

**Right to Asylum
in the Republic of Serbia
Periodic Report
for July-September 2019**



**Belgrade Centre
for Human Rights**

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ACRONYMS

AC - Asylum Centre

AO - Asylum Office

BCHR - Belgrade Centre for Human Rights

CRM - Commissariat for Refugees and Migration of the Republic of Serbia

EASO - European Asylum Support Office

ECtHR - European Court of Human Rights

EU - European Union

LA - Law on Asylum

LATP - Law on Asylum and Temporary Protection

LGAP- Law on the General Administrative Procedure

MI - Ministry of the Interior of the Republic of Serbia

RS - Republic of Serbia

RTSL- Road Traffic Safety Law

UN - United Nations

UNAMA - United Nations Assistance Mission in Afghanistan

UNCAT - United Nations Committee against Torture

UNCRC- Committee on the Rights of the Child

UNHCR - United Nations High Commissioner for Refugees

INTRODUCTION

The legal team of the BCHR has been extending legal aid to asylum seekers and foreigners granted international protection in the RS since 2012. These activities have been implemented within the project *Support to Refugees and Asylum Seekers in Serbia* supported by the UNHCR. The project aims to improve the protection of refugees in RS and the realisation of their rights and its numerous activities are geared at the integration of successful asylum seekers in the cultural, social and economic life in the RS.

This Report on the Right to Asylum in the RS, covering the July-September 2019 period, was authored by the BCHR legal team. It contains information the team obtained whilst representing asylum seekers and in its regular cooperation and communication with the state authorities and the UNHCR.

The statistical data presented in the Report cover the 1 January-30 September 2019 period. The Report focuses on specific issues that the BCHR team deemed particularly important in the third quarter of 2019.¹ Specifically, it includes an analysis of the practices and decisions of the relevant asylum authorities in the reporting period and outlines them in order to provide a better illustration of the course of specific proceedings. The Report also describes some of the problems refugees have been facing in integrating in Serbian society. It ends with a summary of the decision the UNCAT adopted on an individual communication against the RS in August 2019.

The Report is primarily addressed to all RS state authorities charged with ensuring the realisation of the rights of asylum seekers and foreigners granted international protection, as well as other professionals and organisations monitoring the situation in the field of refugee law. Its authors endeavoured to alert to specific shortcomings and challenges in the work of the relevant authorities, as well as highlight the good practice examples, through the personal accounts of the asylum seekers.² We believe that this Report will help improve the readers' understanding of the situation refugees are in and contribute to the establishment of a functional asylum system in the RS.

Report Cover: Composition, Theo van Doesburg, 1917

¹ A comprehensive analysis of the asylum system in the RS is available in BCHR's annual reports on asylum, available at www.azil.rs.

² With a view to protecting the privacy of the asylum seekers whose cases are mentioned in this Report, the authors altered or did not fully disclose some of their personal data.

1. STATISTICS

All statistical data were obtained from the UNHCR Serbia Office, to which the MI has been forwarding its operational reports. The data in this Report cover the 1 January - 30 September 2019 period. The competent asylum authorities do not publish information about their work on their websites.

1.1. REGISTRATION OF ASYLUM SEEKERS

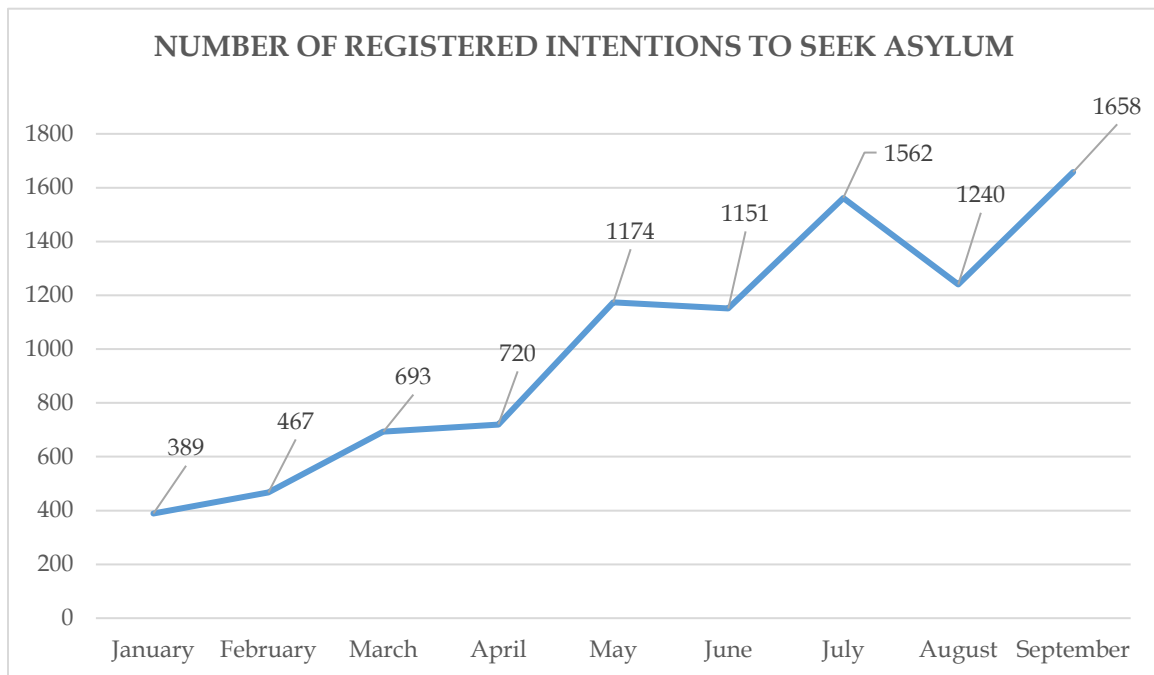
A total of 9,054 foreigners expressed the intention to seek asylum in the RS since the beginning of the year; 8,536 of them were men and 518 were women. The intention to seek asylum in the RS was expressed by 2,019 children, 570 of whom were unaccompanied by their parents or guardians. Herewith a breakdown by month of the number of foreigners whose intention to seek asylum was registered since the beginning of the year: 389 in January, 467 in February, 693 in March, 720 in April, 1,174 in May, 1,151 in June 2019, 1,562 in July, 1,240 in August and 1,658 in September 2019.

Most of the foreigners, who expressed the intention to seek asylum in the reporting period, were nationals of Afghanistan (2,736), Pakistan (2,557), Iraq (883), Bangladesh (784) and Syria (693). The intention to seek asylum was also expressed by nationals of Iran (296), Algeria (152), India (130), Palestine (123), Egypt (114), Eritrea (110), Morocco (106), Somalia (87), Libya (53), Burundi (45), Turkey (41), Yemen (22), Lebanon (18), Tunisia (12), China (10), Sudan (nine), Russia (seven), North Macedonia (six), Nepal (five), Ghana (four), Jordan (four), Kuwait (four), Bosnia and Herzegovina (three), Cuba (three), Ukraine (three), Albania (two), Chad (two) Greece (two), Guinea (two), Cameroon (two), Germany (two), Mali (two), Myanmar (two), Romania (two), Sri Lanka (two), Azerbaijan (one), Bulgaria (one), Georgia (one), Israel (one), Kazakhstan (one), Democratic Republic of Congo (one), Republic of the Congo (one), Nigeria (one), Peru (one), Sierra Leone (one), South Sudan (one), Togo (one), the United Kingdom (one) and the United States of America (one),.

Most of the foreigners issued certificates of registration of the intention to seek asylum in the RS (certificates of registration) in the nine months of the year were registered in police stations (8,074) and at border crossings (882); while such certificates of registration were issued also to 62 foreigners at Belgrade Airport 'Nikola Tesla'. Seven

foreigners were registered as intending to seek asylum in the Shelter for Foreigners³ in Padinska Skela and another 29 by the AO staff in the ACs.

A total of 642,790 foreigners expressed the intention to seek asylum in RS from 2008 until end September 2019. Specifically, such an intention was expressed by 77 foreigners in 2008, 275 foreigners in 2009, 522 foreigners in 2010, 3,132 foreigners in 2011, 2,723 foreigners in 2012, 5,066 foreigners in 2013, 16,490 foreigners in 2014, 577, 995 foreigners in 2015, 12,821 foreigners in 2016, 6,199 foreigners in 2017, 8,436 foreigners in 2018 and 9,054 since the beginning of 2019.



1.2. ACCOMMODATION AND NUMBER OF MIGRANTS IN THE RS

According to MI data, 1,745 registered migrants who expressed the intention to seek asylum reported to and were accommodated in ACs and 3,366 of them left these establishments of their own accord since the beginning of the year. A total of 4,200 migrants were living in Serbian Reception Centres and ACs in January 2019. Their

³ Under Article 3(1(12)) of the FL (*Official Gazette of the RS*, Nos. 24/18 and 21/19), the Shelter for Foreigners is designated for the accommodation of foreigners refused entry into the RS, foreigners against whom rulings ordering their deportation, removal or return have been issued but cannot be enforced immediately, and foreigners who have been ordered into detention under enhanced police supervision in accordance with the law.

number steadily fell, to 2,400 in August 2019, and then slightly increased in September 2019. The total number of migrants in RS territory was slightly higher than the number of those accommodated in the centres every month; it ranged from 4,500 at the beginning of the year to 3,400 in September 2019. In late September 2019, most of the migrants were accommodated in the Reception Centres in Adaševci, Kikinda, Obrenovac, Principovac and Bujanovac and the Asylum Centre in Krnjača.

The UNHCR estimated that most of the migrants had entered RS from North Macedonia and far fewer from Bulgaria. Since the beginning of the year, the greatest numbers of migrants were pushed back to RS from Croatia, as well as Bosnia and Herzegovina and Hungary, and the fewest from Romania.⁴

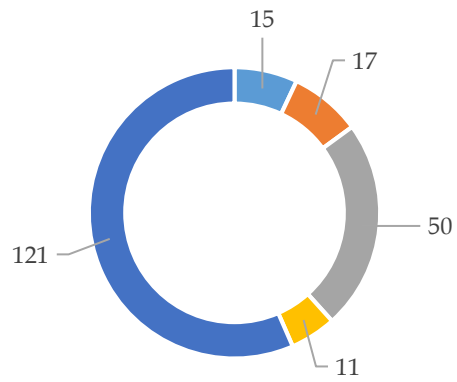
1.3. WORK OF THE AO

As of 1 January 2019, 134 asylum applications were submitted orally before AO staff and 56 applications were filed in writing. The AO held oral hearings concerning 139 asylum seekers. It granted asylum to 15 foreigners – five nationals of Iran, three nationals of Russia, three nationals of Cuba, two nationals of Afghanistan, one national of China and one national of Iraq. Subsidiary protection was granted to 17 foreigners – six nationals of Syria, four nationals of Iraq, three nationals of Libya, two nationals of Pakistan, one national of Iran and one national of Afghanistan. The AO dismissed 35 asylum applications regarding 50 foreigners on the merits and another 10 applications regarding 11 foreigners as ill-founded. The Office discontinued review of 100 applications concerning 121 asylum seekers, for the most part because the applicants had left the RS before the completion of the asylum procedure.

The relevant Serbian authorities have upheld the asylum applications of 161 foreigners since 2008, granting refugee status to 70 and subsidiary protection to 91 persons.

⁴ See *UNHCR Serbia Snapshot – August 2019*. Available at: <https://bit.ly/2WsCxdS>.

Asylum Office Statistics since 1 January 2019
(No of Asylum Seekers)



- Decisions granting asylum
- Decisions granting subsidiary protection
- Decisions dismissing claims on the merits
- Decisions dismissing claims as ill-founded

2. PRACTICES OF THE RELEVANT ASYLUM AUTHORITIES

Under the LATP,⁵ the AO conducts the first-instance asylum procedure, while the Asylum Commission rules on appeals of its decisions. Asylum Commission's rulings may be contested before the Administrative Court. The Administrative Court's decisions are final and enforceable.

