 16). The Migration Management Act renames the Refugee Commissariat, which had been established under the Refugees Act¹⁷, into the Commissariat for Refugees and Migrations and charges it with designing, proposing and undertaking measures for the integration of people granted asylum (Art. 10) and with the accommodation of people granted asylum or subsidiary protection (Art. 15) under the Asylum Act. The mode of integration, i.e. the inclusion of people granted asylum in the social, cultural and economic life of Serbia shall be governed by the Government at the proposal of the Commissariat (Art. 16). The Commissariat is also entrusted with proposing programmes for developing a system of measures to be undertaken with respect to the families of aliens illegally residing in the territory of the Republic of Serbia and with proposing programmes for facilitating the voluntary return of aliens illegally residing in the territory of the Republic of Serbia to their countries of origin.

9 *Sl. glasnik RS* 83/06, available in English at http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav_odredbe.php?id=218.

10 *Sl. glasnik RS* 109/07, came into force on 1 April 2008, available in English at <http://www.unhcr.org/refworld/docid/47b46e2f9.html> [accessed 19 March 2013].

11 See more in D. Dobrković, *Right to Asylum – Legal Framework in the Republic of Serbia, Comment of the Serbian Asylum Act (Pravo na azil – pravni okvir u Republici Srbiji, Komentar Zakona o azilu Srbije)*, Belgrade Centre for Human Rights, 2008, available in Serbian at: http://azil.rs/doc/komentar_zakona_o_azilu_bcljp.pdf.

12 *Sl. list SRJ* 33/97, 31/01 and *Sl. glasnik RS* 30/10.

13 *Sl. glasnik RS* 111/2009.

14 *Sl. glasnik RS* 97/2008.

15 The reunion of people granted asylum with their families is governed by the Asylum Act.

16 *Sl. glasnik RS* 107/12.

17 *Sl. glasnik RS* 18/92, 42/2002 and 45/2002.

3. Statistics¹⁸

A total of **2,723** people expressed the intention to seek asylum in Serbia¹⁹ from 1 January to 31 December 2012. Of them, **601** were registered and a total of **336** asylum applications were submitted in that period.

Following is the breakdown of the 2,723 people who expressed the intention to seek asylum in 2012 by month: 199 in January, 64 in February, 115 in March, 108 in April, 227 in May, 261 in June, 237 in July, 242 in August, 352 in September, 352 in October, 335 in November and 232 in December.

Of them, 975 were nationals of Afghanistan, 505 of Somalia, 292 of Syria, 246 of Pakistan, 164 of Algeria, 123 of Bangladesh, four of Burkina Faso, 2 of Congo, 1 of the Democratic Republic of Congo, one of Comoros, 128 of Eritrea, 16 of Gambia, 68 of Palestine, three of Guinea-Bissau, 14 of Guinea, five of the Ivory Coast, nine of India, 19 of Iraq, 17 of Iran, one of Liberia, 42 of Lebanon, five of Mauritius, 1 of Macedonia, 30 of Mali, 85 of Morocco, 13 of Myanmar, four of Nigeria, eight of Sierra Leone, 65 of Sudan, 41 of Tunis, one of South Africa, one of Turkey and two of Yemen.²⁰

The Aliens Reception Centre in Padinska Skela accommodated 1,849 foreign nationals²¹, whose identity was being established, who were waiting for their travel documents or were waiting for deportation in 2012. Five of them expressed the intention to seek asylum²².

The Asylum Centre in Bogovađa accommodated 1,253 people and the Asylum Centre in Banja Koviljača accommodated 267 people in 2012.²³

A total of 744 minors (607 boys and 134 girls), 501 of whom unaccompanied (472 boys and 29 girls),²⁴ expressed the intention to seek asylum in 2012.²⁵ The Home for Children and Youths in Belgrade looked after 38 unaccompanied minors in the January-October 2012 period; 24 of them expressed the intention to seek asylum.²⁶ The Home for Children and Youths in Niš looked after 41 unaccompanied minors in the same period; 39 of them sought asylum.²⁷

The Asylum Office²⁸ rendered 52 decisions dismissing asylum applications in 2012. It interviewed 71 asylum seekers in that period and rendered 350 decisions discontinuing the procedure. The Asylum Commission reviewed 56 appeals in 2012; 22 were rejected, 27 were upheld, while

18 The collated statistical data in the graphs were obtained from the UNHCR Office in Belgrade, the MIA Asylum Office and the MIA Bureau for Information of Public Importance, as well as from the report *Serbia as a Country of Asylum*, p. 9, and the *2012 Challenges* report, p. 17.

19 Of them, 292 expressed the intention to seek asylum at the border, 2,392 at the regional police administrations, 34 at the Centre for Underage Aliens and five at the Alien Reception Centre.

20 Data obtained from the UNHCR Belgrade Office.

21 Of them 28 were female and seven were underage and accompanied by their parents or guardians. Forty-five were deported (21 to Algeria, seven to Morocco, six to Tunisia, two to Ukraine, and one to Cameroon, Lebanon, China, Romania, Slovakia, Bulgaria and Croatia). The others were released from the Reception Centre and ordered to leave the Republic of Serbia and prohibited from returning to it. Data obtained from the RS MIA Bureau for Information of Public Importance.

22 BCHR statistics, collected on a weekly basis throughout 2012.

23 Data obtained from the Refugee Commissariat.

24 Data obtained from the UNHCR.

25 Border Police Administration, Asylum Unit 2012 Annual Performance Report

26 Data obtained from the publication entitled *Children before the Law*, by Miroslava Jelačić, Group 484, Belgrade, 2013.

27 *Ibid.*

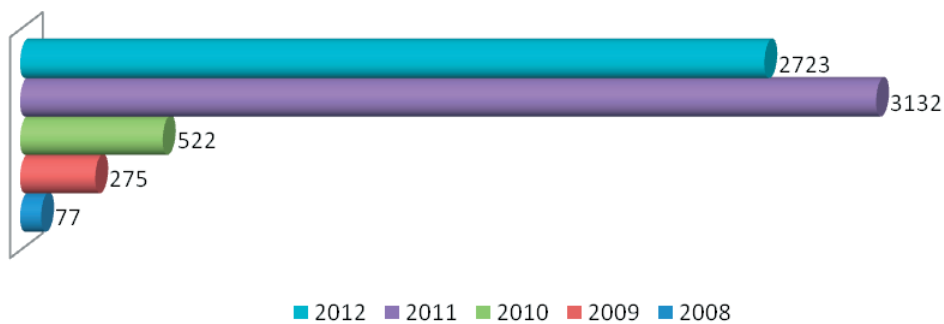
28 That is, officially the Asylum Unit until a new classification of jobs in the MIA is adopted. The Office is staffed by four civil servants who are directly involved in interviewing and meeting with the asylum seekers, see more in *Serbia as a Country of Asylum*, paragraphs 18–20.

seven were pending at the end of the year.²⁹ Five people were granted subsidiary protection in Serbia since the Asylum Act entered into force on 1 April 2008. The authorities granted refugee status for the first time in December 2012, to three applicants.

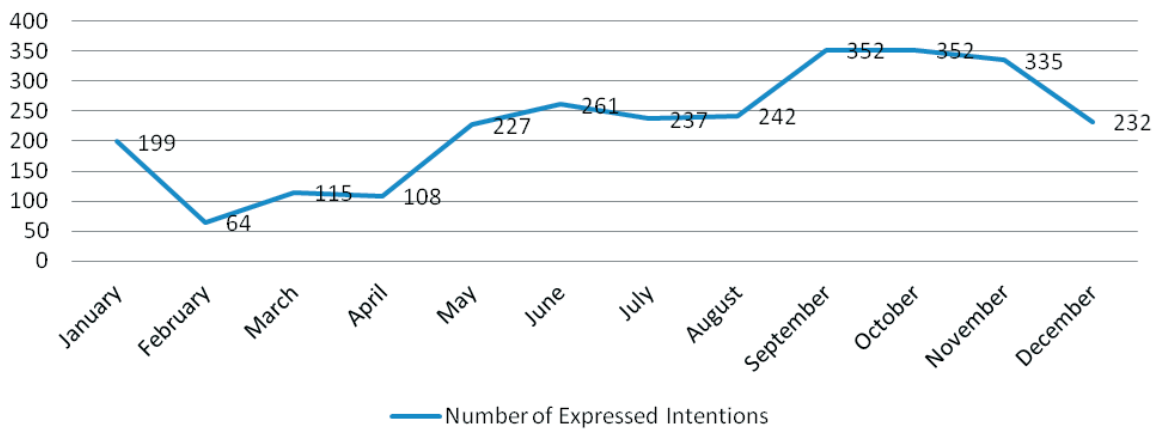
The Asylum Commission reviewed 56 appeals in 2012; 22 were rejected, 27 were upheld while seven were pending at the end of the year.³⁰ The first Asylum Commission³¹ reviewed 10 appeals until its term in office expired on 17 April 2012³².

Ten administrative disputes against Asylum Commission decisions were initiated before the Administrative Court by 1 December 2012. The Court ruled on four disputes and rejected the claims. None of the claimants challenged the final Administrative Court judgments by filing motions for their review to the Supreme Court of Cassation.³³

Number of Registered Intentions to Seek Asylum



Registered Intentions to Seek Asylum in 2012 by Month



29 Data obtained from the RS MIA Bureau for Information of Public Importance on 26 February 2013.

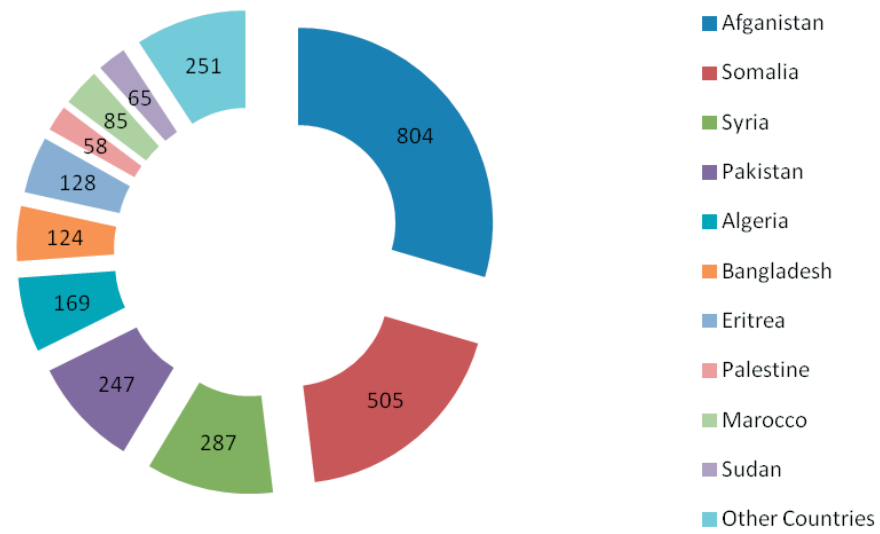
30 *Ibid.*

31 *Ibid.* More on the Commission in 5.3. *Second-Instance Procedure.*

32 See the press release entitled Expiry of the Terms of Office of the Asylum Commission Members of 12 April 2012, available at <http://www.azil.rs/news/view/expiry-of-the-terms-of-office-of-the-asylum-commission-members>.

33 Data obtained from the Administrative Court pursuant to the Free Access to Information of Public Importance Act on 14 December 2012.

Number of Registered Intentions to Seek Asylum in 2012 by Nationality



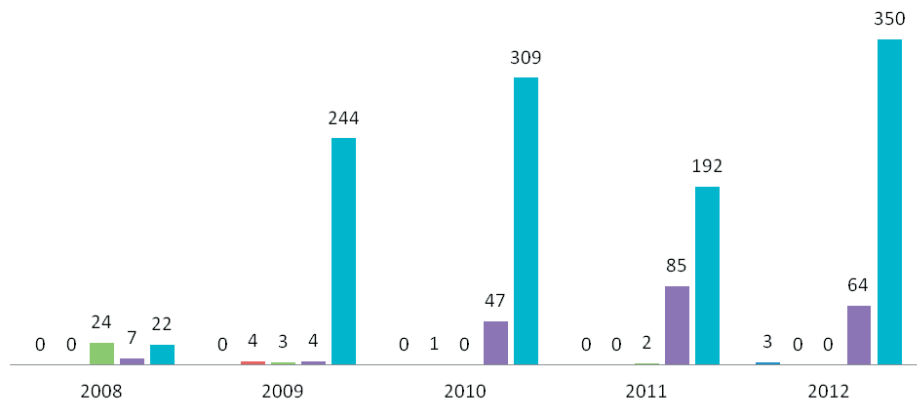
2012 Statistics on Asylum Seekers



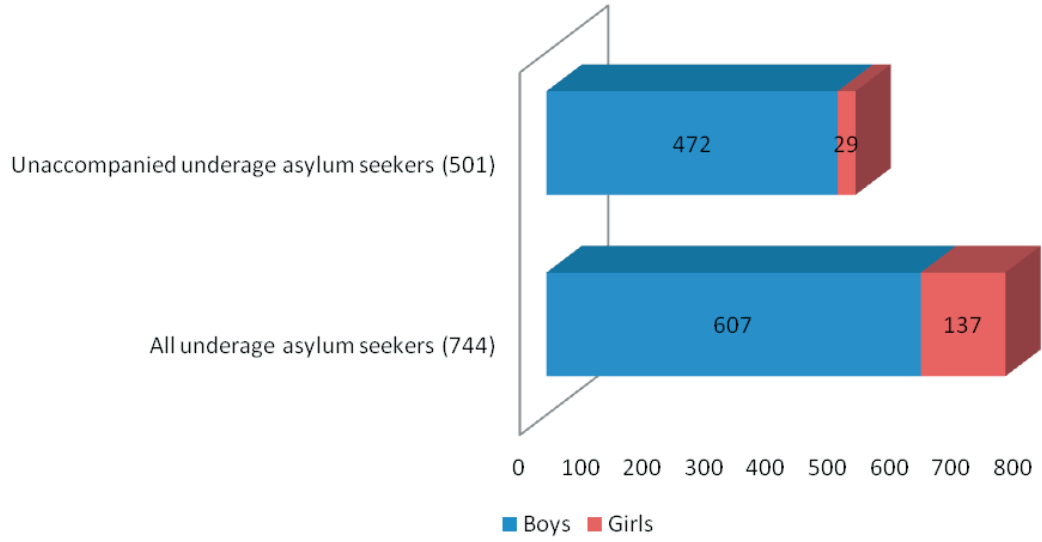
- Number of Expressed Intentions
- Number of Registered People
- Number of Asylum Applications
- Number of First-Instance Decisions (Upheld, Rejected or Dismissed Applications)
- Number of Discontinued Procedures

