RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2013.

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RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2013

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Content

Acronyms

APC – Asylum Protection Centre

BCHR – Belgrade Centre for Human Rights

CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

EU – European Union

GAPA – General Administrative Procedure Act

IATA – International Air Transport Association

January-June 2013 Report – *Asylum in the Republic of Serbia: January-June 2013 Report,* Belgrade Centre for Human Rights, Belgrade, 2013

June-October 2013 Report – *Asylum in the Republic of Serbia: June-October 2013 Report,* Belgrade Centre for Human Rights, Belgrade, 2013

MIA – Ministry of Internal Affairs

NGO – Non-Government Organisation

NPM – National Preventive Mechanism

OJ – Official Journal of the European Union

OPCAT – Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

PA – Police Administration

Refugee Convention – 1951 UN Convention Relating to the Status of Refugees

Right to Asylum 2012 – *2012 Annual Report on the Right to Asylum in the Republic of Serbia*, Belgrade Centre for Human Rights, Belgrade, 2012

RS – Republic of Serbia

Serbia as a Country of Asylum – *Serbia as a Country of Asylum: Observations on the Situation of Asylum Seekers and Beneficiaries of International Protection in Serbia,* UNHCR, August 2012

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

International Sources of Law

United Nations

1. UN Convention on the Rights of the Child (*Sl. list SFRJ –Međunarodni ugovori i drugi sporazumi* 15/90 and *Sl. list SRJ – Međunarodni ugovori i drugi sporazumi*, 4/69 and 2/97).
2. UN Convention Relating to the Status of Refugees of 1951 (*Sl. list FNRJ – Međunarodni ugovori i drugi sporazumi* 7/60)
3. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Sl. list SFRJ – Međunarodni ugovori i drugi sporazumi* 9/91)
4. International Covenant on Civil and Political Rights (*Sl. list SFRJ* 7/71)
5. Protocol Relating to the Status of Refugees of 1967 (*Sl. list SFRJ – Međunarodni ugovori i drugi sporazumi* 15/67).

Council of Europe

1. European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (*Sl. list SCG – Međunarodni ugovori* 9/03)
2. European Convention for the Protection of Human Rights and Fundamental Freedoms, (*Sl. list SCG – Međunarodni ugovori* 9/03)
3. European Convention on Extradition (*Sl. list SRJ – Međunarodni ugovori* 10/2001)

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1. Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for inter-

national protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L. 180/1–180/30; 29.6.2013, (EU)2003/86.

2. Council Directive 2205/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326; 13 December 2005, pp. 13–34.
3. Council Directive 2003/9/EC of 27 January 2003 on minimum standards of the reception of asylum seekers, OJ L. 31/18–31/25; 6.2.2003, 2003/9/EC.

Regulations of the Republic of Serbia

1. Act on Employment of Foreign Nationals (*Sl. list SFRJ*, 11/78 and 64/89, *Sl. SRJ* 42/92, 24/94 and 28/96 and *Sl. glasnik RS* 101/05)
2. Act on International Legal Aid in Criminal Matters (*Sl. glasnik RS* 20/2009)
3. Act on the Basis of the Education System (*Sl. glasnik RS* 72/09 and 52/11)
4. Administrative Disputes Act (*Sl. glasnik RS* 111/2009)
5. Aliens Act (*Sl. glasnik RS* 97/2008).
6. Asylum Act (*Sl. glasnik RS* 109/07)
7. Constitution of the Republic of Serbia (*Sl. glasnik RS* 83/06)
8. Constitutional Court Act (*Sl. glasnik RS* 109/07, 99/11 and 18/13 – Constitutional Court decision)
9. Criminal Code (*Sl. glasnik* 85/2005, 88/2005 – corr, 107/2005 – corr, 72/2009, 111/2009, 121/2012 and 104/2013)
10. General Administrative Procedure Act (*Sl. list SRJ* 33/97, 31/01 and *Sl. glasnik RS* 30/10)
11. High Education Act (*Sl. glasnik RS* 76/2005, 100/2007 – authentic interpretation, 97/2008 and 44/2010 93/2012 and 89/2013)
12. Instructions on Submission of Applications and Issuance of Consent to Employ Foreign Nationals (*Sl. list SFRJ* 51/81 and *Sl. list SCG* 1/2003 – Constitutional Charter)
13. Instructions on the Treatment of Arrestees and Detainees (*Sl. glasnik RS* 101/05, 63/09 – Constitutional Court and 92/11).
14. Migration Management Act (*Sl. glasnik RS* 107/12)
15. Misdemeanour Act (*Sl. glasnik RS* 101/2005, 116/2008 and 111/2009)
16. Police Act (*Sl. glasnik RS* 101/2005 and 63/2009*)*
17. Primary School Act (*Sl. glasnik RS* 50/92, 53/93, 67/93, 48/94, 66/94 – Constitutional Court decision, 22/2002,62/2009 – other law 101/2005 – other law and 72/2009 – other law)
18. Republic of Serbia Government Conclusion 05 Ref. No. 019–340/2013 of 24 January 2013
19. Republic of Serbia Government Conclusion 05 Ref. No. 031–10248/2013–1 of 28 November 2013

20. Republic of Serbia Government Decision on Lists of Safe Countries of Origin and Safe Third Countries (*Sl. glasnik RS* 67/2009)
21. Republic of Serbia Government Decision on Network of Social Welfare Institutions (*Sl. glasnik RS* 51/08)
22. Republic of Serbia Government Decision on the Establishment of the Bogovađa Asylum Centre 05 Ref. No. 02–3732/2011 (*Sl. glasnik RS* 34/2011)
23. Republic of Serbia Government Ruling Appointing the Asylum Commission Chairperson and Members Ref. No. 119–6141/2012 of 20 September 2012.
24. Rulebook on Accommodation and Basic Living Conditions in Asylum Centres (*Sl. glasnik RS* 31/08)
25. Rulebook on Asylum Centre House Rules (*Sl. glasnik RS* 31/08)
26. Rulebook on Health Examinations of Asylum Seekers on Admission in the Asylum Centres (*Sl.glasnik RS*, 93/08)
27. Rulebook on Records of People Accommodated in the Asylum Centres (*Sl. glasnik RS* 31/08)
28. Rulebook on Requirements for and Issuance of Work Permits to Aliens and Stateless Persons (*Sl.glasnik RS 22/2010)*
29. Rulebook on Social Assistance to Asylum Seekers and People Granted Asylum (*Sl. glasnik RS* 44/08)
30. 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)
31. Secondary School Act (*Sl. glasnik RS* 50/92, 53/93, 67/93, 48/94, 24/96, 23/2002, 25/2002 – corr, 62/2003 – other law, 64/2003 – corr. of other law, 101/2005 – other law, 72/2009 – other law and 55/2013 – other law)
32. Social Protection Act (*Sl. glasnik RS* 24/2011)
33. State Border Protection Act (*Sl. glasnik RS* 97/2008)

Judicial Decisions

Court of Justice of the European Union

1. *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, joined cases C – 175/08, C – 176/08, C – 178/08, C – 179/08 2010 I –01493, judgment of 2 March 2010

European Court of Human Rights

1. *Al – Moayadv. Germany*, App No. 35865/03, decision on admissibility of 20 February 2007
2. *Amuur v. France,* App. No. 17/1995/523/609, judgment of 25 June 1996
3. *Artico v. Italy*, App No. 6694/74, judgment of 13 May 1980
4. *Bader and Kanbor v. Sweden*, App. No. 13284/04, judgment of 8 November 2005
5. *Baumann v. France*, App. No. 33592/96, decision on admissibility of 16 March 2000
6. *C.G. and Others v. Bulgaria*, App. No. 1365/07, judgment of 28 April 2008
7. *Ghorbanov v. Turkey*, App. No. 28127/09, judgment of 3 December 2013
8. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, GC decision of 23 February 2012
9. *Jabari v. Turkey*, App. No. 40035/98, judgment of 11 July 2000
10. *Lupsa v. Romania*, App. No. 10337/04, judgment of 8 June 2006
11. *M.S.S. v. Belgium and Greece,* App. No. 30696/09, GC judgment of 21 January 2011
12. *Nolan and K v. Russia*, App. No. 2512/04, judgment of 12 February 2009
13. *Vernillo v. France*, App. No. 11889/85, judgment of 20 February 1991
14. *Z. and T. v. United Kingdom*, App. No. 27034/05, decision on admissibility of 28 February 2006

International Court of Justice

1. ICJ judgment in the Asylum Case (*Columbia v. Peru*) of 20 November 1950, ICJ Reports 1950

Administrative Court of the Republic of Serbia

1. Judgment No. 1 U 540/13, of 20 March 2014
2. Judgment No. 23 U 3831/12 of 11 October 2012

Constitutional Court of the Republic of Serbia

1. Decision on Constitutional Appeal Už –3458/13 of 19 November 2013
2. Decision on Constitutional Appeal Už–1286/2012 of 29 March 2012
3. Decision on Constitutional Appeal Už–5331/2012 of 28 December 2012

Introduction

The Belgrade Centre for Human Rights (BCHR) implemented the project entitled "Providing Legal and Psychological Assistance to Asylum Seekers" in 2012 and 2013 with the support of the United Nations High Commissioner for Refugees (UNHCR). The project aimed to provide asylum seekers with adequate legal and psychological assistance and improve the legal regulations and practices of the state authorities involved in the asylum procedure. Apart from directly extending legal aid to the asylum seekers, the BCHR team also endeavoured to raise awareness of this topic among the general public and the competent authorities and promote new, adequate solutions to the identified problems. The BCHR in 2013 organised training on international standards for protecting the human rights of asylum seekers, in cooperation with the Judicial Academy of the Republic of Serbia and UNHCR.

The Report before you is the second annual BCHR report on the situation in the field of asylum in the Republic of Serbia, which presents the data and information the BCHR team obtained directly and from competent institutions, international organisations, other NGOs and the media.

The masculine pronoun is used in the Report to refer to an antecedent that designates a person of either gender unless the Report specifically refers to a female. Both the authors of the Report and the BCHR advocate gender equality and in principle support gender neutral language.

The Report was prepared by: Nikola Kovačević, Lena Petrović, Sonja Tošković i Jovana Zorić, who were assisted by Vesna Jovanović, Bogdan Krasić, Milena Manojlović and Maša Vukčević.

Belgrade, April 2014

Summary

Legal Framework

Serbia is bound by numerous universal and regional international human rights protection treaties of direct or indirect relevance to the protection of the rights of asylum seekers: the UN Convention and Protocol Relating to the Status of Refugees (hereinafter Refugee Convention and Protocol), the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CaT), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT), the UN Convention on the Rights of the Child (CRC), et al.

The right to asylum is enshrined in Article 57(1) of the Constitution of the Republic of Serbia. The asylum procedure and the rights and obligations of asylum seekers, refugees and persons granted subsidiary protection are governed in greater detail by the 2008 Asylum Act. The RS Commissariat for Refugees and Migrations is charged with the accommodation and integration of people granted asylum or subsidiary protection under the Asylum Act and the 2012 Migration Management Act (Articles 15 and 16).

Statistics

A total of 5066 people expressed the intention to seek asylum in Serbia in the 1 January– 31 December 2013 period. Of them, 598 – 564 boys and 34 girls – were unaccompanied minors. The Asylum Office rendered 193 decisions on asylum applications in the same period: it upheld four, rejected five and dismissed eight asylum applications and discontinued the review of 176 applications. Serbia's authorities granted the refugee status to five and subsidiary protection to seven applicants from the day the Asylum Act entered into force, 1 April 2008, until 31 December 2013.

Procedure

Access to Serbia's Territory and Procedure. – The work of border police officers, with whom regular migrants first establish contact, i.e. the way the border authorities have been fulfilling their obligation to enable asylum seekers

access to the regular asylum procedure needs to be more transparent and subject to independent monitoring, which could be conducted by NGOs, like in the other countries in the region. Belgrade Airport officers recognised the migrants' intention to seek asylum only in two cases in 2013 and, to the best of BCHR's knowledge, only one of them had access to Serbian territory. Asylum seekers in 2013 complained to the BCHR that the police administrations (PA) failed to issue them certificates of their intention to seek asylum.

Principle of Impunity for Asylum Seekers for Illegal Entry or Presence. – Statistical data on the number of persons found guilty of illegal entry or presence in Serbia bring into question compliance with this principle in practice, although it is enshrined both in the Refugee Convention and the Asylum Act: 4371 people were found guilty of the misdemeanour of illegal entry into Serbia, 231 people were found guilty of the misdemeanour of illegal presence in Serbia, while 43 people were found guilty of both illegal entry and illegal presence in Serbia in the 1 January – 1 November 2013 period. The data the BCHR collected from misdemeanour courts indicate that none of the people who had appeared before them on those charges in the period expressed the intention to seek asylum.

First-Instance Procedure. – Asylum applications are submitted to the authorised officers of the Asylum Office orally for the record, at the time scheduled by the officers. In practice, as many as six months pass between the day the migrants arrive at an Asylum Centre and the day they apply for asylum, which prolongs the duration of the procedure. Furthermore, the Asylum Act does not set a deadline by which a first-instance decision on an asylum application has to be rendered.

Safe Third Country and Safe Country of Origin Concept. – The Asylum Office in 2013 continued with its practice of automatically applying the safe third country concept, pursuant to the unilateral 2009 Government Decision on Lists of Safe Countries of Origin and Safe Third Countries (that has never been amended), which leads to the risk of violation of the principle of non-refoulement, both direct and chain refoulement. The Administrative and Constitutional Court reaffirmed the lawfulness of the practice of automatically applying the Government Decision in their decisions. The Constitutional Court declared it did not have jurisdiction to rule on the constitutionality of the Decision.

Second-Instance Procedure. – The Asylum Commission has not rendered any rulings on the merits of the asylum applications since the BCHR began extending legal aid to asylum seekers. Nineteen appeals were submitted to the Asylum Commission in 2013. The Commission upheld two appeals and set aside the first-instance rulings and rejected 10 appeals as ill-founded. Three applicants filed appeals over silence of the administration in the same period and the Asylum Commission ordered the Asylum Office to rule on their asylum applications.

Judicial Review: Administrative Court's Reviews of Claims. – Asylum seekers may initiate administrative disputes before the Administrative Court challenging the final decisions of the Asylum Commission or its failure to rule on an appeal. The Administrative Court did not deviate from its practice in 2011 and 2012 and did not deliver any judgments upholding the asylum seekers' claims in 2013 either. As a rule, the submission of a claim to the Administrative Court does not stay the enforcement of the impugned administrative enactment, i.e. it does not have "suspensive effect". Although the Administrative Court has not stayed the enforcement of the final asylum-related administrative enactments in any cases to date, the Constitutional Court of Serbia has nevertheless held the view that the submission of claims to the Administrative Court is an effective legal remedy in this context.

Accommodation

The Commissariat for Refugees and Migrations in 2013 accommodated asylum seekers in facilities in Banja Koviljača, Bogovađa, Vračević, Sjenica and Obrenovac. Many asylum seekers were living in the woods near the Bogovađa Centre in September and October 2013, in conditions that can be qualified as inhuman and degrading, because this Centre lacked the capacity to admit them. At the proposal of the Commissariat for Refugees and Migrations, the RS Government in January 2013 issued a conclusion to open a temporary centre in a private house in the village of Vračević, where asylum seekers lived in unhygienic and inhuman conditions until July 2013.

The RS Government in December 2013 opened two more temporary Asylum Centres, in Sjenica and Tutin.

Integration

Nothing has yet been done to facilitate the integration of people granted some form of protection in the Republic of Serbia. Nor were any budget funds allocated for that purpose by the end of 2013.

1. International Legal Framework

The Universal Declaration of Human Rights[1] 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 Refugees[2] 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 Refugee 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

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.

international human rights 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.

4 Available at: http://www.unhcr.org/refworld/docid/3ae6b3aa0.html.

5 Available at: http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html.

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

7 Available at: http://www.cpt.coe.int/en/documents/ecpt.htm.

8 Available at: 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 Serbia.[9]

> 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 be entitled 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 persons granted subsidiary protection.[10] Apart from the right to asylum, which comprises the right to asylum 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 Act (GAPA) [12] and the Administrative Disputes Act (ADA)[13] apply to issues not regulated by the Asylum Act.

Although the Aliens Act[14] 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 protection[15] (Art. 49, Aliens Act) and to the expulsion of aliens (Art. 57, Aliens Act).

The Migration Management Act[16] entrusts the accommodation and integration of people granted asylum or subsidiary protection to the Commissariat for Refugees and Migrations (Arts. 15 and 16).

The exercise of the rights enshrined in the Refugee Convention depends on the effect of the procedural safeguards, which should be efficient and

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

10 *Sl. glasnik RS* 109/07, entered into force on 1 April 2008, available in English at http://www.unhcr.org/refworld/docid/47b46e2f9.html

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.

effective in practice, not theoretical or illusory.[17] Authorities charged with the asylum procedure and any removal of aliens (both those not granted asylum and those who had not applied for asylum) from the territory of the Republic of Serbia must act in accordance with the international human rights law standards deriving from the ECHR and the case law of the European Court of Human Rights (ECtHR). Unfair asylum proceedings, i.e. deprivation of the right to access the asylum procedure may not only result in the violation of the non-refoulement principle, but also in grave violations of other human rights, such as the right to life[18], the prohibition of torture and inhuman and degrading treatment[19], right to liberty[20], fundamental aspects of the right to a fair trial[21] and the right to an effective legal remedy.[22]

17 *Artico v. Italy*, App. No. 6694/74, ECtHR judgment of 13 May 1980, § 33.

18 *Bader and Kanbor v. Sweden*, App. No. 13284/04, ECtHR judgment of 8 November 2005, § 48.

19 *M.S.S. v. Belgium and Greece*, App. No. 30696/09, ECtHR judgment of 21 January 2011, §§ 344 – 361.

20 *Z. and T. v. United Kingdom*, App. No. 27034/05, ECtHR decision on admissibility of 28 February 2006.

21 *Al - Moayad v. Germany*, App. No. 35865/03, ECtHR decision on admissibility of 20 February 2007, §§ 100-102.

22 *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, ECtHR GC decision of 23 February 2012, §§ 201 – 207.