The BCHR's legal team did not identify any major changes in the Serbian asylum authorities' practices in the reporting period, compared with the first half of 2019. Therefore, the recommendations in BCHR's prior report, *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*⁶ still stand. Their implementation will eliminate the risk of any violations of the asylum seekers' human rights and ensure proper and lawful decision-making.

The positive decisions taken by the relevant authorities in some cases were still an exception rather than the rule. The BCHR legal team identified several problems in the implementation of the asylum procedure, which will be described in greater detail in the below analysis of the decisions. First, the asylum procedure often takes longer than prescribed by law. Second, both the AO and the Asylum Commission mostly rule on the applications based on wrong or insufficient findings of fact, without thoroughly scrutinising the submitted evidence and available information about the applicants' countries of origin. Third, these authorities still dismiss asylum applications by applying the safe third country concept under the LA⁷ that is no longer in force. The LA is still applied in cases that were opened while it was still in effect. Under the LATP, the relevant authorities shall apply the law more favourable to the applicants in such cases, which the LA definitely is not, at least with respect to the ways facts are established and grounds for dismissing asylum applications.⁸ In one of its positive decisions, which will be discussed below, the Asylum Commission highlighted and elaborated on the AO's obligation to apply the law more favourable to the applicants.

⁵ *Official Gazette of the RS*, No. 24/18.

⁶ *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019. Available at: <http://azil.rs/en/right-to-asylum-in-the-republic-of-serbia-periodic-report-for-january-june-2019/>

⁷ *Official Gazette of the RS*, No. 109/07.

⁸ See more in *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 24-26.

The AO ruled on four applications filed by asylum seekers represented by BCHR's lawyers in the reporting period. Only one application was upheld. The Asylum Commission adopted one positive and one negative decision and the Administrative Court delivered one judgment dismissing the applicant's claim on the merits. The analysis of these decisions is provided in the following section.

2.1. ANALYSIS OF AO DECISIONS

2.1.1. Unwarranted Departure from Prior Practice

In September 2019, the AO dismissed on the merits the asylum application filed by Libyan national R.⁹ This case has two problematic aspects. First, the AO departed from its previous view on the state of general insecurity in Libya. The AO did not consider evidence indicating that the asylum seeker would be at risk of persecution if he returned to Libya because he was qualified as a supporter of Muammar Gaddafi when the armed conflict broke out in that country in 2011. Second, the AO exceeded the legal deadlines by which it was to render its decision.

R. fled Libya in early September 2011, after he was wounded in an attack by the rebel militia on the house he was living in. Given that he had supported and collaborated with Gaddafi's regime, the Libyan public authorities issued a search warrant against him after the armed conflict ended. During the asylum procedure, his legal representatives submitted a number of documents and evidence corroborating grounds for asylum and clearly indicating that R. would be at risk of persecution on account of his political beliefs. Furthermore, the applicant claimed that he was at even greater risk of persecution given the armed clashes that have been raging in Libya and the vicinity of Tripoli since April 2019.

a) Libya is a Safe Country - Wrong and Incomplete Findings of Fact

⁹ AO Ruling No. 26-1389/17 of 16 September 2019.

In a number of earlier cases,¹⁰ the AO had clearly held that a state of general insecurity reigned in Libya. It had referred to reports by the UNHCR, the British Government, Amnesty International and Human Rights Watch. In this case, however, the AO dismissed R.'s asylum application on the merits.¹¹ It explained its departure from its prior practice by claiming that the applicant had "not proven his close ties with the former regime".

The AO did not consider the evidence submitted by the applicant's legal representatives (reports by international organisations, newspaper articles, news published on online portals, etc.). Nor did it explain in its decision why it failed to do so. The AO's failure to even mention the submission of such evidence in its decision seriously brings into question the lawfulness of its decision. Furthermore, the AO failed to mention any specific reports by international organisations that apparently led it to establish that Libya was a safe country for the asylum seeker.

The AO was under the obligation to properly, accurately and fully establish the facts and circumstances relevant to a lawful decision on this administrative matter. Such an obligation is laid down in the LGAP¹² that applies to asylum issues not regulated by asylum law. The LGAP enshrines the principle of truth and free evaluation of evidence, which means that decisions must be based on a scrupulous and diligent evaluation of all individual pieces of evidence and the evidence in its entirety.¹³ Furthermore, the LATP lays down that, when ruling on the merits of an asylum application, the AO shall collect and review all the relevant facts, evidence and circumstances and, in particular, take into consideration reports by international organisations, such as the UNHCR, the EASO and other organisations focusing on human rights protection.¹⁴

In the operational part of its ruling, the AO ordered the asylum seeker to leave within 15 days from the day its decision became final. The AO clearly ignored UNHCR's

¹⁰ AO Rulings Nos. 26-4099/15 of 7 August 2015, 26-5792/14, 26-5793/14 and 26-5794/14 of 3 August 2016, 26-812/16 of 29 September 2016, 26-5489/15 of 20 October 2017 and 26-222/15 of 3 July 2018.

¹¹ Under Article 30(1(2)) of the LA, an asylum application is ill-founded in the event it is established that the applicant does not fulfil the requirements to be granted asylum or subsidiary protection, particularly in the event the claims made in the asylum application regarding facts relevant to the decision on asylum contradict the claims made during the applicant's hearing or other evidence adduced during the procedure (if, contrary to the claims in the application, it is established during the procedure that the asylum application was submitted to stay deportation, that the asylum seeker came to Serbia for purely economic reasons, et al).

¹² *Official Gazette of the RS*, Nos. 18/16 and 95/18.

¹³ Art. 10 LGAP.

¹⁴ Art. 32(2(2)) LATP.

September 2018 report,¹⁵ reiterating that the UNHCR opposed forcible returns to Libya of its nationals, including those whose asylum claims had been rejected. This is a minimum standard state must fulfil until the security and human rights situation improve considerably. The UNHCR also noted that the sympathisers and former collaborators of Gaddafi's regime were still considered a vulnerable category, whose human rights were frequently violated by all parties to the armed conflict in Libya. Therefore, in the event the decision dismissing R.'s application becomes final and he fails to leave RS as ordered by the Asylum Commission, he will be in real danger of *refoulement* to Libya, where he is at risk of torture and inhuman or degrading treatment.

b) Application of the Less Favourable Law

The AO failed to apply the law more favourable to this asylum seeker. Namely, its ruling is in contravention of both the LATP and the view the Asylum Commission explicitly voiced in one of its prior decisions¹⁶ on the obligation to apply the law more favourable to the asylum seeker.¹⁷ In the opinion of the Asylum Commission, Article 103 of the LATP imposes upon the AO the obligation to review which law is more favourable to the asylum seekers when ruling on their applications that were filed at the time the LA was in force. In the event it does not do so, it will have violated the LATP.

In the context of this case, it may be concluded that the LATP is more favourable to the applicant because it defines the AO's obligation regarding the assessment of facts and circumstances more precisely and rigorously than its predecessor. The LATP enumerates the evidence that the relevant asylum authorities must particularly take into consideration. Such evidence includes, inter alia, updated reports on the human rights situation in the asylum seeker's country of origin published by various international organisations.¹⁸ However, the AO's application of the LA in this case resulted in its insufficient consultation of these reports.

c) Overly Long Procedure

The overly long asylum procedure was another problem identified in this case. The decision was served on the asylum seeker as many as 796 days after the asylum procedure

¹⁵ UNHCR *Position on Returns to Libya - Update II*, UNHCR, September 2018, p. 20. Available at: <https://bit.ly/2MVIQ5g>.

¹⁶ Asylum Commission Ruling No. Až - 26/18 of 12 July 2019.

¹⁷ Art. 103 LATP.

¹⁸ Art. 32 LATP.

was initiated. Namely, R. applied for asylum back on 19 July 2017 but he was not interviewed by the AO staff until 31 May 2018. The AO adopted its decision on 16 September 2019.

R. applied for asylum under the LA, which was in force at the time. The LGAP applied to issues not governed by the LA, including the deadlines by which the procedure must be completed.¹⁹ Under the LGAP, the authorities shall issue a ruling within 60 days from the day the procedure is initiated, when it is initiated on the motion of a party.²⁰ These deadlines were obviously exceeded in this case. Therefore, the time spent on resolving this administrative matter amounts to a violation of the principle of effectiveness and economy of procedure enshrined in the LGAP.²¹

d) Conclusion

The AO did not offer any valid explanation for its departure from its prior practice and view on general insecurity in Libya. Its decision dismissing R.'s application is in contravention of the UNHCR's views, which it should have complied with in order to properly apply the LATP and protect refugee rights. Furthermore, its decision was taken under the law less favourable to the asylum seeker and long after the expiry of the legal deadlines for the completion of the procedure. All of this has undermined legal certainty and brought into question the realisation of the principle of truth in the asylum procedure. The appeal was pending before the Asylum Commission at the time this Report was finalised.

2.1.2. Asylum Application by an Iranian Family Dismissed on the Merits

In late August 2019, the AO adopted a ruling²² dismissing on the merits the asylum application filed by Iranian nationals E., his spouse E.S. and their underage daughter E.D.²³ The AO found that they did not fulfil the requirements for asylum or subsidiary protection laid down in the LATP.²⁴

Namely, E. has been politically active on social media (Facebook, Instagram, Telegram) in his country of origin since 2016. He criticised the Iranian regime, Islam's

¹⁹ Art. 3(2) LA.

²⁰ Art. 145(3) LGAP.

²¹ Art. 9 LGAP.

²² AO Ruling No. 26-1607/18 of 26 August 2019.

²³ *Ibid.*

²⁴ Arts. 24 and 25 LATP.

detrimental influence on society and advocated democracy. He published his comments under a pseudonym given the stringent free speech restrictions and strict Internet control in Iran.²⁵

In June 2018, the supreme leader of the Islamic Republic of Iran issued a public proclamation, encouraging Iranian citizens to rally and contribute to the monitoring and punishment of individuals opposing the regime. E. feared for his own safety and the safety of his family, especially because of the threats, including death threats, he got from citizens because of the opinions he published on social media. E. succeeded in leaving his country of origin with his wife and daughter in July 2018. Upon arrival in the RS, E. revealed his identity and continued with his political activism, which led to increasing threats against him and his family, and, consequently, their greater fear of returning to Iran.²⁶

Perceived government critics or those offending public morality, including social media users, may be subjected by the Iranian authorities to harassment, intimidation, arbitrary arrest, flogging, severe custodial sentences, incommunicado detention, unfair trial and torture.²⁷ Furthermore, Iranian authorities have been filtering tens of thousands of foreign websites, including news sites and leading social network platforms.²⁸

a) Credibility of the Asylum Application

In accordance with the Convention Relating to the Status of Refugees,²⁹ the LATP provides for the right to refuge i.e. refugee status to individuals fearing persecution in their country of origin on account of their *political opinion*³⁰ wherefore they are unable or unwilling to avail themselves of the protection of that country.³¹ During the asylum procedure, the applicants' legal representative submitted to the AO the above information with detailed descriptions of the situation in their country of origin and individual pieces of evidence, substantiated by information published by relevant international and media sources.³² The evidence proves that the Iranian family's asylum

²⁵ Minutes of the Oral Hearing in Case No. 26-1607/18 of 20 December 2018.

²⁶ *Ibid.*

²⁷ *Country Policy and Information Note – Iran: Journalists and internet-based media, Version 2.0*, United Kingdom, Home Office, 26 October 2016, p. 6. Available at: <https://bit.ly/2BU3hdB>.

²⁸ *Freedom on the Net 2018*, Freedom House. Available at: <https://bit.ly/2WsYtoR>.

²⁹ *Official Herald of the FNRY – International Treaties and Other Agreements*, No. 7/60.

³⁰ *Italics ours.*

³¹ Art. 24 LATP.