Breakdown of First-Instance Decisions Rendered in 2008-2012

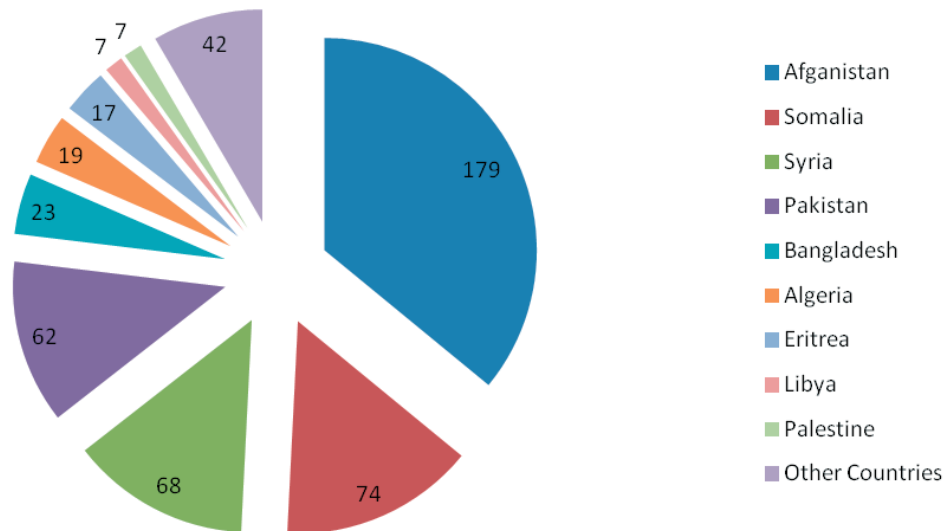
- Upheld Applications – Asylum
- Upheld Applications – Subsidiary Protection
- Rejected Applications
- Dismissed Applications
- Discontinued Procedures



Underage Asylum Seekers in 2012



Ethnic Breakdown of Unaccompanied Underage Asylum Seekers in 2012



4. Access to the Territory of the Republic of Serbia and to the Asylum Procedure

4.1. Access at the Border Crossings³⁴

As a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals. However in exercising control of their borders, States must act in conformity with their international human rights obligations.³⁵ Sixty-one aliens were denied entry into the Republic of Serbia in the first six months of 2012.³⁶ In the January-September 2012 period, 253 foreign nationals expressed the intention to seek asylum at Serbia's borders.³⁷ During its visits to the border crossings, the BCHR team identified several customary practices that may result in violations of the right to access the asylum procedure. For instance, during its interviews with the MIA officers at the Horgoš border crossing between Serbia and Hungary³⁸, the BCHR learned that the MIA officers recognised the intention of irregular migrants to seek asylum only if they explicitly said the word "asylum", but not if they indicated fear of being returned to their countries of origin in another manner. The MIA officers at the railway border crossing Preševo between Serbia and Macedonia³⁹ claimed that no irregular migrants had ever sought asylum at this border crossing.

If an irregular migrant's intention to seek asylum is not recognised at the border, the Border Police Sector for Aliens, the Suppression of Illegal Migrations and Human Trafficking of the local police administration, within whose jurisdiction the irregular migrant was arrested, files misdemeanour charges with the misdemeanour court with territorial jurisdiction.⁴⁰ The MIA officers who are in contact with the aliens at the borders must be adequately trained in recognising the intention to seek asylum and to treat the asylum seekers as an especially vulnerable group of migrants.

The work of border police officers in contact with irregular migrants, i.e. the way in which the border authorities fulfil their obligation to provide asylum seekers with access to the regular asylum procedure ought to be subjected to independent monitoring. Such monitoring could be performed by non-government organisations, a practice already developed in the other countries in the region.⁴¹ For example, the number of asylum applications increased in neighbouring Hungary after the authorities allowed the NGO Hungarian Helsinki Committee to conduct independent monitoring visits.⁴²

34 More on Serbia's borders and border authorities in *Challenges of Forced Migration 2013*, pp. 13–14.

35 *Practitioners guide on migration and international human rights law – Practitioners Guide no. 6*, International Commission of Jurists, Geneva, 2011, p. 43.

36 *Challenges of Forced Migration 2013*, p. 19.

37 *Challenges of Forced Migration 2013*, p. 13.

38 The Horgoš border crossing was visited on 22 June 2012, within the project entitled "Networking and Capacity Building for a More Effective Migration Policy", implemented by Group 484, the BCHR and the Belgrade Centre for Security Policy.

39 The Preševo border crossing was visited on 15 June 2012, within the project entitled "Networking and Capacity Building for a More Effective Migration Policy", implemented by Group 484, the BCHR and the Belgrade Centre for Security Policy.

40 More on misdemeanour proceedings see below 4.4. *Impunity of Asylum Seekers and Access to the Asylum Procedure in Misdemeanour Proceedings*.

41 More on the monitoring of borders in Central Europe is available at <http://www.unhcr-centraleurope.org/en/what-we-do/monitoring-the-border.html>; more on the monitoring of borders in Croatia is available at <http://www.mup.hr/main.aspx?id=79225>.

42 *Serbia as a Safe Third Country: A Wrong Presumption*, Hungarian Helsinki Committee, Budapest, 2011, p. 12, available at http://azil.rs/doc/Serbia_as_a_safe_third_country_A_wrong_presumption_HHC.pdf.

4.2. Access at Belgrade Airport Nikola Tesla

The BCHR was unable to ascertain whether asylum seekers had access to Serbia's territory via the Belgrade airport given the absence of data on the number of people who had expressed the intention to apply for asylum.⁴³ The border authorities at the Belgrade airport denied entry to around 1,500 foreigners in 2009 and 2010.⁴⁴ In the same period, only one person was admitted into the asylum procedure from the airport, and, in that case, the intervention of UNHCR was required. In contrast, when UNHCR was mandated with refugee status determination⁴⁵, more than a dozen individuals expressed their intention to apply for asylum at the airport annually.⁴⁶ The Asylum Act explicitly entitles asylum seekers to contact authorised UNHCR staff during all stages of the asylum procedure (Art. 12); people seeking asylum at Belgrade Airport, however, do not have the possibility of contacting the UNHCR in practice.

4.3. Access to the Asylum Procedure

The right to access the asylum procedure is the *conditio sine qua non* for exercising both the right to asylum and a series of rights guaranteed in the asylum procedure. Although this right is not explicitly enshrined in the Asylum Act, a logical and teleological interpretation of the Act leads to the conclusion that the Act guarantees the right to access the asylum procedure. Under the Asylum Act, the asylum procedure shall be initiated by the submission of an asylum application, while the right to access the procedure is exercised by the fulfilment of a series of administrative actions by the competent authorities of the Republic of Serbia (the Border Police Administration, the Aliens Department, the Commissariat for Refugees and Migrations – the Asylum Centre) which precede the submission of an asylum application.

The intention of an asylum seeker to seek asylum must be recognised and registered by the competent authorities (the RS MIA) and s/he must be duly accommodated in an Asylum Centre for him or her to have access to the asylum procedure, because the asylum procedures are in practice nearly always conducted only with respect to asylum seekers living in the Asylum Centres, although the Asylum Act does not recognise this condition for accessing the asylum procedure.

The Asylum Act sets out that an alien may express the intention to seek asylum orally or in writing to an authorised Ministry of Internal Affairs officer during a border check on entry into the Republic of Serbia or within its territory (Art. 22). Therefore, under the law, the intention to seek asylum may be expressed both at the border and in all police administrations in Serbia, to an officer of the Aliens Department. The officer shall enter the intention to seek asylum in the register and issue a certificate thereof to the asylum seeker instructing him or her to report to the authorised Asylum Office or Asylum Centre within 72 hours. The certificate is issued in three copies; the first is given to the alien, the second is forwarded to the Asylum Office and the third is filed in the archives of the MIA unit in which the authorised officer who issued the certificate works.⁴⁷

Although the Asylum Act allows aliens to express the intention to seek asylum in any police administration in Serbia, some asylum seekers claim that the police administrations have refused to issue them certificates of intention to seek asylum or did not issue them on time.⁴⁸ The problem regarding the issuance of certificates became particularly topical in August 2012, when it transpired

43 Data obtained from the RS MIA Bureau for Information of Public Importance on 27 November 2012.

44 *Serbia as a Country of Asylum*, paragraph 14. The obligation to refrain from refoulement arising from Articles 3 and 1 of the ECHR applies also to individuals in airport transit zones, who have not entered the territory of Serbia "in the technical sense", see the case of *D. v. The United Kingdom* App. No. 30240/96 (1997).

45 Under a 1969 "gentlemen's agreement", the UNHCR reviewed the asylum applications in Serbia from 1976 to 2008 and identified the states which would take in persons it had approved protection to.

46 *Serbia as a Country of Asylum*, paragraph 14.

47 Rulebook on the Content and Design of the Asylum Application Form and Documents Issued to Asylum Seekers or People Granted Asylum or Temporary Protection, Sl. glasnik 53/2008, Art. 5(2).

48 Information the BCHR legal professionals obtained in interviews with migrants living outside the Asylum Centre in Bogovada in August 2012.

that the Asylum Centre's capacities were insufficient and that between 100 and 200 people lived in the vicinity of the Bogovađa Asylum Centre. Furthermore, the asylum seekers in Banja Koviljača alleged that the Loznica police administration refused to issue them these certificates.⁴⁹ Aliens may not exercise the right to accommodation if they do not possess certificates of the intention to seek asylum and they are thus deprived of the right to access the asylum procedure, which renders their presence in the territory of the Republic of Serbia unlawful and they risk deportation.

4.4. Impunity of Asylum Seekers and Access to the Asylum Procedure in Misdemeanour Proceedings

The Asylum Office allows for the registration, i.e. the submission of asylum applications only to people accommodated in the Asylum Centres.⁵⁰ The right to access the asylum procedure is denied to aliens who entered the territory of the Republic of Serbia illegally⁵¹ and are living in private accommodations they themselves are paying for or those without shelter and living outdoors.⁵² Furthermore, aliens issued certificates that they had expressed the intention to seek asylum and waiting for a bed to free up in one of the Centres risk deportation from Serbia unless they are provided with accommodation within 72 hours. Once the 72 hours expire, aliens who have no other legal grounds for residing in the territory of Serbia may be found guilty of a misdemeanour, penalised and ordered to leave the territory of the Republic of Serbia.⁵³

Under Article 31 of the Geneva Refugee Convention, “[T]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Article 8 of the Asylum Act raises to the level of a principle the guarantee that asylum seekers shall not be penalised for illegally entering or residing in the Republic of Serbia provided that they submit their asylum applications without delay and show good cause for their illegal entry or presence. Literal abidance by this principle ought to ensure unhindered access to the asylum procedure. Statistical data on the number of people found guilty of the misdemeanour of illegally entering or living in Serbia, however, give rise to doubts about the observance of this principle in practice.

In the January-October 2012 period, 2,604 people were convicted for illegally entering or residing in the Republic of Serbia.⁵⁴ The defendants' intentions to seek asylum were recognised only in three misdemeanour trials and the proceedings were accordingly terminated.⁵⁵ Under the State Border Protection Act,⁵⁶ a person who crosses or attempts to cross the state border in an unlawful manner shall be fined between 5 and 50 thousand RSD or sentenced to maximum one month imprisonment.⁵⁷ The Aliens Act sets out that an alien shall be fined between 6 and 30 thousand dinars for unlawfully residing in the Republic of Serbia. This law also allows for the imposition of the protective measure of deporting the alien from the territory of the Republic of Serbia.⁵⁸ The greatest numbers of convictions for illegal border crossings were handed down by the Misdemeanour Courts in Subotica (654) and Sremska Mitrovica (611). Lots of convictions were also delivered by the Misdemeanour Courts in Kikinda (164), Sombor (138), Prokuplje (97), Preševo and Leskovac (92).

49 Information obtained from asylum seekers living in private accommodations in Banja Koviljača in July 2012.

50 The asylum procedure begins at the moment the asylum application is submitted, not at the moment the intention to seek asylum is expressed.

51 Asylum seekers, who have legally entered the Republic of Serbia, have access to the asylum procedure, see p. 37-8.

52 More under 7.1. Accommodation.

53 Aliens Act (Sl. glasnik RS 97/2008), Arts. 42 and 85.

54 Information obtained in response to requests for access to information of public importance and comprising the statistics of all the Misdemeanour Courts.

55 All three cases were heard by the Kikinda Misdemeanour Court.

56 Sl. glasnik RS 97/2008.

57 Article 65, State Border Protection Act.

58 Article 85, Aliens Act.

Although irregular migrants are under the obligation to give good cause for their illegal entry into or presence in Serbia without delay, they may be unable to do so during their initial contact with the police officers out of fear or ignorance. Furthermore, the police officers do not necessarily have enough understanding for the reasons for their illegal entry into or presence in the country or may not be sufficiently qualified to assess whether an irregular migrant is a potential asylum seeker. This is why irregular migrants have to be provided with the opportunity to explain to the misdemeanour judges the reasons for their illegal entry into or presence in the territory of Serbia. Aliens are entitled to express the intention to seek asylum during the misdemeanour proceedings, in which case the judges have to terminate the proceedings and instruct the aliens to apply for asylum. The intention of the defendants to seek asylum has, however, been recognised in only a few misdemeanour trials, which can be ascribed to the vagueness of the legal norms and the obviously narrow interpretation of the Misdemeanour Act by the misdemeanour judges. Namely, the Misdemeanour Act does not explicitly specify the determination of the fact that the defendant is a potential asylum seeker as grounds for terminating the proceedings (Art. 216(1)). Indeed, the Act lays down that the proceedings may be terminated “in other instances prescribed by the Act” (Art. 216(2)), which ought to provide the judges with the margin of appreciation to terminate the proceedings by applying Article 31 of the Refugee Convention and Article 8 of the Asylum Act prohibiting the imposition of penalties on asylum seekers for illegally entering or residing in Serbia. This legal vagueness, however, allows for various interpretations of the Act to an extent, because the judges have not been terminating the proceedings *ex officio* in practice whenever they concluded that the defendants were asylum seekers; rather, they have been invoking other grounds for terminating the proceedings. For instance, the Preševo Misdemeanour Court said in one of its decisions⁵⁹ that it was terminating the proceedings due to lack of evidence, although its reasoning clearly demonstrates that it recognised the defendants as asylum seekers and that this was why they could not be penalised for illegally crossing the border. The Kikinda Misdemeanour Court rendered three decisions suspending the proceedings in 2012 after recognising the defendants as asylum seekers during the hearings.⁶⁰ One of the defendants had told the Kikinda Misdemeanour Court⁶¹ that he had turned to the police with the request to seek asylum and that he had ended up in Kikinda while he was searching for a refugee camp. The proceeding was discontinued, but the Court stated in its decision that the proceeding was terminated because the authority authorised to file the motion for misdemeanour proceedings withdrew the motion (Art. 216(1(8))). This proceeding was, therefore, not formally terminated because the Court established that the defendant was an asylum seeker; the initiator of the proceeding had to abandon the motion. The BCHR is of the view that the law must include the court’s determination that the defendants are asylum seekers among grounds for terminating the proceedings and obligate the judges to advise them of their right to seek asylum and provide them with basic information about the asylum procedure in Serbia.⁶² Otherwise, the termination of proceedings will continue to depend exclusively on the experience and expertise of the acting judges and on the discretion of the authorised initiators to abandon their misdemeanour motions.