3. Statistics[23]

Number of People Who Expressed the Intention to Seek Asylum

A total of 5066 people expressed the intention to seek asylum in Serbia in the 1 January – 31 December 2013 period.[24] In that period, 742 asylum seekers were registered and 153 asylum applications were submitted; only 19 asylum seekers were interviewed and four asylum applications were upheld.[25]

Breakdown of the 5066 people who expressed the intention to seek asylum by month: 157 in January, 193 in February, 381 in March, 490 in April, 370 in May, 272 in June, 369 in July, 334 in August, 627 in September, 651 in October, 607 in November and 614 in December.[26]

Breakdown of the 5066 people who expressed the intention to seek asylum by nationality: 1338 – Syria, 624 – Eritrea, 507 – Somalia, 490 – Afghanistan, 249 – Algeria, 226 – Mali, 207 – Pakistan, 169 – Sudan, 149 – Nigeria, 116 – Ivory Coast, 95 – Morocco, 85 – Ghana, 83 – Palestine, 79 – Tunis, 66 – Bangladesh, 58 – Iraq, 57 – Comoros, 49 Senegal, 44 – Sierra Leone, 40 – Cameroon, 38 – Guinea, 36 – Congo, 32 – Mauritius, 34 – Iran, 30 – Gambia, 21 – Libya, 20 – Egypt, 21 – Burkina Faso, 15 – Madagascar, 13 – Cuba, 10 – Togo, 10 – Rwanda, 9 – India, 4 – Tanzania, 3 – Ethiopia, 3 – Kenya, 3 – Gabon, 2 – Central African Republic, Turkey, Chad, Angola, Benin, West Sahara, 1 – Liberia, The Netherlands, Uganda, FYROM, Bosnia-Herzegovina, Nepal, Sri Lanka, Ukraine, Croatia, Yemen, Russia and the Philippines. Two people expressed the intention to seek asylum at Belgrade Airport "Nikola Tesla" and another four at the Padinska Skela Aliens Reception Centre.[27] In the 1 January – 30 September 2013 period, 30 foreign nationals expressed the intention to seek asylum at Serbia's borders, while 3148 aliens expressed the intention in the regional police administrations.[28]

A total of 598 unaccompanied minors (564 boys and 34 girls) and 768 accompanied minors expressed the intent to seek asylum in the Republic of Serbia in 2013.[29]

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23 See the graphic presentation of statistical data at www.azil.rs/documents/category/reports.

24 Compilation of statistical data obtained from the UNHCR Office in Belgrade, the RS MIA Asylum Office and the RS MIA Bureau for Information of Public Importance in 2013.

25 Data obtained from the Police Administration, Border Police Administration, Belgrade, 28 January 2014.

26 *Ibid.*

27 Data obtained from the MIA, Border Police Administration, Belgrade, 28 January 2014.

28 Border Police Administration, reply to a request for access to information of public importance 03/09 Ref. No. 26-262/13-5 of 16 October 2013.

29 *Ibid.*

Asylum Procedure Statistical Data

The Asylum Office interviewed only 19 people and rendered 193 decisions in 2013. It upheld four asylum applications, rejected five and dismissed eight applications and discontinued the review of 176 applications. A total of 19 appeals of Asylum Office decisions were submitted to the Asylum Commission in the same period. The Commission upheld two appeals and set aside the first-instance rulings and rejected 10 appeals as ill-founded. Three appeals of silence of the administration were submitted in 2013.[30]

Ten administrative disputes challenging the Asylum Commission rulings were initiated before the Administrative Court in 2013. Five claims were rejected and five disputes were pending at the end of the year.[31]

Five people were granted refugee status and seven were granted subsidiary protection from 1 April 2008, when the Asylum Act entered into force, to 31 December 2013.

Statistical Data on Accommodation of Asylum Seekers

A total of 3023 people were accommodated in Serbian Asylum Centres in 2013: 684 in Banja Koviljača, 1945 in Bogovađa, 239 in Obrenovac and 155 in Sjenica.[32] More people had been accommodated in the temporary centre in Vračević than in other centres in 2013, but the data on their numbers were unavailable at the end of the reporting period.[33]

The Belgrade Home for Children and Youths looked after 43 unaccompanied minors in 2013; 29 of them expressed the intention to seek asylum, four ran away, and 25 were registered by the Asylum Office and subsequently accommodated in the Bogovađa and Banja Koviljača Asylum Centres.[34] The Niš Home for Children and Youths looked after 23 unaccompanied minors in the same period.[35]

30 Data obtained from the MIA, Border Police Administration, Belgrade, 28 January 2014.

31 Data obtained from the Administrative Court, Belgrade, 17 January 2014, reply to a request for access to information of public importance Ref. No. Su III-18 7/14.

32 Data obtained from the Commissariat for Refugees and Migrations Ref. No. 019 - 205-4/2014, Belgrade, 4 April 2014.

33 The data obtained from the Commissariat for Refugees and Migrations refer only to the number of people per month, notably: 142 people in the 25-31 January 2013 period, 141 in February, 553 in March, 635 in April, 670 in May, 528 in June, 207 in the 1-8 July period, 77 people in one facility over a ten-day period in November and December 2013 and 96 people in another facility over a 21-day period. These numbers do not reflect the number of room and board services, but the number of people who stayed in this facility during specific periods of time, which do not coincide with calendar months. Data obtained from the Commissariat for Refugees and Migrations Ref. No. 019 - 205-1/2014, Belgrade, 5 February 2014.

34 Data obtained from the Belgrade Home for Children and Youths, 9 April 2014.

35 Data obtained from the Niš Home for Children and Youths, 7 April 2014.

4. Access to Serbia's Territory and the Asylum Procedure

The right of access to the asylum procedure is the main prerequisite for exercising the right to refuge. This right of access is not explicitly prescribed by the Asylum Act, but a logical and teleological interpretation of the Act leads to the conclusion that the Act guarantees the right of access to the asylum procedure. For asylum seekers to have access to the asylum procedure, their intention to seek asylum must be recognised and registered by the competent authorities (by the Ministry of Internal Affairs [MIA] of the Republic of Serbia).

Under Article 22 of the Asylum Act, aliens may express the intention to seek asylum orally or in writing to competent MIA officials at a border checkpoint of the Republic of Serbia or within its territory. Therefore, under the Act, the intention to seek asylum may be expressed at the border or in any of the police administrations in Serbia, to Aliens Department officials. The competent MIA Border Police Administration Aliens Department officials register the intention and issue the aliens certificates thereof. The aliens are then under the obligation to report to the Asylum Office or authorised staff in one of the asylum centres within 72 hours. Three copies of the certificates are issued: one is given to the aliens, one is forwarded to the Asylum Office without delay and the third is filed in the MIA unit that issued it.[36] The Asylum Act guarantees aliens in Serbia's territory the right to apply for asylum (Article 4), but it allows for the submission of asylum applications only after the registration of the aliens who had expressed the intention to seek asylum.[37]

4.1. Access to Serbia's Territory and the Asylum Procedure in the Border Areas

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 hu-

36 Article 5(2) 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).

37 For more see Chapter 5. Asylum Procedure in Serbia, p. 29.

man rights obligations.[38] In other words, all states must guarantee, secure and protect the human rights of everyone within their jurisdiction. The term "jurisdiction" in this case does not apply only to persons in the territory of a specific state, but to all persons who fall under the authority or the effective control of the state's authorities.[39] As one of the guides on the border crossing monitoring standards recommends:

> "States must be careful to ensure that claimants are not summarily rejected at their borders before their claims have been considered due to the fact that refugee status is of a declaratory nature (a person does not become a refugee because of recognition, but is recognised because he/she is a refugee) and due to the fact that the principle of non-refoulement applies to asylum seekers whose requests for refugee status have not yet been determined."[40]

Migrants caught crossing the border illegally or crossing it outside the border crossings or in the immediate vicinity of the border are deprived of liberty by the police and either brought before misdemeanour judges immediately or held in police custody for 24 hours.[41] Whenever possible, such persons are brought before misdemeanour judges without delay and charged with the misdemeanour of illegally crossing the border.[42] Aliens who do not express the intention to seek asylum at the border crossings and do not fulfil the requirements for entry into Serbia are sent to the border crossing of the state they came from. Both the Refugee Convention (Art. 31) and the Asylum Act (Art. 8) include provisions prohibiting the imposition of penalties on refugees on account of their illegal entry or presence if they are coming directly from a territory where their life or freedom was threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[43]

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. One of the main prerequisites for recognising an alien's intention to seek asylum is that the alien and the border police officer communicate in a language the alien understands, i.e. that the arrested alien is read his rights in a language he understands. This is why all arrested

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

39 *Ibid.*

40 Neža Kogovšek, *Border Monitoring Methodologies*, Peace Institute, Slovenia, 2006, p. 11.

41 Data BCHR associates obtained whilst visiting the Sombor Police Administration within the National Preventive Mechanism (NPM) activities.

42 Article 65(1), State Border Protection Act, *Sl. glasnik RS* 97/2008.

43 More on misdemeanour proceedings in chapter 4.4. Impunity of Asylum Seekers and Access to the Asylum Procedure in Misdemeanour Proceedings, p. 25.

aliens must be provided with written notification of their basic rights and the procedure that will be applied with respect to them in their native languages.[44]

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[45], a practice already developed in the other countries in the region.[46] Independent monitoring is an institute usually based on a tri-partite agreement among the Ministry of Internal Affairs, the UNHCR and NGOs providing the asylum seekers with legal aid. This model has helped improve practices regarding the exercise and protection of the rights of both asylum seekers and illegal migrants.[47]

4.2. Access to Serbia's Territory and the Asylum Procedure at Belgrade Airport "Nikola Tesla"

Belgrade Airport "Nikola Tesla" is one of the rare European airports at which the border officers have recognised only several intentions to seek asylum since 2008. Namely, only one person was provided with the opportunity to seek asylum in the 2008–2010 period, and only after the UNHCR intervened[48]; no data on such cases were available for 2011 and 2012.[49] The situation gives rise to concern because numerous risks of violations of the rights of potential asylum seekers (particularly of the non-refoulement principle) arise; furthermore, it brings into question not only the competence, but also the will of the

44 This practice exists at the Preševo border crossing, where the arrested irregular migrants are given forms in English, French and Arabic.

45 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. More in "Access to Territory and Asylum Procedure in Serbia (2011)" available at http://helsinki.hu/wp-content/uploads/final_border_monitoring_ENG.pdf and "Access to Territory and Asylum Procedure in Serbia (2012)", available at: http://helsinki.hu/wp-content/uploads/hel2013_menekulteng_final.pdf.

46 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.

47 As explained in "Border Monitoring Methodologies," *supra* 45*,* "Border monitoring is an organized and systematic activity aimed at observing and documenting the procedures with foreigners and potential asylum seekers at the borders and in all other facilities that are related with the border (police stations, detention centres for aliens, etc.)".

48 UNHCR, *Serbia as a Country of Asylum – Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia,* UNHCR, August 2012, paragraph 14, available at: http://www.refworld.org/docid/50471f7e2.html.

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

border police officers in the airport transit zone to recognise the intention to seek asylum. For instance, over 230 people expressed the intention to seek asylum in neighbouring Hungary in 2011 and 2012.[50]

The border police at Belgrade Airport recognised the intention of the migrants to seek asylum only in two cases in 2013[51] and, to the best of BCHR's knowledge, only one of them was granted access to Serbia's territory.[52] In one of the two cases, the asylum seeker repeatedly expressed the intention to seek asylum, but the certificate thereof was issued to him only after two unsuccessful attempts to return him to the country he had come from and after the BCHR and UNHCR intervened.

This case clearly demonstrates the shortcomings of the valid Asylum Act, which does not specifically regulate situations of migrants expressing the intention to seek asylum in the airport transit zone; they are subjected to the standard procedure set out in the Asylum Act, which would not be concerning *per se* if the application of the non-refoulement principle were adequately guaranteed both by law and in practice.

Deprivation of Liberty at Belgrade Airport "Nikola Tesla"

The migrant spent over two days in the airport transit zone in the absence of a decision by the competent authority, which amounts to a violation of Article 5 of the ECHR on the liberty and security of person under ECtHR case law.[53] Namely, in the case of *Amuur v. France*,[54] the ECtHR took the view that holding the applicants in transit zones amounted to deprivation of liberty. For a person's presence in the transit zone to be lawful i.e. in accordance with the ECtHR's principles, it must be based on a decision ordering him to remain in the transit zone and rendered in accordance with the law of the state at issue. Otherwise, arbitrary deprivation of liberty not based on national law amounts to a violation of Article 5(1(f)) of the ECHR, under which the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country must be in accordance with a procedure prescribed by law. Even if a decision on the migrant's deprivation of liberty had been issued, Article 48 of

50 E.g. over 230 intentions to seek asylum were recognised in the same period in the transit zone of the Ferenz Liszt Airport in Hungary (168 in 2011 and 70 in 2012), see the Hungarian Helsinki Committee 2011 and 2012 Reports, available at http://helsinki.hu/wp-content/uploads/final_border_monitoring_ENG.pdf, and http://helsinki.hu/wp-content/uploads/hel2013_menekulteng_final.pdf.

51 Data obtained from the MIA Bureau for Information of Public Importance on 28 January 2014.

52 Information BCHR obtained during its regular legal aid activities and according to data obtained from APC.

53 See, e.g. the judgment in the case of *Nolan and K v. Russia*, App. No. 2512/04, of 12 February 2009, § 99.

54 *Amuur v. France*, *supra* 3, § 50.

the Aliens Act provides for maximum 24-hour police custody if so required to ensure his forced removal. Therefore, the asylum seeker had been unlawfully deprived of liberty in the airport transit zone.[55]

4.3. Issuance of Certificates of Intention to Seek Asylum

Asylum seekers complained to the BCHR in 2013 of the failure of the police administrations to issue them certificates of their intention to seek asylum.[56] Several asylum seekers in the newly-opened temporary Asylum Centre in Obrenovac made claims to such effect. According to BCHR's information, rather than issuing certificates of intention to the migrants, who had arrived without them to this Centre, the Obrenovac police station, which is part of the Belgrade PA, referred them to the headquarters of the Aliens Department in Belgrade to obtain the certificates.[57] This practice is fraught with risks, given that migrants travelling to Belgrade to obtain the certificates may be stopped and ID-ed by the police. In the event they lack any ID document or proof that they are legally present in Serbia, they risk being deprived of liberty both under the Misdemeanours Act[58] and the Police Act[59] and being charged with illegal presence in Serbia (a misdemeanour). In the event the police fail to recognise their intention to seek asylum due to difficulties in communicating with them, there is a risk that the migrants' right of access to the asylum procedure, and thus a number of their other rights, will be violated – without a certificate of intention to seek asylum, an asylum seeker cannot be admitted to the Centre and registered and, consequently, cannot apply for asylum. Furthermore, these migrants are at risk of deportation and violation of the non-refoulement principle. The BCHR also heard complaints about the work of the Loznica police station; asylum seekers claimed they also had to travel to Belgrade to obtain their certificates of intention. However, BCHR learned that the number of issued certificates of intention grew significantly in 2013. A total of 5066[60] foreign nationals expressed the intention to seek asylum in Serbia in 2013, over half of them in the September-December period.[61]

55 The CoE Committee for the Prevention of Torture (CPT) is also of the view that holding a person in the transit zone amounts to deprivation of liberty. See the CPT's 7th General Report [CPT/Inf (97) 10], paragraph 25, available at http://www.cpt.coe.int/en/annual/rep-07.htm.

56 More in the *June-October 2013 Report – Asylum in the Republic of Serbia*, BCHR, available at http://www.azil.rs/doc/ENG_periodi_ni_izve_taj_FINALNI_jun_oktobar_2013.pdf.

57 The Aliens Department is headquartered in Belgrade, Savska Str. 35.

58 *Sl. glasnik* 65/2013.

59 *Sl. glasnik* 101/2005 and 36/2009.

60 Nearly twice as much as in 2012, when 2723 people expressed the intention to seek asylum. See the *Right to Asylum in the Republic of Serbia 2012,* BCHR, Belgrade, 2012, available at: http://www.azil.rs/doc/Right_to_Asylum_in_the_Republic_of_Serbia_FINAL.pdf

61 Data obtained from the MIA Border Police Administration, 28 January 2014.

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

Under Article 31 of the 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 entry or presence in Serbia, however, give rise to doubts about the observance of this principle in practice.

Under the State Border Protection Act,[62] a person who crosses or attempts to cross the state border illegally shall be fined between 5 and 50 thousand RSD or sentenced to maximum one month imprisonment. 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.[63]

The number of people penalised for illegal entry or presence in the Republic of Serbia soared over 2012.[64] A total of 4371 people were found guilty of illegal entry in the 1 January – 1 November 2013 period; 231 were found guilty of illegal presence and 43 of both illegal entry and illegal presence in Serbia.[65] The misdemeanour courts in the following towns rendered the greatest number of convictions for illegal entry in the Republic of Serbia: Senta (2188), Sremska Mitrovica (745) and Subotica (676). Considerable numbers of people were found guilty of this misdemeanour by the courts in Preševo (274), Vranje (91), Leskovac (118) and Prijepolje (96) as well.[66]

Although irregular migrants are under the obligation to give good cause for their illegal entry or presence in Serbia without delay, they may be unable to

62 Article 65(1), *Sl. glasnik* 97/2008.

63 Article 85, Aliens Act.

64 More in *Right to Asylum 2012*, *supra 60*, p. 23.

65 The data are incomplete, given that the Preševo, Vranje and Mladenovac Misdemeanour Courts failed to reply to the requests for access to information of public importance the BCHR sent to all courts.

66 *Ibid.*

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 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 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. However, only in a few cases have the misdemeanour judges recognised the defendants' intention to seek asylum, which can be ascribed to the vagueness of the legal norms and their unfamiliarity with refugee law. According to the data the BCHR collected from the misdemeanour courts, not one person expressed the intention to seek asylum during the misdemeanour proceedings in 2013; the defendants' intention to seek asylum was recognised in only three cases in 2012, by the Kikinda Misdemeanour Court.[67]

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 a 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[68]

The recognition of the intention to seek asylum in misdemeanour proceedings necessitates in the engagement of court-sworn interpreters speaking the native language or the language the defendant can clearly follow the course of the proceedings in. However, the data most misdemeanour courts forwarded to the BCHR[69] indicate that their practices have not changed[70] and that irregular migrants are not always provided with interpreters who speak their native languages or languages they understand, which 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.[71]

67 More in *Right to Asylum 2012*, *supra* 60, p. 22.

68 *Ibid.*

69 *Supra* 65.