³² Specifically, reports by the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, Amnesty International, Freedom House, the Australian Red Cross (ACCORD), the United States

application is credible and that they have a well-founded fear of persecution in Iran because of their political opinions. The UNHCR is of the view that credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.³³

The AO concluded that the reasons cited by E., the problems he had described and the evidence he had submitted did not indicate risk of persecution. This is why it held that they could not be considered grounds for granting him and his family refugee protection. The AO, however, did not provide a valid explanation why it found E.'s statement insufficiently credible although it noted in the same ruling³⁴ that he had made a genuine effort to corroborate it with evidence.³⁵ It remains unclear how the AO reviewed specific factors³⁶ when it assessed the credibility of the asylum application and how it arrived at the conclusion that these factors did not indicate the applicants' well-founded fear of persecution.

Moreover, the AO said in its reasoning that the threats voiced against E. while he was living in Iran and after he came to RS were not serious, but merely *a discussion* among people with different opinions of the previous and current regimes in Iran. It went on to say that he had had no problems with the police and that his posts had not assumed the degree of "virality"³⁷ to be perceived as a threat to the Iranian regime. The AO held that "it is unrealistic to expect of the Iranian authorities to control every single user of Internet application given their multitude".³⁸ The AO assessed that the very fact that the family

Commission on International Religious Freedom (USCIRF), and media reports on detention and killing of individuals who publicly "insulted the prophet" and criticised the Iranian regime.

³³ *Note on Burden and Standard of Proof in Refugee Claims*, UNHCR, 16 December 1998, para. 11. Available at: <https://www.refworld.org/pdfid/3ae6b3338.pdf>.

³⁴ AO Ruling No. 26-1607/18 of 26 August 2019, p. 4.

³⁵ Art. 32(4(1)) LATP.

³⁶ External and internal credibility indicators, when applied appropriately, may be used to guide decision-makers when they are deciding whether to accept an asserted material fact. Internal credibility indicators include: 1) sufficiency of detail and consistency; and, 2) internal coherence. Specifically, internal credibility is the assessment of an individual's testimony based exclusively on his or her statements and other presented evidence. External credibility indicators include: 1) consistency with information provided by any family members and/or other witnesses; and 2) consistency with available specific and general information, including country of origin information. See more at *Beyond Proof – Credibility Assessment in EU Asylum Systems*, UNHCR, May 2013, p. 245. Available at: <https://www.unhcr.org/51a8a08a9.pdf>.

³⁷ E's Instagram profile has over 7,900 followers.

³⁸ AO Ruling No. 26-1607/18 of 26 August 2019, p. 5.

had freely and legally left Iran demonstrates that they had had no problems with the Iranian authorities.

b) Wrong and Insufficient Findings of Fact

In this case, the AO failed to diligently and objectively assess the asylum seekers' statements in the context of the other submitted evidence of the status of Iranian nationals brutally punished for their dissenting political opinions. It also failed to review whether the Iranian authorities extended protection to individuals from threats and assaults by pro-regime citizens. Consequently, its findings of fact were wrong and insufficient, leading it to mistakenly conclude that E. and his family had not proven that they were at risk of persecution in their country of origin.

The AO's decision is in contravention of the LGAP, under which the reasoning of a ruling must include the reasons that were decisive in the evaluation of each piece of evidence, i.e. why specific pieces of evidence had or had not been considered.³⁹ It is also in contravention of the LATP, under which, during its examination of the merits of an asylum application, the AO shall collect and review all the relevant facts, evidence and circumstances, particularly taking into account, inter alia, the reports of international organisations, such as the UNHCR, EASO and other organisations focusing on the protection of human rights.⁴⁰

Furthermore, the AO's practice appears to be based on a selective consideration of reports on countries of origin, given that, in this specific ruling, it quoted only the parts of the reports substantiating its negative decision. Namely, the AO said it had perused the international reports submitted during the procedure⁴¹ on the Iranian regime's treatment of dissenters and Internet activists who criticised the government. It, however, concluded that no connection could be drawn between the reports and this case, inter alia, because these reports said that a lot of people in Iran were active in social media.

This is quite a blanket statement. During the procedure, E. named a few people who were arrested (and some of them were killed) in Iran for criticising the regime on social networks, which was also cause for his objective fear of persecution.⁴² However,

³⁹ Art. 141(4) LGAP.

⁴⁰ Art. 32(2(2)) LATP.

⁴¹ USCIRF and ACCORD.

⁴² In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him or would for the same reasons be intolerable if he returned there. These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other

the AO dismissed these claims as well, explaining that these people were arrested the year E. started criticising the regime in social media. It held that E. could also have been arrested had his posts been perceived as “pernicious to the security of the ruling regime” but that this had not happened given that he only left his country of origin in 2018.

E.’s claims were also dismissed because he had not collaborated with these people and because he had lived “a normal life” in his country of origin. Such an explanation is unacceptable given that E. hid his identity on the Internet while he lived in Iran. His lack of ties with the activists he mentioned who were the victims of the Iranian regime is not a decisive indicator that he himself is not at real risk of persecution.

c) Conclusion

This is not the first time the AO failed to consider all the evidence submitted to it during the asylum procedure or to explain why.⁴³ Its decision shows that it is still not fulfilling the obligation it has as the organ deciding on asylum applications, primarily to assess the credibility of the asylum applications in the light of all the circumstances of the case, both the personal statements and the submitted evidence and the relevant information on the situation in the applicants’ countries of origin. Such practice and selective assessments of reports on the countries of origin have resulted in wrong and insufficient findings of fact and essentially given rise to the risk of *refoulement*.⁴⁴ The case was pending on appeal before the Asylum Commission at the time this Report was finalised.

members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, 2019, para 42. Available at <https://www.unhcr.org/4d93528a9.pdf>.

⁴³ BCHR alerted to similar cases, e.g. in its *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 26-34.

⁴⁴ In the context of refugee law, the non-*refoulement* principle imposes upon states the obligation not to return expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33 of the Convention Relating to the Status of Refugees). In the context of the prohibition of torture, this principle requires of states not to expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture (Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

2.1.3. Asylum Application of an LGBT Person from Zimbabwe Dismissed as Ill-Founded

On 31 July 2019, the AO rendered a decision⁴⁵ dismissing as ill-founded an asylum application filed by X. from Zimbabwe.⁴⁶ The AO concluded that it was safe for X. to return to her country of origin although it had not taken into consideration available country of origin information published by relevant international sources or comprehensively examined risk of her persecution.⁴⁷

In her asylum application, X. claimed she was at risk of persecution because of her membership of a particular social group (sexual orientation), political opinion (LGBT activist), ethnic affiliation and political opinion thus attributed to her.⁴⁸ In this case, persecution is reflected in the Zimbabwean authorities' laws and practices discriminating against LGBT persons. As an activist of a local LGBT organisation, X. was on several occasions the victim of violence at the hands of the police, who arrested her together with other LGBT activists and tortured her in custody.⁴⁹ X. had for years also been a victim of gender-based violence because of her sexual orientation.⁵⁰

At the oral hearing before the AO, X. said that she had been subjected to numerous acts of persecution by the state authorities in her country of origin. She also said she had continuously been a victim of violence by non-state actors, and discriminated against and ostracised by the wider community, which is extremely traditional and intolerant of LGBT persons.

Furthermore, because of her ethnic affiliation and political opinion attributed to her on account of her father's political activities, X. and her family had faced persecution and been deprived of their property rights. This is why her immediate family had to flee Zimbabwe and move to another country.

⁴⁵ AO Ruling No. 26-462/18 of 31 July 2019.

⁴⁶ Art. 38(1(3)) LATP.

⁴⁷ The AO examined the existence of persecution only with respect to the applicant's membership of a particular social group, but not with regard to her expression of a political opinion or imputed political opinion.

⁴⁸ X. and her family are ethnic Ndebeles, who are automatically perceived as supporting ZAPU, wherefore they have been systemically discriminated against and threatened by the Shona ethnic group, supporting the ruling ZAPU-PF.

⁴⁹ Minutes of the Oral Hearing in Case No. 26-462/18 of 24 April 2018, p. 4.

⁵⁰ *Ibid.*

a) Wrong and Insufficient Findings of Fact

Under the LATP, the AO must assess the facts and circumstances by reviewing the evidence presented by the asylum seekers.⁵¹ It must consider the information obtained from the asylum seekers in the light of the updated reports on the situation in their country of origin,⁵² including the laws and regulations of that country and the manner in which they are applied.⁵³ Pursuant to the LATP and the ECtHR case-law,⁵⁴ the AO is under the obligation to collect information about countries of origin from various relevant sources, such as the UNHCR, EASO and other organisations focusing on human rights protection.⁵⁵

Furthermore, when assessing all the relevant information, the asylum authority must bear in mind the position and personal circumstances of the asylum seekers, including their sex and age, in order to establish whether the acts and procedures they have been or might be subjected to amount to persecution.⁵⁶ In addition, foreigners subjected to gender-based or psychological violence fall in the group of asylum seekers requiring additional procedural guarantees,⁵⁷ and LATP provisions must be interpreted in a gender-sensitive manner.⁵⁸

All of the above are positive obligations of the asylum authorities. Therefore, the AO was under the obligation to collect and review all facts, evidence and circumstances *proprio motu*, i.e. at its own initiative, and to reach its decision on the asylum application based on them. However, this is precisely what it failed to do. The AO failed to ascertain which laws were in force in Zimbabwe and how their application reflected on the status of LGBT persons. Second, the AO failed to review the numerous reports on Zimbabwe by international human rights organisations in the context of X.'s personal circumstances.

The AO's explanation of why it dismissed X.'s asylum application does not show that it had even paid attention to the fact that "physical contact" between two women is a criminal offence in Zimbabwe.⁵⁹ The fact that the new Zimbabwean Constitution explicitly prohibits same-sex marriages speaks volumes about society's attitude towards

⁵¹ Art. 32(2(1)) LATP.

⁵² *Vilvarajah and Others v. the United Kingdom*, ECtHR, App. No. 45/1990/236/302-306 (1991), para. 108.

⁵³ Art. 32(2(2)) LATP.

⁵⁴ See e.g. *Salah Sheekh v. the Netherlands*, ECtHR, App. No. 1948/04 (2007), para. 136.

⁵⁵ Art. 32(2(2)) LATP.

⁵⁶ Art. 32(2(3)) LATP.

⁵⁷ Art. 17(1) LATP.

⁵⁸ Art. 16(1) LATP.

⁵⁹ Art. 67(1(b(ii))) Zimbabwe Criminal Code. Available at: <https://bit.ly/2tX0PNz>.

the rights of the LGBT population.⁶⁰ Zimbabwean law does not prohibit discrimination on grounds of sexual orientation and gender identity; on the contrary, such discrimination is encouraged and sponsored by the state through hate speech and vilification in state media.⁶¹

In its explanation of its negative decision,⁶² the AO said that activists rallied in the local organisation X. had worked for were not persecuted and that the members of this organisation did “not suffer any consequences” for their public presence on the Internet. This conclusion is not based on either facts or evidence.

Namely, during the asylum procedure, X. on several occasions spoke about the repression she had been subjected to by the public authorities and stated that around 60% of the activists of the organisation she had worked for had already fled Zimbabwe and settled down in other countries.⁶³ Furthermore, available international reports say that the members of this organisation have been subjected to harassment and systemic discrimination, as well as blackmail and threats that their sexual orientation would be revealed to the police, the church or their families unless they rendered payment.⁶⁴

The AO ruling dismissing X.’s asylum application does not refer to any legally relevant reports on the status of LGBT persons in Zimbabwe. It does mention a UNHCR document, but exclusively in the context of the general criteria for granting refugee protection⁶⁵ (the LATP also contains these procedural provisions). However, the AO failed to peruse UNHCR documents containing information about the situation in Zimbabwe to assess X.’s fear of persecution.⁶⁶

The AO should have referred to UNHCR’s position on Zimbabwe⁶⁷ which, although adopted in 2002, is relevant until it adopts a new document in case the human rights situation in this country changes. Furthermore, the AO should have reviewed

⁶⁰ Art. 78(3) Zimbabwe Constitution. Available at: <https://bit.ly/2h2lxGf>.