The Misdemeanour Act has to be aligned with the Asylum Act given the legal vagueness surrounding the grounds for discontinuing proceedings and the Misdemeanour Courts’ practices regarding irregular migrants in the following manner: a new provision needs to be included in the Misdemeanour Act specifying that the misdemeanour proceeding shall be discontinued in the event the court establishes that the defendant is an asylum seeker. This would allow the judges to terminate the proceedings *ex officio*. Misdemeanour Court judges need to be trained in asylum law to enable them to recognise the intentions of asylum seekers and react adequately when they recognise such intentions.⁶³

59 Preševo Misdemeanour Court Decision Ur. No. 339/09–1 kb 18, of 11 March 2009, available at <http://azil.rs/documents/category/judgements>.

60 Information obtained in response to a request for access to information of public importance.

61 The Decision is available at <http://azil.rs/documents/category/judgements>

62 Under the Misdemeanour Act, the court is obliged to make sure that rights of the parties are not affected by their ignorance or lack of knowledge (Art. 82).

63 The European Commission also highlights the need to develop the administrative judges’ expertise, particularly in areas such as asylum. See the Serbia 2012 Progress Report, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf.

The BCHR's perusal of the judgments forwarded by the Misdemeanour Courts in Serbia lead to the impression that the courts convicted the defendants and did not recognise the reasons they gave for leaving their countries of origin as intentions to seek asylum although some of them said that they had left their countries of origin "to seek asylum in an EU country",⁶⁴ "because of the Taliban",⁶⁵ "because of the constant conflicts and difficult life in Syria"⁶⁶ or "because I intended to seek asylum in Italy"⁶⁷.

If Misdemeanour Courts are to recognise the defendants' intentions to seek asylum, they have to always engage court-sworn interpreters, who know the languages the defendants can definitely follow the proceedings in. The BCHR is also of the view that observance of the *auditur et altera pars* principle appears not to have been abided by in quite a few misdemeanour proceedings, because the accused aliens had not been provided with interpretation into their native languages, and had thus been deprived of the opportunity to give good cause for their illegal entry into or presence in the Republic of Serbia. The analysis of the judgments the Misdemeanour Courts forwarded to the BCHR shows that the Courts had failed to specify in most of the reasonings of their judgments whether interpreters had been engaged in the proceedings at all. In some cases, the Courts engaged interpreters, but for the wrong languages. For instance, the Pirot Misdemeanour Court engaged a court-sworn interpreter for English in ten trials against the nationals of Afghanistan, Syria, Morocco and Palestine although very few migrants are fluent enough in English to be able to follow proceedings in that language.⁶⁸ The Pirot Misdemeanour Court specified in the reasonings of two judgments that the defendants had been questioned in the absence of interpreters, because the Court "was unable to find an Arabic interpreter".⁶⁹ Doubts that the *auditur et altera pars* principle is not observed in practice in misdemeanour proceedings are also corroborated by the allegations of aliens serving their misdemeanour sentences in the Sremska Mitrovica penitentiary. They told the BCHR legal team that they had not been provided with an interpreter in court and that they had been unaware of their right to appeal the first-instance decisions.⁷⁰

The fact that court-sworn interpreters are not always engaged to assist the defendants in misdemeanour proceedings precludes the latter from following the course of the proceedings. This amounts to an absolutely substantive violation of the provisions governing misdemeanour proceedings that cannot be reversed since the aliens are not even aware of their right to appeal. The violation of this principle also derogates from the principle of determining the truth in proceedings. Unless a court-sworn interpreter is taking part in the proceeding, an alien cannot express the intention to seek asylum and may therefore be deprived of access to the asylum procedure.

In the BCHR's view, the judgments delivered in misdemeanour proceedings are often enforced before they become final and legally binding. Namely, Article 230 of the Misdemeanour Act sets out that an appeal shall have suspensive effect, but Article 294(1(1)) of that law sets out that a judgment may be enforced before it becomes final in the event the defendant cannot prove his identity or does not have permanent residence. The Misdemeanour Courts have frequently been referring to Article 294 in their convictions against irregular migrants. Paragraph 3 of this Article, however, sets out that the Higher Misdemeanour Court shall urgently review the defendant's appeal of a judgment ordering the enforcement of the sentence before it takes effect. Irregular migrants not provided with interpreters during the misdemeanour proceedings are thus unlikely to be able to exercise their right to appeal. Some of the irregular migrants serving time in Serbian penitentiaries claimed that they had told the misdemeanour judges that they wanted to seek asylum in the Republic of Serbia, but that the judges reportedly told them "that they first had to serve their prison terms and could apply for asylum afterwards".⁷¹

64 Zrenjanin Misdemeanour Court, Sečanj Unit, judgment 2 Pr J-289/12 of 26 December 2012.

65 Smederevo Misdemeanour Court judgment 07 Pr 7375/12 of 30 July 2012.

66 Pirot Misdemeanour Court judgments I 5 Pr 1942/12, 1943/12 and 1944/12 of 8 September 2012.

67 Pirot Misdemeanour Court judgments 2 Pr 1307/12, 1306/12 and 1305/12 of 6 July 2012.

68 Based on the experience of BCHR's legal professionals, who were providing legal aid to Afghani asylum seekers in 2012.

69 Pirot Misdemeanour Court judgments 1-5 Pr 1062/12 and 1063/12 of 10 June 2012.

70 Information obtained in interviews with aliens serving their misdemeanour sentences in the Sremska Mitrovica penitentiary in 2012.

71 *Ibid.*

Furthermore, some of the aliens the BCHR team talked to alleged that they had sought asylum at the time the police arrested them for illegally crossing the borders, but that the police officers ignored their requests and immediately brought them before the misdemeanour judges. The BCHR team perused the judgments delivered by the Misdemeanour Courts after talking to the irregular migrants. All the analysed judgments contained almost identical statements of fact and reasonings, which indicates that the Courts had not assessed all the circumstances of each individual case or assessed the evidence duly and diligently. The above described practices of both the Misdemeanour Courts and the police lead to the conclusion that the competent state authorities have in some cases acted in contravention of the principle under which asylum seekers shall not be penalised for illegal entry into or presence in the Republic of Serbia.

5. Asylum Procedure in Serbia

The asylum procedure in the Republic of Serbia is governed by the Asylum Act. The General Administrative Procedure Act⁷² is applied subsidiarily in the asylum procedure. Procedures relating to the determination of refugee status are not specifically regulated by the 1951 Refugee Convention or other international refugee instruments,⁷³ but the detailed procedural standards are recommended in the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.⁷⁴ The competent authorities conducting the asylum procedure and, subsequently, the procedure for removing from Serbia's territory persons not granted protection are bound by the international human rights standards arising from the ECHR, primarily the prohibition of discrimination and the right to an effective legal remedy. An unfair asylum procedure may result in gross violations of international human rights law, including in breaches of non-refoulement and the prohibition of torture and inhuman treatment.

Aliens must express the intention to seek asylum either orally or in writing in any police administration in Serbian territory. They shall then be entered in the register and issued certificates of intention to seek asylum,⁷⁵ entitling them to remain in Serbian territory for 72 hours, during which they must report to the MIA Asylum Office or one of the two Asylum Centres – in Banja Koviljača or Bogovađa (Art. 22 and 23, Asylum Act).

Once an alien is admitted to an Asylum Centre, the Asylum Office initiates the first official action – registers him or her (Art. 24). Registration entails establishing the alien's identity and photographing and fingerprinting him or her. During the registration procedure, the Asylum Office staff temporarily seizes all the alien's documents that may be relevant to a decision in the asylum procedure. The vast majority of asylum seekers do not possess any documents. An alien who intentionally obstructs, avoids or refuses registration is not allowed to apply for asylum.

After registering the aliens, Asylum Office issues them IDs the design and content of which are laid down in the Rulebook on the Content and Design of the Asylum Application Form and Documents Issued to Asylum Seekers or People Granted Asylum or Temporary Protection.⁷⁶ The IDs issued to asylum seekers are valid until the asylum procedure is completed and their validity is extended every six months. Another problem asylum seekers have faced arises from the failure of both the Asylum Act or the subsidiary legislation to specify the deadline within which the competent authorities are under the duty to issue IDs to asylum seekers, wherefore the Asylum Office has the discretion to issue them at the time it sees fit. The Asylum Office had until recently practiced issuing the IDs to the asylum seekers at the moment they applied for asylum. Under the Asylum Act, an asylum seeker must apply for asylum within 15 days from the day of registration. However, in reality, the Asylum Office sets the dates when the asylum seekers will submit their applications and sometimes even several months pass from the day the asylum seekers are registered to the day they submit their applications.⁷⁷ The freedom of movement of asylum seekers without IDs is limited and they are only allowed to move within the grounds of the Asylum Centre. Furthermore, they cannot dispose of their money in their bank accounts. In November 2012, the Asylum Office again

72 *Sl. list SRJ* 33/97, 31/01 and *Sl. glasnik RS* 30/10

73 UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, paragraph 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

74 *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/enG/Rev. 3, 2011, available at <http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf>.

75 The Rulebook on the Content and Design of the Asylum Application Form and Documents Issued to Asylum Seekers or People Granted Asylum or Temporary Protection also specifies the design and content of the certificates issued to persons who had expressed the intention to seek asylum.

76 *Sl. glasnik RS* 53/2008.

77 Based on the experience of the BCHR legal professionals who extended legal aid to asylum seekers in 2012.

began issuing IDs to asylum seekers before they submitted their applications,⁷⁸ which has greatly facilitated their presence and movement in the territory of the Republic of Serbia.

Although the asylum procedure is formally launched by the submission of an asylum application, the deadlines within which the administrative actions preceding the procedure are conducted nevertheless affect the duration of the procedure. This is why the deadlines for the registration of asylum seekers and for issuing them their IDs have to be prescribed.

5.1. Principles

The principles in Chapter II of the Asylum Act lay down the procedural safeguards that apply in the asylum procedure – the principles of directness, information, confidentiality, free legal aid and of free interpretation/translation, etc.

Principle of Free Legal Aid and Free Interpretation

An asylum seeker is entitled to free legal aid and representation by the UNHCR and non-government organisations the goals and activities of which are aimed at providing legal aid to refugees (Art. 10). The following two NGOs provided asylum seekers with free legal aid in 2012: the Belgrade Centre for Human Rights⁷⁹ and the Asylum Protection Centre⁸⁰. The principle of free interpretation (Art. 11) into the language of the asylum seeker's country of origin or a language s/he understands is consistently abided by thanks to UNHCR funding; no funding for this purpose has been allocated in the Serbian Budget yet.⁸¹

Principle of Gender Equality

Under Article 14 of the Asylum Act, an asylum seeker shall be interviewed by a person of the same sex and provided with an interpreter of the same sex, unless this is impossible or would cause the authority conducting the procedure disproportionate difficulties. The conclusion that non-abidance by this principle is necessarily unlawful cannot be drawn, given that the Act itself allows for deviations from this principle. The impression is, however, that the failure to provide the asylum seekers with interviewers or interpreters of the same sex can be ascribed more to the human resource policies of the competent authorities. The Asylum Office by and large designates female officers to meet and interview female asylum seekers given that it has both men and women on staff.⁸² Furthermore, the MIA always hires male interpreters for specific languages, such as Farsi, although there are female interpreters speaking those languages as well. The gender equality principle must be consistently abided by given the rigid gender roles and the strict patriarchal cultures in which people in e.g. Afghanistan have been raised. The failure to observe this principle undermines the principle of truth guaranteed by the General Administrative Procedure Act⁸³, which is to ensure that all facts and circumstances relevant to the adoption of a lawful and fair decision are established in the procedure.

Principle of Particular Care for Vulnerable Asylum Seekers

During the asylum procedure, particular attention has to be paid to the specific vulnerabilities of people with special needs, such as minors, people fully or partially deprived of legal capacity, unaccompanied minors, people with disabilities, the elderly, pregnant women, single parents with underage children or victims of torture, rape or other grave forms of psychological, physical or sexual violence.

78 Information BCHR legal professionals obtained in interviews with asylum seekers in the Banja Koviljača Asylum Centre.

79 More at www.azil.rs.

80 More at www.apc-cza.org.

81 *Serbia as a Country of Asylum*, paragraph 18.

82 Information BCHR legal professionals obtained while they extended legal aid to asylum seekers.

83 All facts and circumstances relevant to the adoption of a lawful and fair decision (decisive facts) shall be established in the procedure (Art. 8, General Administrative Procedure Act).

The realisation of this principle may be hindered by the practice of the Asylum Office to have entire families submit their asylum applications together and to interview them together. For instance, a woman, who had been a victim of sexual or physical violence in her country of origin, may be afraid, ashamed or uncomfortable talking about what she had gone through in front of her husband and children. It is common knowledge that Afghani women found guilty of “moral crimes”, such as running away from home to flee domestic violence or because they wanted to divorce their husbands, are subjected to so-called honour killing. Women who act “immorally” are killed by their family members to preserve the families’ honour in their communities. These women are often convicted and deprived of liberty by the Afghani authorities because of their “immoral behaviour”.⁸⁴ Furthermore, adultery is punishable by imprisonment in Afghanistan.⁸⁵ Family members have to be interviewed individually, so that they can honestly and fully relate the reasons why they had left their countries of origin and to enable the competent Serbian authorities to take the requisite measures if they establish that any of them are victims of domestic violence. This principle is closely related also to the principle of gender equality. Namely, consistent abidance by the principle of gender equality facilitates and ensures the realisation of the principle of affording particular care to people with special needs. All the more since a female asylum seeker is more likely to open up to a female officer of the Asylum Office or a female interpreter that she had been sexually abused in her country of origin or that she is still subjected to domestic violence.

Principle of Confidentiality

The data obtained about an asylum seeker during the asylum procedure are an official secret and may be made available only to legally authorised parties. The asylum seekers’ data may not be revealed to the countries of origin unless they have to be returned by force to their countries of origin upon the completion of the asylum procedure and the rejection of their asylum applications.⁸⁶ The Constitutional Court decided to publish its decision on a constitutional appeal filed by an asylum seeker in Serbia⁸⁷ in the Official Gazette of the Republic of Serbia in view of its importance for the protection of the constitutionally guaranteed human rights, but failed to conceal the asylum seeker’s personal data, the individual circumstances of his claim or the circumstances that had led him to seek asylum, although the asylum procedure was still under way. The Constitutional Court thus ignored the principle of confidentiality enshrined in the Asylum Act and jeopardised the asylum seeker’s safety.