70 More in *Right to Asylum 2012*, *supra* 60, p.23.

71 The information BCHR obtained and perusal of some of the judgments the misdemeanour courts forwarded it indicate that judgments delivered in misdemeanour proceedings are often enforced even before they become formally legally binding. Namely, Article 230 of the Misdemeanours Act lays down that appeals shall have suspensive effect, but Article 294(1(1)) of

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. For instance, the Sremska Mitrovica Misdemeanour Court found 745 irregular migrants, 156 of them Syrians and 123 of them Afghanis, guilty of illegal entry or presence in Serbia. It engaged English language interpreters in 659 of the cases, but did not engage an Arabic or Farsi interpreter for any of the migrants.[72] It would be reasonable to assume that a certain number of irregular migrants are fluent enough in English to follow the course of the proceedings and take procedural actions, but it is extremely unlikely, if not impossible, that English language interpreters enabled every single one of them to take an equal part in the proceedings.[73] The BCHR is also of the view that the *auditaur et altera pars* principle[74] may not have been complied with in a significant number of 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 or presence in the Republic of Serbia.

4.5. Access to the Asylum Procedure during Arrest and Police Custody

As already noted, many irregular migrants (potential asylum seekers) were apprehended and arrested by the police in 2013 for illegal entry or presence in the Republic of Serbia. Police officers usually bring the illegal migrants before misdemeanour judges on misdemeanour charges forthwith. When this is impossible in specific circumstances, the police are entitled to keep them in custody up to 24 hours.[75] Under Article 4 of the Instructions on the Treatment of Arrestees and Detainees (hereinafter: Instructions)[76], aliens deprived of liberty are entitled to receive written notice of their rights in their native languages as soon as they are arrested.

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that law sets out that judgments may be enforced before they become legally binding in the event the defendants cannot prove their identity or do not have a permanent residence permit. Misdemeanour courts have frequently invoked Article 294 in their judgments against irregular migrants. Paragraph 3 of that Article, however, specifies that the Higher Misdemeanour Court shall urgently review appeals of judgments to be enforced before they become legally binding.

72 Data obtained from the Sremska Mitrovica Misdemeanour Court in 2003.

73 E.g., the BCHR team talked to an asylum seeker who said he had been unclear about what was happening and which procedure applied to him throughout – from the moment he was arrested, brought before a misdemeanour judge, sentenced to serve a term in a penitentiary to the moment he was referred to the Aliens Reception Centre.

74 "*Hear the other side*" - refers to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

75 Misdemeanours Act, Article 190(3).

76 *Sl. glasnik RS* 101/05, 63/09 – Constitutional Court and 92/11.

The BCHR had the opportunity to peruse the police records on custody of aliens-illegal migrants during NPM's visits to police stations[77] and establish the extent to which their rights are respected. The perusal of the records leads to the conclusion that the aliens are notified of their rights, which are listed in hard copy, in a form issued pursuant to the Instructions,[78] either orally, usually in English, or provided with copies of the form in Serbian; a statement to the effect that the alien was read his rights in English orally is printed at the bottom of the form. The Instructions entitle arrested and detained persons to "*freely contact representatives of appropriate international organisations*", which would be the UNHCR in the event the irregular migrants express the intention before MIA officers. A migrant's knowledge of English is not sufficient guarantee that he will be adequately notified of all his rights set out in the Instructions, hence the risk that the authorised police officers do not recognise the migrants' intention to seek asylum.[79]

The same applies to custody rulings, which gives rise to additional problems, given that these rulings include factual and legal grounds for the custody and the precept that the detained person may initiate a procedure for the judicial review of the lawfulness of the ruling, during which he can claim that his deprivation of liberty is unlawful because he is seeking refuge in the Republic of Serbia. Furthermore, several asylum seekers BCHR has been representing before the competent authorities had been arrested and placed in custody by the police before their intention to seek asylum had been recognised.

Some of the migrants BCHR talked to claim that they had sought asylum before the police as soon as they were arrested for illegally crossing the border, but that the police officers ignored their requests and immediately took them before misdemeanour judges. Nevertheless, an analysis of the case law of the Basic Courts on the crime of Illegal Crossing of State Border and Human Trafficking[80] revealed a good practice example. Namely, the First Basic Public Prosecution Service in Belgrade's indictment[81] filed against people accused of human trafficking includes the following text in the reasoning of the charges:

77 Pursuant to the Act Amending the Act Ratifying OPCAT, which was adopted on 28 July 2011, the Protector of Citizens (Ombudsman) of the Republic of Serbia has been designated to perform the duties of the National Preventive Mechanism against Torture. The Protector of Citizens accordingly rendered a decision on the establishment of the National Preventive Mechanism (NPM) tasked with overseeing all institutions in which persons deprived of liberty are held.

78 *Supra* 76.

79 This claim was corroborated by a police officer working in the Aliens Department of the Sombor PA Border Police Administration who told the NPM on 12 February 2014 that not one alien had expressed the wish to seek asylum in the past two years. According to the data the Sombor Misdemeanour Court forwarded to the BCHR, this court had tried migrants from Afghanistan, Pakistan, India, the Philippines, Syria, Somalia, Eritrea and Iran on illegal entry or presence charges and had provided only English language interpreters for each of them.

80 Article 350, Criminal Code, *Sl. glasnik* 85/2005, 88/2005 - corr, 107/2005 - corr, 72/2009, 111/2009, 121/2012 and 104/2013.

81 Indictment KT No 9099/13, First Basic Public Prosecution Service in Belgrade, 3 October 2013.

"Furthermore, it is undisputed that the Traffic Police Administration officers halted the vehicle of the defendant during a check at the Bubanj Potok checkpoint and found 38 males and two females in it, all of them foreign nationals without travel documents, *some of whom sought asylum in the Republic of Serbia and were placed in the Bogovađa Asylum Centre*, while the others, 26 of them, were taken before a Belgrade Misdemeanour Court judge and sentenced to 10-day prison terms, after which they were transferred to the Padinska Skela penitentiary to serve their sentences."[82]

82 Italics ours.

5. Asylum Procedure in Serbia

The asylum procedure in the Republic of Serbia is governed by the Asylum Act. The General Administrative Procedure Act[83] is applied subsidiarily in the asylum procedure. Procedures relating to the determination of refugee status are not specifically regulated by the Refugee Convention or other international refugee instruments,[84] but the detailed procedural standards are recommended in the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status.[85]

Once an alien is admitted to an Asylum Centre or receives approval to reside at a private address, the Asylum Office initiates the first official action – registration. Registration entails establishing the alien's identity and photographing and fingerprinting him. During the registration procedure, the Asylum Office temporarily seizes all the alien's documents that may be relevant to a decision in the asylum procedure and issues the alien a receipt on the seized documents. 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.

The Asylum Act does not set a deadline by which the Asylum Office must register asylum seekers and sometimes more than 30 days pass between the day the aliens are admitted to an Asylum Centre and the day they are registered. The registration of asylum seekers in the Bogovađa Asylum Centre was quite problematic in 2013 – Asylum Office staff failed to conduct any official actions in this Centre from August to the end of the year, wherefore the asylum seekers living in this Centre were practically deprived of access to the asylum procedure.[86] Furthermore, the Asylum Office had not been conducting any official actions, including registration in the new, temporary Asylum Centres in Tutin and Sjenica. The Asylum Office did register the asylum seekers living in the temporary Asylum Centre in Obrenovac.[87]

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83 *Supra* 12.

84 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.

85 *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/1P/4/enG/Rev. 3, 2011, available at http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf.

86 The BCHR obtained this information while it was extending legal aid to asylum seekers and in talks with them and the Bogovađa Asylum Centre administration in December 2013.

87 The BCHR obtained this information from the Asylum Office staff and the asylum seekers living in the temporary Asylum Centre in Obrenovac in December 2013.

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.[88] The IDs issued to asylum seekers are valid until the asylum procedure is completed and their validity is extended every six months. Neither the Asylum Act nor the subsidiary legislation 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 a time it sees fit. Asylum seekers the BCHR team met during its regular visits to the Asylum Centres often complained that they had been waiting for their IDs for a long time. Given that their travel documents and other ID documents (if they have any) are seized during registration, the asylum seekers are left without any ID documents until they are issued their IDs and are thus unable to freely move in the territory of the Republic of Serbia or dispose of their funds in their bank accounts. Under Article 6 of the EU Council Directive laying down minimum standards of the reception of asylum seekers,[89] Member States shall ensure that asylum seekers are provided with documents issued in their own names certifying their status as asylum seekers or testifying that they are allowed to stay in the territory of the Member State while their applications are pending or being examined within three days after the applications are lodged with the competent authority. The timeframes in Serbia are, however, unjustifiably long. IDs are issued promptly only in the Banja Koviljača Asylum Centre, where an Asylum Office staff member is present.[90]

Although the asylum procedure is formally launched only once an asylum application is submitted, the timeframes in which the administrative actions preceding the procedure are completed nevertheless affect the duration of the procedure, wherefore the Asylum Act has to be applied to ensure that the administrative actions are completed speedily.

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 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

88 *Sl. glasnik RS* 53/2008.

89 EU, Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards of the reception of asylum seekers, OJ L. 31/18-31/25; 6 February 2003, 2003/9/EC.

90 The BCHR obtained this information from the asylum seekers it was extending legal aid to and in contact with the Banja Koviljača Asylum Centre administration.

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 Rights and the Asylum Protection Centre (APC)[91]. The principle of free interpretation (Art. 11) into the language of the asylum seeker's country of origin or a language he understands is consistently abided by thanks to UNHCR funding. The Commissariat for Refugees and Migrations issued a call for proposals for the allocation of budget funding to NGOs extending legal aid to asylum seekers. The requirements the applicant NGOs had to fulfil included, *inter alia*, legal representation of at least 3000 asylum seekers and "successful" representation of asylum seekers, resulting in the granting of asylum to at least one of their clients[92]; these requirements effectively disqualified all NGOs with the exception of the Asylum Protection Centre.

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 BCHR, however, gained the impression that this principle is not taken sufficiently into account,[93] although the Asylum Office employs both men and women, wherefore there are no impediments for complying with the principle in practice. Furthermore, the MIA always hires male interpreters for specific languages, such as Farsi, although there are female interpreters speaking those languages as well.

The UN Committee for Elimination of Discrimination against Women (CEDAW) reviewed Serbia's 2nd and 3rd periodic reports in July 2013.[94] The Committee expressed concern over the lack of state monitoring of the status of refugee, displaced and asylum-seeking women in various fields of social life and called on the Republic of Serbia to establish a mechanism to monitor this vulnerable category of women with a view to protecting their rights, including protection from violence, and ensuring the relevant data on them.[95]

Principle of Particular Care for Vulnerable Asylum Seekers. – During the asylum procedure, particular attention has to be paid to the specific vulner-

91 More at www.apc-cza.org.

92 Commissariat for Refugees and Migrations, public procurement of lesser value tender documentation JN 27/2013, Belgrade, October 2013, pp. 7 and 8, available at http://www.ekapija.com/dokumenti/tCsh_66991_KonkursnaDokumentacija.pdf.

93 Based on the experience BCHR gained in representing asylum seekers before the Asylum Office.

94 CEDAW Concluding Observations on Serbia's 2nd and 3rd Periodic Reports, CEDAW/C/SRB/2-3, 25 July 2013.

95 *Ibid,* paragraphs 36 and 37.

abilities 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. The Asylum Act does not explicitly define human trafficking victims as persons with special needs in terms of this principle. This principle should also entail priority examinations of the asylum applications of vulnerable groups.

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. This practice is not uniform, however, and not all Asylum Office staff members apply it.[96] 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. 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 disclosed only to legally authorised officials. The asylum seekers' data may not be revealed to their 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.[97] This principle, however, does not include safeguards against disclosing information that an alien sought asylum in the Republic of Serbia, which may adversely affect him upon return to his country of origin or may result in him becoming a refugee *sur place.*[98] Article 22 of the EC Directive on minimum standards on procedures in Member States for granting

96 Experience BCHR gained whilst representing asylum seekers before the Asylum Office.

97 Article 18(2), Asylum Act. 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.

98 UNHCR, *Country of Origin Information: Towards Enhanced International Cooperation,* February 2004.

and withdrawing refugee status[99] imposes upon the Member States the obligation not to directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum and not to obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his dependants, or the liberty and security of his family members still living in the country of origin.

Principle of Directness. – All aliens, who have applied for asylum, are entitled to be interviewed in person and directly by an authorised officer of the competent organisational unit of the MIA about all facts relevant to the recognition of the right to asylum or the granting of subsidiary protection. The principle of directness, however, also entails that the decision on the status of the asylum seeker shall be rendered by the Asylum Office staff member who had interviewed him. The realisation of this right is extremely important in the asylum procedure, because most asylum seekers do not have any material evidence to prove their claims and the decisions on their applications are based on the credibility of their statements, i.e. the personal impressions of the Asylum Office staff members. In practice, however, all first-instance decisions are signed by the Head of the Asylum Office, who does not attend the interviews,[100] wherefore the question arises whether the decisions are actually taken by the staff, who had conducted the interviews, and to what extent their decisions are based on their personal impressions of the truthfulness of the asylum seekers' statements.

5.2. First-Instance Procedure

The asylum procedure is initiated by the submission of an asylum application to an authorised Asylum Office staff member on the prescribed form within 15 days from the day of registration. The Office may extend this deadline for a justified reason and at the request of the applicant. The Asylum Office was submitted a total of 153 asylum applications in 2013, 135 of which were filed by men and 18 by women.[101]

99 EU, Council Directive 2205/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326; 13 December 2005, pp. 13-34.

100 Information the BCHR team obtained during the representation of asylum seekers before the Asylum Office.

101 Reply to a request for access to information of public importance, Border Police Administration 03/10 Ref. No. 26-176/14 of 28 January 2014.

Under Article 115(1) of the General Administrative Procedure Act (GAPA), an administrative procedure shall be deemed initiated as soon as an administrative authority performs any procedural action. A procedure is initiated by the competent authority *ex officio* or upon the request of a party. The Asylum Act envisages a number of administrative actions to be performed by the Asylum Office prior to the submission of an asylum application. Article 25(1) of this law, under which the procedure shall be deemed initiated by the submission of an asylum application, is thus in contravention of Article 115(1) of the GAPA. Under the Asylum Act, an alien shall forfeit the right to stay in the Republic of Serbia in the event he failed to submit an asylum application within the deadline for no good cause. Although this deadline is preclusive, the effects of exceeding it do not occur in practice. Namely, the submission of an asylum application does not depend on the will of the aliens, but on the performance of the Asylum Office staff members. Asylum applications are submitted to the authorised Office staff members in the following manner: they ask the asylum seekers the questions in the form orally and write down the replies themselves in the form; the forms are then signed by the asylum seekers, their legal representatives and the Office staff members. Therefore, asylum seekers cannot themselves submit asylum applications, but have to wait for the interviews scheduled by the authorised Asylum Office staff members, who must be present. Asylum seekers have, however, been waiting for the Asylum Office to schedule their interviews for much too long, which has led a great number of them not to perceive the Republic of Serbia as a country of asylum and leave the Asylum Centres before the completion of the asylum procedure.[102] During its extension of legal aid to asylum seekers in the Bogovađa Asylum Centre, the BCHR team noted that asylum seekers, who had been living in the Centre since July 2013, had not submitted their asylum applications until the end of the year, which led it to the conclusion that as many as six months sometimes passed between their arrival and the submission of their applications.

Such an asylum application submission practice is not in compliance with the principle of procedural economy. Under Article 14 of the GAPA, procedures must be conducted promptly and incur the least costs to the parties and other participants in the procedure, whilst ensuring that all evidence requisite for the proper and full establishment of fact and issuance of a lawful and fair decision are collected.

5.3. Interviews

Asylum seekers are interviewed by the Asylum Office staff members after they submit their applications. Under Article 26 of the Asylum Act, the asylum seekers shall be interviewed "as soon as possible", which is not complied with

102 According to the Border Police Administration's reply to a request for access to information of public importance 03/10 Ref. No. 26-176/14 of 28 January 2014. Out of the 193 decisions rendered by the Asylum Office in 2013, 176 of them were decisions to discontinue the procedure.

in practice and does not satisfy the principle of procedural economy, given that more than one month passes on average between the submission of the application and the interview. Apart from the Asylum Office staff member and interpreter, the interview is also attended by the asylum seeker's legal representative and may also be attended by a UNHCR representative, with the consent of the asylum seeker. The interviews are conducted in the following manner: with the help of the interpreter, the Asylum Office staff member asks the asylum seeker questions about his identity, why he is seeking asylum, his movements after leaving his country of origin and whether he had already applied for asylum in another country. When the staff member is questioning the asylum seeker, the asylum seeker's legal representative has the opportunity to ask him/her additional questions. The staff member draws up a record of the interview, which is co-signed by the asylum seeker, his legal representative and the interpreter. During the interview, the asylum seeker is asked about why he had left his country of origin, which countries he had passed to before arriving in Serbia and whether he had sought asylum in another country. The Asylum Act does not lay down rules on the burden of proof or that the authority should render a decision in favour of the asylum seeker in case of any doubt, provided that his account is coherent and plausible.[103] An asylum seeker may be interviewed more than once, which occurs very rarely in practice as the Asylum Office endeavours to interview every asylum seeker in one go – consequently, the interviews sometimes last more than five hours without any breaks, which is extremely taxing upon everyone involved in them. The Asylum Act does not govern interviews, wherefore the detailed provisions on oral hearings in the GAPA are applied. The GAPA provides for adjourning a hearing in the event the subject matter cannot be reviewed and determined during one hearing. Only 19 interviews were conducted in 2013. Although numerous aliens abandon the procedure before applying for asylum or before the interview, which results in the discontinuance of the procedure, it is precisely the excessive length of the asylum procedure that deters the asylum seekers from staying in Serbia until its completion.

5.4. First-Instance Decisions

After interviewing an asylum seeker, the Asylum Office may rule on the merits and render a first-instance decision either upholding the application and granting the asylum seeker asylum or subsidiary protection or rejecting the application and ordering the asylum seeker to leave the territory of the Republic of Serbia within a specific period unless he is entitled to stay on other grounds.

103 UNHCR, International standards relating to refugee law, checklist to review draft legislation, March 2009, p. 19.

The Asylum Office may also render a procedural decision discontinuing the asylum procedure or dismissing the asylum application without ruling on the merits upon the fulfilment of the legal requirements.

The Asylum Act does not specify the deadline within which the Asylum Office is to rule on asylum applications. Although Article 208(2) of the GAPA sets a general 60-day deadline for rulings on administrative matters, this deadline is apparently inadequate for ruling on asylum applications because the outcome of the procedure regards the fundamental human rights of the asylum seekers and they may be additionally traumatised by waiting for the decisions and stop perceiving Serbia as a country of refuge. The Asylum Office should rule on the applications as soon as possible. However, as the BCHR team concluded whilst extending legal aid to asylum seekers, the procedures take much longer than 60 days from the day the asylum seekers submit their asylum applications.