⁶¹ Official rhetoric about LGBT persons is extremely homophobic. The Zimbabwean President, who *de facto* controls all branches of government, has described homosexuals as beings “worse than dogs and pigs”. See more in *The Rights of LGBT People in Zimbabwe*, SIDA, November 2014, p. 1, available at: <https://bit.ly/2LV4dEm>.

⁶² AO Ruling No. 26-462/18, of 31 July 2019.

⁶³ Minutes of the Oral Hearing in Case No. 26-462/16 of 17 October 2018, p. 5.

⁶⁴ See *Zimbabwe 2018 Human Rights Report*, US State Department, 2019, p. 40. Available at: <https://bit.ly/309FGAa>.

⁶⁵ The AO mentioned the 2002 Handbook although the UNHCR re-issued it in 2019.

⁶⁶ AO Ruling No. 26-462/18 of 31 July 2019, pp. 4 and 6.

⁶⁷ *Position on Return of Unsuccessful Zimbabwean Asylum Seekers*, UNHCR, 2 May 2002. Available at: <https://bit.ly/306Zy6U>.

many other reports⁶⁸ about systemic discrimination against and persecution of LGBT persons in Zimbabwe.

The UNHCR has described the situation in Zimbabwe as concerning and has held that persons holding or imputed different political opinions are at risk of abuse, unlawful deprivation of liberty and other human rights violations. Given that X. is of a different sexual orientation and that she has been fighting for civil and political rights of LGBT persons, she would be at risk of persecution not only on grounds of her gender and sexual orientation, but her actual and imputed political opinion as well. These two grounds overlap in countries like Zimbabwe, because advocacy of LGBT rights runs counter to widespread political opinion or practices.⁶⁹ The AO, however, did not take this into account.

In order to ensure they do not violate the principle of non-*refoulement*, the asylum authorities must evaluate the facts *ex nunc*, that is, to establish whether the situation in the country of origin has changed since the moment the asylum application was submitted.⁷⁰ The UN issued a press release on 16 August 2019 expressing its grave concern because of police violence against activists and threats to the freedom of assembly.⁷¹ The UN was especially concerned by the physical attacks on and arrests and detention of civil society leaders and activists over the past few months.⁷²

The above information testifies to the gravity of the situation in Zimbabwe and calls for a thorough *ex nunc* evaluation of the facts by the AO, in the light of the facts presented earlier and the latest information about the situation in the country of origin. Notwithstanding, the only report mentioned by the AO in its ruling was a 2018 Human Rights Watch report,⁷³ which it referred to when it made the following statement about the activities of the Gays and Lesbians of Zimbabwe (GALZ):

⁶⁸ See, inter alia, *World Report 2016: Events of 2015*, Human Rights Watch, 2016, p. 658. Available at: <https://bit.ly/1Kadeoa>; Michel Forst, *World Report on the Situation of Human Rights Defenders*, UN Special Rapporteur on the Situation of Human Rights Defenders, December 2018, p. 152. Available at: <https://bit.ly/2MtrzTh>; *URGENT ACTION: Seven Activists Arrested, Charged with Treason*, Amnesty International, 31 May 2019. Available at: <https://bit.ly/2KO9oo0>.

⁶⁹ *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, 23 October 2012, HCR/GIP/12/01, para. 40. Available at: <https://bit.ly/2KElst6>.

⁷⁰ *J.K. and Others v. Sweden*, ECtHR, App. No. 59166/12 (2016) para. 83, and *F.G. v. Sweden*, ECtHR, App. No. 43611/11 (2016), para. 115.

⁷¹ UNHCR press release, 16 August 2019. Available at: <https://bit.ly/2ZeCOke>.

⁷² *Ibid.*

⁷³ *World Report 2018: Zimbabwe, Events of 2017*, Human Rights Watch (2018). Available at: <https://bit.ly/35gjWFM>.

“GALZ participated in the Global Fund consultation process through the national coordination mechanism. The issues discussed included also access to health care, legal barriers and the LGBT community shared experiences, dealing with family and society, religion and culture.”⁷⁴

Perusal of the Human Rights Watch website clearly shows that it does not contain such information.⁷⁵ In its reports over the past decade, Human Rights Watch has been saying that Zimbabwean authorities are ignoring constitutional provisions on human rights and preventing their implementation.⁷⁶

In addition, the AO made a number of claims about LGBT persons in Zimbabwe without quoting their sources. Therefore, it reneged on its legal obligation to properly, accurately and comprehensively establish all the facts and circumstances of the case.⁷⁷

b) Non-Compliance with the *In Dubio Pro Reo* Principle

In terms of the LATP, the *in dubio pro reo* principle means that, in the absence of other evidence, the asylum seekers’ statements are considered credible provided they, *inter alia*, invested genuine efforts in substantiating their statements with evidence. Furthermore, the asylum seekers’ statements must be consistent and in compliance with the specific and general information about their country of origin and they must provide satisfactory explanations for the lack of any other relevant facts.⁷⁸

The applicant’s own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community.⁷⁹ The UNHCR has held that a pervading and generalised climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted.⁸⁰

⁷⁴ AO Decision, No. 26-462/18 of 31 July 2019, p. 9.

⁷⁵ *World Report 2018: Zimbabwe, Events of 2017*, Human Rights Watch (2018). Available at: <https://bit.ly/35gjWFM>.

⁷⁶ These reports are available at: <https://bit.ly/2H8Em98>.

⁷⁷ Art. 10(1) LGAP.

⁷⁸ Art. 32(4(1-3)) LATP.

⁷⁹ *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/12/01, UNHCR, 23 October 2012, para. 64. Available at: <https://bit.ly/2JA3oz9>.

⁸⁰ *Ibid.*, para. 28.

The AO, however, said in its decision that X. had not provided an “acceptable explanation” why she had not substantiated her statement with evidence and thereby lent it credibility, and that “there was no evidence in this case”. The AO thus fully disregarded the circumstances under which X. had fled her country of origin to save herself, without thinking of taking with her any evidence of persecution. During the oral hearing, X. gave a valid explanation why she was unable to substantiate her claim with additional evidence. Among other things, she said that she had travelled under a false name and feared that the police would search her or her phone and that her smuggler advised her to hide information about her identity.

The AO did not find X.’s claim that she was unable to obtain protection in Zimbabwe credible either. Its finding that X.’s “faith in the relevant institutions is based on an assumption” and that she “had the opportunity to seek the help of the state institutions, which were capable of extending her protection” is illogical. Namely, X. said that she had been discriminated against by her family, community, as well as police officers and teachers, ever since she was a teenager.⁸¹ Given her personal experience and inadequate protection of human rights of LGBT people by the Zimbabwean state institutions, it would be unreasonable to expect of her to seek protection from the same entities discriminating against her and violating her human rights. Protection from persecution in the country of origin must be effective and of a non-temporary nature.⁸²

The AO was essentially unable to assess the credibility of X.’s statement, i.e. whether it was in contravention of specific and general information about her country of origin because, as already noted, it did not thoroughly peruse the relevant international reports on the status of LGBT persons in Zimbabwe. Namely, its reasoning of its decision does not indicate whether it had consulted these reports at all when it examined the case. By failing to peruse them and to act in accordance with the *in dubio pro reo* principle, the AO put X. at a grave and real risk of persecution in case she is returned to her country of origin.

c) Conclusion

The AO’s decision is deeply flawed for a number of reasons. First, it failed to consider all of X.’s individual circumstances and adequately qualify the grounds of persecution. Second, it utterly failed to examine the general situation in X.’s country of origin in the context of her individual circumstances, let alone examine it diligently and thoroughly. The AO failed to ascertain the quality of the laws in force in Zimbabwe and whether they

⁸¹ Minutes of the Oral Hearing in Case No. 26-462/18 of 24 April 2018, pp. 4 and 5.

⁸² Art. 30 LATP.

facilitated discrimination against and persecution of LGBT persons. It also failed to consider the relevant reports on the status of LGBT persons in Zimbabwe. Finally, it concluded that X.'s statement was not credible, paying no heed to the particular circumstances in which LGBT persons left their country of origin where they had suffered violence. The appeal was pending before the Asylum Commission at the time this Report was finalised.

2.1.4. Positive Decision in the Case of a Chinese National

In September 2019, the AO adopted a ruling granting asylum to Chinese national Y.⁸³ It found that he had grounds to fear persecution in case he returned to China because he is a member of a national minority.

Y. belongs to the Uyghur national minority. The Chinese authorities have been persecuting members of this predominantly Moslem minority and restricting their freedom of movement. Uyghurs are often tortured and interned in “political re-education camps”.⁸⁴ During the oral hearing, Y. said that he had been tortured and arrested a number of times and that he feared for his life. He had been interned in a political re-education camp since January 2015, where he attended political education classes and was forced to perform various forms of physical labour. He was repeatedly slapped during police interrogation. The police hit him with metal bars and broke his fingers.⁸⁵ After years of such problems, Y. paid a lot of money for a passport⁸⁶ in 2016 and succeeded in fleeing China. He spent around 15 months in Turkey before coming to the RS.

a) Overview of the Course of the Procedure

This is the second time the AO ruled on this case, after the Administrative Court remitted it for reconsideration because of specific shortcomings in the findings of fact and inconsistencies in the asylum authorities' actions. The AO had initially dismissed Y.'s

⁸³ AO Decision, No. 26-2050/17 of 12 September 2019.

⁸⁴ See more in *China: Situation of Uyghurs*, Austrian Centre for Country of Origin and Asylum Research and Documentation, April 2016. Available at: http://www.ecoi.net/file_upload/90_1462195747_accord-2016-04-china-uyghurs.pdf.

⁸⁵ Minutes of the Oral Hearing held on 13 October 2017.

⁸⁶ Uyghurs cannot obtain passports like other citizens. See *China: Passports Arbitrarily Recalled in Xinjiang*, Human Rights Watch, 21 November 2016. Available at: <https://bit.ly/36kkw5W>.

asylum application⁸⁷ because he had come to the RS from Turkey. Turkey is listed in the 2009 Serbian Government Decision on Safe Countries of Origin and Safe Third Countries⁸⁸ wherefore the AO concluded that this country complied with international principles on refugee protection and that the asylum seeker could have been granted asylum in it.⁸⁹ It therefore found that the requirements for dismissing the asylum application were fulfilled because Y. had not presented credible evidence that he would be at real risk of persecution if he were returned to Turkey or that his fear of persecution was well-founded.⁹⁰

In its ruling on the appeal,⁹¹ the Asylum Commission upheld the view of the AO. Neither the AO nor the Asylum Commission reviewed the claims on the status of Uyghurs in Turkey or the risk of their deportation to China. Furthermore, the Asylum Commission failed to consider the reports by international organisations about the deficiencies of the asylum system in Turkey.⁹² It held that the AO would have acted in contravention of the LA if it had taken the view that Turkey was not a safe country for Y.

The Administrative Court quashed the impugned Asylum Commission ruling and remitted the case for reconsideration.⁹³ In its judgment, the Administrative Court said that the Asylum Commission had failed to consider all the claims in the appeal and examine the risk of Y.'s *refoulement* from Turkey to China or the existence of risk to his life, safety or freedom in China. Therefore, in the view of the Administrative Court, the Asylum Commission had violated procedural rules⁹⁴ of major relevance to the regularity and legality of decision making in the asylum procedure.

The Administrative Court also found that the Asylum Commission had not complied with the principle of foreseeability laid down in the LGAP.⁹⁵ Specifically, it had not taken into consideration prior AO decisions concluding that Turkey was not a safe third country because of the poor conditions for the realisation of asylum seekers' rights.