5.2. First-Instance Procedure

The entire first-instance procedure and all the decisions on asylum applications and the termination of the right to asylum are within the purview of the Asylum Office. The asylum procedure is initiated by the submission of an asylum application on the prescribed form that can be obtained only from an authorised officer of the Asylum Office (Art. 25). In practice, however, asylum seekers file their applications in their statements for the record to the Office staff.⁸⁸

84 See the Human Rights Watch report “*I had to run away*“ *The imprisonment of Women and Girls for “moral crimes“ in Afghanistan*, 2012, available at: http://www.ecoi.net/file_upload/1788_1333042191_afghanistan0312webwcover-0.pdf

85 See *The Status of Women in Afghanistan (Položaj žena u Avganistanu)*, 2012, available in Serbian at <http://www.azil.rs/news/view/polozaj-zena-u-avganistanu>.

86 The following data must be provided in these cases:
1) personal identification data;
2) data of the asylum seeker’s family members;
3) data on personal documents issued by the country of origin;
4) permanent address;
5) fingerprints, and
6) photographs.

87 Constitutional Court decision in the case of Už-5331/2012 of 28 December 2012, paragraph 12.

88 Based on the experience of BCHR lawyers, who extended legal aid to asylum seekers in 2012.

The authorised Asylum Office officers interview the asylum seekers to establish all facts of relevance to the decisions on the asylum applications, particularly their identity, grounds for asylum, their movement after they left their countries of origin and whether they already sought asylum in another state (Art. 26). The interviews are usually attended by a representative of the Asylum Office, the asylum seekers' legal representatives and the interpreters, although the Act also allows the attendance of UNHCR representatives, unless the asylum seekers object to the latter.

The Asylum Office may render a decision upholding the asylum application and recognising the alien's right to asylum or subsidiary protection, or a decision rejecting the asylum application and ordering the alien to leave the territory of the Republic of Serbia within a specific deadline unless s/he has other grounds for residence in Serbia. In instances specified by the law, the Asylum Office may render a decision to discontinue the asylum procedure (Art. 27). The Asylum Office may also dismiss an asylum application without reviewing whether the asylum seeker satisfies the asylum eligibility requirements in instances set out in the law (Art. 33).⁸⁹

First-instance decisions on asylum applications may be appealed within 15 days from the day they are served (Art. 35).

5.3. *Second-Instance Procedure*

The Asylum Commission that reviews appeals of Asylum Office decisions is comprised of nine members appointed by the Government to four-year terms of office. The Asylum Act lays down that the Commission shall render its decisions by a majority vote (Art. 20), but does not specify the deadline within which it has to render them.⁹⁰ The terms of office of the first Commission⁹¹ expired on 17 April 2012 but the new Commission members were not appointed until 20 September 2012.⁹² The authorities partly upheld the suggestions of the NGOs and appointed to the Commission one representative of the academia with experience in human rights protection. They did not, however, heed the suggestion to appoint to it representatives of NGOs promoting and protecting human rights.⁹³

Although there was no one to review the first-instance decisions by the Asylum Office from 17 April to 20 September 2012, the Constitutional Court was not of the view that this constituted a violation of the right to an effective legal remedy.⁹⁴ The Constitutional Court stated the following in its Decision: “[t]he members of the second-instance authority were appointed by a Government decision of 20 September 2012. The conditions for the review of the appellant's appeal by the second-instance authority were thus fulfilled three months after it was filed, wherefore the appellant cannot successfully dispute the effectiveness of the appeal in this specific administrative procedure.”

89 More under 5.5. *Application of the Safe Third Country Concept and Violations of the Prohibition of Refoulement*.

90 The general 60-day deadline prescribed in Article 208 of the General Administrative Procedure Act is to be applied accordingly.

91 The RS Government Decision on the Appointment of the Commission Members No. 119–1643/2008 of 17 April 2008 (*Sl. glasnik RS*, 42/08).

92 The RS Government Decision on the Appointment of the Commission Chairperson and Members No. 119–6141/2012 of 20 September 2012.

93 See “Statement on the Expiry of the Terms of Office of the Asylum Commission Members” of 12 April 2012, available at <http://www.azil.rs/news/view/expiry-of-the-terms-of-office-of-the-asylum-commission-members>. A key procedural safeguard essential to the fairness and efficiency of the asylum procedure is that the appeal be considered by an authority different from and independent of that making the initial decision (see UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)* in *Global Consultations on International Protection (31 May 2001)*, UN Doc. EC/GC/01/12, paragraph 43). The Assistant to the Head of the MIA Border Police Directorate was appointed Chairman of the Asylum Commission. The authority rendering first instance decisions reviewed on appeal operates within this Directorate, which may give rise to doubts about its independence, *Serbia as a Country of Asylum*, paragraph 45.

94 Constitutional Court Decision in the case of Už–5331/2012 of 28 December 2012, paragraph 6.

5.4. Procedure before the Administrative Court

An Asylum Commission decision may be challenged in an administrative dispute before the Administrative Court, which rules on the claims in three-member judicial panels. As a rule, a claim filed with the Administrative Court shall *not suspend the enforcement of the impugned administrative enactment*.⁹⁵ The Court may, however, suspend the enforcement of a final administrative enactment on the motion of the claimant, until it rules on the administrative dispute in the event such enforcement would cause the claimant damage difficult to reverse and the suspension is not in contravention of public interests and would not cause major or irreparable damage to the opposing party, i.e. interested party.⁹⁶ Exceptionally, the suspension of the enactment may be sought in an emergency, i.e. when an appeal without suspensive effect under the law has been lodged and the appeals procedure has not been completed.⁹⁷ In such cases, the Administrative Court rules on the motions to suspend enforcement within five days from the day they are filed.

Furthermore, for a legal remedy to be considered effective in the meaning of ECtHR case law, the “suspensive effect” of the appeal must follow automatically from an application alleging a potential violation of a Convention right rather than resting solely on the discretion of the domestic authority considering the individual’s case.⁹⁸

The Administrative Court has to date mostly limited itself to reviewing whether the procedural aspects of the asylum procedure had been observed. The Administrative Court did not uphold any claims by asylum seekers in 2011 and the first half of 2012. Ten administrative disputes against the Asylum Commission decisions were lodged with the Administrative Court by 1 December 2012,⁹⁹ and not one motion for a review of the final Administrative Court judgments was filed with the Supreme Court of Cassation.¹⁰⁰ In four of the ten cases, the Administrative Court rejected the claims and six disputes were still pending. The Administrative Court did not hold oral hearings in any of the disputes, having found that the matters under dispute obviously did not necessitate the direct hearing of the parties or additional findings of fact.

5.5. Application of the Safe Third Country Concept and Violations of the Non-Refoulement Principle

The prohibition of expulsion (*non-refoulement*) prohibits States to transfer anyone to a country where he or she faces a real risk of persecution or serious violations of human rights or to third countries where he or she face such risks.¹⁰¹ The principle of non-refoulement applies both to transfers to a State where the person will be at risk (direct refoulement), and to transfers to States where there is a risk of further transfer to a third country where the person will be at risk (indirect refoulement). This principle prohibits “prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”¹⁰² and it is not subject to derogation.¹⁰³

95 Article 23, Administrative Disputes Act, *Sl. glasnik RS*, 111/2009

96 *Ib idem*. Supra 93

97 *Ib idem*. Supra 93

98 More in N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe, 2010, pp. 118–121.

99 Selected Administrative Court judgments are available at <http://www.azil.rs/documents/category/judgements>.

100 Statistics obtained from the Administrative Court pursuant to the Free Access to Information of Public Importance Act on 14 December 2012.

101 *Non-refoulement* is part of international customary law and is binding on all states, *Practitioners Guide no. 6*, p. 96.

102 UNHCR, *General Conclusion on International Protection*, 11 October 1996, No. 79 (XLVII) – 1996, paragraph (j).

103 *Ibid*, paragraph. (i).

Apart from the prohibition of *refoulement* in Article 33 of the Refugee Convention, the competent authorities are also bound by the prohibition in Article 6 of the Asylum Act to expel or return people against their will to a territory where their lives or freedom would be threatened on account of their race, sex, language, religion, nationality, membership of a particular social group or political opinion.

Under the Asylum Act, the state may, inter alia, dismiss an asylum application without reviewing whether the asylum seeker fulfils the asylum eligibility requirements by applying the concepts of safe countries of origin and safe third countries (Arts. 2 and 33). The application of the “safe country of origin” and “safe third country” concepts should not result in depriving the asylum seekers of access to the asylum procedure or violations of the *non-refoulement* principle.¹⁰⁴ It is essential that the state is reassured in all these cases that the protection an asylum seeker can enjoy in another state is actually effective, and, in any case, it must provide the asylum seeker with the opportunity to refute the allegations about the safety of the other state in his/her particular case.

The competent authorities have systematically abused this rule practically from the moment the Assembly Act came into effect and almost automatically¹⁰⁵ applied the RS Government Decision on Lists of Safe Countries of Origin and Safe Third Countries.¹⁰⁶ According to the asylum authorities, an asylum application can be reviewed on the merits if the asylum seeker entered Serbia legally, i.e. with a visa in a valid passport, or from the territory of a state not designated as safe in the Government Decision. Given that all the states Serbia borders with and through which most asylum seekers arriving in Serbia transit are on the Government lists, this condition is impossible to fulfil and renders senseless the entire procedure for exercising the right to asylum in the Republic of Serbia.¹⁰⁷ The Asylum Office upheld asylum applications, three of them, for the first time in 2012. However, these asylum seekers had all entered Serbia legally with valid documents, by plane, or had been legally residing in Serbia for longer periods of time before armed conflicts erupted or political changes occurred in their countries of origin.¹⁰⁸

Basing the concept of a safe third country on a unilateral Government Decision, which was rendered in 2009 and has not been revised since, is problematic. The Government did not obtain in advance guarantees that the countries it was declaring safe had in place fair and effective asylum procedures and took into consideration only the following criteria: whether they were parties to the 1951 Convention, whether they had a visa free regime for Serbian citizens and the opinion of the Serbian Ministry of Foreign Affairs.¹⁰⁹

The decision designating safe countries of origin and safe third countries should be periodically reviewed and consideration should be given to the situation in them and the degree in which they protect the rights of asylum seekers, as well as the views of the ECtHR,¹¹⁰ the UNHCR and the reports of relevant international organisations, such as the Council of Europe¹¹¹ or international NGOs focusing on the international protection of refugees and asylum seekers.

104 *Conclusions Adopted by The Executive Committee on The International Protection of Refugees 1975 – 2009 (Conclusion No. 1 – 109)*, December 2009, paragraph (j).

105 The Asylum Commission reviewed 55 asylum applications in 2011, but only two of them on the merits.

106 *Sl. glasnik RS* 67/2009. The BCHR filed an initiative for the review of the constitutionality of this Decision with the Constitutional Court of Serbia. The Court has not yet rendered a decision on the initiative.

107 Serbian authorities consider even airport transit through these states sufficient grounds for rendering decisions rejecting the applications.

108 MIA Asylum Unit Decisions No. 03/9–26–2324/11 of 19 December 2012, No. 03/9–4–26–2326/11 of 20 December 2012 and No. 03/9–26–17/12 of 6 December 2012.

109 *Serbia as a Safe Third Country: Revisited*, Hungarian Helsinki Committee, June 2012, p. 7, available at: http://azil.rs/doc/HHC_Serbia_report_final_2_1.pdf.

110 E.g. Greece was declared a safe country although it is not considered a safe third country since the ECtHR delivered its judgment in the case of *M. S. S. v. Belgium and Greece*, ECHR, App. No. 30696/09 (2011).

111 The impugned Decision also declares Belarus a safe country of origin although it was suspended from the CoE for its poor human rights track record in 1997. The situation in this country deteriorated further in the meantime, see e.g. the CoE Parliamentary Assembly, *The situation in Belarus*, AS/Pol (2012) 29, of 3 October 2012.

The Assembly Act should be interpreted in the following manner: the fact that a country was listed as safe in the Government Decision on Lists of Safe Countries of Origin and Safe Third Countries should constitute an arguable claim, i.e. an authority reviewing an asylum application should not merely assume that the asylum seeker would be treated in conformity with the Convention standards in a safe third country, but, on the contrary, should first verify how the authorities of a safe third country applied their legislation on asylum in practice.¹¹² Authorities deciding on asylum applications ought to take into consideration all relevant sources, such the reports of the UNHCR, NGOs or international human rights bodies, primarily the ECtHR. This view was taken also by the Constitutional Court of Serbia, which, although it has not established a breach of non-refoulement yet, highlighted that non-refoulement and the other relevant provisions of the Asylum Act “led to the conclusion that the list of safe third countries had been drawn up, inter alia, also on the basis of UNHCR reports and conclusions. The Court also assessed in its Decision that the reports of that organisation contributed to the proper application of the Asylum Act by the competent authorities of the Republic of Serbia, insofar as they would not dismiss an asylum application in the event the asylum seeker arrived from a safe third country on the Government list if that country applied its asylum procedure in contravention of the Convention.”¹¹³

The Administrative Court in its decisions gave the green light to the asylum authorities’ practice of automatically applying the Decision on the Lists of Safe Countries of Origin and Safe Third Countries although they had not first established whether the third countries were actually safe for the asylum seekers at issue.¹¹⁴

In four cases in which it rejected the asylum seekers’ claims in 2012, the Administrative Court found that the second-instance authority had properly applied the law when it rejected their appeals as ill-founded because the first-instance authority had established that the asylum seekers had passed through safe third countries. The claimants in one case disputed that the countries they had passed through were safe for them (Turkey, Greece, the Former Yugoslav Republic of Macedonia), alleging that they had not realistically had the chance to apply for asylum in them.¹¹⁵ The claimants referred to reports by international organisations about the poor status of asylum seekers in those countries and the fact that Turkey had not ratified the 1967 Refugee Protocol, which means that the Geneva Refugee Convention does not apply to people who had fled non-European countries to Turkey. The Administrative Court found that the claimants had not proven that the countries through which they passed on route to Serbia were not safe for them and ignored the fact that Turkey has not ratified the 1967 Protocol; it merely stated (but failed to elaborate) that the asylum seekers had had the opportunity to seek asylum in those countries.

If the claimant in an administrative dispute is disputing the fact that the “safe third countries” are actually providing effective protection in the asylum procedure in practice, the Administrative Court should provide a sufficiently clear explanation why the countries through which the asylum seeker transited are safe for him. In its assessments of whether a country an asylum seeker transited through was actually safe for him, the Administrative Court applied the same reasoning as the first- and second-instance authorities: that these countries were safe for the sole reason that they were on the Government list, without deliberating whether those countries actually abided by the international principles on refugee protection in practice.

In one judgment it delivered in 2011, the Administrative Court took the view that the reports of international organisations about the poor status of the asylum seekers in specific countries referred to in the claim and the appeal could not per se be proof that the claimant had not had the opportunity to apply for asylum in these countries or that they were unsafe for him.¹¹⁶ The Court was of the view that the cited cases could illustrate the state of human rights in a specific country

112 See *M.S.S. v. Belgium and Greece*.

113 See the Constitutional Court Decision UŽ- 1286/2012, of 29 March 2012, available at <http://www.azil.rs/documents/category/judgements>.