The Asylum Office shall reject asylum applications based on false grounds or data, forged identity or other documents, unless the asylum seekers present justified reasons for that. The Asylum Office shall also reject asylum applications in the event the asylum seekers' allegations are incoherent or in contravention of other evidence adduced during the procedure, in the event it is established during the procedure that the asylum applications were submitted to postpone deportation or the asylum seekers came to Serbia purely for economic reasons. Unsuccessful asylum seekers may submit new applications in the event they have evidence that the circumstances relevant to the recognition of the right to asylum or granting of subsidiary protection have significantly changed in the meantime.

The Asylum Office rendered 193 decisions in 2013. It upheld four, rejected five, dismissed eight asylum applications and discontinued the procedure with respect to 176 asylum applications.[104]

Safe Third Country and Safe Country of Origin Concept. – The above statistical data on first-instance decisions may lead to the conclusion that the vast majority of Asylum Office decisions to dismiss the asylum applications without ruling on their merits were not based on the grounds set out in Article 33(1(6)) of the Act[105], as the case had been ever since the Asylum Act entered into force[106]. However, given that the Asylum Office ruled on only 17 asylum applications in 2013, the above data create only an illusion that the practice of automatically applying the safe third country concept has been abandoned and that the quality of first-instance decisions has improved. Under the Asylum Act,

104 Reply to the request to access information of public importance, Border Police Administration 03/10 Ref. No. 26-176/14 of 28 January 2014.

105 An asylum application shall be dismissed in the event the asylum seeker has come from a safe third country, unless he can prove that it is not safe for him/her.

106 *Serbia as a Country of Asylum*, *supra* 48, §§ 36-43.

a safe third country shall be understood to mean a country from a list established by the Government[107], which observes international principles pertaining to the protection of refugees in the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees, where an asylum seeker had resided, or through which he had passed, immediately before he arrived in the territory of the Republic of Serbia and where he had an opportunity to submit an asylum application, where he would not be subjected to persecution, torture, inhuman or degrading treatment, or sent back to a country where his life, safety or freedom would be threatened. Basing the safe third country concept on a unilateral Government decision, which was adopted in 2009 and has not been amended since, is problematic. The Government of Serbia had failed to obtain guarantees that the countries it was declaring safe reviewed asylum applications in efficient and fair proceedings before it adopted the list. In determining whether a particular country is safe, the Serbian Government only takes into consideration the opinion of the Serbian Ministry of Foreign Affairs, whether the country ratified the 1951 Refugee Convention, and whether it has a visa-free regime for Serbian citizens.[108] The Government list of safe third countries includes all of Serbia's neighbouring states, and some countries with very problematic and inaccessible asylum systems, such as Greece.[109] In the 2008–2012 period, the Asylum Office had been dismissing asylum applications solely because the applicants had passed through or lived in a state on the Government list, without examining whether that state fulfilled the other requirements to be qualified as safe. Abidance by the principle of non-refoulement also includes a state's duty to do its utmost to prevent both transfers to a state where the person will be at risk (direct refoulement) and transfers to states where there is a risk of further transfer to a third country where the person will be at risk (indirect or chain refoulement).[110] EU member states apply the Dublin System,[111] which sets out a hierarchy of

107 *Sl. glasnik* 67/2009.

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

109 UNHCR, Observations on Greece as a Country of Asylum, December 2009, available at http://www.refworld.org/docid/4b4b3fc82.html.

110 More on the consequences of the automatic application of the safe third country concept in BCHR's *Asylum in the Republic of Serbia June – October 2013* Report, pp. 11-12, available at http://www.azil.rs/doc/ENG_periodi_ni_izve_taj_FINALNI_jun_oktobar_2013.pdf.

111 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L. 180/1-180/30; 29.6.2013, (EU)2003/86.

criteria based on which their competence for ruling on an asylum application is determined. This system is not applied automatically and requires the competent state's agreement to examine asylum application. Furthermore, Article 27 of the Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status[112] recognises the concept of safe third countries, but sets out that states applying it must provide the asylum seekers with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees.

The Asylum Office does not issue any documents to the asylum seekers in the languages of safe third countries. The BCHR has not been able to establish whether the Asylum Office sends any requests to safe third countries asking them to examine specific asylum applications; nor do the reasonings of first-instance decisions lend themselves to such a conclusion. The conclusion that can be drawn from the analysis of the first-instance decisions is that, by applying the safe third country concept, the Asylum Office has simply been declaring itself without jurisdiction, regardless of whether or not the safe third country agreed to review the asylum applications and in general, without establishing which safe third country would have the jurisdiction to review a specific application. In the event a safe third country does not accept jurisdiction to rule on an asylum application regarding which the competent Serbian authorities declared themselves incompetent for and does not allow an asylum seeker to enter its territory, the latter practically ends up in a legal vacuum, without the possibility of obtaining international protection. Furthermore, in the event the state that renounced jurisdiction to rule on an asylum application removes the asylum seeker to a safe third country that had not agreed to examine his application, such conduct, in the absence of adequate procedural guarantees[113], may instil feelings of fear and despair in the asylum seeker and thus reach the threshold of cruelty severe enough to be qualified as inhuman treatment within the meaning of Article 3.[114]

5.5. 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. Under the Asylum Act, nationals of the Republic of Serbia with

112 *Supra 99*.

113 See more about the Second-Instance Procedure and the Procedure before the Administrative Court in chapters 5.3. Second-Instance Procedure, p. 40 and 5.5. Judicial Review: Procedure before the Administrative Court, p. 45.

114 *Ghorbanov v. Turkey*, App. No. 28127/09, judgment of 3 December 2013, §§ 33–35.

a degree in law and at least five years of professional experience and versed in human rights regulations may be appointed Commission chairperson or members. The Act, however, does not lay down any additional and precise criteria for the appointment of the Commission members, e.g. that they are expert in refugee law, and only requires that they are versed in human rights regulations, which is no guarantee of the quality or competence of this body. For instance, the Director of the General Affairs Department of the telecommunications company Telekom, who has not worked in the field of human rights at all, has been appointed Commission member. The Asylum Commission is chaired by the Assistant Head of the Border Police Administration, within which the Asylum Office operates, which raises *prima facie* doubts about the independence of the second-instance authority.[115]

The Asylum Act does not regulate the appeals procedure and the GAPA applies subsidiarily to the second-instance procedure. Appeals of first-instance decisions are submitted to the Commission within 15 days from the day of service of the first-instance decision to the parties or their legal representatives. The Commission renders its decisions by a majority of votes.

The right to an effective legal remedy in the asylum procedure entails the existence of an independent appeals authority with jurisdiction to review the first-instance decisions, both on points of law and procedure, and to revoke the decisions if necessary.[116] Under Article 221(1) of the GAPA, appeals shall stay enforcement. Appeals are submitted to the first-instance authority, which examines whether the procedural prerequisites for their review by the second-instance authority have been fulfilled. When the first-instance authority receives the appeal, it may render a different decision on the matter and substitute the impugned ruling by a new one, in the event it finds the appeal well-founded and that it is unnecessary to conduct the procedure again. In the event the first-instance authority finds that the implemented procedure was incomplete, it may perform the requisite supplementary actions and render a new ruling, which may also be appealed by the party. In the event it does not reject the appeal, the second-instance authority may itself decide on the administrative matter. It may also set aside the impugned ruling and order the first-instance authority to re-examine the matter, when it finds that the shortcomings of the first-instance procedure will be eliminated more rapidly and economically by the first-instance authority (Article 232, GAPA).

The Asylum Act does not specify the duration of the second-instance procedure. Under the Administrative Disputes Act, a claim may be filed with the

115 The RS Government Ruling on the Appointment of the Commission Chairperson and Members No. 119-6141/2012 of 20 September 2012, available in Serbian at http://www.apc-cza.org/ar/komisija-za-azil.html.

116 *Migration and International Human Rights Law, supra* 38, pp. 140 – 142.

Administrative Court in the event the Asylum Commission failed to render a decision on the appeal within 60 days from the day of its receipt, upon the expiry of eight days from the day the reminder was served on the second-instance authority (Art. 19).

The "silence of the administration" may also be appealed, in the event the first-instance authority failed to issue a ruling within 60 days from the day the procedure was initiated. In such cases, in the event the second-instance authority finds that the reasons for the failure to render the ruling are unjustified, the second-instance authority requires of the first-instance authority to forward it the case files and itself rules on the administrative matter. Exceptionally, in the event the second-instance authority is of the view that the first-instance authority will conduct the procedure more rapidly and economically, it shall order the first-instance authority to conduct the procedure and submit the collected data within a specific deadline and then shall itself proceed to rule on the administrative matter. Such rulings are final (Art. 236(2), GAPA). Although the GAPA includes a provision obliging second-instance authorities to conduct a hearing with respect to appeals of the silence of the administration, that is, to hear the asylum seeker in the meaning of the Asylum Act, the Asylum Commission has not held any hearings to date,[117] although such hearings would greatly contribute to the economy of the asylum procedure. The BCHR is of the view that there are no justified reasons precluding the second-instance authority from hearing the appellants.

Under Article 236 of the GAPA, the resolution of an administrative matter by a second-instance authority on appeal is a rule, while the annulment of the first-instance ruling and the order to the first-instance authority to rule on it again is an exception serving to achieve the principle of procedural economy. However, the Asylum Commission has not once ruled on the merits of an asylum application since the BCHR began extending legal aid to the asylum seekers. Nineteen appeals were submitted to the Asylum Commission in 2013.[118] The Commission upheld two appeals and rejected 10 as ill-founded. Three appeals of the silence of the administration were filed in the same period and the Asylum Commission ordered the Asylum Office to render decisions on the asylum applications.

5.6. Termination of Asylum

A person granted the status of a refugee by the competent authority may lose his refugee status only if specific conditions are met. Refugee law distin-

117 Based on BCHR's and APC's experiences in extending legal aid to asylum seekers.

118 Reply to a request for access to information of public importance, Border Police Administration 03/10 Ref. No. 26-176/14 of 28 January 2014. Four appeals submitted in 2013 were pending before the Asylum Commission at the time this report was finalised.

guishes between three categories of grounds for ending refugee status[119] and domestic legislation should be formulated so as to enable distinguishing between them and avoid confusion.[120]

Under Article 54 of the Asylum Act, the right to refuge shall cease in the event a person: 1. voluntarily re-availed him/herself of the protection of his country of origin; 2. voluntarily reacquired the citizenship he had lost; 3. acquired new citizenship and thus enjoys the protection of the country of his new citizenship; 4. voluntarily returned to the country he had left or outside which he remained owing to fear of persecution or ill-treatment; or 5. can no longer continue to refuse to avail him/herself of the protection of his country of origin, because the circumstances due to which he had been granted protection have ceased to exist. Termination of protection pursuant to paragraph 1, item 5 of this Article shall not apply to persons able to give compelling reasons, arising out of past persecution or ill-treatment, for refusing to avail themselves of the protection of their country of origin.

The provision of the Asylum Act providing for the termination of the refugee status in the event the circumstances due to which a person had been granted protection have ceased to exist should be supplemented by the following requirement: that fundamental and lasting changes occurred in the country of origin. The fundamental character of the changes should be assessed objectively and carefully and include assessments of both the general human rights situation and the particular cause of fear of persecution.[121] Furthermore, in order to arrive at the conclusion that the refugee's fear of persecution is no longer well founded, the competent authorities, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.[122] The Asylum Act does not explicitly state that a decision to terminate asylum has to

119 Cessation: the ending of refugee status pursuant to Article 1C of the 1951 Convention because international protection is no longer necessary or justified on the basis of certain voluntary acts of the individual concerned or a fundamental change in the situation prevailing in the country of origin. Cessation has *ex nunc* effect. Cancellation: a decision to invalidate a refugee status recognition which should not have been granted in the first place. Cancellation has *ex tunc* effect. Revocation: withdrawal of refugee status in situations where a person engages in conduct which comes within the scope of Article 1F(a) or 1F(c) of the 1951 Convention after having been recognised as a refugee. This has *ex nunc* effect.

120 International Standards Relating to Refugee Law Checklist to Review Draft Legislation, *supra* 103, p. 10.

121 UNHCR Executive Committee Conclusion No. 69 of 2 October 1992.

122 Court of Justice of the European Union, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, joined cases C – 175/08, C – 176/08, C – 178/08, C – 179/08 2010 I -01493, judgment of 2 March 2010, §§ 70 – 76.

be reasoned and have *ex nunc* effect. Nor does it guarantee the right to a legal remedy against a decision on the termination of refugee status. In this case, too, the remedy must have suspensive effect.

The wording of the Asylum Act gives rise to confusion, because it sets out the same grounds for revoking a decision granting asylum and for the cessation of refugee status[123], although it also lays down that refugee status shall be terminated also "as well as in other cases defined by law". Given that the revocation of a decision granting asylum affects the existential rights of the individual at issue, the phrase "as well as in other cases defined by law" should be avoided because it creates legal uncertainty. The Asylum Office shall cancel a decision granting asylum *ex officio* if it is subsequently established that a decision granting asylum was rendered on the basis of falsely presented facts or of concealment of facts by the asylum seeker and that, due to the above reason, he was not eligible for asylum at the time of he submitted the asylum application, and there exist reasons why he would have been denied the right to refuge, had these reasons been known at the time he submitted the asylum application.

All these legal interventions are extraordinary legal means affecting final rulings, which are mostly undertaken *ex officio*. Under the GAPA, the legal consequences of the rulings are invalidated by the annulment and invalidation of the rulings. However, some rights (acquired with relation to family status and intellectual property) cannot be annulled and the Asylum Act should guarantee this. Furthermore, in the event a person's refugee status is annulled on grounds laid down for denying the right to asylum (Article 31, Asylum Act), e.g. because he had committed a war crime or a crime against humanity, this annulment should not be allowed to affect the refugee status of his family members.[124]

5.7. Judicial Review: Procedure before the Administrative Court

A final decision by the Asylum Commission or its failure to rule on an appeal may be challenged in an administrative dispute before the Administrative

123 Article 54 of the Asylum Act: The right to refuge shall cease in the event a person: 1. voluntarily re-availed him/herself of the protection of his country of origin; 2. voluntarily reacquired the citizenship he had lost; 3. acquired new citizenship and thus enjoys the protection of the country of his new citizenship; 4. voluntarily returned to the country he had left or outside which he remained owing to fear of persecution or ill-treatment; or 5. can no longer continue to refuse to avail him/herself of the protection of his country of origin, because the circumstances that due to which he had been granted protection have ceased to exist. Termination of protection pursuant to paragraph 1(5) of this Article shall not apply to persons able to give compelling reasons, arising out of past persecution or ill-treatment, for refusing to avail themselves of the protection of their country of origin. Article 55 of the Asylum Act: The Asylum Office shall *ex officio* revoke a decision to grant asylum in the event it is established that the reasons referred to in Article 54 of this Law apply, as well as in other cases defined by law.

124 International Standards Relating to Refugee Law, *supra* 103, p. 11.

Court (Article 15, Administrative Disputes Act)[125]. The Administrative Court rules on the lawfulness of final administrative enactments in three-member judicial panels.

The lawfulness of an administrative enactment may be challenged by a claim in an administrative dispute: in the event it was adopted by an authority without jurisdiction; at the authority's discretion, in the event the authority had exceeded its legal powers or the enactment had not been adopted in accordance with the goal why it was vested with a specific power; in the event the law or another general enactment had not been enforced properly; in the event the procedural rules were violated during the procedure; in the event the finding of fact was incomplete or inaccurate, or an incorrect conclusion was drawn from the facts.[126] The claimant may also ask the Administrative Court to establish that the respondent authority has again adopted the enactment that had already been invalidated, i.e. ask it to declare the adopted enactment unlawful and legally ineffective (declaratory judgement).

The Administrative Court has to date mostly limited itself to reviewing whether the procedural aspects of the asylum procedure had been observed. Like in 2011 and 2012[127], the Administrative Court did not uphold any claims by asylum seekers in 2013 either. Ten administrative disputes challenging the Asylum Commission rulings were initiated in 2013.[128] Not one motion to review a legally binding Administrative Court was submitted to the Supreme Court of Cassation in the same period.[129] The Administrative Court ruled on five of the ten administrative disputes by rejecting the claims and the other five disputes remained pending at the end of the year.

The Administrative Court has not held any oral hearings on asylum claims to date. Article 33(2) of the GAPA envisages such exceptions to the rule in the event the matter under dispute does not necessitate the direct hearing of the parties or additional findings of fact or in the event the parties agree that an oral hearing need not be held. The Court has to date availed itself of this opportunity in every single case.

Suspensive Effect. – As a rule, a claim filed with the Administrative Court shall *not suspend the enforcement of the impugned administrative enactment.*[130]

125 *Supra* 4.

126 More in the BCHR *Asylum in the Republic of Serbia: January-June 2013 Report*, p. 7, available at http://www.azil.rs/doc/Report_eng_final_final.pdf.

127 *Ibid.*

128 Data obtained from the Administrative Court pursuant to the Access to Information of Public Importance Act, 17 January 2014.

129 *Ibid.*

130 Article 23, Administrative Disputes Act.

The Court may, however, stay 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 stay is not in contravention of public interests and would not cause major or irreparable damage to the opposing party, i.e. interested party (Art. 23, GAPA).[131] Exceptionally, the stayed enforcement 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.[132] In such cases, the Administrative Court rules on the motions to stay enforcement within five days from the day they are filed.

For a legal remedy to be considered effective in the meaning of ECtHR case law, the "suspensive effect" of the appeal must follow automatically rather than rest solely on the discretion of the domestic authority considering the individual's case.[133] In the opinion of the ECtHR, for a legal remedy to be considered effective, the „suspensive effect" of the appeal must follow automatically, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised in the event an alien were returned to his country of origin.[134] The automatic suspensive effect of the appeal thus must be explicitly prescribed by law. The Administrative Court has failed to stay the enforcement of any final administrative enactments on asylum to date,[135] but the Constitutional Court nevertheless considers that claims filed with the Administrative Court are an effective legal remedy.[136]

Safe Third Country Concept. – The Administrative Court decisions confirmed the lawfulness of 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. In its decisions rejecting complaints in 2012 and 2013, the Administrative Court found that the second-instance authority had properly applied the law and rejected the appeals as ill-founded because the first-instance authority had established that asylum seekers had passed through safe third countries before entering Serbia.[137]

131 *Ibidem*.

132 *Ibidem.*

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

134 *Jabari v. Turkey*, App. No. 40035/98, judgment of 11 July 2000, § 50.