⁸⁷ AO Decision, No. 26-2050/17 of 4 December 2017.

⁸⁸ *Official Gazette of the RS*, No. 67/09.

⁸⁹ More in Sonja Tošković (ed.), *Right to Asylum in the Republic of Serbia 2017*, BCHR, 2018, pp. 51-59. Available at: <http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf>

⁹⁰ AO Decision, No. 26-2050/17 of 4 December 2017, p. 6.

⁹¹ Asylum Commission Decision, No. Až-44-1/17 of 20 February 2018.

⁹² Such as: Amnesty International, *No safe Refuge: Asylum-seekers and Refugees denied effective protection in Turkey* (London, 2016), available at: <https://bit.ly/2BOBaRJ>; i ProAsyl, *Despite subsequent improvements: EU-Turkey deal violates fundamental human rights* (Frankfurt, 2016), available at: <https://bit.ly/2pbs8XM>.

⁹³ Administrative Court judgment No. U-6310/18 of 27 August 2018.

⁹⁴ Arts. 166(6) and 168(2) LGAP.

⁹⁵ Art. 5(3) LGAP.

Namely, Y.'s legal representatives claimed that the AO had taken a view opposite to the one it took in its final decision of 28 April 2015.⁹⁶ In that decision, the AO found that Turkey could not be considered a safe third country and that it could not dismiss the asylum application on account of the fact that the asylum seeker had been in Turkey before he came to Serbia. The AO noted a number of problems in the Turkish asylum system, including the long time the asylum seekers had to wait before they applied for asylum, lack of welfare, the excessively long appeal procedure, exclusion of the asylum seekers from social life, etc.

In the view of the Administrative Court, neither the AO nor the Asylum Commission had either ascertained or explained in their rulings that the situation of asylum seekers in Turkey had changed and that this change was decisive for their qualification of Turkey as a safe third country. Such a practice is in contravention of the LGAP, under which authorities must specify in their rulings the reasons why they departed from their prior decisions on identical or similar matters.⁹⁷

Although the Administrative Court instructed the Asylum Commission to adopt a “new ruling on the plaintiff’s appeal in accordance with the law,” the latter overturned the AO’s ruling dismissing the asylum application and remitted it the case for reconsideration.⁹⁸ The Asylum Commission held that the AO would eliminate the shortcomings identified by the Administrative Court more efficiently and cost-effectively because the Commission did not have insight in most rulings issued by the AO and was unable to validly assess what decision would be in accordance with the Office’s prior practice. Furthermore, the Asylum Commission instructed the AO to examine all of the asylum seeker’s claims that his return to Turkey would put him at risk of *refoulement* to China, where his life would be in danger, and to explain its departure from its prior practice.

b) New AO Decision

The AO reviewed the case and issued a new ruling granting Y. asylum, having found that he was at risk of persecution in his country of origin on account of his membership of a national minority. The AO considered all the claims made during the oral hearing, international reports on the status of Uyghurs in China and the evidence submitted by Y.

⁹⁶ AO Decision, b) No. 26-1342/2014 of 28 April 2015.

⁹⁷ Art. 141(4) LGAP.

⁹⁸ Asylum Commission Decision, No. Až-44/17 of 18 October 2018.

The AO referred to reports alerting to growing repression and coercion in China and showing that many people were being secretly deprived of liberty for months. It concluded that restrictions of the freedom of movement, religion and assembly were increasing, that the Chinese authorities frequently denied passports to Uyghurs and that family members of Uyghur activists living abroad were denied Chinese visas. The Chinese Government has been exerting pressure on other countries to return Uyghurs who have left China; those who were forcibly returned have disappeared. The AO also referred to a BBC report⁹⁹ on camps used as re-education centres in which tens of thousands of people were detained. The BBC also reported on the introduction of strict legal penalties to stifle Islamic identity. Uyghurs are subjected to ethnic profiling and are prohibited from practicing their religion.¹⁰⁰

Interestingly, the AO did not mention at all that Y. had come to Serbia from Turkey in this ruling, although that was the reason why it had initially dismissed his asylum application. As opposed to the first ruling, this one was adopted under the LATP, which includes more favourable provisions on the application of the safe third country concept;¹⁰¹ the AO failed to explain why it opted for applying that law and not the LA.

Furthermore, the AO exceeded the deadlines prescribed by law during the procedure. It had issued its first ruling within two months from the day Y. applied for asylum, but he had to wait much longer for the second ruling. Namely, the Asylum Commission issued its ruling remitting the case for reconsideration by the AO on 18 October 2018 and the latter issued its new ruling on 12 September 2019. During this period, the AO did not organise an additional oral hearing that could have sped up the process. Furthermore, the LATP, which the AO applied the second time round, lays down that it shall rule on asylum applications within three months.¹⁰² The applicant waited around two years for a final decision, which definitely was not in his best interest.

c) Conclusion

This case is a good practice example. Namely, during its review of the case, the AO examined more thoroughly all of the applicant's claims about the status of Uyghurs in China and the reports by international organisations substantiating his account. Such findings of fact resulted in a different decision by the first-instance authority. Furthermore, this Administrative Court decision is extremely important because it

⁹⁹ Kathy Long, "China's hidden camps", BBC, 24 October 2018. Available at: <https://bbc.in/36hCciy>.

¹⁰⁰ *Ibid.*

¹⁰¹ Art. 45 LATP.

¹⁰² Art. 39 LATP.

instructs the relevant asylum authorities to establish all the circumstances of the case diligently and ensure that their decisions are foreseeable. The BCHR hopes that the Administrative Court's view will help improve the work of the AO and Commission on other cases as well.

2.2. ANALYSIS OF ASYLUM COMMISSION DECISIONS

2.2.1. Dismissal of the Appeal Filed by an Afghan National

In July 2019, the Asylum Commission issued a ruling¹⁰³ dismissing an appeal of the AO ruling¹⁰⁴ rejecting an asylum application filed by an Afghan national, Z. The Asylum Commission explained that the asylum procedure had been properly implemented and that the appealed AO ruling was valid and lawful. In its view, Z.'s appeal was ill-founded because the requirements for granting him asylum or subsidiary protection had not been met.

To recall,¹⁰⁵ Z. and his family had received death threats from rebel groups (the Taliban and the so-called "Islamic State of Iraq and the Levant") because his two older brothers were working in state institutions. The lives of civil servants in Afghanistan are constantly in danger because they are branded infidels by the Taliban and the "Islamic State". During its review of the merits, the AO held that the asylum seeker had not proven that he personally had been persecuted and concluded that he had not been subjected to abuse and that he would not be in case he returned to Afghanistan. However, the AO failed to take into account the relevant facts and evidence presented by Z. and his legal representatives during the procedure, or the reports of international bodies and relevant human rights organisations on the situation in Z.'s country of origin.¹⁰⁶ This is why his legal representatives filed an appeal with the Asylum Commission.¹⁰⁷

¹⁰³ Asylum Commission Ruling No. Až-47/18 of 2 July 2019.

¹⁰⁴ AO Decision, No. 26-1278/17 of 17 April 2019.

¹⁰⁵ The first-instance decision is analysed in greater detail in *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019.

¹⁰⁶ More in *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 34-36.

¹⁰⁷ Appeal of AO Decision, No. 26-1278/17, filed on 8 May 2019.

a) Asylum Commission Failed to Examine All the Claims in the Appeal

The Asylum Commission concluded that the AO had properly applied substantive law. The latter had held that the events Z. described during the asylum procedure could not be qualified as persecution. It had also said that the treatment Z. had been subjected to in his country of origin fell below the standard of torture or inhuman or degrading treatment and that he would not be subjected to such treatment in case he returned to Afghanistan. The Asylum Commission upheld all these views, concluding that the AO had properly qualified the facts in this legal matter.¹⁰⁸

Z.'s legal representatives are of the view that the Asylum Commission reneged on its obligation to control the work of the first-instance authority. Namely, the Asylum Commission failed to examine all the claims in Z.'s appeal and merely upheld the AO's views in the first-instance decision.¹⁰⁹ Nothing in the Asylum Commission's explanation indicates how it had reviewed whether the AO's findings of fact were consistent with information from impartial sources of information submitted by Z.'s legal representatives during the first-instance procedure.¹¹⁰ The impression is that neither asylum authority had adequately examined the existence of a real risk that Z.'s rights would be violated in case he returned to his country of origin, or his individual circumstances in the context of the persistent indiscriminate violence in Afghanistan.

In its ruling, the Asylum Commission did not review the other claims in the appeal either. For instance, it said the following in its explanation of its decision:¹¹¹

The Asylum Commission also reviewed the other claims in the appeal. However, in the light of the ascertained situation and legal view taken, it concluded that they were not of such major influence to result in a different decision on this administrative matter, wherefore it did not elaborate them in greater detail.

The Asylum Commission ignored the claim in the appeal that the AO had not applied the LAMP, which was more favourable to the asylum seeker than the LA. In another case,¹¹² the Asylum Commission had said that, under the LAMP,¹¹³ the AO was

¹⁰⁸ Asylum Commission Decision, No. Až-47/18 of 2 July 2019, pp. 4-5.

¹⁰⁹ See *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 34-36.

¹¹⁰ Art. 167(3) LGAP.

¹¹¹ Asylum Commission Decision, No. Až-47/18 of 2 July 2019, p. 8.

¹¹² Asylum Commission Decision, No. Až-26/18 of 12 July 2019 is also analysed in this Report.

¹¹³ Art. 103 LAMP.

under the obligation to examine whether the LA or the LATP was more favourable to asylum seekers who had applied for asylum at the time the former law was in force. The AO should provide a clear and comprehensible explanation why it applied the law it referred to in its explanation of the ruling in a specific case. However, the AO did not provide such an explanation in the case of Z., who had applied for asylum when the LA was in force. The Asylum Commission itself reneged on its obligation to apply the more favourable law because its decision does not mention this claim in the appeal.

b) Security situation in Afghanistan

In its decision, ¹¹⁴ the Asylum Commission said that it had reviewed a number of international reports on the situation in Afghanistan, referred to in the appeal and Z.'s submission.¹¹⁵ However, it did not clarify why it deemed that the facts in these reports could "in no way" be linked to Z. and that they would not result in a different decision in this case. Furthermore, the Asylum Commission mentioned in its decision only the sources (specifically reports by international organisations) referred to by the AO in its negative decision.¹¹⁶

The Asylum Commission concluded¹¹⁷ that the appellant's claims that the AO had acted in contravention of the principles of truth and free evaluation of evidence¹¹⁸ were ill-founded. It held that the AO had acted fully in compliance with the law:

[...] the first-instance authority acted in accordance with Article 10 of the Law on the General Administrative Procedure, under which 'authorities are under the obligation to properly, truthfully and fully establish all facts and circumstances of relevance to the lawful and correct resolution of administrative matters' and pursuant to which 'authorised public officials shall decide at their own discretion which facts they consider proven based on a diligent and meticulous evaluation of each piece of evidence and evidence in its entirety and the results of the procedure in its entirety.' Therefore, the first-instance authority thoroughly, properly and fully reviewed all the facts and circumstances relevant to the adoption of a lawful

¹¹⁴ Asylum Commission Decision, No. Až-47/18 of 2 July 2019, p. 8.

¹¹⁵ Submission No. 23/168 of 13 June 2019 filed by N.M.'s legal representatives.

¹¹⁶ Asylum Commission Decision, No. Až-47/18 of 2 July 2019. See also *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 34-36.

¹¹⁷ Asylum Commission Decision, No. Až-47/18 of 2 July 2019, p. 6, available at: <https://bit.ly/2Ng8GRw>.

¹¹⁸ Art. 10 LGAP.

and valid decision, whilst taking into account, inter alia, the relevant international reports, as specified on page 5 of the appealed ruling.