114 Decision No. U 8\3815/11, of 7 July 2011.

115 Administrative Court judgment 23 U 3831/12 of 11 October 2012.

116 Administrative Court judgment 15 U 10336/11 of 10 November 2011.

and provide credibility to an asylum seeker's allegations but that the reasons why a specific country was not safe for a specific individual had to be linked to his personality. This view of the Administrative Court is partly correct. However, with a view to providing more efficient protection to asylum seekers in Serbia, the Administrative Court ought to establish whether the asylum seekers had had the opportunity to seek asylum in the countries at issue, rather than merely fully uphold the grounds given in the reasoning of the decision on the appeal and assess that "it is undisputable that, on their way to Serbia, the claimants had resided and transited through states designated as safe third countries in the Decision of the Government of the Republic of Serbia pursuant to Article 2 of the Asylum Act and that they had had the opportunity to apply for asylum in them but had not availed themselves of it."¹¹⁷

In its guidelines, the UNHCR states that in refugee claims, the burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.¹¹⁸

The Administrative Court should also change its view because the Constitutional Court was of the opinion that the list of safe third countries ought to be amended to reflect the UNHCR reports. The case law of the Administrative Court should be aligned with this view of the Constitutional Court to ensure that the asylum procedure in the Republic of Serbia affords adequate protection from *refoulement*.

117 Administrative Court judgment 23 U 3831/12 of 11 October 2012, p. 3.

118 UNHCR, Note on Burden and Standard of Proof in Refugee Claims, paragraph 6.

6. Deportations

Irregular migrants, who do not express the intention to seek asylum during their first contact with the police, are taken before misdemeanour judges who conduct misdemeanour proceedings and imposes upon them a prison sentence or a fine for illegal entry into or presence in Serbia. Given that most illegal migrants cannot afford to pay the fines, their pecuniary penalties are replaced by prison sentences. Interestingly, the majority of misdemeanour court decisions the BCHR analysed did not order the migrants' deportation from Serbia as soon as they served their prison sentences.¹¹⁹ When they are released from jail, the illegal migrants are allowed to leave the country themselves and continue their journey to West European countries. The data the BCHR obtained from the governors of the penitentiaries in which illegal migrants serve their sentences show that the police have begun taking over the released aliens and transporting them to the Alien Reception Centre. How exactly they are deported from the country remains unclear. Under the Aliens Act, an alien is considered to have left Serbia when he entered a state allowing his or her entry (Art. 42(3)). It is hardly likely that the FYROM officially allows the entry of a large number of illegal migrants deported from Serbia. The interviewed asylum seekers in Macedonia, who had been deported from Serbia after serving their prison sentences, said that the migrants were bussed to the border and ordered to cross into Macedonia on their own.¹²⁰ The BCHR team has on a number of occasions heard complaints from the asylum seekers that, before they applied for asylum, they had been deported to FYROM, not via the official border crossings, without first being brought before a judge. The UNHCR assessed that asylum seekers in Serbia faced the risk of so-called chain deportation to Macedonia and then to Greece, where they were in the danger of being deported to their countries of origin, without ever having had their asylum claim considered on the merits. During its visit to Serbia in April 2012, the Hungarian Helsinki Committee interviewed a Somali asylum seeker, who stated that he had been transferred to Greece after being returned from Hungary to Serbia and Macedonia.¹²¹ The UNHCR also said that it had received reports that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the Former Yugoslav Republic of Macedonia.¹²² However, there are no reports that persons who have managed to apply for asylum in Serbia have been subject to such deportations.¹²³ The BCHR team has heard no reports of deportations of asylum seekers who have been issued the asylum seeker IDs.

Therefore, asylum seekers are at risk of deportation until they are accommodated in one of the two Asylum Centres and issued IDs. Some of the migrants living near the Asylum Centre in Bogovada did not have certificates of intention to seek asylum since, as they alleged, the Valjevo police Aliens Department refused to issue them such certificates because the Asylum Centre was full and could not take them in. These groups included minors and they were in fear of deportation.¹²⁴ The police administrations should issue certificates of the intention to seek asylum to the asylum seekers on time to enable them to remain legally in the territory of the Republic of Serbia, whether or not the Asylum Centres have enough room to take in all the people who expressed the intention to seek asylum. Otherwise, they are deprived of the right to access the asylum procedure and, thus, of protection from expulsion, given that they can apply for asylum only once they are accommodated in the Asylum Centres.

119 The BCHR perused around 20 misdemeanour court decisions during its visits to the penitentiaries in which aliens were serving their misdemeanour prison sentences in September 2012. More on the status of irregular migrants in the penitentiaries in Chapter 10.

120 *Serbia as a Country of Asylum*, paragraph 13

121 *Serbia Revisited*, p. 11.

122 *Serbia as a Country of Asylum*, paragraph 76.

123 *Ibid.*

124 The BCHR team obtained this information directly from the asylum seekers living in front of the Bogovada Asylum Centre during its regular visits to this facility.

7. Realisation of the Rights and Obligations of Asylum Seekers, Refugees and People Granted Subsidiary Protection

These rights are governed by Chapter VI of the Asylum Act, which deals with the right to residence, accommodation, basic living conditions, health care and education. Specific rights are guaranteed only to people granted asylum but not to those granted subsidiary protection as well.¹²⁵ For example, the right to family reunion is not equally guaranteed to all categories of people afforded protection as it should be. This right is granted to persons granted asylum (Art. 48), while people granted subsidiary protection may exercise it “pursuant to regulations on the movement and residence of aliens” (Art. 49), while people afforded temporary protection may exercise it only in “justified cases” (Art. 50).

7.1. Accommodation

The Asylum Centres in Banja Koviljača and Bogovađa, which are under the jurisdiction of the Commissariat for Refugees and Migrations and funded from the state budget, are charged with accommodating asylum seekers until final decisions on their applications are rendered. Specific issues of relevance to the Centres’ work are governed in detail by subsidiary legislation.¹²⁶ The Banja Koviljača Centre can take in up to 85 and the Bogovađa Centre up to 150 people at any given time, but they have on occasion accommodated as many as 93 and 230 people respectively.¹²⁷ Families with children and people with health problems are given priority. The asylum seekers are free to leave the Centres and the living conditions in them are satisfactory. The Asylum Centres obviously lacked the capacities to take in all the asylum seekers and between 30 and 195 asylum seekers remained unaccommodated on a daily basis. Although it appeared in March 2012 that the lack of capacity problem would finally be addressed,¹²⁸ a large number of asylum seekers, sometimes as many as 200, had been living outside, in the woods near the Bogovađa Asylum Centre since June.¹²⁹ The Commissariat for Refugees and Migrations has not been providing them with emergency accommodation or humanitarian aid although they occasionally included unaccompanied minors, pregnant women, families with small children and asylum seekers in need of medical care.¹³⁰

Apart from the lack of room, the Bogovađa Asylum Centre also suffers from problems regarding the organisation of accommodation for the asylum seekers, the timely provision of medical assistance; moreover, asylum seekers who violate the House Rules are denied meals and accommodation. In late 2012, the Commissariat for Refugees and Migrations accommodated most of the asylum seekers in the Bogovađa Asylum Centre, which brought the number of its residents to over 230. The Commissariat also launched activities to find adequate privately-owned housing which it plans to rent for the asylum seekers.

125 See more in the *2011 Report*, pp. 190–191.

126 Rulebook on Health Examinations of Asylum Seekers on Admission in the Asylum Centres, *Sl. glasnik RS*, 93/08; Rulebook on Accommodation and Basic Living Conditions in Asylum Centres, *Sl. glasnik RS* 31/08; Rulebook on Social Assistance to Asylum Seekers and People Granted Asylum, *Sl. glasnik RS* 44/08; Asylum Centre House Rules *Sl. glasnik RS* 31/08; Rulebook on Records of People Accommodated in the Asylum Centres, *Sl. glasnik RS* 31/08.

127 BCHR statistics, information collected from the competent authorities on a weekly basis throughout 2012.

128 Between 70 and 145 people were waiting to be accommodated in the Banja Koviljača Centre every day until March. The Centre management kept updated records of asylum seekers waiting for accommodation and issued them certificates that they had tried to find accommodation in the Centre within the 72-hour legal deadline. More on asylum seekers living outside the Banja Koviljača Centre in the *2011 Report*, II.4.7.

129 The Bogovađa Centre management does not keep records of people waiting for accommodation in the Centre.

130 Based on the information collected by the BCHR legal team that extended legal aid to asylum seekers in 2012.

There was talk of a Serbian government decision to cede the army barracks in the village of Mala Vrbica at Mladenovac to the Commissariat for Refugees and Migrations¹³¹, which was to have renovated it to accommodate the asylum seekers.¹³² The residents of the neighbouring villages protested against the decision and the Mladenovac Municipal Assembly rendered a decision opposing the construction of the Asylum Centre in the municipality.¹³³ There are no indications that another Centre will soon be built to permanently address the accommodation of asylum seekers although the Commissariat for Refugees and Migrations was provided with funds from the budget for that purpose back in 2011.¹³⁴

7.2 Integration

Article 46 of the Asylum Act lays down a general obligation of the Republic of Serbia to, commensurate with its capacities, ensure conditions for the integration of refugees in social, cultural and economic life and facilitate the naturalisation of the refugees. Nothing has yet been done to enable their integration. Nor have funds in the budget been earmarked for that purpose. The Migration Management Act¹³⁵, however, charges the Commissariat for Refugees and Migrations with the accommodation and integration of people granted asylum or subsidiary protection (Arts. 15 and 16).

131 This Government Decision is not publicly available, but a representative of the Refugee Commissariat confirmed that part of the army barracks in Mala Vrbica would be renovated to accommodate asylum seekers at a round table “Towards Europeanisation of Serbia – monitoring established policies and practices in the asylum and readmission related areas in the Republic of Serbia,” organised by Group 484 on 30 August 2012.

132 M. Anđelković, *Challenges of Forced Migration, State of Human Rights of Asylum Seekers and Returnees Based on the Readmission Agreements*, Group 484, Belgrade, 2012, p. 29, available at http://www.azil.rs/doc/Challenges_of_Forced_Migration_eng.pdf.

133 “Blocked Barracks in Protest against Asylum Seekers”, *B92*, 15 May. See also “Uncertainty in Vrbica”, 16 May 2012, www.mladenovac.rs.

134 See the *2011 Report*, II.4.6.

135 *Sl. glasnik RS* 107/12.

8. Unaccompanied Minor Asylum Seekers¹³⁶

The principle of the “best interests of the child” is the basic principle all competent authorities dealing with underage asylum seekers must be guided by.¹³⁷ Article 22 of the Convention on the Rights of the Child explicitly lays down that States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee shall receive appropriate protection,¹³⁸ and that, in cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.¹³⁹ The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender.¹⁴⁰

As provided for by the Constitution and international standards, the Asylum Act lays down the principle of particular care of asylum seekers with special needs, including minors and children separated from their parents or guardians (Art. 15). The Act, however, does not lay down the duty of the asylum authorities to give priority to and efficiently review asylum applications filed by unaccompanied minors.¹⁴¹ Furthermore, underage asylum seekers should be interviewed by professionally qualified staff, specially trained in refugee and children’s issues. Insofar as possible, interpreters should also be specially trained persons.¹⁴²

Greater attention needs to be devoted to underage asylum seekers, both by the asylum authorities and the competent social work centres and establishments in which they are accommodated (Asylum Centres and units accommodating underage unaccompanied aliens) in view of their vulnerabilities and the greater risk of them falling prey to human traffickers.

The shortcomings in the special protection afforded underage unaccompanied aliens in the territory of Serbia are illustrated by a case of four unaccompanied minors who were accommodated in one of the units for underage unaccompanied asylum seekers in late 2012.¹⁴³ These four boys, probably brothers aged between 4 and 15, reportedly contacted by phone their mother in Germany and subsequently, also only by phone, their uncle, who was allegedly staying in private accommodation in Banja Koviljača. The information that these four boys left the unit in a cab, which was allegedly to drive them to Banja Koviljača, where a person claiming he was their uncle was living at an unknown address and with the staff’s knowledge gives rise to concern. Their departure was not preceded by more detailed checks, the authorities did not verify that the children were actually related to the people who claimed that they were their relatives; nor are clear procedures in place obliging the staff in the competent agencies to ensure the children’s

136 Unaccompanied minors are aliens under 18 years of age who arrived in the Republic of Serbia unaccompanied by their parents or guardians or were separated from them upon arrival in the Republic of Serbia (Art. 2, Asylum Act). Compare M. Jelačić, *Children before the Law – in International Transit and as Asylum Seekers*, Group 484, Belgrade, 2013.

137 See, e.g. UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

138 Art. 22(1).

139 Art. 22 (2).

140 CRC General Comment No. 6, paragraph 18.

141 *Ibid.* paragraph 69.

142 UNHCR Guidelines on Unaccompanied Children Seeking Asylum, p. 5.13.

143 BCHR and UNHCR visit to the Belgrade Home for Children and Youths during 2012.

safety in such situations. However, even in the absence of specific regulations on underage asylum seekers, the competent authorities should be guided by their common sense, the principle of the best interest of the child and the obligation to act with particular vigilance with respect to unaccompanied minors, who stand a much greater risk of becoming victims of human trafficking, ill-treatment and other forms of abuse.

A total of 744 minors (607 boys and 137 girls) expressed the intention to seek asylum in 2012; 501 of them (472 boys and 29 girls) were unaccompanied.¹⁴⁴

Access to the Territory and Prohibition of Refoulement of Minors to Countries Where They Risk Persecution

The prohibition of refoulement to a country in which unaccompanied minors would be subjected to persecution is absolute and arises from international human rights law, humanitarian law and refugee law, primarily Article 33 of the 1951 Refugee Convention, Article 3 of the ECHR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Because of their vulnerability, unaccompanied children seeking asylum should not be refused access to the territory.¹⁴⁵

The Convention on the Rights of the Child prohibits states from returning a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.¹⁴⁶

Guardianship

States Parties to the Convention on the Rights of the Child are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State. The guardian should be consulted and informed regarding all actions taken in relation to the child.¹⁴⁷

Unaccompanied children seeking asylum change three temporary guardians from the moment they first establish contact with the Serbian authorities until the asylum procedure is completed. The first guardian they are appointed is an officer of the local Social Work Centre (in the town in which the first contact with the minor was established). They are then appointed a second temporary guardian in one of the two cities with units accommodating underage unaccompanied aliens (Niš or Beograd). Finally, the third temporary guardian is appointed in one of the two Asylum Centres, in Banja Koviljača or Bogovađa, in which the underage asylum seekers are accommodated. This practice, although in accordance with the Asylum Act, is not ideal. Namely, one can hardly expect the minors and guardians to develop a meaningful trusting relationship guaranteeing the protection of the best interests of the child. This practice should change and minors should be appointed a single guardian throughout the asylum process.¹⁴⁸ Furthermore, to the best of BCHR's knowledge, the guardians do not have the oppor-

144 Data obtained from the UNHCR.

145 UNHCR Guidelines on Unaccompanied Children Seeking Asylum, p. 1.

146 CRC General Comment No. 6, paragraphs 26–27.

147 *Ibid*, paragraphs 33–34.