135 The Administrative Court decisions are available at http://www.azil.rs/documents/category/judgements.

136 Decision in the case Už–1286/2012, of 29 March 2012, available at: http://www.azil.rs/documents/category/judgements.

137 More in the *January-June 2013 Report*, *supra 126*, p. 7.

In one case, the claimants disputed the fact that the countries they had passed through were safe for them, stating that they did not stand a real chance of submitting asylum requests in those countries (Turkey, Greece and Macedonia).[138] The claimants referred to the reports of international organisations indicating the plight of asylum seekers in those countries, and the fact that Turkey had not ratified the 1967 Protocol, which means that the Refugee Convention is not applied in Turkey to persons who have fled non-European countries. The Administrative Court found that the claimants did not prove that the countries the asylum seekers passed through on their way to Serbia were not safe for them, and did not refer to the fact that Turkey did not ratify the 1967 Protocol. They merely concluded (without elaborating) that the asylum seekers had had the opportunity to submit asylum applications in those countries. If the fact that "safe third countries" genuinely provide efficient protection in the asylum procedure is being challenged in an administrative dispute, the Administrative Court should have nevertheless provided a sufficiently clear reasoning why the countries that asylum seekers had passed through were safe for them. In its assessments of whether the countries asylum seekers had passed through were really safe for them, the Administrative Court had applied the same reasoning as the first and second-instance authorities, concluding that these countries were save just because they were on the Government list, without considering whether these countries abided by international principles on the protection of refugees in practice.

The Administrative Court did not consider the reports of international organisations specified in the complaint and illustrating the plight of asylum seekers in certain countries as evidence *per se* that the asylum seeker did not have the opportunity to apply for asylum in those countries or that they were unsafe for him. The Court was of the opinion that the reports of international organisations could merely illustrate the human rights conditions in safe third countries and thus corroborate the credibility of the asylum seekers' statements, but that the reason why one country was not safe had to be individualised, i.e. closely linked to the personality of the asylum seeker. This view of the Administrative Court is valid to an extent. However, more efficient protection of asylum seekers in Serbia would require of the Administrative Court to establish whether the asylum seekers had had the opportunity to seek asylum in specific countries during its qualification of those countries as safe third countries rather than upholding the grounds in the reasoning of the second-instance decision *en general* and assessing that it was

> "an undisputed fact that, prior to their arrival in the territory of the Republic of Serbia, the claimants had been in and passed through the territory of countries cat-

138 Administrative Court judgment No. 23 U 3831/12 of 11 October 2012.

> egorised as safe third countries in the Decision of the Government of the Republic of Serbia (...) under Article 2 of the Asylum Act and that they had had the opportunity to, but did not apply, for asylum in them."[139]

The Administrative Court would adjust its view if it took into account the UNHCR reports, an opinion shared also by the Constitutional Court.[140] Both the administrative procedures and administrative disputes, as mechanisms for reviewing the lawfulness of administrative enactments, would thus truly provide adequate protection from refoulement. The Administrative Court ignored the view of the Constitutional Court of Serbia in its 2013 decisions.[141] As far as the ECtHR case law, particularly its judgment in the case of *MSS v. Belgium and Greece*[142] is concerned, the Administrative Court does not think the ECtHR's standards on the safe third country presumption i.e. protection from refoulement need to be applied. It stated the following in one of its judgments:

> "As per the claimant's reference to the European Court of Human Rights judgment in the case of *M.S.S. v. Belgium and Greece* and the claim that Greece is not a safe third country, the Court finds that a judgement of the European Court of Human Rights may be of relevance only in the event the asylum seekers claim that one of their rights enshrined in the European Convention on Human Rights has been violated in an administrative procedure before the competent administrative authority in the Republic of Serbia or a proceeding before this Court."[143]

Although it is not entirely clear what the Court meant to say, the fact that this sentence was reiterated verbatim in a number of decisions leads to the conclusion that the view of the Court, not a typo, is at issue. Some experts are of the view that the Court actually considers as relevant only ECtHR judgments against Serbia.[144] The Court is definitely under the obligation to interpret the Convention in accordance with ECtHR's case law, without limiting itself to judgments against Serbia.

In its review of the lawfulness of the first-instance ruling, the Administrative Court highlighted as particular grounds for the inadmissibility of the claim that "the first-instance ruling did not specify which country the claimants should return to, only that they leave the territory of the Republic of Serbia."[145] This view, too, is absolutely ill-founded, because person illegally present in Serbia

139 *Ibid*, p. 3.

140 Constitutional Court Ruling rejecting constitutional appeal No. UŢ-5331/2012 of 28 December 2012.

141 See e.g. the decision in the case of 1 U. 540/13, of 20 March 2013.

142 *M.S.S. v. Belgium and Greece*, *supra* 19.

143 See e.g. the decision in the case of 1 U. 540/13, of 20 March 2013.

144 See I. Krstić, M. Davinić, *Pravo na azil, međunarodni i domaći standardi,* Pravni fakultet u Beogradu, Belgrade, 2013, pp. 351-352.

145 See e.g. the decision in the case 1 U. 540/13, of 20 March 2013, p. 4.

cannot leave it themselves without documents and could usually be deported either to their countries of origin or countries they had passed through before they had entered Serbia.[146]

The Administrative Court's confirmation of the lawfulness of the authorities' practice of automatically applying the Decision on the Lists of Safe Countries of Origin and Safe Third Countries actually leads to absurd situations, in which none of the asylum seekers, who had arrived to Serbia by land, will be granted asylum because all the neighbouring states are on the list of safe third countries. Such reasoning by the Administrative Court implies that the right to asylum and subsidiary protection may be granted only to asylum seekers who arrived in the territory of the Republic of Serbia on a direct flight, which renders the right to asylum entirely senseless, given that there are hardly any direct flights to Belgrade Airport "Nikola Tesla" from conflict areas, such as Africa, Asia and the Middle East.[147]

146 More in Chapter 7. Removal of Aliens from the Territory of the Republic of Serbia, p. 52.

147 More about access to territory and procedure in the Belgrade Airport in Section 4.2. Access to Serbia's Territory and the Asylum Procedure at Belgrade Airport "Nikola Tesla", p. 23.

6. Constitutional Court of Serbia Case Law

A constitutional appeal may be filed against a legally binding decision on an asylum application once all effective administrative remedies have been exhausted. As a rule, constitutional appeals do not stay the enforcement of the individual enactments they contest. On the motion of the appellant, the Constitutional Court may stay the enforcement of an individual enactment in the event it would cause the appellant irreparable harm and the stay is not in contravention of public interest and will not incur damages to a third party (Article 86, Constitutional Court Act).[148] Therefore, this legal remedy does not have automatic suspensive effect either.

The Constitutional Court has reviewed three constitutional appeals of asylum seekers and one initiative to review the constitutionality of the Government Decision on the Lists of Safe Countries of Origin and Safe Third Countries since the Asylum Act entered into force. The Court dismissed one and rejected two constitutional appeals because the regular legal remedies, which are effective in the view of the Court, had not been exhausted.

Safe Third Country Concept. – The Constitutional Court confirmed the lawfulness of the application of the safe third country concept in all the asylum constitutional appeal cases it reviewed. The Court referred to the August 2012 UNHCR Report "Serbia as a Country of Asylum – Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia", which states that if asylum seekers are to be returned to Greece or Turkey, they run the genuine risk of finding themselves in limbo, without access to protection, and at possible risk of *refoulement* and to UNHCR's report "Observations on Greece as a Country of Asylum", advising Governments to refrain from returning asylum-seekers to Greece under the Dublin Regulation or otherwise. The Court nevertheless held that the obligation of the competent authorities to cooperate with the UNHCR in the asylum procedure on the implementation of its activities and in accordance with its mandate (Article 5, Asylum Act) leads to the conclusion that the list of safe third countries is drawn up also on the basis of UNHCR reports and conclusions insofar as they shall not dismiss an asylum application in the event the asylum seeker arrived from a safe third country on the Government list if that country applies its asylum procedure in contravention of the Refugee Convention.[149] Despite the Court's interpretation of the Asylum Act

148 *Sl. glasnik RS* 109/07, 99/11 and 18/13 – Constitutional Court decision.

149 The Constitutional Court held this view in all its decisions on constitutional appeals: Decision Už 1286/12 of 29 March 202, p. 8, Decision Už 5331/12 of 24 December 2012, p. 6, Decision Už 3458/13 of 19 November 2013.

provision imposing upon the competent authorities the obligation to cooperate with the UNHCR, the practice of applying the safe third country concept, which the appellants alerted the Constitutional Court to, as well as the UNHCR reports quoted by the Court, indicate that the professed cooperation with the UNHCR does not entail a revision of the list of safe third countries or abandonment of its automatic application. The Court's opinion is thus absolutely illogical and contradictory and practically justifies the actions of all instances in the asylum procedure.

Effectiveness and Exhaustion of Legal Remedies. – In addition, in the case in which the Constitutional Court dismissed the constitutional appeal because the regular legal remedies had not been exhausted, the Court took quite an illogical view on the effectiveness of legal remedies in the asylum procedure. Namely, the constitutional appeal was filed on 12 June 2012, at the time the Asylum Commission members' terms of office had expired and no-one had been appointed in their stead. Given that the Asylum Commission members were appointed three months after the constitutional appeal was submitted, on 20 September 2012, the Constitutional Court found that the requirements for its review of the appeal had been met, wherefore the appellant could not successfully challenge the effectiveness of the appeal to the second-instance authorities. The Constitutional Court's opinion is absolutely illogical because the effectiveness of a legal remedy is assessed at the moment the appeal is filed, not with respect to a point in the future. The ECtHR has held the existence of any legal remedy must be sufficiently certain not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness.[150] The fulfilment of the requirements regarding the exhaustion and availability of regular legal remedies must be assessed with respect to the time the constitutional appeal was filed.[151] At the time the asylum seeker filed the constitutional appeal, he was unable to appeal to the Asylum Commission, i.e. that legal remedy was unavailable because there was no body that could rule on it; nor was it certain when the Government would appoint the new Commission members.

As far as the effectiveness of filing claims with the Administrative Court is concerned, the Constitutional Court has held that asylum seekers have the opportunity to refute the presumption that a specific third country is safe for them before the Administrative Court and that, in the event they are successful, the Court shall rule on the merits. The appellant submitted to the Constitutional Court the Administrative Court judgment rejecting the claim, highlighting that the asylum seeker did not have a reasonable chance of success in proceedings before the Administrative Court. Although the Administrative Court had rejected the claims in all cases, the Constitutional Court stated that, given that the UN-

150 *Vernillo v. France,* judgment of 20 February 1991, App. No.11889/85, § 27.

151 *Baumann v. France*, ECtHR Decision on Admissibility of 16 March 2000, App. No. 33592/96, § 47.

HCR's Observations and the ECtHR's judgment in the case of *M.S.S. v. Belgium and Greece* had not been presented as evidence before the Administrative Court, the Administrative Court's hitherto case law does not give rise to doubts that the evidence on which the asylum seeker is basing his belief that he will be exposed to a real risk of treatment in contravention of the non-refoulement principle in one of the safe third countries will not have been seriously examined during a review of his claim. Therefore, the Constitutional Court based its view on the hypothetical conduct of the Administrative Court in the event the asylum seekers referred to ECtHR case law and the relevant UNHCR reports. The Administrative Court's 2013 case law, however, proved the Constitutional Court's hypothesis wrong. In all the asylum cases it reviewed in 2013, the Administrative Court ignored the relevance of ECtHR case law and the UNHCR reports.[152]

In that same decision, the Constitutional Court stated that the legal remedies in the asylum procedure had "mandatory suspensive effect", which rendered them effective in the view of the UNHCR and ECtHR case law. The Constitutional Court based its view on Article 42 of the Aliens Act, under which aliens, who have applied for asylum on time, may remain the Republic of Serbia until a legally binding ruling is rendered. This imprecise legal provision does not, however, guarantee the automatic suspensive effect of appeals of decisions dismissing or rejecting asylum applications, and merely envisages the aliens' possibility of staying in Serbia until a legally-binding decision is rendered. In the view of the Constitutional Court, although the UNHCR lists specific shortcomings in the appeals and the administrative dispute procedure in its Observations, the legal remedies in the asylum procedure, including constitutional appeals, fulfil the effective legal remedy requirements on the whole. The Constitutional Court particularly referred to Article 86 of the Constitutional Court Act, under which persons who filed constitutional appeals may seek a stay in the enforcement of an individual enactment, wherefore this legal remedy, too, provides sufficient guarantees protecting asylum seekers. However, neither claims submitted to the Administrative Court nor constitutional appeals have automatic suspensive effect, which the Constitutional Court disregarded, although, in the view of the ECtHR, automatic suspensive effect is prerequisite for qualifying a remedy as efficient in the asylum procedure. Furthermore, the Constitutional Court is of the view that the realisation of the Asylum Act principles, which are complied with in practice according to the UNHCR, contribute to the effectiveness of legal remedies, given that asylum seekers are extended legal aid, accommodation, interpretation, etc. Compliance with these principles, however, does not affect the efficiency of legal remedies in any way, particularly not the automatic application of the safe third country concept by all instances in the asylum procedure; it merely provides the asylum seekers with basic procedural safeguards allowing them to take part in the procedure at all.

152 More in about jurisprudence of the Administrative Court in Section 5.5. Judicial Review: Procedure before the Administrative Court, p. 45.

7. Removal of Aliens from the Territory of the Republic of Serbia

Under Article 57 of the Asylum Act, an alien whose asylum application has been refused or rejected, or whose asylum procedure has been suspended shall leave the Republic of Serbia within the time limit specified in the decision on his asylum application provided that he cannot remain in the country on other grounds. The time limit may not exceed 15 days. In practice, the Asylum Office gives the unsuccessful asylum seekers a three-day deadline to leave the country voluntarily.[153] Aliens who do not leave Serbia within a specific deadline shall be removed by force, pursuant to the Aliens Act. Such aliens may be placed in the Aliens Reception Centre pending their compulsory removal. The competent authority shall order the placement of aliens, who cannot be removed by force immediately, and aliens, whose identity has not been established or who do not have travel documents, in the Aliens Reception Centre. The compulsory removal of unsuccessful asylum seekers must be in accordance with Article 32(2 and 3) of the Refugee Convention, which includes procedural safeguards in case of forced removals: "The expulsion of a refugee lawfully in the territory of a Contracting State shall be only in pursuance of a decision reached in accordance with due process of law.... the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. ..."

Under Article 39(3) of the Constitution of the Republic of Serbia, a foreign national may be expelled only pursuant to a decision of a competent authority in a procedure prescribed by the law, provided that he had been provided with the right of appeal, and only where he does not risk persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinion, or where there is no threat of a grave violation of his rights guaranteed by this Constitution.

Article 1 of Protocol 7 to the ECHR lays down the procedural safeguards that must be in place relating to the expulsion of aliens.[154]

Although neither the Aliens Act nor the Asylum Act govern the forced removal procedure, this institute is partly regulated by the readmission agreements

153 Information and experience obtained during the extension of legal aid to asylum seekers by the BCHR team.

154 See the *June-October 2013 Report*, *supra* 110, pp. 16 - 20.

the Republic of Serbia signed with (most of) the neighbouring states. All readmission agreements are very similar, provide room for group expulsions of aliens and do not include sufficient human rights guarantees.[155] Article 4 of Protocol No. 4 to the ECHR prohibits the collective expulsion of aliens. The removal of an alien may be effected only on the basis of a reasonable and objective examination of the particular cases of each individual alien.[156] The Asylum Act or the Aliens Act should govern the forced removal of unsuccessful asylum seekers in a general and thorough manner and the provisions on forced removal should include procedural safeguards complying with international human rights standards.

155 *Ibid.*

156 *Lupsa v. Romania*, App. No. 10337/04, judgment of 8 June 2006, § 55, *C.G. and Others v. Bulgaria*, App. No. 1365/07, judgment of 28 April 2008, § 73.

8. Accommodation

Asylum seekers need to report to one of the Asylum Centres to be provided with accommodation. The Commissariat for Refugees and Migrations of the Republic of Serbia, however, had failed to provide accommodation for all asylum seekers until November 2013, wherefore many of them were living in open air or private accommodations near the Asylum Centres. Given that the Asylum Office registers only asylum seekers living in one of the Asylum Centres, aliens not admitted to the Centres are deprived of access to the asylum procedure. Furthermore, asylum seekers, who fail to report to the authorised Asylum Centre on time, forfeit the right to accommodation in the Centre and thus of both access to the asylum procedure and the right to stay in Serbia.

Aliens reporting to the Asylum Centres have to submit the certificates that they expressed the intention to seek asylum, which are kept by the Centre managements.[157] Those, who are not provided with a place in the Centre, spend the time waiting to be admitted outside, without any documents by which they could prove they are seeking asylum in Serbia if the police ask them for their IDs; they are thus in effect irregular migrants, since most of them lack travel documents or any other identification papers. The BCHR noted that the Asylum Centre managements have begun issuing copies of the certificates of intention to seek asylum to the asylum seekers, as proof of their status in Serbia until they are issued their IDs. This issue should nonetheless be regulated by the Asylum Act.

Under Article 39(4) of the Asylum Act, asylum seekers may request consent from the Asylum Office to live in private accommodations. The BCHR team in 2013 extended legal aid to a number of clients, who had been living in rented premises with the consent of the Asylum Office. Given that rental of private accommodation by asylum seekers is not governed in detail by the law, we noted that they may encounter problems in practice, because they cannot conclude lease agreements until the Asylum Office issues them the IDs they need to enter into such agreements. This legal lacuna can be resolved by the more expedient registration and issuance of the IDs by the Asylum Office because asylum seekers cannot exercise all the rights they are entitled to under the Asylum Act without their IDs.[158]

In 2013, asylum seekers were accommodated in Asylum Centres in Banja Koviljača, Bogovađa, Vračević, Sjenica and Obrenovac pending final decisions

157 Article 2, Rulebook on Accommodation and Basic Living Conditions in Asylum Centres (*Sl. glasnik RS* 31/08).

158 See more in Chapter 5. Asylum Procedure in Serbia, p. 29.

on their asylum applications. These facilities are within the jurisdiction of the Commissariat for Refugees and Migrations and funded from the state budget. Specific issues of relevance to the work of Asylum Centres are governed in greater detail by subsidiary legislation.[159]

8.1. Banja Koviljača Asylum Centre

The Serbian Government adopted the Decision on the Establishment of the Asylum Centre in Banja Koviljača in 2008. This was the first centre that opened in the Republic of Serbia.[160] The Centre has the capacity to accommodate 84 people in 18 triple bed rooms and 15 double bed rooms. The Centre operates an open regime and the living conditions in it are satisfactory; advantage is given to families with small children and people with health problems. A total of 684 people were accommodated in the Banja Koviljača Centre since the beginning of 2013; a total of 15,726,733 RSD (i.e. 135,701.75 EUR) were earmarked in the state budget for the Centre.[161]

8.2. Bogovađa Asylum Centre

The Red Cross resort in Bogovađa was designated to serve as an Asylum Centre under a 2011 Government decision[162]. Asylum seekers admitted to this Centre live in it pending decisions on their asylum applications. The Bogovađa Asylum Centre was opened in June 2011 and is operating under the Commissariat for Refugees and Migrations. The work of the Asylum Centre is funded from the budget of the Republic of Serbia.[163]

The facility has 44 rooms on two floors; 19 of the rooms have bathrooms while the other 25 rooms share bathrooms, one per three rooms. The Centre can accommodate up to 150 people.[164]

159 Rulebook on Accommodation and Basic Living Conditions in Asylum Centres (*Sl. glasnik RS* 31/08); Rulebook on Health Examinations of Asylum Seekers on Admission in the Asylum Centres (*Sl. glasnik RS*, 93/08); Rulebook on Records of People Accommodated in the Asylum Centres (*Sl. glasnik RS* 31/08); Rulebook on Social Assistance to Asylum Seekers and People Granted Asylum (*Sl. glasnik RS* 44/08); Rulebook on Asylum Centre House Rules (*Sl. glasnik* 31/2008).