The Asylum Commission merely confirmed the AO's views by quoting the same excerpts from two reports by international organisations, EASO¹¹⁹ and UNICEF,¹²⁰ but not the other reports submitted by Z. The Asylum Commission thus disregarded the claims in the appeal and reports on the state of human rights and the security situation in Afghanistan submitted by Z. and alerting to the high degree of violence, internal unrest and gross violations of fundamental human rights in Afghanistan.

c) Conclusion

The Asylum Commission's view that the AO had examined all facts and circumstances of relevance to the adoption of a valid and legal decision on this administrative matter cannot be accepted given the security situation in Afghanistan. The Asylum Commission acted in contravention of the LGAP¹²¹ in its ruling because it did not comment on all the claims in the appeal. Importantly, the Commission did not examine whether the AO's findings of fact complied with information on the security situation in Afghanistan contained in reports by international organisations. Hence the wrong and incomplete findings of fact and misapplication of the law in this case. The case was pending before the Administrative Court at the time this Report was finalised.

2.2.2. Positive Decision in the Case of Iranian Nationals

On 31 May 2019, the Asylum Commission issued a ruling¹²² upholding the appeal of an AO decision in which the latter had applied the safe third country concept and dismissed the asylum application by two Iranian nationals, X. and her underage daughter Y.¹²³ This Asylum Commission decision warrants attention because it instructs the AO how to decide whether it should apply the LA or the LATP as the more favourable law to asylum seekers.

¹¹⁹ *Afghanistan Key socio-economic indicators, Focus on Kabul City, Mazar e Sharif and Herat City, Country of Origin Information Report*, EASO, April 2019.

¹²⁰ *Child Notice Afghanistan 2018*, UNICEF, the Hague, 2018, available at: <https://bit.ly/2Ng8GRw>.

¹²¹ Art. 158(1, 3 and 4) LGAP.

¹²² Asylum Commission Decision, No. Až-26/18 of 31 May 2019.

¹²³ The AO's ruling is presented in detail in *Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019*, BCHR, Belgrade, July 2019, pp. 24-31.

a) Asylum Commission's View on the Application of the More Favourable Law

In this case, the Asylum Commission took a view on the application of the more favourable asylum law in case of pending asylum applications filed at the time the LA was in effect. In this specific case, the asylum seekers' legal representatives requested of the AO to apply the LAMP as the more favourable law to X. and Y., as vulnerable applicants.¹²⁴ The AO ignored their request and applied the LA; in its ruling, it failed to explain why it had not applied the LAMP. The applicants' legal representatives appealed this point.

The Asylum Commission said that Article 103 of the LAMP imposed upon the AO the obligation to examine which law was more favourable to asylum seekers who had applied for asylum at the time the LA was in force. It went on to say that the AO should provide a clear and comprehensible explanation to the asylum seekers why it had applied one law or the other. In the opinion of the Asylum Commission, the AO's failure to provide such an explanation was in violation of Article 103 of the LAMP to the asylum seekers' detriment.

The Asylum Commission did not examine the other claims in the appeal or the validity of the AO's ruling in terms of substantive law. It upheld the appeal, quashed the illegal first-instance ruling and remitted the case to the AO for reconsideration, instructing it to eliminate the specified shortcomings. The Asylum Commission could have itself decided on the merits of the case, but it remitted the case for reconsideration by the AO, holding that the latter would eliminate the shortcomings more efficiently and cost-effectively.

b) Conclusion

The LAMP is generally much more favourable to asylum seekers than the LA and the AO will have a hard time proving it is not in individual cases. This is all the more important given that final decisions are still pending in a number of other asylum cases, such as the case of X. and Y., which was opened at the time the LA was in effect. Namely, the asylum authorities in 2017 dismissed as many as 70% of the asylum applications without reviewing their merits.¹²⁵ Asylum procedures initiated at the time the LA was in force can now be completed by applying the more favourable LAMP. Its provisions narrow the

¹²⁴ Art. 103 LAMP.

¹²⁵ More in Trkulja A. (ed.), *Right to Asylum in the Republic of Serbia 2018*, BCHR, December 2018, pp. 43-47. Available at: <http://azil.rs/en/wp-content/uploads/2019/02/Right-to-Asylum-2018.pdf>.

possibilities for dismissing asylum applications as ill- founded, which means that the AO will have to review them on the merits.

2.3. ANALYSIS OF THE ADMINISTRATIVE COURT'S DECISION

2.3.1. Safe third country – insurmountable obstacle on the path to asylum

The Administrative Court dismissed on the merits BCHR's claim and thus rendered a final decision on an asylum application filed by Afghan national K. In its judgment,¹²⁶ the Administrative Court upheld the Asylum Commission decision dismissing his asylum application because he had entered the RS from Bulgaria and failed to prove it was not safe for him.

K. had fled Afghanistan because of the problems he had with the Taliban, after refusing to join their fight against international and Afghan security forces. The Taliban sent a number of threat letters to him and his family, branding him “the friend of infidels”. K. feared he would be subjected to similar threats if he returned to Afghanistan and that his life would be in danger due to indiscriminate violence in that country.

The AO dismissed K.'s asylum application in March 2018,¹²⁷ under the explanation that he had come to Serbia from Bulgaria, which is listed as a safe third country in the 2009 Government Decision. This ruling was adopted under the LA, which ceased to have effect on 2 June 2018. Three months later, the Asylum Commission rejected BCHR's appeal and upheld the AO's decision.¹²⁸

a) View on Bulgaria as a 'Safe Third Country'

Like the AO and the Asylum Commission, the Administrative Court also neglected the fact that K. had been deprived of liberty and abused by the police while in Bulgaria. Furthermore, although he was a minor at the time, the Bulgarian authorities failed to appoint him a guardian or accommodate him in an institution suitable for the accommodation of unaccompanied minors. K.'s legal representatives had submitted to

¹²⁶ Judgment No. U 11906/18 of 22 August 2019.

¹²⁷ AO Decision, No. 26-1219/17 of 30 March 2018.

¹²⁸ Asylum Commission Decision, No. Az 15-1/18 of 28 May 2018.

the Asylum Commission reports by UN treaty bodies – the UNCRC,¹²⁹ the UNCAT¹³⁰ and the Committee on the Elimination of Racial Discrimination¹³¹ – criticising Bulgaria’s treatment of refugees and asylum seekers. It needs to be noted that only states allowing foreigners back into their territory, providing them with access to the asylum procedure and agreeing to review their asylum applications on the merits can be considered safe third countries.¹³² However, the Asylum Commission saw nothing wrong in the AO’s failure to obtain such guarantees from the relevant Bulgarian authorities.¹³³

In the view of the Administrative Court, the asylum authorities had properly examined the safe third country concept in this case. The Court found that it had been established that he would not be at risk of torture or inhuman or degrading treatment or *refoulement* to Afghanistan if he were returned to Bulgaria.¹³⁴ The Administrative Court failed to elaborate why it considered that Bulgaria was a safe third country for K. Rather, its summary decision merely reiterates the AO’s and Commission’s views on the issue.

In their claim to the Administrative Court, K.’s legal representatives argued that Bulgaria was not a safe country for him personally, because the Bulgarian authorities had not complied with international refugee protection standards. Furthermore, they drew the Administrative Court’s attention to the numerous reports by UN treaty bodies about the dismal situation of refugees in Bulgaria, including the ones mentioned above. Notwithstanding, the Administrative Court dismissed the claim and consequently the asylum application without further examination. The Afghan asylum seeker remained in a “legal limbo” as it is uncertain whether the RS will return him to Bulgaria and under which guarantees, if any.¹³⁵

¹²⁹ *Concluding observations on the combined third to fifth periodic reports of Bulgaria*, UNCRC, CRC/C/BGR/CO/3-5, 21 November 2016, available at: <https://bit.ly/2N0x6j0>.

¹³⁰ *Concluding observations on the sixth periodic report of Bulgaria*, UNCAT, CAT/C/BGR/CO/627, 27 November 2017, available at: <https://bit.ly/2n97dTW>.

¹³¹ *Concluding observations on the combined twentieth to twenty-second periodic reports of Bulgaria*, Committee on the Elimination of Racial Discrimination, CERD/C/BGR/CO/20-2, 31 May 2017, available at: <https://bit.ly/2NoSQnJ>

¹³² See *The ‘Safe Third Country’ Policy in the Light of the International Obligations of Countries vis-à-vis Refugees and Asylum Seekers*, UNHCR, London, July 1993, para. 4.2.14.

¹³³ Pursuant to ECtHR case-law, a Contracting Party’s failure to obtain genuine guarantees that the applicant’s rights will be respected in the receiving country may amount to a violation of Article 3 of the ECtHR (prohibition of torture). See *Tarakhel v. Switzerland*, ECtHR, App. No. 29217/12 (2014), paras. 120 – 122; *Bader and Others v. Sweden*, ECtHR, App. No. 13284/04 (2005), para. 45.

¹³⁴ *Quarterly Report on the Protection of Civilians in Armed Conflict: 1 January to 31 March 2019*, UNAMA, 24 April 2019. Available at: <https://bit.ly/2GydChc>.

¹³⁵ In the experience of BCHR lawyers, many asylum seekers, whose applications were dismissed by the application of the safe third country concept, were not returned to those countries by the RS.

After they filed a claim against the Asylum Commission's ruling, K.'s legal representatives twice submitted evidence of the alarming security situation in Afghanistan and the Nangarhar Province the applicant hails from. Namely, in its 2018 guidelines for assessing asylum applications filed by Afghan nationals, the UNHCR concluded that no part of that country could be considered safe, because human rights were grossly violated in its entire territory.¹³⁶ The Administrative Court did not take such facts into consideration when it ruled on this case.

In other words, although the LAMP has been applied for 15 months now, the relevant asylum authorities have continued dismissing asylum applications on the basis of the safe third country concept under the LA, which is no longer in effect, depriving the applicants of legal grounds to stay in the RS. Furthermore, they have been dismissing the cases without reviewing them on the merits i.e. deciding whether or not the applicants really deserved international protection.

b) The Administrative Court Did Not Apply the More Favourable Law

During the administrative dispute, K.'s legal representatives asked the Administrative Court to conduct the proceedings under the law more favourable to the asylum seekers, specifically the LAMP.¹³⁷ The AO and Commission had applied the LA rather than the LAMP, which provides a more detailed definition of the safe third country concept that is more favourable to asylum seekers. Under the LAMP, a safe third country denotes a country in which the asylum seeker inter alia has access to an effective asylum procedure and protection of a non-temporary nature.¹³⁸ If the safe third country refuses to accept the foreigner, a decision shall be rendered on the merits of his/her asylum application in accordance with the provisions of the LAMP. Therefore, the application of the LAMP would definitely have resulted in the adoption of a different decision on this administrative matter.

Rather than itself applying the LAMP, which is more favourable to the asylum seeker, the Administrative Court merely examined whether the AO and Commission could have applied the LAMP. Given that the LAMP has been applied since 3 June 2018, the Administrative Court concluded that the AO and Commission had been correct to

¹³⁶ UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, UNHCR, Geneva, 30 August 2018. Available at: <https://bit.ly/2JANvsh>.

¹³⁷ Under Art. 103 of the LAMP, all asylum procedures initiated before the coming into effect of the LAMP shall be completed in accordance with the provisions of the prior Law on Asylum, unless the provisions of the LAMP are more favourable to the applicants.

¹³⁸ Art. 45(1) LAMP.

apply the LA, as the former adopted its ruling on 30 March and the latter ruled on the appeal on 28 May 2018. Although the LATP entered into force after the initiation of the administrative dispute, the Administrative Court was under the obligation to apply it as the more favourable law.

c) Conclusion

Serbia would risk violating Article 3 of the ECHR¹³⁹ if it forcibly returned K. to Bulgaria, given the ill-treatment he suffered there. Furthermore, his legal representatives alerted to reports showing that Bulgaria did not provide refugees with adequate protection. The ECtHR¹⁴⁰ has emphasised that states are under the obligation to closely and rigorously review any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3.¹⁴¹ The RS asylum authorities had failed to ascertain whether Bulgaria would agree to allow K. back into its territory. This is why there is real likelihood that he will end up without a regulated status or any rights in the RS. K.'s constitutional appeal was pending before the Constitutional Court at the time this Report was finalised.