148 The UNHCR is of the same view, see its report *Serbia as a Country of Asylum*, paragraph 57.

tunity to avail themselves of the services of interpreters in the languages the minors understand and it is extremely unlikely that the guardians and their wards can engage in a meaningful conversation in English, which the minors speak at best and which many of the guardians do not know. This is one of the reasons why guardians and social workers have rarely been visiting the underage asylum seekers.¹⁴⁹

As far as separated children are concerned,¹⁵⁰ guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so, for example, where the accompanying adult has abused the child. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinised more closely. If such a guardian is able and willing to provide day-to-day care, but unable to adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures (such as the appointment of an adviser or legal representative) must be secured.¹⁵¹

Education

States should ensure that every unaccompanied and separated child, irrespective of status, has full access to education in the country that they have entered. The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities and provided with school certificates. Furthermore, all adolescents should be allowed to enrol in vocational/professional training or education.¹⁵²

Underage asylum seekers in Serbia had not had access to education by the end of 2012, although Serbia has in place the legislative framework governing the procedures for enrolling and meeting the specific education needs of this category. The enrolment of foreign nationals and stateless persons is governed by the Act on the Basis of the Education System¹⁵³ (Art. 100(2)) and the Rulebook on Detailed Instructions for Establishing the Right to an Individual Education Plan, Its Implementation and Evaluation.¹⁵⁴ Pursuant to these regulations, individual education plans providing additional educational support are designed for foreign nationals who do not speak the language of tuition to ensure that they exercise their right to preschool, primary and secondary education. According to the data obtained from the Ministry of Education, Science and Technological Development, children who do not speak Serbian attend class across Serbia,¹⁵⁵ and there are no legal or practical obstacles to providing underage asylum seekers with access to education either.

Unaccompanied underage asylum seekers, as well as minors staying in the Asylum Centres with their parents, should be enrolled in school by the competent Social Work Centres in cooperation with the Commissariat for Refugees and Migrations. There are children in the Asylum Centres who have been living in Serbia since June 2011 but have not been provided with the opportunity to go to school. Their parents or relatives cannot be expected to enrol them in schools, because they do not speak Serbian, are not familiar with the valid regulations and are by and large uneducated themselves. The competent state authorities are under the duty to act in the best interest of all children, both those with Social Work Centre guardians and those without them, wherefore they also have the obligation to provide access to education to all children, regardless of their age, hitherto education or status in the asylum process.

149 *Ibid*, paragraph 57

150 "Separated children" are children, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. See *CRC General Comment No. 6*, paragraph 8.

151 *Ibid*. paragraph 34.

152 *CRC General Comment No. 6*, paragraphs 41–42.

153 *Sl. glasnik RS* 72/09 and 52/11.

154 *Sl. glasnik RS* 76/2010.

155 Letter to the BCHR No. 611–00–01998/2012–01, of 19 November 2012.

8.1. Accommodation of Minor Asylum Seekers

When the police establish first contact with irregular migrants who claim they are underage, they contact the local Social Work Centres which designate them temporary guardians. There are no particular norms or protocols for establishing the age of aliens seeking asylum in Serbia.¹⁵⁶

The minor is then referred to the one of the two Homes for Children and Youths, in Niš or Belgrade.¹⁵⁷ Both Homes are under the jurisdiction of the ministry charged with labour and social policy and have difficulties financing the accommodation of underage asylum seekers. Minors in Homes who express the intention to seek asylum are referred to one of the Asylum Centres (in Bogovađa or Banja Koviljača). How long they stay in the Homes depends on when the Asylum Centres can take them in.

The Belgrade Home for Children and Youths accommodated 38 unaccompanied minors in the first nine months of the year; 24 of them expressed the intention to seek asylum.¹⁵⁸ In the same period, the Niš Home for Children and Youths accommodated a total of 41 unaccompanied minors, 39 of whom sought asylum.¹⁵⁹

The minors staying in the Belgrade and Niš Homes are *de facto* deprived of liberty, which is in contravention of the recommendations of the Committee for the Rights of the Child.¹⁶⁰ Both Homes are able to accommodate only boys, which is justified by the fact that there are hardly any underage girls seeking asylum.¹⁶¹ Due to the limited capacities of the two Homes, which can take in 22 boys altogether, the Social Work Centres in the north and south of the country are forced to themselves find temporary accommodations for the underage migrants.

In Vojvodina,¹⁶² unaccompanied underage asylum seekers are temporarily accommodated in the Safe House for Children in Novi Sad and the Home for Children and Youth Kolevka in Subotica.

The Novi Sad Safe House for Children has been operating within the Novi Sad Social Work Centre since 2003. Child victims of human trafficking and unaccompanied foreign minors found in the jurisdiction of the Novi Sad Police Administration are referred to the Safe House. Underage aliens found in other municipalities are exceptionally also referred to the Safe House, but the Novi Sad Social Work Centre is reluctant to accommodate them because no additional funds are earmarked for the accommodation of alien minors.

When they establish contact with an unaccompanied foreign child, the Novi Sad police summon the Social Work Centre staff, who are on duty round the clock and take the minor to the Social Work Centre. Minors placed in the Safe House undergo check-ups conducted by the nurses who are on duty in the Safe House at all times. For preventive reasons, the minor is placed in a separate room with two beds and two auxiliary beds until s/he is if necessary taken to the Out-Patient Health

156 *Serbia as A Safe Third Country*, str. 10. Prioritized identification of a minor includes age assessment and should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such – see CRC General Comment No. 6, paragraph 31 (i).

157 RS Government Decision on the Network of Social Protection Institutions, *Sl. glasnik RS* 51/08.

158 Data quoted in the publication *Children before the Law*, by Miroslava Jelačić, Group 484, Belgrade, 2013.

159 *Ibid.*

160 CRC General Comment No. 6, paragraph 40. The minors may leave the Home only if they are escorted by the staff. The CPT, which visited the Niš Home in 2011, also qualified this as deprivation of liberty (more on their findings below).

161 The Commissioner for Protection of Equality shares this view. See her Opinion No. 379/2012 of 3 December 2012, available in Serbian at <http://www.azil.rs/doc/poverenica.pdf>.

162 All the information on underage aliens and underage asylum seekers in the territory of Vojvodina that is quoted in this Report was collected by the Novi Sad NGO Humanitarian Centre for Integration and Tolerance, HCIT (<http://hcit.rs>) in the January-December 2012 period.

Clinic for a medical examination, usually the following day. A minor whose life is in danger of has suffered grave physical injuries is immediately taken to the hospital.

Either the manager of the Safe House or a Social Work Centre staff member, a pedagogue or psychologist by profession, is appointed the minor's guardian. Alien minors spend less time in the Safe House, between 10 and 15 days, i.e. until all the documents for their reassignment to the Belgrade Centre for Underage Asylum Seekers within the Home for Children and Youths are collected. The Safe House is a minimum security establishment and underage asylum seekers have been known to leave the establishment of their own accord.

According to the Safe House records, it provided temporary shelter to 15 foreign minors in 2011; they were assigned temporary guardians and then moved to the Belgrade Centre for Underage Asylum Seekers. Fifty two unaccompanied minors stayed at the Safe House in 2012; the Social Work Centre moved 24 of them to the Belgrade Centre for Underage Asylum Seekers and 28 of them left the Safe House of their own will. According to the information at the disposal of the Safe House staff, all the unaccompanied minors that stayed at the Safe House had expressed the intention to seek asylum. The Safe House in 2011 accommodated unaccompanied minors from Albania who did not express the intention to seek asylum; they were driven to the Merdare border crossing with Kosovo by the Social Work Centre staff.

Subotica has a Home for Children and Youths Kolevka, where unaccompanied foreign minors are accommodated by the Subotica and Kanjiža Social Work Centres. The older children usually spend only one day in this establishment. More precisely, only young minors are accommodated in Kolevka, while the older ones (particularly those who claim they are underage but the Social Work Centre staff assess that they are actually over 20 years old) are rarely accommodated in this establishment, but frequently just stay the night. According to the data the HCIT obtained from the Subotica Social Work Centre, 50 foreign minors were temporarily accommodated in the Kolevka Home; 11 of them were transferred to the Belgrade Centre for the Accommodation of Unaccompanied Foreign Minors, two to the Asylum Centre in Bogovađa and one girl was taken to the Safe House in Novi Sad, i.e. fourteen altogether. The others ran away. Some of the minors had been in such a poor psycho-physical condition that they had to be hospitalised. The Social Work Centre covered the costs of their treatment.

Niš Home for Children and Youths

As mentioned above, when the police first establish contact with an irregular migrant who declares that he is a minor, they contact the local Social Work Centre, which designates him a temporary guardian. In the event the first contact was established in South Serbia, the minor is referred to the Niš Home for Children and Youths. The minor then declares whether he wishes to seek asylum in the Republic of Serbia in the presence of an interpreter. The Home avails itself of the services of an English interpreter. Despite the management's claims that the minors can communicate in English, this practice is concerning because a large number of asylum seekers in Serbia do not speak English. The BCHR heard about a situation in which the staff was unable to communicate with an underage Turkish national because he only spoke Turkish.¹⁶³ In the event the unaccompanied minors state that they do not want to seek asylum, they are returned to the border of the state they came from (FYROM, Kosovo or Bulgaria in most cases)¹⁶⁴. If they state that they wish to seek asylum, they are referred to one of the two Asylum Centres (in Bogovađa or Banja Koviljača). As already noted, the duration of their stay in the Home depends on whether the Asylum Centres have the capacities to take them in. They are transported to the Asylum Centres in vans, in the company of their guardians. The underage asylum seekers are kept in a separate room in the Home, which is locked at nights. The room, which includes a bathroom, has bars on the windows and is in pretty bad shape. The ceiling has caved in and the room is filled with an unpleasant stench. There

163 The staff of the Niš Home for Children and Youths communicated this information to the BCHR during one of their regular weekly telephone conversations.

164 See Chapter 6 on the procedure for deporting illegal migrants, including underage illegal migrants, from Serbia.

are four bunk beds, i.e. eight beds, in the room. The underage asylum seekers may use the Home sports grounds and yard during the day. If they have money, they may leave the Home and go shopping if they are escorted by the staff.

The Home staff (psychologists, pedagogues) do not conduct meaningful activities with the underage asylum seekers, because they stay in the Home for short periods of time and because of the language barriers. The minors get along well with the other children staying in the Home, although the other wards have been allegedly known to steal the underage asylum seekers' money on occasion.

In its Report on its visit to the Republic of Serbia on 1–11 February 2011, which was published on 14 June 2012,¹⁶⁵ the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) qualified as unsatisfactory the living conditions in the Niš Home facility for underage unaccompanied foreign nationals and recommended its urgent refurbishment. The CPT also noted the unacceptable practice of depriving the children living in the room of daily outdoor exercise.¹⁶⁶ In its Response to the CPT Report,¹⁶⁷ the Republic of Serbia said that it agreed with the CPT's assessment of the situation in Niš and had accordingly undertaken activities with a view to exchanging experiences with the Belgrade Home for Children and Youths, whose unit for accommodating underage unaccompanied aliens has been operating successfully since 2006. The Government also said that “depending on the amount of the funding in the budget for 2012, ... shall allocate the funds for the refurbishment and adaptation“ of the Niš Centre for the Accommodation of Underage Aliens Unaccompanied by Parents or Guardians.¹⁶⁸

The refurbishment of the unit began in mid-December 2012 with the UNHCR's financial support.

Belgrade Home for Children and Youths Vasa Stajić

The Home can accommodate up to 76 children; 12 of the beds are envisaged for underage unaccompanied irregular migrants.¹⁶⁹ The girls are put up in separate rooms, which are not in the ward where asylum seekers are accommodated. Underage girls hardly ever arrive in Serbia unaccompanied. The Home has trouble funding the activities targeting underage unaccompanied migrants. No funds were earmarked for their care in the first 3.5 years since this unit in the Home was established. The Ministry of Labour, Employment and Social Policy Ministry covered 50% of these expenses in the second half of 2012.¹⁷⁰

The underage aliens are brought to the Home by the police officers and are escorted by the staff of Social Work Centre within whose catchment area the police first established contact. The minors are designated guardians within 24 hours from admission. The Home has brochures on the right to asylum and the asylum procedure in languages the minors understand. The Home also provides the minors with interpreters. In the event the minors express the intention to seek asylum,¹⁷¹ the Home notifies the Asylum Commission thereof and the minors are escorted by their guardians to an Asylum Centre that can take them in. The minors usually stay between three and seven weeks in the Home, depending on how long they have to wait for a bed to free up in an Asylum Centre. Minors who do not declare the intention to seek asylum may not stay on in the Home and the police transport them to the border. The Home provides the underage aliens with food meeting their religious dietary requirements. The rooms they sleep and spend time in are in decent shape. They have the freedom of movement in the Home compound, but may leave

165 See the CPT Report on its visit to Serbia in 2011, available at <http://www.cpt.coe.int/documents/srb/2012-17-inf-eng.htm>.

166 *Ibid*, paragraphs 147 and 149.

167 The Response of the Government of Serbia is available at <http://www.cpt.coe.int/documents/srb/2012-18-inf-eng.htm>.

168 See paragraph 149.

169 The Home also has units for children imposed correctional measures and a centre for accommodating children without any or adequate parental care.

170 BCHR visited the Belgrade Home for Children and Youths Vasa Stajić on 26 November 2012.

171 Around 90% expressed the intention to seek asylum. Source: *ibid*.

it only in the company of their guardians. The Home does not have medical professionals on staff and the wards are taken to the health centres for their examinations. The girls are accommodated in separate rooms, which are not located in the ward designated for the underage asylum seekers because hardly any girls who arrive in Serbia are unaccompanied. The underage migrants can watch TV in their own languages, they are allowed to use the Internet club (around an hour and a half a day), play computer games and chess and use the sports grounds. They are free to communicate with the other children.

The Belgrade Home has a separate Department for Coordinating the Protection of Human Trafficking Victims, which has not identified any irregular migrants as victims of human trafficking yet.

9. Psychological State of the Asylum Seekers Living in the Asylum Centres in Serbia¹⁷²

The UNHCR in 2012 provided group and individual psychological counselling to the asylum seekers living in the Banja Koviljača and Bogovađa Asylum Centres. The psychological condition of asylum seekers in Serbia is predominantly characterised by a high degree of trauma. Namely, most of them had experienced a trauma before arriving in Serbia, having fled from their home towns because their lives were in danger, because they were physically or psychologically abused, because their personal freedom was jeopardised or they lacked the basic living conditions. The group and individual psychological counselling focused on helping the asylum seekers confront their experiences and express their feelings. Their state of mind is further affected by the asylum process they begin upon arrival in Serbia, because they experience strong and continuous feelings of uncertainty, which exacerbate their anxiety and feelings of helplessness and of inability to have any control over their lives, which may result in apathy and depression in the long term. Their dissatisfaction with the position they are in often causes anger and fury on the one hand, and results in their withdrawal, feelings of abandonment and loss of trust in the state system and other people, on the other. Many asylum seekers feel useless and helpless because they are not entitled to work; they spend a lot of time doing nothing in the Centres, which do not organise enough meaningful activities. This results in boredom and the feeling of uselessness and may affect their overall self-respect and self-confidence.