160 More on the Banja Koviljača is available at http://www.kirs.gov.rs/docs/azil/Asylum%20Center%20Banja%20Koviljaca.pdf.

161 Commissariat for Refugees and Migrations reply to a request for access to information of public importance, Ref. No. 019-205-1/2014, Belgrade, 5 February 2014.

162 RS Government Decision on the Establishment of the Bogovađa Asylum Centre 05 Ref. No. 02-3732/2011, *Sl. glasnik RS* 34/2011.

163 More on the Bogovađa Asylum Centre is available at: http://www.kirs.gov.rs/docs/azil/Asylum%20Center%20Bogovadja.pdf.

164 *Ibid.*

Since the Bogovađa Centre was full in September and October 2013, large numbers of asylum seekers lived in the woods around the Centre, sleeping on the ground, on makeshift bedspreads, and a few of them found shelter under nylon tents and in abandoned wooden barracks. The conditions they were living in can be characterised as inhuman and degrading.[165] In addition to lack of room, the Bogovađa Asylum Centre in 2013 faced other problems, the organisation of the asylum seekers' accommodation, late provision of medical assistance; some asylum seekers, who had violated the House Rules, were deprived of their meals and accommodations.[166]

The Protector of Citizens visited the Bogovađa Asylum Centre in October 2013, within the National Preventive Mechanism's activities.[167] The NPM noted that the procedures prescribed by the Asylum Act were not applied with respect to migrants found in the territory of the Republic of Serbia, notably that it remained unclear how the migrants as a rule arrived in the Bogovađa Centre before they were registered and issued certificates on the expressed intention to seek asylum by the MIA, based on which they are referred to the Centre. The migrants said that they knew they were to go to the Bogovađa Centre when they crossed the border and entered Serbia. Their statements also lead to the conclusion that the main reason why they obtained the certificates was to exercise the right to accommodation in the Centre, as a stop on their way to EU countries, rather than to seek asylum in the Republic of Serbia. This may indicate the existence of an informal system playing an important role with respect to the status of migrants in the Republic of Serbia.

A total of 1945 people were accommodated in the Bogovađa Centre in 2013. A total of 54 million RSD (i.e. 465,951.47 EUR)[168] were allocated for their accommodation and satisfaction of their basic needs.[169] The BCHR is concerned by the high costs, particularly in view of the fact that the greatest number

165 Protector of Citizens report on the visit to the Bogovađa Centre within the National Preventive Mechanism, 14 October 2013, p. 5.

166 The BCHR sent a letter to the Commissariat for Refugees and Migrations on 4 November 2013 re the Centre's decision to turn out an asylum seeker represented by the BCHR, in which it said that the accommodation situation was complex and that the Centre Manager and all its staff were under great pressure given that over a 100 people were living in open air for over a month but that this required of the institutions involved in asylum issues to extend greater support, rather than letting the Asylum Centre management shoulder all the responsibility and wield discipline. The Commissariat never replied to the letter. BCHR's clients in Bogovađa repeatedly complained that the asylum seekers were being deprived of their meals, thrown out of the Centre and not provided with medical assistance on time.

167 Protector of Citizens report on the visit to the Bogovađa Centre within the National Preventive Mechanism, 14 October 2013.

168 The exchange rate is available at http://www.kursna-lista.com/konvertor-valuta.

169 Commissariat for Refugees and Migrations reply to a request for access to information of public importance, Ref. No. 019-205-1/2014, Belgrade, 5 February 2014.

of irregularities were identified in this Centre and that the asylum procedures were hardly conducted in it in 2013.[170]

8.3. Temporary Asylum Centre on a Private Estate in Vračević

Up to 250 migrants at a time were occasionally living in open air near the Bogovađa Asylum Centre due to lack of room in 2012 and 2013[171]. When it transpired that the available accommodation capacities were insufficient, the Government of the Republic of Serbia on 24 January 2013 rendered a Conclusion[172] at the proposal of the Commissariat for Refugees and Migrations to open a temporary asylum centre for aliens who express the intention to seek asylum and cannot be accommodated in the Bogovađa Centre.

In early 2013, the Commissariat for Refugees and Migrations concluded an agreement with the owner of a private facility – an estate in the village of Vračević, 5 km from Bogovađa in the municipality of Lajkovac, which became a new temporary centre for asylum seekers. Under the contract, the owner was under the obligation to provide fuel and a change of bed linen once a week, a sanitary block for 20 asylum seekers, a dining room in which 30 asylum seekers could eat at the same time, electricity, water and the Internet (Art. 4). The lessor did not fulfil the contractual obligations.[173]

The Vračevićе state comprises a house and two barracks. Asylum seekers were to be accommodated in eight rooms, most of which 10 or 15 square metres in size (some of them smaller). These capacities were insufficient for the adequate accommodation of asylum seekers living in Vračević, whose numbers reached up to 150 at any one time.[174]

Up to 10 people shared each of the two 16–20 m^2 rooms in one barrack. The rooms with ten beds (some of them bunk beds), and a wood furnace, were cramped and stuffy. The bunk beds were placed next to the windows, wherefore the rooms could not be aired and lacked natural light. Maintaining hygiene was practically impossible in the circumstances.[175] The situation in the two-floor house with the other five rooms (two on the ground floor and three on the first

170 See more in Chapter 5. Asylum Procedure in Serbia, p. 29.

171 More in the *January-June 2013 Report, supra* 126, and the *2012 Right to Asylum in the Republic of Serbia Annual Report, supra* 60.

172 RS Government Conclusion 05 Ref. No. 019-340/2013 of 24 January 2013.

173 Lease contract between the Commissariat for Refugees and Migrations and the owner of the Vračević property Ref. No. 9-9/15 of 25 January 2013.

174 Reply of the Commissariat for Refugees and Migrations to a request for access to information of public importance Ref. No. 019-205-1/2014, Belgrade, 5 February 2014.

175 More in the *January-June 2013 Report, supra* 126, p. 10.

floor) was no better.[176] They, too, were cramped and stuffy, with the bunk beds placed next to the windows. The asylum seekers, who were living on the estate in the winter months, complained that the rooms were cold, especially at night, and the owners admitted that there were not enough blankets and firewood.[177]

There was only one dilapidated bathroom, used by all the tenants living in the house and two barracks. The tiles in the damp bathroom were old, the shower cabin was not partitioned, there was only one toilet bowl without a toilet seat, and one water tap for all the asylum seekers. Maintaining hygiene in the facility was thus impossible. The asylum seekers did their laundry in a barrel in front of the house. They had absolutely no privacy in these circumstances.

The temporary Asylum Centre in Vračević was closed on 8 July 2013.

An average of 250 people was again living around the Bogovađa Centre in September and October 2013 because this Centre lacked the capacity to accommodate them. All of the people the BCHR lawyers talked to had certificates of intention issued by the Valjevo Police Administration, but they were nevertheless forced to live, sleep and eat in the nearby woods. All this alerted to the need to address the problem of people living in open air, whose numbers were continuously growing in September and October 2013.[178] The Commissariat for Refugees and Migrations again concluded a contract[179] with the owners of the Vračević property on 29 November 2013, which was broken off on 3 December 2013. [180] Seventy seven people were accommodated in one facility and another 96 in the other facility during this period.

BCHR had insight in the Notice of Termination of the Contract on the Provision of Accommodation Services to Asylum Seekers outside the Asylum Centres,[181] which is extremely vague and does not specify the reasons for the termination of the contract. Rather, it states that the reason for the termination of the contract lies in "a series of objective, well-known circumstances because

176 The ground floor had two rooms, one around 35m^2 in size with 20 beds and one around 10m^2 in size with six beds. There were three rooms on the first floor: one was around 18-20 m^2 in size and furnished with ten beds, the other was around 10m^2 in size and had eight beds and the third was around 12m^2 in size and had six beds.

177 Information obtained during a direct interview the BCHR legal team had with the owners of the Vračević estate, more in the *January-June 2013 Report*, *supra* 126. This simultaneously indicates breach of Article 4 of the lease agreement between the Commissariat for Refugees and Migrations and the Vračević estate owner No. 9-9/15, of 25 January 2013, in which the BCHR legal team had insight.

178 More in the *January-June 2013 Report*, *supra* 126.

179 Contract on the Provision of Accommodation Services to Asylum Seekers outside the Asylum Centres Ref. No. 404-37/14, November 2013 and Notice of Termination of the Contract on the Provision of Accommodation Services to Asylum Seekers outside the Asylum Centres Ref. No. 404-37/16 of 3 December 2013.

180 Notice of Termination of the Contract on the Provision of Accommodation Services to Asylum Seekers outside the Asylum Centres Ref. No. 404 - 37/14 of 3 December 2013.

181 *Ibid.*

of which the Commissariat for Refugees and Migrations is terminating the mentioned contract". BCHR is of the view that the wording of the Notice of Termination of the Contract, which was funded by the tax payers and cost the citizens of Serbia over 2.5 million RSD, is unprofessional and unacceptable, and that it should have been terminated in accordance with the Tort and Contracts Act, particularly when, in the view of the BCHR, the lessor had failed to fulfil his contractual obligations, thus damaging the interests of the Republic of Serbia.

A total of 2,143,887.40 RSD were allocated from the Serbian budget for the Vračević Temporary Asylum Centre in the 25 January – 8 July 2013 period and another 794,000 RSD were allocated for the November – December 2013 period.[182]

8.4. Opening of New Temporary Asylum Centres in Obrenovac, Sjenica and Tutin

Obrenovac– Due to the lack of capacity in the Bogovađa Asylum Centre and the large number of migrants living in the woods around it, the Commissariat for Refugees and Migrations decided in November 2013 to accommodate a number of them in abandoned workers' barracks in Obrenovac,[183] but the residents of the town sharply opposed the decision of the Serbian Government and the Commissariat and prevented the asylum seekers from passing through it and moving into the barracks. After a day of barricades and protests, the asylum seekers were put up in a nearby hotel in Obrenovac, which still serves as a temporary asylum centre.[184]

The hotel Sava Tent Ltd in Obrenovac was designated as a temporary asylum centre under a RS Government conclusion[185] of 28 November 2013[186]. The hotel has 100 beds and was initially to have taken in asylum seekers in the 29 November–31 December 2013 period.[187] Under the annexes to the initial contract between the Commissariat for Refugees and Migrations and the Obrenovac company Sava Tent,[188] the capacities of the facility were expanded

182 The first contract included accommodation and firewood (Art. 4 of the Contract Ref. No. 9-9/15), while the second contract included only accommodation, without meals and firewood (Art. 1 of the Contract Ref. No. 404-37/14)

183 RS Government Conclusion Ref. No: 031-10248/2013-1 of 28 November 2013.

184 See RTS report "Obrenovac, Barracks for Asylum Seekers Set on Fire"of 27 November 2013, available in Serbian at http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1455573/Obrenovac,+zapaljena+baraka+za+azilante.html.

185 *Supra* 183.

186 Contract on the provision of Room and Board Services to Asylum Seekers in Obrenovac Ref. No. 9-9/307, 29 November 2013.

187 Articles 1 and 2 of the Contract on the provision of Room and Board Services to Asylum Seekers in Obrenovac Ref. No. 9-9/307, 29 November 2013.

188 Annex I to Contract Ref. No. 9-9/307-1/2013 of 9 December 2013 and Annex II to Contract Ref. No. 9-9/307-2/2013 of 31 December 2013.

from 100 to 180 beds and the contract was extended until 31 March 2014. Until the end of 2013, 239 asylum seekers stayed in this centre.[189] Although the living conditions in the Obrenovac hotel are satisfactory and it can take in large numbers of asylum seekers,[190] the Government of the Republic of Serbia opened two more temporary centres, in Sjenica and Tutin.

Sjenica and Tutin. – At the proposal of Minister without Portfolio Sulejman Ugljanin and the Commissariat for Refugees and Migrations, the RS Government opened two new temporary centres in Sjenica and Tutin on 5 December 2013.[191] Both centres can take in up to 100 people and are to operate until 31 May 2014; the contracts may be extended. A total of 155 asylum seekers lived in the Sjenica Centre until 31 December 2014.[192] To the best of BCHR's knowledge, the MIA did not perform any official asylum procedure actions in the Sjenica by the end of the year and only one organisation assisting asylum seekers visited them only three times[193], given that visits to these centres require significant outlays (travel costs, interpretation). This gives rise to doubts about the expedience of these centres given that they are not within easy reach of any of the competent institutions or organisations. In view of the Vračević experience, the fact that accommodation of asylum seekers is becoming a self-serving purpose and does not facilitate the efficient and cost-effective implementation of the asylum procedure gives particular rise to concern, which is inadmissible where persons seeking international protection and fleeing persecution are at issue. The BCHR repeatedly expressed its concern by this decision of the RS Government and Commissariat for Refugees and Migrations, but the centres nevertheless continued operating.[194]

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189 Reply of the Commissariat for Refugees and Migrations to BCHR's request for access to information of public importance Ref. No. 019 -205-4/2014 Belgrade, 4 April 2014.

190 The capacities of the facility were increased to 180 beds under Annex I of the Contract and the Obrenovac centre was the largest temporary asylum centre in the Republic of Serbia at the end of the reporting period.

191 Facilities in the Sjenica and Tutin municipalities were designated temporary asylum centres under RS Government Conclusions 05 Ref. No. 031-10087/2013 of 25 November 2013 and 05 Ref. No. 031-10248/2013-1 of 28 November 2013.

192 Reply of the Commissariat for Refugees and Migrations to BCHR's request for access to information of public importance Ref. No 019 -205-4/2014, Belgrade, 4 April 2014. The Commissariat did not provide information about Tutin because our request concerned 2013 and the Tutin centre opened in 2014.

193 *Ibid*, APC visited the centres. The letter stated that APC visited them three times but did not specify when. To the best of BCHR's knowledge, the APC visited the centres in 2014.

194 BCHR press release on accommodation of asylum seekers of 28 November 2013, available in Serbian at: http://azil.rs/news/view/saopstenje-beogradskog-centra-za-ljudska-prava-povodom-smestaja-za-trazioce-azila; Vreme weekly: "Nema zemlje za izbeglice", no. 1196, 5 December 2013, available in Serbian at: www.vreme.rs/cms/view.php?id=1156097

9. Realisation of the Rights and Obligations of Asylum Seekers, Refugees and Persons 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, education, welfare and other rights equal to those of aliens permanently residing in the Republic of Serbia as well as rights equal to those of Serbia's nationals. The rights of asylum seekers, people in the asylum procedure, and persons granted asylum are not clearly distinguished. The provisions of this Chapter need to be systematised better and the rights of each group of people the Act mentions need to be listed to improve their layout and clarity.[195]

9.1. Right to Accommodation

Asylum seekers are entitled to reside in the Republic of Serbia and to accommodation in an Asylum Centre if necessary pending decisions on their applications. Persons granted asylum or subsidiary protection shall be provided with accommodation proportionate to the capacities of the Republic of Serbia, but not for longer than one year from the day the final decision recognising their status has been rendered. Accommodation shall imply the provision of specific habitable space for use, or of financial assistance necessary for housing (Article 44, Asylum Act). The BCHR is unaware of any case in which funding was approved for the accommodation of a person granted international protection since 2012. In its reply[196], the Commissariat for Refugees and Migrations stated that no funding for accommodation of persons granted asylum or subsidiary protection had been earmarked because they were provided with accommodation proportionate to Serbia's capacities. The Commissariat for Refugees and Migrations referred to the Asylum Act, notably Article 44 of the Act[197], which it inter-

195 See, for instance, the Croatian Asylum Act, Chapter II, Rights and Obligations of Asylum Seekers, Asylees and Aliens under Subsidiary Protection (Article 29-53).

196 *Supra* 192.

197 Article 44 of the Asylum Act: "Accommodation shall be provided in proportion to the capacities of the Republic of Serbia to persons whose right to refuge or subsidiary protection has been recognised, but not for longer than one year from the day the final decision recognising their status has been rendered. For the purposes of paragraph 1 of this Article, accommodation shall entail the provision of specific habitable space for use or of financial assistance necessary for housing."

prets in the following manner: funding for housing is provided alternatively, if the migrants cannot be accommodated in another manner. The BCHR is of the view that the Commissariat is under the duty to secure accommodation to all people granted international protection and that the issue of their accommodation (housing or funding) must be addressed on a case to case basis. Although only 12 people have been granted international protection since the Act entered into force in 2008, the Commissariat for Refugees, as the competent institution, has not taken all the requisite measures in the past five years to prepare and organise accommodations for people under international protection, which is one of the important elements of their integration. To the best of BCHR's knowledge, the Commissariat provided two people granted subsidiary protection with accommodation in an Asylum Centre, which definitely will not facilitate their integration in society.

9.2. Right to Education and Welfare

Asylums seekers and people granted asylum shall have the right to free primary and secondary education and the right to welfare benefits, in accordance with separate regulations (Art. 41, Asylum Act).

Right to Education. – The right to education is governed by a set of laws in the Republic of Serbia, notably the Act on the Basis of the Education System,[198] while specific levels of education are regulated by the Primary School Act,[199] Secondary School Act[200] and the High Education Act.[201] These laws also govern the education of foreign nationals and stateless persons in the Republic of Serbia and the recognition of foreign school certificates and diplomas.[202]

Under the Act on the Basis of the Education System, foreign nationals and stateless persons[203] shall enrol in primary and secondary schools and exercise the right to education under the same conditions and in the same manner as nationals of the Republic of Serbia. Schools shall organise language, preparatory and additional classes for children and pupils who are foreign nationals,

198 *Sl. glasnik RS* 72/2009 and 52/2011.