3. Decision of the UNCAT

On 3 August 2019, the UNCAT adopted a decision¹⁴² finding the RS in violation of Articles 3 and 22 of the Convention against Torture and Other Cruel, Degrading or Humiliating Treatment or Punishment (Convention). The UNCAT found a number of flaws in the RS extradition authorities' actions during their examination of whether the requirements were fulfilled for extraditing Kurdish political activist Mr. Cevdet Ayaz to Turkey.

Article 3 of the Convention prohibits the expulsion of individuals to states where they are at risk of torture (the principle of non-refoulement). The UNCAT said that the Higher Court in Šabac, the Court of Appeals in Novi Sad and the Justice Minister had failed to rigorously examine Mr. Ayaz's allegations that he would be tortured in Turkey

¹³⁹ Under Article 3, no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹⁴⁰ *M.S.S. v. Belgium and Greece*, ECtHR, App. No 30696/09 (2011).

¹⁴¹ *Ibid.*

¹⁴² *Ayaz v. Serbia*, CAT, Communication No. 857/2017 (2019).

and that his criminal conviction in Turkey had been based on his own confession extorted by torture.¹⁴³ UNCAT came to the same conclusion with respect to the asylum authorities,¹⁴⁴ which had failed to review his asylum application on the merits. They had taken the view that Montenegro, as a safe third country,¹⁴⁵ should be responsible for reviewing his asylum claim on the merits and dismissed Mr. Ayaz's asylum application. UNCAT found that none of the listed authorities had invested efforts in examining the serious claims of torture or the applicant's claims that his confession extorted by torture had been used in the criminal proceedings against him in Turkey.

The Committee further noted that the case files obtained from Turkey had been inadequately translated. Furthermore, none of the RS authorities examined the general circumstances regarding the state of human rights in Turkey and Mr. Ayaz's individual circumstances to establish whether he would be at risk of torture if he were returned to Turkey.¹⁴⁶

In addition, the UNCAT found the RS in violation of Article 22 of the Convention because it had not complied with its request of 11 December 2017 for interim measures for Mr. Ayaz not to be extradited to Turkey while it considered his complaint¹⁴⁷ By ignoring UNCAT's request for interim measures, the RS had "impeded the comprehensive examination by the Committee of a complaint relating to a violation of the Convention".¹⁴⁸

At the end, UNCAT stated that the RS had an obligation to provide redress for the complainant, including adequate compensation of non-pecuniary damage resulting from the physical and mental harm caused. It called on the RS to explore ways and means of monitoring the conditions under which Mr. Ayaz was in detention in Turkey and to take other steps to prevent similar violations.¹⁴⁹

In Mr. Ayaz's case, the RS state authorities took decisions automatically, i.e. they only examined the formal requirements for his extradition and dismissal of his asylum application. During the asylum and extradition proceedings, they failed to thoroughly and properly assess evidence of torture, as well as of the risk of Mr. Ayaz's torture upon return to Turkey. This case is an excellent illustration of the consequences of the asylum

¹⁴³ *Ayaz v. Serbia*, para. 9.9.

¹⁴⁴ *Ibid.*

¹⁴⁵ Under Art. 33(1(6)) LA, which was in effect at the time.

¹⁴⁶ *Ayaz v. Serbia*, paras. 9.8 and 9.9.

¹⁴⁷ More in Petrović V. (ed.) *Human Rights in Serbia 2017*, BCHR, Belgrade, 2018, pp. 42-44, available at: <https://bit.ly/2NokJMB>.

¹⁴⁸ *Ayaz v. Serbia*, para. 7.3.

¹⁴⁹ *Ibid.*, paras. 10-12.

authorities' application of the safe third country concept without consideration of the merits of the asylum claims. Especially when they fail to diligently examine general information about the applicants' countries of origin and their personal circumstances.

4. INTEGRATION

The Council of Europe has emphasised that social integration is rooted in the protection of the individuals' human dignity, non-discrimination and engagement in the society of the receiving country.¹⁵⁰ Integration "is an ongoing process rather than a final destination, depending on constructive tripartite engagement between the authorities, the host community (especially civil society) and the refugees."¹⁵¹ The Council of Europe Committee of Ministers has urged states to adopt and implement integration policies that "respect the cultural diversity of society, and always avoid stigmatisation of migrants and persons of immigrant background."¹⁵²

In terms of the LAMP, integration entails inclusion of refugees in Serbia's social, cultural and economic life and the issue of their naturalisation.¹⁵³ As regards requirements for granting temporary residence on humanitarian grounds, the FL lays down that the degree of integration shall be assessed by taking into consideration the foreigners' prior schooling, work experience and knowledge of Serbian.¹⁵⁴

Asylum seekers and refugees in the RS are facing a number of problems in exercising their legally guaranteed rights relevant to integration. This Report describes situations demonstrating the problems arising from the non-alignment of various laws with the LAMP and impinging on the realisation of rights by asylum seekers and successful asylum seekers. Integration of refugees has also been undermined by the fact that most laws still do not recognise them as a particularly vulnerable category entitled to specific benefits.

According to BCHR's records, at least 18 successful asylum seekers have left the RS over the past two years because of integration problems.¹⁵⁵ Nearly all of them said that the

¹⁵⁰ *Living together as equals in dignity*, Council of Europe, Strasbourg, 7 May 2008, available at: <https://bit.ly/2ozsTti>.

¹⁵¹ *Resolution 2176 (2017), Integration of refugees in times of critical pressure: learning from recent experience and examples of best practice*, Parliamentary Assembly of the Council of Europe, 28 June 2017, available at: <https://bit.ly/2WpyKOe>.

¹⁵² "Issue paper: Human rights aspects of immigrant and refugee integration policies," Special Representative of the Secretary General on migration and refugees, Council of Europe, March 2019, available at: <https://rm.coe.int/168093de2c>.

¹⁵³ Art. 71 LAMP.

¹⁵⁴ Art. 61 FL, *Official Gazette of the RS*, Nos. 24/18 and 31/19.

¹⁵⁵ Number of BCHR clients who left the RS.

main reason why they left the RS and moved to the EU lay in their inability to naturalise and be issued travel documents. Economic reasons were not decisive.

Some successful asylum seekers lacking refugee travel documents returned to their countries of origin in order to exercise their right to family life. Since they again feared persecution in those countries, they asked the BCHR whether they would be allowed back into the RS. Legal return to the RS is almost impossible for these individuals if they do not have refugee travel documents. Although theirs was a so-called voluntary return, the question arises as to the actual degree of voluntariness and to what extent their return was motivated by their wish to normally exercise their right to family life.

This section illustrates merely some of the challenges faced by refugees and asylum seekers who want to integrate in Serbian society and live in it as equal citizens. A more thorough analysis of the relevant authorities' practices regarding the exercise of the rights relevant to integration will be provided in BCHR's 2019 annual report on the right to asylum.

4.1. INABILITY TO NATURALISE

Naturalisation is a particularly important issue for long-term integration. The Serbian Citizenship Law¹⁵⁶ (CL) entitles foreigners with habitual residence to acquire citizenship by admission.¹⁵⁷ Habitual residence is granted to foreigners with temporary residence, who fulfil the requirements under the FL.¹⁵⁸ This law, however, does not explicitly recognise successful asylum seekers as foreigners with habitual residence. This is why foreigners granted asylum under the LAMP cannot acquire Serbian citizenship by admission because they do not fulfil the requirements laid down in the FL and the CL.

The CL needs to be amended to allow status categories of foreigners under the LAMP to acquire Serbian citizenship as well. It should also provide them with the possibility of acquiring Serbian citizenship under more favourable conditions, like many EU Member States¹⁵⁹ do.

Recommendation to the CRM

¹⁵⁶ *Official Gazette of the RS*, Nos. 135/04, 90/07 and 24/18.

¹⁵⁷ Art. 14 CL.

¹⁵⁸ Arts. 67 and 68 FL.

¹⁵⁹ E.g. Refugees have to live four rather than the standard five years in Sweden to qualify for citizenship. More is available at: <https://bit.ly/2owJSMT>.

Under the LATP, the terms and conditions, procedure and other issues of relevance to the naturalisation of successful asylum seekers shall be determined by the RS Government on the proposal of the CRM.¹⁶⁰ The CRM has not forwarded such a proposal to the RS Government yet, although the LATP entered into force in April 2018 and has been applied since June 2018. Notwithstanding the MI's competence for ruling on citizenship applications, the CRM should officially propose the amendment of the CL to the RS Government as soon as possible.

4.2. SERBIA DOES NOT ISSUE TRAVEL DOCUMENTS TO REFUGEES

The BCHR has for a long time now been alerting to the fact that the MI's failure to prescribe the content and design of the refugee travel document has impinged on the refugees' integration. Both the LATP¹⁶¹ and its predecessor¹⁶² lay down that the Minister of the Interior shall enact a regulation on the content and design of the refugee travel document within 60 days from the day the law enters into force. Such a by-law has not been adopted yet, although over 10 years have passed since the LA was adopted (and the LATP has been applied for over a year now).

Since states usually issue passports valid between five and ten years, the passports of the increasing number of successful asylum seekers represented by BCHR have expired or are about to expire. In the absence of any documents allowing them to travel abroad, their freedom of movement is actually restricted to RS territory, giving rise to their general dissatisfaction and disappointment in the RS asylum system.

The inability to leave the country of asylum often results in violations of the right to family life, as well as the right to work. Namely, the refugees may need to travel abroad to maintain contacts with their families or on business. A Syrian refugee in the RS has missed out on numerous business opportunities because he cannot go abroad on business. Another refugee ended up divorced because she was unable to visit her husband temporarily living outside Serbia. A BCHR client from Iraq, who has been granted subsidiary protection, returned to his country of origin because that was his only chance of obtaining a passport to attend a funeral.

In response to travel document applications filed by the BCHR on behalf of its clients, the MOI said that they would be issued once the "technical" requirements were

¹⁶⁰ Art. 71(2) LATP.

¹⁶¹ Art. 101 LATP.

¹⁶² Art. 67 LA.

fulfilled. However, the non-issuance of travel documents to refugees in the RS cannot be justified by lack of technical equipment, as indicated by the amendments to the 2016 Rulebook on Ordinary, Diplomatic and Official Passports.¹⁶³ Under these amendments, the name of the state and document shall be written in English and French on the passport covers. The MOI did not request additional funding or alert to lack of technical equipment when it adopted this Rulebook.

Recommendation to the MI

It remains unclear which technical glitch is preventing the MI from laying down the content and design of the refugee travel document that could be identical to that of the national passport except that the word *Passport* would be replaced by *Refugee Travel Document*.¹⁶⁴ The Minister of the Interior should adopt the requisite by-law without delay, considering that there are no justifiable technical or other impediments to its adoption.

4.3. SHORTCOMINGS OF THE REFUGEE ID CARDS

Under the valid by-law,¹⁶⁵ refugee ID cards are issued without any protective elements apart from the seal; the data in them are filled manually by AO staff. Not only are refugee ID cards easy to forge. The fact that the refugees' data are handwritten have met with mistrust among those perusing them and caused successful asylum seekers unpleasantness. Furthermore, in BCHR's experience, most ID cards are damaged after a few months of use due to substandard lamination.

Refugees have been asking BCHR for help when notaries public and staff at banks, railway stations and in other institutions would not acknowledge the validity of their ID cards. In most cases, the mere format of the document gave rise to their suspicions.