All this exacerbates the deep vulnerabilities of the asylum seekers and increases the risk of psychological disorders, which is why staff working with them have to be sensitised and provide them with support, understanding and psychological empowerment. Furthermore, all relevant actors, above all the state institutions, must help the asylum seekers feel safe and secure during the asylum process in Serbia. The basic trust and hope of this group are gravely undermined by the traumatic experiences they have had. The provision of adequate care by the community they are in could allay their feelings of destitution and isolation. This is why it is incumbent upon all the stakeholders in the asylum system in Serbia to coordinate and develop an efficient system of support to the asylum seekers.

The Convention on the Rights of the Child imposes upon the states the obligation to provide rehabilitation programmes and quality counselling for children who had been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman or degrading treatment or armed conflicts.¹⁷³ To the best of BCHR's knowledge, such programmes are not conducted in Serbia.

172 The information about the psychological condition of the asylum seekers was obtained from the UNHCR.

173 CRC General Comment No. 6, paragraph 47.

10. Status of Irregular Migrants in Penitentiaries

The so-called irregular migrants serving short prison sentences of misdemeanours account for most foreigners incarcerated in the Serbian penitentiaries.¹⁷⁴ In the January-October period, around 3000¹⁷⁵ foreign nationals were imprisoned in the Serbian penitentiaries (1663 of whom in the Subotica District Prison alone), most of them for illegally crossing the state border¹⁷⁶ or illegal presence in the Republic of Serbia¹⁷⁷.

The BCHR team visited the penitentiaries in which foreign nationals were serving their misdemeanour sentences in September 2012. It particularly focused on the status of irregular migrants sentenced for illegally crossing the state border or illegally residing in the Republic of Serbia.¹⁷⁸ The following penitentiaries were visited: the Belgrade/Padinska Skela Correctional Establishment, the Subotica and Vranje District Prisons and the Sremska Mitrovica Correctional Establishment. Although each of these establishments treats foreign nationals serving misdemeanour sentences differently, what all of them have in common is difficulties in communication between the penitentiary staff and the foreign prisoners, given that the establishments do not engage interpreters. The foreign inmates are not properly familiarised with House Rules or their rights and obligations under the Penal Sanctions Enforcement Act (PSEA), given that these regulations have not been translated into the languages spoken in the countries which most of the irregular migrants come from (Pashtu, Arabic, Urdu, Farsi)¹⁷⁹. The staff and the irregular migrants communicate in English because, as the governors of the visited establishments claim, there is always another inmate who speaks English and interprets for the others.

Irregular migrants serve ten-day prison sentences on average; the sentences for these misdemeanours range between 2–3 and 30 days.¹⁸⁰

Admission

According to the penitentiary governors, aliens are allowed to make a telephone call at the penitentiary's expense and contact the diplomatic consular mission of their country of nationality on admission. The alien prisoners rarely request to use the phone on admission. The penitentiary management notifies the Ministry of Foreign Affairs that a foreign national is serving a misdemeanour prison sentence in their establishment and the Ministry then notifies the diplomatic consular mission of his/her country of origin thereof. This practice of mandatory notification is disputable given that data on the movement of potential asylum seekers may reach their alleged persecutors in their

174 There are views that irregular migrants should not be sentenced by imprisonment at all. The CPT, for instance, "considers the detention of irregular migrants in a prison environment to be fundamentally flawed". See the CPT 19th General Report, paragraph available at <http://www.cpt.coe.int/en/annual/rep-19.pdf>. The same view is reiterated in the Comment of the 2006 European Prison Rules.

175 Information obtained in response to a request for access to information of public importance.

176 Art. 65, State Border Protection Act, *Sl. glasnik RS* 97/2008.

177 Art. 85(1(3), Aliens Act.

178 Arts. 84 and 85 of the Aliens Act, Art. 65 of the State Border Protection Act.

179 The CPT underlined the following in its 19th General Report (paragraph 84): "It is essential that newly arrived irregular migrants be immediately given information on these rights in a language they understand. To this end, they should be systematically provided with a document explaining the procedure applicable to them and setting out their rights in clear and simple terms. This document should be available in the languages most commonly spoken by the detainees and, if necessary, recourse should be had to the services of an interpreter."

180 A total of 2,522 people served sentences in Serbian penitentiaries in the first five months of 2012 for violating Article 10(2), Article 65(1), Article 41(1) or Article 65(4) of the State Border Protection Act or Article 85(1(3)) of the Aliens Act. More statistical data on illegal migrations are available in the BCHR Report: Status of Asylum Seekers in Serbia (January-June 2012), available in Serbian at http://www.azil.rs/doc/izvestaj_januar_jun_2012_BCHR.pdf.

countries of origin. In other words, if a person had really been persecuted by the state authorities, notifying those authorities that s/he is in Serbia may endanger his/her life and safety. Therefore, the diplomatic consular missions of the countries of origin should be noted that their national was deprived of liberty only with his/her explicit consent. The CPT also subscribes to this view.¹⁸¹ On the other hand, there are difficulties in obtaining such consent because of the difficulties in communication with the convicted aliens.

Pursuant to the PSEA, inmates are subjected to medical examinations on admission. These examinations usually boil down to physical check-ups. Lab analyses are conducted if necessary. The absence of interpreters also hinders the medication examinations on admission and during the foreign inmates' incarceration.¹⁸² A doctor can obtain the basic information on the patient's state of health and medical history (anamnesis) only if the patient or another foreign inmate in the establishment speaks English. For example, the medical reports of foreign inmates in the Vranje District Prison are quite brief and almost identical, which leads to the conclusion that their examinations had not been conducted properly. The Sremska Mitrovica penitentiary medical records lead to the conclusion that foreign inmates do not undergo check-ups on admission unless they themselves ask to be examined.

Accommodation

Article 7 of the Penal Sanctions Enforcement Act¹⁸³ clearly states that “[A] prisoner shall not be discriminated on grounds of race, colour, sex, language, religion, political or other convictions, ethnic or social origin, financial status, education, social or another personal feature”.

Irregular migrants are however discriminated against because this PSEA provision is not respected in principle with regard to their accommodation. During its visits to the penitentiaries in which irregular migrants have been serving sentences imposed upon them mostly for misdemeanours, the BCHR team established that the penal regime applied to foreign inmates and the cells they are living in differed from those of other inmates serving misdemeanour sentences. Namely, many of them are kept locked in overcrowded cells up to 23.5 hours a day, and some of them even have to sleep on the floor (in the Subotica District Prison and the Sremska Mitrovica Correctional Establishment). The foreign inmates do not have access to the common day rooms in either of the two penitentiaries and spend all day in the cells they sleep in. The interviewed inmates also claimed that they were deprived of the right to spend an hour a day outdoors. In the CPT's opinion, a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence.¹⁸⁴ If irregular migrants are nevertheless detained, they should be subjected to limited restrictions, i.e. should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible.¹⁸⁵

According to the Governor of the Subotica District Prison, up to 30 people lived in one cell during the summer of 2011. This practice amounts to discriminatory treatment, because Serbian nationals serving misdemeanour sentences are accommodated in much more humane conditions – they are not locked up, they have beds and access to the day rooms. The fact that the cells in which foreign inmates are held are overcrowded is obviously also the consequence of their groundless separation from Serbian nationals serving misdemeanour sentences. The foreign and domestic inmates are kept apart to avoid any conflicts arising from cultural differences, which is understand-

181 CPT 19th General Report, paragraph 83.

182 The CPT states the following in its 19th General Report (paragraph 92): “Whenever members of the medical and/or nursing staff are unable to make a proper diagnostic evaluation because of language problems, they should be able to benefit without delay from the services of a qualified interpreter. Further, detained irregular migrants should be fully informed about the treatment being offered to them.”

183 *Sl. glasnik RS* 85/05, 72/09 and 31/11

184 See the CPT 19th General Report, paragraph 77.

185 *Ibid*, paragraph 79.

able to an extent. However, this practice should under no circumstances result in the management assigning all the aliens to the same cells, which are consequently overcrowded, which may result in inhuman or degrading treatment.

The food in all the penitentiaries satisfies the religious dietary requirements of the foreign inmates. None of these establishments registered attempts of escape or use of means of force against the irregular migrants. The foreign inmates in the Vranje District Prison told BCHR that they were not taken out for their daily exercise outdoors at all and that they were not allowed to use the telephone. It is, however, possible, that they have not been exercising these rights because they are unaware that they have them, given that they are unable to read the PSEA, which has not been translated into the languages they understand. The BCHR is aware of the fact that some of the PSEA provisions are often very difficult to implement in practice (e.g. ensuring that the inmates are provided with the opportunity to spend two hours a day outdoors, that each inmate has the requisite number of square meters of living space, that they have access to the day rooms, etc) because the penitentiaries are overcrowded and suffer from architectural deficiencies. This problem is however different and necessitates equal treatment of all inmates and does not allow any distinctions between them on grounds of nationality, language or race. Particular attention should be devoted to the Subotica District Prison, which is exposed to a large inflow of migrants found guilty of misdemeanours because of the proximity of the Hungarian border. The penitentiaries, therefore, have to provide additional facilities for the foreign inmates and subject them to the same regime they apply to domestic inmates to them.

Realisation of the Right to Asylum and Access to the Asylum Procedure during Imprisonment

The governors of the penitentiaries claim that none of the foreigners serving misdemeanour sentences have sought asylum during incarceration, which may be due to their unfamiliarity with the right to seek asylum while they are deprived of liberty, but also to the penitentiary staff's inability to recognise their intention to seek asylum. Once the irregular migrants have served their sentences, they are taken over by the police. The managements of the penitentiaries do not know where the aliens are taken after release; some governors claim that they are "deported to the border" or taken to the Aliens Reception Centre in Padinska Skela if the courts had ordered their deportation. During our visit to the Subotica District Prison, we were told that misdemeanour judges endeavoured to order the release of more than one irregular migrant the same day, to cut the costs of their transportation.

As far as the family unity principle is concerned, it needs to be noted that the families of some aliens serving misdemeanour prison sentences were living in the Asylum Centres i.e. had already initiated the asylum procedure. The principle of family unity is laid down in the Asylum Act, under which the competent authorities shall take all the available measures to preserve the unity of families during the asylum procedure and after asylum is granted. However, the principle of family unity is hardly realised in practice due to the lack of coordination between the state authorities conducting the asylum procedure and the ones charged with protecting the state borders and the above-mentioned shortcomings of the misdemeanour proceedings.

Police Treatment of Irregular Migrants

The police may exceptionally hold an alien up to 24 hours to ensure his involuntary removal.¹⁸⁶ Pursuant to the Misdemeanour Act, the police may order 24-hour custody of an offender caught in the commission of a misdemeanour who cannot be immediately taken before a judge and there are reasons to believe that s/he will abscond or continue with the commission of the misdemeanour.¹⁸⁷

The CPT recommends that illegal migrants be notified in a language they understand of the three fundamental rights of persons deprived of liberty: the right of access to a lawyer, the right

186 Article 48, Aliens Act

187 Article 165, Misdemeanour Act.

of access to a doctor and the right to notify a relative or a third party of their choice about the detention measure.¹⁸⁸ Furthermore, they should be notified of the right to asylum and other rights asylum seekers are entitled to.

Article 54(1) of the Police Act¹⁸⁹, whose provisions on safeguards afforded to people in custody apply also to custody pursuant to the State Border Protection Act, sets out that people placed under custody must be notified of the right to an attorney of their own choosing and of the right to have their next of kin notified of their custody in their native language or a language they understand. Paragraph 2 of this Article lays down that aliens shall be instructed in their native language or a language they understand that the diplomatic consular missions of the states they are nationals of shall be notified of their custody at their request.

Under the Asylum Act¹⁹⁰, police officers controlling entry into the Republic of Serbia and elsewhere in its territory shall provide the illegal migrants with access to the asylum procedure. Notification of people deprived of liberty of these rights is a separate issue. People held in custody pursuant to the above-mentioned laws are notified of their rights only orally.¹⁹¹ On the other hand, Serbian law does not oblige the authorities to notify irregular migrants of their right to seek asylum. The current practices do not ensure the notification of the irregular migrants of their rights, above all, due to the difficulties in communication with them and the lack of information sheets in languages they understand. Therefore, information sheets about the rights of persons deprived of liberty must be translated into the languages illegal migrants understand and disseminated to them when the police take them into custody. These information sheets should outline both the rights of persons deprived of liberty, the right to asylum and the other rights enjoyed by asylum seekers.

188 CPT's 19th General Report, paragraph 84.

189 *Sl. glasnik RS* 101/2005 and 63/2009

190 Article 22(1), Asylum Act.

191 The Government of Serbia Response to the CPT Report on its Third Visit to the Republic of Serbia on 1–11 February 2011, CPT/Inf (2012) 18

Annex 1

Extradition Procedure and Asylum – Case Study

In 2012, the Subotica Higher Court conducted extradition proceedings against a national of Turkey, a Kurd, A.B, who was granted refugee status by the Federal Republic of Germany. During the asylum procedure, the German authorities found that A.B. had good cause to fear political persecution in Turkey. A.B. arrived in Serbia with a refugee travel document in July 2012, but the Serbian police deprived him of liberty pursuant to an Interpol arrest warrant. The proceedings to extradite A.B. to Turkey at its request were initiated before the Subotica Higher Court. The Turkish courts had sentenced A.B. to imprisonment for taking part in an armed secession of part of the country. A.B. was ordered into custody in July and remained in detention for six months.

Turkey failed to forward the final judgment based on which A.B. was allegedly convicted during the extradition proceedings; it merely communicated evidence proving that specific investigation activities had been launched against him. Under the Act on International Legal Aid in Criminal Matters,¹⁹² extradition shall be granted (provided that the other procedural requirements specified in Articles 7 and 17 are satisfied as well) if the offence in respect of which it is requested is not regarded as a political offence or an offence connected with a political offence i.e. an offence exclusively regarding the violation of army duties and in the event the requesting state makes the final judgment available. The Higher Court ignored the fact that A.B. was a refugee and was thus granted international protection precisely because it had been established that he was a victim of political persecution. Rather, it asked the Turkish authorities to communicate the final judgment convicting A.B. Given that the Turkish authorities did not respond to its request, the Higher Court ruled that the extradition requirements had not been fulfilled. However, the competent Appellate Court quashed the judgment and instructed the Higher Court to again request a copy of the final judgment from Turkey. The Appellate Court also ignored the fact that A.B. was a refugee. Turkey failed to forward the judgment during the retrial and the Higher Court again ruled that the extradition requirements had not been satisfied. The Appellate Court held a session in December 2012, at which the Appellate Public Prosecutor agreed with the Higher Court that this was indeed the case. The Appellate Court, however, again overturned the Higher Court decision and instructed the Higher Court to seek the final judgment from Turkey again. Under the Act, the final decision granting or refusing extradition is rendered by the Minister of Justice.