199 *Sl. glasnik RS,* 50/92,53/93,67/93,48/94,66/94 – Constitutional Court decision, 22/2002, 62/2009 – other law, 101/2005 – other law and 72/2009 – other law.

200 *Sl. glasnik RS* 50/92, 53/93, 67/93, 48/94, 24/96, 23/2002, 25/2002 - corr, 62/2003 – other law, 64/2003 – corr. of other law, 101/2005 – other law, 72/2009 – other law and 55/2013 – other law.

201 *Sl. glasnik RS* 76/2005, 100/2007 – authentic interpretation, 97/2008 and 44/2010, 93/2012 and 89/2013.

202 *Fundamentals of Migration Management in the Republic of Serbia,* IOM Mission to Serbia, Belgrade, 2012, p. 62.

203 Asylum seekers and persons granted asylum in the Republic of Serbia are equated with the category of stateless persons or foreign nationals. This applies to the field of education as well, given that the subsidiary legislation governing this field in greater detail has not been adopted yet.

stateless, refugees or IDPs and do not speak the language used in the schools or are in need of specific instructions in order to continue their education, pursuant to specific guidelines enacted by the Minister of Education.[204]

Although the legal framework governing the procedures for the enrolment and fulfilment of the specific educational needs of underage asylum seekers is in place, they have not had efficient access to education in the Republic of Serbia.[205] Two asylum seekers enrolled in the Bogovađa primary school in the spring term of the 2012/2013 school year for the first time since the Asylum Act came into effect in 2008. The BCHR learned that the two pupils were enrolled thanks to APC, which extended legal aid to their families.[206]

The BCHR is of the view that unaccompanied minor asylum seekers and those living in the Asylum Centres with their parents should be enrolled in school by the competent social welfare centre staff in cooperation with the Commissariat for Refugees and Migrations. Their parents or relatives cannot be expected to enrol them in school given that they do not speak Serbian, are not familiar with the national legislation and how the Serbian education system operates.

The BCHR is also of the view that secondary vocational education or at least Serbian language lessons should be provided to adult migrants in the Asylum Centres. The competent education authorities have not been involved in the organisation of Serbian language courses by the UNHCR and the Danish Refugee Council.[207]

Right to Welfare. – The Asylum Act guarantees asylum seekers and persons granted asylum the right to welfare benefits. The new RS Social Protection Act[208] defines social protection as an organised social activity of public interest, the goal of which is to extend assistance and empower individuals and families to lead independent and productive lives in society and to prevent social exclusion and eliminate its consequences (Art. 2). The Act also specifies that social protection beneficiaries shall include nationals, as well as foreign nationals and stateless persons in accordance with the law and international treaties.

The regulations on welfare for asylum seekers and persons granted asylum are enacted by the minister in charge of social policy. Only one by-law on welfare for asylum seekers and persons granted asylum has been adopted to

204 Article 100, Act on the Basis of the Education System.

205 See *January-June 2013 Report*, *supra 126*.

206 According to the information BCHR team obtained, the family with two children,who had been enrolled in the Bogovađa school, left Serbia in the autumn of 2013.

207 Serbian language courses for children and adults were held in the Banja Koviljača and Bogovađa Asylum Centres, thanks to the financial support of the UNHCR Belgrade Office and the Danish Refugee Council.

208 *Sl. glasnik RS* 24/2011.

date[209], but, to the best of BCHR's knowledge, none of these categories were extended welfare in the 2012–2013 period.

9.3. Right to Health Care[210]

Under Article 40 of the Asylum Act, "asylum seekers and persons granted asylum in the Republic of Serbia shall have equal rights to health care, pursuant to the regulations governing the health care of aliens".

The RS Ministry of Health Rulebook on Health Examinations of Asylum Seekers on Admission in the Asylum Centres governs the check-ups of asylum seekers on admission in the Asylum Centres, which are conducted by doctors working in the competent local outpatient health clinics.

Asylum seekers and persons granted asylum in Serbia exercise the right to health care at all levels of health care. The key institutions providing health services to asylum seekers and persons granted asylum include the competent local outpatient health clinics (in Loznica, Lajkovac, Obrenovac, Sjenica, Tutin, Zvezdara) and inpatient health institutions (Loznica, Valjevo, Uzice, Novi Pazarand Belgrade), including the Clinical Centre of Serbia, the University Children's Clinic, the Public Health Institute "Dr Milan Jovanovic Batut" and a network of medical and public health institutes that perform epidemiological supervision and identify risks of communicable diseases and undertake preventive and control measures.

All health care services provided to asylum seekers and persons granted asylum in Serbia are funded by the Ministry of Health of the Republic of Serbia.

All the medications the Danish Refugee Council (DRC) provides for asylum seekers and persons granted asylum in Serbia are funded by the UNHCR.

A Working Group rallying representatives of the Ministry of Health, Public Health Institute of Serbia and the network of medical and public health institutes, health institutions, the Commissariat for Refugees and Migrations, the Ministry of Labour and Social Protection, the UN agencies and other international organisations (UNHCR, WHO, DRC, IOM) and the Red Cross of Serbia was established in the first half of 2013 with a view to improving the health care of these categories and performing medical supervision. The Working Group drafted a *Protocol on Medical Supervision over the Population of Asylum Seekers and Migrants in the Territory of the Republic of Serbia*, including asylum seekers and persons granted asylum who are living outside the Asylum Centres

209 *Supra* 157.

210 The data on health care of asylum seekers in Serbia were collected by Dr. Vesna Jovanović, Danish Refugee Council in 2013.

(as mentioned, their number significantly grew in 2013, resulting in the opening of three new temporary asylum centres). The Draft Protocol, which has been submitted to the Ministry of Health for adoption, envisages the establishment of an efficient system for health supervision and identification of risks of communicable diseases and the implementation of preventive and control measures.

When a wild poliovirus was isolated in Syria in late 2013, the Working Group concluded that immediate action needed to be undertaken in the event it was carried into Serbia and the asylum seekers from the endemic countries were inoculated, pursuant to the Rulebook on Immunisation and Chemoprophylaxis.

The national anti-tuberculosis program in Serbia envisages the free diagnosing and treatment of tuberculosis among people without health insurance, including asylum seekers and migrants in Serbia, upon the completion of the Global Fund donation (2015–2020).

9.4. Right to Family Reunion

Specific rights are guaranteed only to people granted asylum but not to those granted subsidiary protection as well. For example, the right to family reunion is not equally guaranteed to all categories of people afforded protection as it should be. This right may be exercised by persons granted asylum (Art. 48). 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).

9.5. Rights of Refugees Equal to Rights of Permanently Residing Aliens

Persons whose right to refuge in the Republic of Serbia has been recognised shall have rights equal to those of permanently residing aliens with respect to the right to work and rights arising from employment, entrepreneurship, the right to permanent residence and freedom of movement, the right to movable and immovable property, and the right of association (Article 43, Asylum Act).

The Act on Employment of Foreign Nationals governs the employment of foreign nationals and stateless persons.[211] Under the Act, foreign nationals may enter into employment provided they fulfil the general and specific employment requirements. The general requirements set out in the Act include a prohibition to employ persons under 15 and the fulfilment of conditions laid down in the collective agreement and the general enactments on the performance of specific

211 *Sl. list SFRJ* 11/78 and 64/89, *Službeni list SRJ* 42/92, 24/94 and 28/96 and *Sl. glasnik RS* 101/05.

jobs. The specific requirements aliens have to fulfil include possession of a permanent or temporary residence permit and a work permit. The branch office of the National Employment Service may refuse to issue a work permit to an alien in the event its unemployment records include nationals of the Republic of Serbia fulfilling the requirements for the job specified in the work permit application.[212]

The authorities have also adopted Instructions on the Submission of Applications for Consent to the Employment of Foreign Nationals[213] and the Rulebook on Work Permits for Foreigners and Stateless Persons.[214] Under the Rulebook, the National Employment Service shall issue work permits to foreign nationals in accordance with the law provided that they have permanent or temporary residence permits.

The BCHR had experience only with one person who was granted subsidiary protection in 2008 and had the opportunity to start working as an interpreter at the Banja Koviljača Asylum Centre. This was the first time the local branch office of the National Employment Service dealt with a case regarding the employment of a person enjoying a special form of international protection and undergoing the procedure of registering with the National Employment Service, obtaining a work permit and an employment booklet.

A person granted any form of international protection (asylum or subsidiary protection) is not automatically given an Alien Registration Number (ARN), which is prerequisite for exercising a whole series of rights. The authority charged with issuing the ARN, the Asylum Office, reacted quickly in the above-mentioned case and he was issued an employment booklet and regulated his employment status. The BCHR recommends that every person granted international protection automatically be issued a personal identification number they need to realise a broad catalogue of personal and status-related rights.

9.6. Travel Documents for Refugees

Under Article 62 of the Asylum Act, persons granted asylum shall be issued travel documents in the prescribed form that will valid for two years. The right to travel documents is enshrined in Article 58 of the Refugee Convention as well. In October 2012, the International Air Transport Association (IATA), which Air Serbia is a member of, adopted a Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons.[215] The

212 Article 5, Rulebook on Work Permits for Foreign Nationals and Stateless Persons, *Sl. glasnik RS* 22/2010.

213 *Sl. list SFRJ*, 51/81 and *Sl. list SCG,* 1/2003 – Constitutional Charter.

214 *Supra* 212.

215 The Guide is available at http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_WP09.pdf.

Guide regulates in detail what biometric travel documents for refugees and stateless persons have to include. However, the Ministry of Internal Affairs has not adopted instructions on the form and content of travel documents for refugees since the Asylum Act was adopted in 2008, wherefore they cannot be issued travel documents.[216] This legal lacuna has led to limiting the refugees' freedom of movement enshrined in Article 39 of the Constitution of the Republic of Serbia and Article 2 of Protocol No. 4 to the ECHR. Under the Constitution, freedom of movement may be restricted if necessary to conduct criminal proceedings, protect public order, prevent the spreading of communicable diseases or defend the Republic of Serbia. Under Article 2 of Protocol No. 4 to the ECHR, no restrictions shall be placed on the exercise of the right to the freedom of movement other than such as are in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Neither the Serbian Constitution nor the ECHR accept the non-existence of a legal regulation pursuant to which travel documents are issued as admissible grounds for restricting the freedom of movement. The BCHR is of the view that restrictions of the freedom of movement in this case cannot be subsumed under any of the permissible grounds for limiting the freedom of movement prescribed by the Serbian Constitution or the ECHR and can only be ascribed to laxity on the part of the Ministry of Internal Affairs and its lack of will to enable refugees to exercise their rights under the Refugee Convention.

9.7. Integration

Article 46 of the Asylum Act lays down a general obligation of the Republic of Serbia to, ensure conditions for the integration of refugees in social, cultural and economic life and facilitate the naturalisation of the refugees proportionate to its capacities. The Migration Management Act charges the Commissariat for Refugees and Migrations with the accommodation and integration of people granted asylum or subsidiary protection (Arts. 15 and 16).

Neither the Asylum Act nor the Migration Management Act defines the specific measures and procedures for designing individual integration plans for persons granted asylum. This matter needs to be governed by a by-law. A decree on criteria for prioritising accommodation of persons granted asylum or subsidiary protection and conditions for the temporary use of housing, which will

216 Asylum Office letter 03/10 Ref. No. 26-1280/13 of 14 February 2014.

specify the future modalities of integration and facilitate further endeavours in this field, is to be adopted soon.[217]

Nothing has been done to create conditions for integration since the Migration Management Act was adopted in 2012. Nor were funds in the budget earmarked for that purpose by the end of 2013.[218] BCHR has learned that one person who had enjoyed refugee protection in Serbia left the country illegally in 2013 because he lacked any real prospects of availing himself of any integration measures.[219]

217 Reply of the Commissariat for Refugees and Migrations re a BCHR request asking it to facilitate the integration of a person granted refuge in the Republic of Serbia, Belgrade, 18 February 2014, Ref. No. 019 - 421/4.

218 The Commissariat for Refugees and Migrations was approved 2 million RSD under the 2014 Budget Act to facilitate the integration of persons granted subsidiary protection or refugee status under the Asylum Act. Information obtained in reply to a request for access to information of public importance Ref. No. 019-205-1/2014.

219 Information the BCHR team learned whilst extending legal aid to asylum seekers in 2013. This person repeatedly contacted the Commissariat for Refugees and Migrations but was not given any guarantees that he would be able to avail himself of any integration measures.

10. Accompanied and Unaccompanied Minor Asylum Seekers

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.[220] 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,[221] 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 family environment for any reason.[222] 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. [223]

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). 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.[224]

In 2013, 768 unaccompanied minors expressed the intention to seek asylum;[225] 175 boys and 16 girls[226] gave the power of attorney to an organisation extending legal aid to underage asylum seekers, but only two of unaccompanied minors (both from Afghanistan) applied for asylum in 2013.[227]

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220 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.

221 Art. 22(1).

222 Art. 22(2).

223 CRC General Comment No. 6, paragraph 18.

224 UNHCR Guidelines on Unaccompanied Children Seeking Asylum, para. 5.13.

225 The Ministry of Internal Affairs' 2013 data were not segregated by gender, reply to a request for access to information of public importance, Ref. No. 06-36/14, Belgrade, 13 March 2014.

226 Eritrea-11, Afghanistan-1, Somalia-2, Algeria-1, Sudan-1.

227 Data of APC, which extended legal aid to unaccompanied minor asylum seekers in 2013.

When the police first establish contact with an irregular migrant claiming to be underage, they contact the competent Social Work Centre, which appoints him a temporary guardian. There is no legal regulation or specific protocol for age assessment in immigration proceedings in Serbia.[228] The underage migrant is then referred to the Niš or Belgrade Home for Children and Youths,[229] both of which are under the jurisdiction of the Ministry of Labour and Social Policy. Minors placed in one of the Homes who declare they want to seek asylum are referred to one of the Asylum Centres (in Bogovađaor Banja Koviljača) as soon as they can accommodate them.[230] The reconstruction of the facilities for unaccompanied minor aliens in Niš, which began in mid– 2012 with UNHCR's financial support, was completed in March 2013.[231] The Belgrade Home for Children and Youths looked after 43 unaccompanied minors in 2013; 29 of them expressed the intention to seek asylum, four ran away and 25 were registered by the Asylum Office and referred to the Asylum Centres in Bogovađa and Banja Koviljača. The Niš Home for Children and Youths looked after 23 unaccompanied minors.[232]

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.

In 2013, too, unaccompanied children seeking asylum changed three temporary guardians from the moment they first established contact with the Ser-

228 Hungarian Helsinki Committee, *Serbia as A Safe Third Country: Serbia as a safe third country: a wrong presumption,* 2011, p. 10, available at: http://helsinki.hu/wp-content/uploads/Serbia_as_a_safe_third_country_A_wrong_presumption_HHC.pdf.

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).

229 Serbian Government Decision on the Network of Social Protection Institutions, *Službeni glasnik RS* 51/08.

230 More on the Belgrade and Niš Homes for Children and Youths in *Right to Asylum 2012*, *supra* 60.

231 Information obtained from the manager of the Home for Children and Youths in a telephone conversation in December 2013.

232 Information obtained from the Belgrade and Niš Homes for Children and Youths on 9 April and 7 April 2014 respectively.

bian authorities until the completion of the asylum procedure. The BCHR is aware that the current capacities and professional expertise of the Social Work Centres in the field of asylum are insufficient, but this cannot serve as justification for the fact that unaccompanied minors have to change three guardians, a situation in which one can hardly expect the minors and guardians to develop a meaningful and trusting relationship guaranteeing the protection of the best interests of the child.[233] Furthermore, to the best of BCHR's knowledge, the guardians did not have the opportunity to avail themselves of the services of interpreters in the languages the minors understand in 2013 either[234] 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.

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. States should ensure that unaccompanied or separated children are provided with school certificates or other documentation indicating their level of education. Furthermore, all adolescents should be allowed to enrol in vocational/professional training or education.[235]

Only two underage asylum seekers attended school in Serbia in 2013, although the legal framework governing the procedures for the enrolment and satisfaction of the specific educational needs of underage asylum seekers is in place.[236]

233 In its *Right to Asylum 2012 Report*, *supra* 60, the BCHR alerted to this problem and the need to change this practice to ensure that a minor has only one guardian, but the state and centre capacities did not change for the better in 2013 either.

234 Information obtained from representatives of the Social Work Centres in Vojvodina during the *Migrations and Right to Asylum* training that the BCHR and Group 484 organised in Subotica in December 2013 within the Networking and Capacity Building for a More Effective Migration Policy project.

235 *CRC General Comment No. 6*, paragraphs 41-42.

236 More on education seein the chapter 9.2. Right to Education and Welfare, p. 61.

11. Psychological State of Asylum Seekers in Serbian Asylum Centres[237]

Asylum seekers are a category of the population characterised by a high degree of trauma and vulnerability. Research has shown that as many a 70% of adult asylum seekers suffer from the post-traumatic stress disorder and that as many as 88% exhibit symptoms of anxiety and depression.[238] Furthermore, the degree of trauma depends on the country of origin of the asylum seekers, the time they spent travelling to the desired destination and the extent of social support.[239]

Symptoms of depression and anxiety feature prominently among asylum seekers in Serbia. Most of them have experienced numerous traumatic events, including forced departure from their countries of origin, the death of a family member or a person close to them, physical, sexual and/or psychological abuse, lack of basic living conditions, wherefore the mental health of this category of the population is at great risk.

Field visits to the Asylum Centres and close coordination with the asylum stakeholders in Serbia were regularly undertaken in 2013 with a view to providing the asylum seekers with psychological assistance and support. The visits included group and individual psychological counselling, interventions in cases of crises and psychological assistance during the visits by doctors and close coordination with the asylum seekers' legal representatives with a view to extending adequate support and protection to asylum seekers in Serbia.

The group and individual psychological counselling session held in 2013 focused on the asylum seekers' confrontation with the extremely traumatic events they had experienced, the feelings of fury and despair because of the lack of a reliable system they can rely on and the grave feelings of insecurity characterising the asylum procedure. It needs to be noted that the strong feelings of insecurity this psychologically vulnerable category of the population feels on

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237 The data on the psychological state of asylum seekers in Serbia were collected in 2013 by psychologist and psychotherapist Maša Vukčević.