The UNHCR intervened in this proceeding as an *amicus curiae* and alerted the court that refugee A.B. enjoyed international protection and that his extradition to Turkey would be in violation of the principle of *non-refoulement*. During the retrial, the Higher Court found that the extradition requirements had not been fulfilled because Turkey had not forwarded the final judgment against A.B. but the Appellate Court quashed its decision again (for the third time). At a subsequent retrial, the Higher Court established that the requirements for A.B.'s extradition had not been satisfied and released him from detention on 27 February. A.B. tried to leave Serbia but was stopped by the police at the border with Hungary and deprived of liberty. The warrant against him was lifted on 1 March 2013 and A.B. left Serbia.¹⁹³ The prosecutor did not appeal the Subotica Higher Court's decision to release A.B. from detention. The Appellate Court in Novi Sad is to rule on the final outcome of the extradition procedure, i.e. whether it will be discontinued legally and formally.¹⁹⁴ A.B.'s defence counsel filed a constitutional appeal with the Constitutional Court on 26 January 2013, asking it to issue a temporary measure and release A.B., i.e. find that A.B.'s right to liberty had been violated by his unlawful detention and seeking compensation for unlawful detention.¹⁹⁵

192 *Sl. glasnik RS* 20/2009

193 Information obtained from A.B.'s lawyer Juhas – Đurić Viktor from Subotica.

194 The procedure for extraditing A.B. had not been completed by the time this Report went into print.

195 The case was filed with the Constitutional Court under the following reference number UŽ-663/2012 on 26 January 2013.

Although the Embassy of the Federal Republic of Germany notified the court during the extradition proceedings that A.B. had been issued a refugee travel document and that the German authorities had refused to extradite him under the same Interpol warrant because he was being tried by a military court in Turkey and there were fears that his right to a fair trial was violated in the proceeding, neither the Higher nor the Appellate Courts took into consideration the fact the A.B. enjoyed international protection as a refugee and that the Republic of Serbia would violate its non-refoulement obligation if it were to extradite him.

All other states are under the duty to respect the refugee status granted in one state,¹⁹⁶ wherefore this extradition proceeding is absolutely in contravention of the international obligations assumed by the Republic of Serbia. Namely, one of the essential aspects of refugee status is its international character, while the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognised also by the other Contracting States.¹⁹⁷ This is corroborated also by the states' obligation to recognise a refugee travel document issued by the state that granted the refugee status. The provisions of the 1951 Convention, seen against the background of the travaux préparatoires leading to its adoption and of earlier international refugee instruments, illustrate a fundamental concern of Contracting States to safeguard the maintenance and continuity of refugee status once it has been determined. This preoccupation is evident in the definition of the term "refugee" in article 1. A (1), which seeks to preserve refugee status under earlier international refugee instruments, irrespective of the State by which such status may originally have been recognised.¹⁹⁸

In view of the foregoing, the Republic of Serbia is under the obligation not to expel A.B. to Turkey, where his liberty, safety and physical integrity would be in danger, which is precisely the reason why he was granted refugee status in Germany.

Although the Act on International Legal Aid in Criminal Matters does not explicitly prohibit extradition proceedings against people granted refugee status, this ban clearly emanates both from the relevant international treaties and the generally accepted rules of international law, and from the Asylum Act, which is a *lex specialis* vis-à-vis the law governing extradition, wherefore it may derogate its more general provisions.

All the above considerations lead to the conclusion that the Higher and Appellate Court judges are interpreting the Act on International Legal Aid in Criminal Matters much too restrictively and that they are not sufficiently familiar with refugee law and do not directly apply ratified international treaties and generally accepted rules of international law.

196 International Court of Justice judgment in Asylum Case (Columbia v. Peru) of 20 November 1950, ICJ Reports 1950, p. 266, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=haya&case=14&k=d4&p3=0>

197 UNHCR, Extraterritorial Effect of the Determination of Refugee Status, 17 October 1978, No. 12 (XXIX) – 1978, available at: <http://www.unhcr.org/refworld/docid/3ae68c4447.html> [accessed 12 December 2012]

198 UN High Commissioner for Refugees, Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 24 August 1978, EC/SCP/9, available at: <http://www.unhcr.org/refworld/docid/3ae68cccc.html> [accessed 12 December 2012]

Annex 2

Media Reports on Asylum Seekers in Serbia

“They call them grasshopper people, because they apply the technique of these insects to move from one destination to another. Most of them are Aries, that is, they say they were born in January so that they can remember their birthdays more easily, because they do not carry any documents on them. They are 30 years old on average, but there are children and teenagers among them as well. Almost 70% of them have completed only primary school. They are good at respecting authority, they sometimes relax, but their prime concern is to reach their desired destination as soon as possible. The motives and, at the same time the major temptations and challenges in this adventure are usually economic in character...”¹⁹⁹

The Serbian media reports in 2012 mostly focused on the continuous increase in the number of asylum seekers in Serbia, on the problems accommodating them, on the state authorities’ endeavours to suppress illegal migration and on the alleged irregularities in the work of the Bogovađa Asylum Centre management. The protests of the residents of the Mladenovac Municipality that ensued after news broke that a new asylum centre would open in their neighbourhood demonstrate that the population harbours prejudices against the asylum seekers and has groundless fears of having them live close by.²⁰⁰ The xenophobia is exacerbated by sensationalist press articles entitled e.g. “Stampede from Afghanistan”²⁰¹, “Banja Peacefully Sleeping for Now”²⁰² and “Asylum Seekers are Stealing, the State Should Pay”.²⁰³

The article headlined “Woods Full of Asylum Seekers” reported on the accommodation problems in the Bogovađa Asylum Centre and underlined that parts of this town were “teeming” with asylum seekers. The article has caused latent fear of the migrants’ presence by underlining that the asylum seekers have occupied only the uninhabited areas, such as woods, fields and the parts in which the local population is not living. It even included statements on the hunger some of the asylum seekers have been feeling and that some of them had to resort to breaking into the summer cabins because of their intolerable living conditions, thus portraying the asylum seekers as potentially dangerous to the Bogovađa population and natural habitat. The author wrote about the difficulties asylum seekers awaiting accommodation were facing, but his descriptions of the situation were frequently frivolous. For instance, he compared the old abandoned school in which the migrants found temporary shelter to a five star hotel although it lacks water, electricity and windows. The sentence beginning with the following words: “Deep in the Bogovađa woods (...)” is a clear illustration of discourse causing apprehension among the local population, because it suggests that asylum seekers occupy the deep woods into which people do not venture and thus implies that the migrants are involved in suspicious activities “deep in the woods” which are not visible to the locals. Such reporting can foment fears and prejudices. The author then went on to say that the locals found the asylum seekers in “their” woods, which can be interpreted as usurpation of the local population’s property.

The article quoted the head of the Bogovađa Local Community, which incites fear of the asylum seekers and indicates that they are not welcome in the streets of Bogovađa:

“...apart from sleeping in the woods, the asylum seekers spend the days sitting in the streets, so that the parents drive their children to school to be on the safe side. Winter is coming, who knows where the ones now living in the woods will move to then. It’s not all the same, because Bogovađa has a hundred houses and three hundred asylum seekers!”

199 “Asylum Seekers on the Lajkovac Railway”, *Politika*, 7 December 2012, p. A15

200 Protest in Mladenovac against Potential Arrival of Asylum Seekers, available in Serbian at <http://www.blic.rs/Vesti/Beograd/325025/Protest-u-Mladenovcu-protiv-moguceg-dolaska-azilantata>

201 *Večernje novosti*, 04 April 2012, p. 4

202 *Večernje novosti*, 27 September 2012, p. 31

203 *Večernje novosti*, 27 September 2012, p. 17

The last sentence uttered by the head of the Bogovađa Local Community underlines the potential threat migrants may pose to the local households once winter comes and they can no longer live outdoors.

The article also mentioned a very delicate issue – reports that the Asylum Centre staff received bribes. The author quoted two unidentified interlocutors directly or indirectly linked to the work of the Asylum Centre. The way in which the author cited allegations on the treatment of asylum seekers voiced by an Asylum Centre worker leaves a lot to be desired and may result in public condemnation of the work of the Asylum Centre. The sensationalist reporting on the alleged irregularities in the work of the Asylum Centre in Bogovađa may undermine the investigation into suspicions of corruption and give rise to animosities between the Centre's management and the asylum seekers. Media should thus exercise additional diligence in their reports about this topic.

Another concerning fact is that the media reporting on the plight of asylum seekers do not ensure that their identity is protected and publish both their full names and their photographs.²⁰⁴ They thus put at risk people who are reasonably afraid of persecution in their countries of origin and who can be recognised and found by those endangering their lives and safety and because of whom they had been forced to flee their countries. In addition, the Belgrade daily *Danas* published the full name of the asylum seeker who made statements about bribery in the Bogovađa Asylum Centre,²⁰⁵ which may undermine his feeling of safety in the Asylum Centre as well.

Most media reports state that the asylum seekers want to reach West European countries and that Serbia is merely a stop on their route to a better life. There appears to be an intention to justify the inefficiency of the asylum system in Serbia, in which hardly anyone is reportedly seeking refuge.

„A total of 206 foreign nationals – most of them from Afghanistan and Somalia – have sought asylum from the Serbian authorities since the beginning of the year, but none of them have been granted it, the Ministry of Internal Affairs stated. In the same period, 1,212 foreign nationals expressed the intention to seek asylum in Serbia, using that opportunity to reach European states through the territory of our country. With a view to preventing illegal entries, the Border Police Administration has been undertaking a series of measures and using manual and thermovisual cameras and the “aerostat”, air balloons with thermovisual cameras, and has prevented the illegal entry of 4,078 aliens since the beginning of the year ...“²⁰⁶

This article suggests that not only are aliens abusing the asylum system in Serbia, but that the Border Police Administration should be given a free hand to suppress illegal migration by all means, to literally hunt the irregular migrants down. Claiming that no one wants asylum in Serbia is extremely irresponsible, particularly since such assertions are not corroborated by facts, given that the competent authorities do not even rule on the merits of the vast majority of the asylum applications and merely dismiss them by applying the safe third country concept, without establishing whether the applicants are actually refugees or not.

Media often misrepresent the information on the number of people granted asylum. Some authors resort to humorous depictions, minimising the plight of the asylum seekers.

„Fifteen or so asylum seekers – migrants from Somalia, Pakistan and Afghanistan – set up “camp” in the heart of the Subotica landfill and have lived in it for almost three months. They built igloos from the waste and sleep on bare earth. Apart from the cold, they have problems finding food, because most of them have hardly any money. Many of them have left their home countries months, even years ago, travelling towards a “better life” they cannot reach – one of their destinations was Greece, in which they spent a year or two, then Macedonia, and now they are in Serbia, waiting for a miracle to happen, to pass the iron “Schengen Gate” and go off into the brave new world... Still, some are more fortunate, and have more money, and they were under “rented roofs” when winter set in but all of them are mostly illegal residents of Subotica. Namely, only a few have been granted asylum, because obtaining the status of asylum seeker simultaneously means deportation to the Centre in Banja Koviljača. But, one thing is certain, there are no

204 Freezing Cold: Asylum-Seekers Almost Lost Their Legs, *Kurir*, available in Serbian at <http://www.kurir-info.rs/smrzli-se-azilanti-umalo-ostali-bez-nogu-clanak-568143>

205 Asylum Seekers Asked to Pay Bribe for Accommodation?, *Danas*, 24 September, 2012, p. 1

206 *Politika*, 18 August 2012, p. A7

jobs for them in Serbia, and they came all the way to Subotica because that is where they can (illegally) cross into the EU the most easily. But, even when they succeed, the Hungarian police deport them back under the readmission agreement, which means that Serbia is under the obligation to return them to their home countries.”²⁰⁷

“One Somali, one Iraqi and one Egyptian Copt have so far been granted asylum in Serbia. Serbian documents were also granted athletes from Somalia, whom the media qualified as the future members of the national team of their new Balkan homeland, but they just “sprinted off”, to the West. Namely, asylum seekers waiting for the authorities’ decision, a several-month procedure, as a rule “disappear” from the national reception centres and illegally leave Serbia. They seek their fortune in one of the richer EU states.”²⁰⁸

These two articles illustrate the journalists’ unfamiliarity with refugee law, given that no one had been granted asylum and only five people were afforded subsidiary protection in Serbia at the time they were published. Journalists reporting on this topic have to have at least elementary knowledge to be able to distinguish between irregular migrants, asylum seekers and refugees, and to refrain from such humorous escapades which are actually quite insulting.

The media also published incorrect reports that asylum seekers in the Bogovađa Asylum Centre received only one meal a day.²⁰⁹ Actually, the asylum seekers, who had not been accommodated in the Centre, were provided with at least a meal a day lest they starve to death.

Despite their general unfamiliarity with refugee law, the media have on occasion reported on the plight of asylum seekers in Serbia impartially and with a lot of empathy

“The Regional Minority Centre yesterday vehemently condemned the dramatic situation in front of the Bogovađa Asylum Centre, where between 80 and 100 asylum seekers are living outside the Centre since all 150 beds in the Centre are taken. The fundamental rights of these people are violated – they do not have roofs over their heads, access to water or sanitary facilities, they are not getting any food. Their very survival and right to life in dignity are at stake.....”²¹⁰

The Serbian readers had the opportunity also to read about why asylum seekers have come to Serbia in search of refuge. The Belgrade daily published an article headlined “Heart in Syria” in which it told the story of a family that had to flee its home in Syria because of the violent armed clashes and come to Serbia.

„The street fighting with Kalashnikovs raged for a year and the cities were constantly bombed from airplanes and helicopters for the last eight months, and it became unbearable – our interlocutor said. – It was clear we could not stay in Syria another second when I received an anonymous letter saying I would be killed. We packed some of our belongings and headed towards the border with Turkey.”

Although such personal accounts stir the local population’s empathy and understanding the most easily, media reports disclosing the details about the asylum seekers can put their lives at risk and undermine the principle of confidentiality in the asylum process. The media should publish personal accounts without specifying who exactly they obtained the information from.

All the cited reports indicate that media professionals need to be trained in properly reporting about asylum-seekers and thus sensitise the local population and protect the asylum seekers. The general impression is that the media have failed to report accurately and comprehensively on the problems the asylum system in Serbia is fraught with. Media rhetoric should highlight that the asylum seekers are the ones living in fear and in need of the assistance and protection of the Republic of Serbia, not the ones causing problems to and fear in the local population.

207 *Danas*, 24 January 2012, p. 14.

208 *Politika*, 06 June, 2012, p. A7

209 *Danas*, 17 October 2012, p.1

210 Dramatic Situation in Front of the Asylum Centre, *Politika*, 26 September 2012, p. A7.

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