238 Gerritsen, A. M, Bramsen, I, Deville, W, van Willigen, L. H. M, Hovens, J. E, i van der Ploeg, H. M, „Physical and mental health of Afghan, Iranian and Somali asylum seekers and refugees living in the Netherlands," *Social Psychiatry and Psychiatric Epidemiology* 41, (2006), pp.18–26.

239 Gerritsen, A. M, Bramsen, I, Deville, W, van Willigen, L. H. M, Hovens, J. E, i van der Ploeg, H. M, „Health and health care utilisation among asylum seekers and refugees in the Netherlands: Design of a study," *BMC Public Health*, 4(7), (2004), pp. 1-10.

an everyday basis exacerbates their nervousness, feelings of helplessness and inability to establish any kind of control over their own lives, which may result in apathy and depression. Lack of a responsive and reliable system may deepen the asylum seekers' feelings of abandonment, lead them to withdraw into themselves and lose trust in the state system and other people.

All of this affects the vulnerability of asylum seekers and increases the risk of mental illness, wherefore those in contact with them have to take a sensitive approach. Rapid and efficient provision of information to asylum seekers and rapid and adequate responses to the problems they face in Serbia would positively affect the asylum seekers' psychological state and reduce their feelings of uncertainty. They would thus feel that the system and the community care about them and wish to help them. It needs to be noted that fundamental trust and hope, factors that can protect asylum seekers from mental illnesses, are gravely threatened due to the traumatic events they had experienced. Their feelings of abandonment and isolation can be alleviated if the community they are in extends them adequate care. This is why all the asylum stakeholders in Serbia need to coordinate and develop the most efficient possible system of support to asylum seekers.

Annex 1
Extradition Procedure and Asylum – Case Study

Turkish national A.A, who had been granted refugee status in Italy in 2004, was deprived of liberty at the Batrovci (Serbian-Croatian) border crossing in October 2013. The procedure for the extradition of A.A. was initiated before the Sremska Mitrovica Higher Court and he was placed into custody pending extradition on 8 October 2013 after it was established that there was an Interpol warrant for his arrest to serve a 2.5 year term of imprisonment in Turkey for forging a check. A.A. spent 40 days in custody pending extradition. The Sremska Mitrovica Higher Court rendered a decision that the requirements for his extradition to Turkey had not been fulfilled because Turkey had not forwarded the legally binding judgment pursuant to which it was seeking A.A.'s extradition. The Court ordered A.A.'s release from custody in the same decision and he left Serbia when he was set free. During the extradition procedure, the Higher Court did not take into consideration that A.A. had been granted refugee status in Italy. The Italian authorities had refused to extradite A.A. to Turkey to serve his sentence, believing that a *fumus persecutionis*[240] was at issue and that A.A. was actually being politically persecuted because the Turkish State Security Court in 1994 sentenced him to 12 years, nine months and 15 days in prison for publishing and distributing a book perceived as subversive and separatist propaganda. This was the reason why the Italian authorities granted A.A. the status of refugee.

The UNHCR intervened given that the extradition proceedings before the Sremska Mitrovica Higher Court regarded a refugee and emphasised that a refugee status granted by one state must be recognised by other states as well.[241] This obligation arises under Article 1. A (1) of the Refugee Convention, which protects the refugee status a person was granted under prior international instruments on the protection of refugees, regardless of which state initially granted it.[242]

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240 Under Article 3(2) of the European Convention on Extradition (*Službeni list SRJ – International Treaties* 10/2001), extradition shall not be granted if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

241 International Court of Justice judgment in the case of *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.

242 UNHCR, 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.

However, the Sremska Mitrovica Higher Court failed to consider the fact that A.A. was a refugee and that Turkey was only allegedly prosecuting him for forging a check, despite the UNHCR's intervention. A.A.'s legal representative also underlined that the statute of limitations for the enforcement of the judgment at issue had expired, as it was rendered in 1997. The Higher Court thus rendered a decision that the requirements for A.A.'s extradition had not been fulfilled merely because Turkey had failed to send it the legally binding judgment (Article 16(1(6)) of the Act on International Legal Aid in Criminal Matters).[243] A.A.'s legal representative had not been served a decision on the merits, only a ruling ordering A.A.'s release from custody, by the end of the year.[244]

This is the second case (to the best of BCHR's knowledge) in which Serbian courts have conducted extradition proceedings against persons with refugee status.[245] The reason for such conduct may lie in the fact that the Act on International Legal Aid in Criminal Matters does not include a provision prohibiting the extradition of a refugee or another person enjoying another form of international protection. Under the Act, a request for international legal aid may not regard a political crime or a crime related to a political crime; the Act prohibits extradition in the event the requesting state fails to provide guarantees that the person whose extradition is required will not be subjected to capital punishment. Furthermore, the Act does not prohibit extradition to a country in which the person runs a real risk of torture or cruel and inhuman treatment or punishment. Nor does it explicitly prohibit extradition of refugees to countries where they face the risk of persecution. Judges ruling in extradition proceedings should nevertheless themselves apply other regulations, such as the Refugee Convention and the ECHR, not only the Act on International Legal Aid in Criminal Matters.

243 *Sl. glasnik RS* 20/2009.

244 Information obtained in an interview with the legal representative.

245 This case is described in *Right to Asylum 2012*, *supra* 60, pp. 47 – 48.

Annex 2
Constitutional Court: Initiative[246]

The BCHR filed an initiative with the Constitutional Court to review the compliance of the RS Government Decision on the Lists of Safe Countries of Origin and Safe Third Countries with the Constitution, generally accepted rules of international law and ratified international treaties. The BCHR challenged the compliance of the Decision with Article 57 of the Constitution, Article 33 of the Refugee Convention and Article 3 of the ECHR and asked the Court to suspend its implementation and the enforcement of all individual enactments issued under it until it rendered a final decision on the initiative.

The Constitutional Court issued a conclusion declaring it did not have jurisdiction to rule on the Decision, given that it was not a legal enactment general in character and was thus not subject to its constitutional review.

By taking the path of lesser resistance and failing to eliminate the impugned general enactment from Serbia's legal order, the Constitutional Court enabled the administrative authorities charged with the asylum procedure to pursue their problematic practices and continue violating the non-refoulement principle.

246 More in the *January-June 2013 Report, supra* 126 and at http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/12/IUo-812-2012-Odluka-o-inicijativi-za-ocenu-ustavnosti-Odluke-o-utvr%C4%91ivanju-liste-sigurnih-dr%C5%BEava-porekla-i-sigurnih-tre%C4%87ih-dr%C5%BEava.pdf. Both the Initiative and the Constitutional Court Decision are available at http://www.azil.rs/documents/category/judgements.

Annex 3
Media Coverage of Reactions by the Public and Public Officials in the November-December 2013 Period

Bogovađa. – Media devoted a lot of attention to the lack of accommodation capacities for asylum seekers, a problem that escalated in November and December 2013 and prompted numerous reactions of representatives of Serbia's institutions. The Bogovađa residents staged protests in the same period, appealing to the state authorities to address the problem of the asylum seekers' accommodation.[247] Media reported that 180 asylum seekers were staying in the Asylum Centre and as many as 350 outside it, in this settlement with a population of 279. The Serbian authorities provided one meal a day to the 350 asylum seekers, but they had to find roofs over their heads and the other meals by themselves. The failure of the competent authorities, primarily the Commissariat for Refugees and Migrations, to ensure adequate living conditions for these people ultimately resulted in tensions in this local community in the Lajkovac municipality.[248]

Obrenovac. – The steps to address the accommodation problems of asylum seekers were taken with an inexplicable delay, only after the winter set in and the temperature dropped, exacerbating the plight of asylum seekers living around the Bogovađa Asylum Centre. On 25 November 2013, the Serbian Government rendered a decision designating facilities (barracks) at Poljački kraj bb in the Obrenovac settlement of Ušće to serve as a temporary asylum centre until the Mladenovac facility "Mala Vrbica" was officially converted into an Asylum Centre.[249] The Obrenovac municipal authorities reacted to the Government Decision the next day, on 26 November 2013. The media quoted Obrenovac Mayor Miroslav Čučković as saying that the municipal leadership had learned of the Government Decision to use the facilities in this municipality as a temporary asylum centre from the media. He noted:

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247 *Bogovađa: Resolve the Asylum Seeker Problem,* B92, 9 November 2013, available in Serbian at: http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=11&dd=09&nav_category=12&nav_id=775570.

248 *Lajkovac: Blocked Town Hall Because of Asylum Seekers,* Novosti, 25 November 2013, available in Serbian at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:465437-Za-azilante-privremeni-smestaj-u-Obrenovcu.

249 *RS Government Press Release*, 25 November 2013, available at: http://www.srbija.gov.rs/vesti/vest.php?id=200273.

> "Five seconds is enough for an inadequate person to be near this facility and destroy the country's energy system. I am not saying this just to say it, I appeal to the people to re-examine their decision, because they obviously rendered it on the basis of information they have in the papers they brought, because, when you read the address Ušće bb, field X, it sounds absolutely benign, but it is essentially the most important facility for our state. The designated location is absolutely unacceptable in a city municipality, both because of the people and because of the equipment."[250]

Commissioner for Protection of Equality Nevena Petrušić qualified the Obrenovac Mayor's statement as xenophobic in her public warning[251]:

> "The statement that the asylum seekers' arrival would put at risk the thermal electric power plant and Serbia's energy system is extremely dangerous, because it encourages the creation of a hostile environment. Such views are humiliating and offend the dignity of the asylum seekers, as they imply that asylum seekers are prone to criminal and unlawful behaviour."

The Commissioner noted that xenophobic statements were not rare in Serbia and that the results of a public opinion survey her office conducted demonstrated that the social distance towards asylum seekers was very large and that one third of Serbia's citizens did not want to have asylum seekers living next door, befriend them and were against them having Serbian citizenship.

Two days later, on 27 November 2013, the residents of the Ušće and Skela settlements blocked the road and stopped two buses with the asylum seekers, who had been living the woods around the Bogovađa Centre. The protesters claimed they feared for their safety.

The state authorities are nevertheless definitely to blame for the fact that the municipal leadership and local population found out from the media that a large number of asylum seekers would be accommodated in their neighbourhood. Continuous communication and cooperation and preparations of the local communities in which the asylum seekers will be accommodated are needed. The Commissariat for Refugees and Migrations obviously failed to address the problem of their accommodation strategically although it had been identified a long time ago, opting, rather, for an ad hoc resolution of the situation without involving the local authorities. One of the barracks, in which the asylum seekers were to have been accommodated, was set on fire during the protest in Obrenovac on 27 November and the Commissariat was forced to abandon its plan to

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250 *Problems for Asylum Seekers in Obrenovac, Too?* B92, 26 November 2013, available in Serbian at: http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=11&dd=26&nav_category=12&nav_id=781869.

251 *Warning Re Obrenovac Mayor Statement*, Ref. No: 021-02-71/2013-01 of 26 November 2013, available in Serbian at: http://www.ravnopravnost.gov.rs/sr/upozorenja/upozorenje-povodom-izjave-%C4%8Delnika-op%C5%A1tine-obrenovac.

accommodate the asylum seekers in these facilities.[252] The police arrested one person (34-year-old M.G.) in connection with the arson.[253] After spending the whole day in the buses, surrounded by the protesters, the asylum seekers were put up in the Obrenovac Hotel.[254] Interestingly none of the Obrenovac protest rallies had been pre-notified to the competent police station,[255] an obligation their organisers have under Article 6 of the Public Assembly Act.[256] Furthermore, the protest rallies in Obrenovac were neither prohibited nor dispersed although their participants voiced discriminatory and xenophobic statements.[257]

Vračević. – The Obrenovac events, accompanied by inappropriate statements and reactions, may have prompted the decision of the Vračević villagers to block the road and not let food and water deliveries to the facility in which the asylum seekers were staying.[258] The villagers demanded that they be moved out of the private facility the authorities leased, underlining that it did not satisfy the basic living conditions, that there was a great risk of communicable diseases due to the unhygienic conditions and that the safety of the village children was in danger, i.e. the issue of providing accommodations for asylum seekers was again interpreted as a potential threat.[259] Such conduct led to perceptions of the accommodation of asylum seekers as a disaster that must be avoided by persistent protests, like the ones that proved successful in Obrenovac. Food and water were delivered to the asylum seekers in Vračević with the assistance of the police.[260] Only one rally was pre-notified in the Lajkovac municipality but none of the held rallies

252 *Barracks Set on Fire, Asylum Seekers in Hotel*, B92, 28 November 2013, available in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=11&dd=28&nav_category=12&nav_id=782753; see also B92's report in English, available at http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=11&dd=28&nav_id=88499.

253 The BCHR, however, does not have information on whether criminal or other proceedings have been instituted against the arrested man or about the outcome of such proceedings. See the B92 report, *supra* 256.

254 *Government Designates Facilities for Asylum Seekers*, B92, 28 November 2013, available at http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=11&dd=28&nav_id=88499.

255 See BCHR's *2013 Human Rights in Serbia* annual report, pp. 203-204.

256 *Sl. glasnik RS 51/92, 53/93, 67/93 i 48/94, Sl. list SRJ,* 21/2001 – Constitutional Court Decision and *Sl. glasnik RS,* 101/2005 – other law.

257 Under Article 9 of the Public Assembly Act, the competent authority shall temporarily interrupt an assembly aimed at inciting or encouraging ethnic, racial or religious hate and intolerance.

258 *Asylum Seekers Got Food and Water Last Night,* B92, 29 November 2013, available in Serbian at http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=11&dd=29&nav_id=782903.

259 *Vračević Residents Blocked Road Because of Asylum Seekers*, Blic, 28 November 2013, available in Serbian at http://www.blic.rs/Vesti/Drustvo/423382/Mestani-Vracevica-blokirali-put-zbog-azilanata.

260 *Food and Firewood Delivered to Asylum Seekers in Vračević,* Radio Free Europe, 29 November 2013, available in Serbian at http://www.slobodnaevropa.org/content/blokadom-puta-spreavaju-dovoz-hrane-i-ogreva-za-azilante/25183994.html.

were prohibited.[261] The question arises why the police did not prohibit or disperse the rally aimed at preventing the delivery of food to asylum seekers, given that it seriously endangered the rights of others, which constitutes grounds for prohibiting a peaceful assembly both under the Constitution and international treaties.

The blockade was lifted after MIA State Secretary Vladimir Božović's appeal and talk with Lajkovac Mayor Goran Milovanović and agreement was reached with the local authorities to remove all asylum seekers not staying in the Bogovađa Centre to new temporary centres designated by the Government.[262]

Tutin and Sjenica. – At its session on 28 November 2013, the Government fiercely condemned the violence and decided to temporarily accommodate the asylum seekers in a hotel owned by the company Sava TENT in Obrenovac, Miloš Obrenović Str. 189 and put up the other asylum seekers in Sjenica and Tutin municipalities, pursuant to their consent[263] The Government press release states that the Government exempted the asylum seekers from paying residence tax at that session, whereby it demonstrated its lack of knowledge of the asylum system in Serbia, given that asylum seekers do not pay residence tax anyway. The decision to temporarily accommodate the asylum seekers in the remote municipalities of Sjenica and Tutin was not part of the Government strategy, but, rather, its reaction to the protests in Obrenovac. The decision was adopted at the initiative of Minister without Portfolio Sulejman Ugljanin and the Office for the Sustainable Development of Underdeveloped Areas he is in charge of.[264] Obrenovac Mayor Miroslav Čučković confirmed in his statements that the decision prevented the alleged threat to the residents of his municipality and made the following suggestion: "*Each mayor should provide accommodation to between five and ten people, because they cannot be kept in a ghetto and all accommodation capacities should satisfy the highest standards."*[265] This statement lends itself to the conclusion that the accommodation of asylum seekers is perceived as an economic burden that should be evenly distributed among the local self-governments. This perception is the consequence of the state authorities' insufficient concern with the room and board, education and basic needs of asylum seekers, whereby they are violating their fundamental rights.

261 Information obtained pursuant to a request for access to information of public importance, Valjevo Police Administration reply Ref. No. 037-33/13 of 16 December 2013.

262 *Blockade in the Vračević Village Lifted*, RTS, 29 November 2013, available in Serbian at http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1457433/Prekinuta+blokada+u+selu+Vra%C4%8Devi%C4%87.html.

263 RS Government Press Release of 28 November 2013, available in Serbian at http://www.srbija.gov.rs/vesti/vest.php?id=200489.

264 *Serbian Government: Asylum Seekers Going to Tutin and Sjenica, Some Staying in Obrenovac,* SEEbiz, 28 November 2013, available in Serbian at http://www.seebiz.eu/vlada-srbije-azilanti-idu-u-tutin-i-sjenicu-deo-ostaje-u-obrenovcu/ar-77402/.

265 *Ibid.*

Serbian Prime Minister Ivica Dačić's comments about the problem of the asylum seekers' communication were inappropriate as well: "They have to be put up somewhere, until we build those capacities. Of course, no-one you ask would probably let them be accommodated anywhere, but they have to go somewhere."[266] The Prime Minister's statement leads to the impression that the accommodation of asylum seekers is something to be negotiated on, an issue the local authorities yield on, that the accommodation issue is perceived as an unpleasant situation the adept local authorities and persistent local population will manage to avoid as long as they adamantly oppose it. The Prime Minister gave another inappropriate statement, in which he first wondered why anyone would want to seek asylum in Serbia anyway and then compared the situation of asylum seekers in Serbia with that of Serbian asylum seekers in EU countries.[267] The Prime Minister did not contribute to raising general awareness in Serbia on the gravity of the situation in the countries the asylum seekers had fled. He automatically qualified all asylum seekers as economic migrants, ignoring the fact that some of them are in Serbia because they had good cause to fear persecution in their countries of origin. The Prime Minister's reassurances to the population that Serbia was merely a transit country for the asylum seekers and that none of them intended to seek asylum in Serbia were in the same vein. Actually, the entire asylum system in Serbia is founded on that presumption, which seems to be used to justify the state's refusal to improve its asylum system and which has been deterring potential asylum seekers from perceiving Serbia as a country of refuge. Responsible politicians would insist on raising awareness of Serbia as a society, which will be facing increasing numbers of asylum seekers in the future and which will have to be prepared to help a specific number of them make it their new home.

266 *We Need to Put the Asylum Seekers Somewhere,* B92, 27 November 2013, available in Serbian at: http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=11&dd=27&nav_id=782509.

267 *Asylum Seekers and Locals at a Stalemate*, B92, 27 November 2013, available in Serbian at http://www.b92.net/video/videos.php?nav_category=905&yyyy=2013&mm=11&dd=27&nav_id=782811.

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