In August 2019, a BCHR client from Afghanistan spent hours in a Belgrade bank branch office, whose staff declined to service him because of his ID card until the BCHR reassured them that it was a legitimate document. Furthermore, a Belgrade notary public

¹⁶³ *Official Gazette of the RS*, Nos. 7/08, 37/08 and 9/16.

¹⁶⁴ This is the only distinction between national passports and refugee travel documents in Slovenia and Croatia.

¹⁶⁵ Rulebook on the Content and Design of Asylum Applications and Documents Issued to Asylum Seekers and Individuals Granted Asylum or Temporary Protection, *Official Gazette of the RS*, No. 47/18.

BCHR lawyers went to with their client to certify his documents was also of the view that the refugee ID card was not a valid document.

Recommendation to the MI

The MI should prescribe a new template of the ID issued to successful asylum seekers. It should be of the same quality and offer the same level of protection as biometric IDs issued to Serbian nationals. Given that only 161 foreigners have so far been granted asylum under the LA and LAMP, the costs of issuing such biometric documents would not leave a major dent in the state budget.

4.4. LACK OF COURT-SWORN INTERPRETERS IN REFUGEES' LANGUAGES

Translations of specific documents certified by court-sworn translators as well as the services of court-sworn interpreters are required in many procedures¹⁶⁶ in which asylum seekers and refugees are claiming their rights.¹⁶⁷ The Ministry of Justice keeps a Register of Court-Sworn Interpreters and Translators;¹⁶⁸ records of court-sworn interpreters and translators in the Autonomous Province (AP) of Vojvodina are kept by the Provincial Secretariat for Education, Regulations, Administration and National Minorities.¹⁶⁹

Although most asylum seekers in Serbia hail from Afghanistan and Iran, there are no interpreters and translators in Persian, the official language of these two countries, in the Ministry of Justice Register and only one in the records of the Provincial Secretariat. There are no court-sworn interpreters in Kurdish, Pashtu or Urdu in either register.

¹⁶⁶ For instance, the procedure for exercising the right to accommodation, implemented in accordance with the Decree on Criteria for Establishing Priority Accommodation of Persons Recognised the Right to Refuge or Granted Subsidiary Protection and the Conditions for the Use of Temporary Housing, *Official Gazette of the RS*, Nos. 63/15 and 56/18.

¹⁶⁷ Information on replacement of foreign driving licences by Serbian driving licences is available in Serbian at: <https://bit.ly/36mw7l4>.

¹⁶⁸ Electronic Register of Court-Sworn Interpreters and Translators, Ministry of Justice of the Republic of Serbia. Available in Serbian at: <https://bit.ly/332g5L4>.

¹⁶⁹ Court-Sworn Interpreters in AP of Vojvodina, Provincial Secretariat for Education, Regulations, Administration and National Minorities of the AP of Vojvodina. Available in Serbian at: <https://bit.ly/2PvOpKv>.

The appointment and dismissal of court-sworn interpreters and translators is governed by the Rulebook on Court-Sworn Interpreters and Translators.¹⁷⁰ Article 2 of the Rulebook lays down that the Minister of Justice shall publish calls for the appointment of court-sworn interpreters and translators on the proposal of one or more court presidents at least once a year. Such calls are to be published in the Official Gazette and print media.

According to information available to BCHR, presidents of at least one Higher Court filed such an initiative with the Ministry of Justice, at the initiative of Persian interpreters registered by the UNHCR. However, the Minister of Justice has not published a call for the appointment of court-sworn Persian interpreters yet. Indeed, the Ministry of Justice reneged on its obligation to publish such calls at least once a year from early 2015 until March 2019, when it published a call, albeit for the appointment of German and Norwegian court-sworn interpreters/translators.¹⁷¹

Recommendation to the Ministry of Justice

Refugees and asylum seekers need certified translations of their statements and other documents in order to exercise their rights. Specific procedures, such as certification of statements by notaries public,¹⁷² cannot be implemented in the absence of court-sworn interpreters. The Ministry of Justice should thus publish without delay a call for the appointment of a number of court-sworn interpreters in Persian and the other native languages spoken by most refugees, such as Pashtu, Urdu and Kurdish.

4.5. COSTS OF PUBLIC NOTARY SERVICES AND RISK OF NON-COMPLIANCE WITH THE CONFIDENTIALITY PRINCIPLE

Under the confidentiality principle, only officers authorised by law may have access to the refugees' and asylum seekers' data.¹⁷³ The LATP does not define such officers. Identification of individuals as refugees or asylum seekers by persons not authorised by law to access their data may lead to the intentional or unintentional forwarding of specific information to their countries of origin and jeopardise their safety. The importance of

¹⁷⁰ *Official Gazette of the RS*, Nos. 35/10, 80/16 and 7/17.

¹⁷¹ The March 2019 call is available in Serbian at: <https://bit.ly/2Npb6NF>.

¹⁷² For instance, certification of a statement on lack of income and funds that must be submitted for exercising the rights to accommodation in a procedure conducted by the CRM.

¹⁷³ Art. 19 LATP.

confidentiality is reflected also in the UNHCR's approach. The statistics it publishes on the countries of origin at the global level do not include data where the number of refugees from a specific country is lower than five in order to additionally safeguard their anonymity.¹⁷⁴

The following Section illustrates instances of violations of the confidentiality principle during the notarial certification of documents. Attention also needs to be drawn to the high fees refugees and asylum seekers have to pay for notarial services. The Section also describes the risk of the MI violating the confidentiality principle when it issues Serbian driving licences to refugees. This risk stems from the discrepancies between the traffic regulations and the LATP.

4.5.1. Notarial certification of documents

Notaries public invoke the Law on Verification of Signatures, Manuscripts and Transcripts¹⁷⁵ and insist that they cannot partially verify transcripts of rulings granting asylum, notably the introduction, operational part, signature and seal of the rulings. They believe that the transcript of the entire document, including the reasoning, has to be certified. However, it is the reasoning of rulings granting asylum that include extremely sensitive data, the disclosure of which might jeopardise the lives and safety of the successful asylum seekers in specific situations.

Given that the law does not define who is authorised to access data on individuals granted asylum (in terms of respect for the confidentiality principle), the Chamber of Notaries Public is of the view that it cannot address this issue. It opined that the issue should be addressed by "institutions charged with supervising the implementation of the laws" on asylum and employment of foreigners.¹⁷⁶

High notarial fees laid down in the Notary Public Fee Schedule¹⁷⁷ are another major problem faced by refugees and asylum seekers availing themselves of notarial services. The fees notaries public are entitled to charge are much higher when interpreters attend the issuance of the notarial documents.¹⁷⁸ Therefore, in addition to the high fees of court-sworn interpreters/translators, refugees and asylum seekers, who have to produce

¹⁷⁴ *Population Statistics Database*, UNHCR, available at: <http://popstats.unhcr.org/en/overview>.

¹⁷⁵ *Official Gazette of the RS*, Nos. 93/14, 22/15 and 87/18.

¹⁷⁶ Reply of the Chamber of Notaries Public of Serbia to BCHR's query of 29 July 2019.

¹⁷⁷ *Official Gazette of the RS*, Nos. 91/14, 103/14, 138/14, 12/16, 17/17, 67/17, 98/17, 14/19 and 49/19.

¹⁷⁸ Under Fee Schedule No. 18, the fee is increased by 10 points. Under Article 10 of the Fee Schedule, the value of one-point equals 150 RSD without VAT.

specific certified statements or documents,¹⁷⁹ must also pay the inexplicably higher notarial fees because of the mandatory presence of court-sworn interpreters during the certification procedure.

Recommendation to the competent authorities

Compliance with the confidentiality principle can be achieved in two ways. The National Assembly should amend the Law on the Verification of Signatures, Manuscripts and Transcripts¹⁸⁰ to ensure it recognises the confidentiality principle under the LATP and thus render it sensitive to refugees. The amendments should provide for the partial certification of rulings granting asylum, accompanied by a note on the exclusion of their reasoning. Alternatively, institutions charged with the realisation of refugee rights, such as the CRM and the National Employment Service, should no longer require of successful asylum seekers to present certified copies of the rulings granting them asylum. Rather, they should acknowledge their ID cards as valid proof of their legal status in the RS.

As per notarial certification fees, the Notary Public Schedule Fee provides for charging specific vulnerable categories¹⁸¹ lower fees, but refugees and asylum seekers are not listed among them. Refugees represented by BCHR include single mothers, families with a number of children and unemployed; lack of income in the RS is a feature all of them have in common. The Chamber of Notaries Public should review the possibility of abolishing the fees prejudicial to refugees because they have to pay additional fees when interpreters attend the certification of their documents.

4.5.2. Issuance of driving licences

During the reporting period, a number of BCHR clients expressed the wish to replace their foreign driving licences with Serbian ones. BCHR's team helped holders of Iranian biometric driving licences replace them with Serbian ones in a procedure implemented by the MOI Traffic Police Administration.¹⁸²

¹⁷⁹ For instance, a certified statement on lack of income and funds must be submitted for exercising the right to accommodation in a procedure conducted by the CRM.

¹⁸⁰ *Official Gazette of the RS*, Nos. 93/14, 22/15 and 87/18.

¹⁸¹ Under Fee Schedule No. 19, part of the fee shall be waived for persons with disabilities, children without parental care and individuals on welfare provided they submit the corroborating documents to the notaries public in advance.

¹⁸² The number of asylum seekers carrying valid and full personal documents increased with the arrival of larger numbers of foreigners from Iran. Their arrival coincided with the implementation of the Decision on the Abolition of Visas for the Nationals of the Islamic Republic of Iran (*Official Gazette of the RS*, No.

However, the Road Traffic Safety Law (RTSL)¹⁸³ is not harmonised with the LAMP and lacks special provisions on refugees and asylum seekers. Under the RTSL, foreigners temporarily residing in the RS are entitled to drive with valid foreign or international driving licences, pursuant to their valid travel documents, foreign IDs or visas. These foreigners must produce proof of the duration of continuous residence in the RS.¹⁸⁴ The RTSL also lays down that the validity of a foreign and international driving licence shall cease 12 months from the day the foreigner has been issued a habitual residence permit or a temporary residence permit exceeding six months in continuity.¹⁸⁵

The above provisions clearly show that the RTSL applies to foreigners whose status is governed by the FL and that they are not directly applicable to refugees and asylum seekers. Namely, many refugees had not taken with them all the requisite documents when they were fleeing their countries of origin.

On the other hand, refugees and asylum seekers in possession of such documents risk having their identity disclosed to their country of origin. The procedure for replacing driving licences is governed by the Rulebook on Driving Licences (RDL).¹⁸⁶ Under the RDL, foreign driving licences shall be returned to the authorities of the states that had issued them via their diplomatic and consular missions in the RS.¹⁸⁷ The enforcement of this provision in case of refugees and asylum seekers would result in the violation of the confidentiality principle enshrined in the LAMP,¹⁸⁸ which prohibits the disclosure of their data to their countries of origin.

The Traffic Police Administration has addressed this problem in practice by keeping the foreign driving licences submitted by refugees and asylum seekers on file, rather than turning them over to the diplomatic or consular missions of their countries of origin in the RS.¹⁸⁹ However, such a practice has been applied in *ad hoc* situations in which

79/2017), which was in effect from 2 September 2018, until it was revoked by another Decision (*Official Gazette of the RS*, No. 75/2018) on 17 October 2018.

¹⁸³ *Official Gazette of the RS*, Nos. 41/09, 53/10, 101/11, 32/13 – Constitutional Court decision, 55/2014, 96/2015 – other law, 9/16 – Constitutional Court decision, 24/18, 41/18, 41/18 – other law, 87/18 and 23/19.

¹⁸⁴ Art. 178(2) RTSL.

¹⁸⁵ Art. 178(3) RTSL.

¹⁸⁶ *Official Gazette of the RS*, Nos. 73/10, 20/19 and 43/19.

¹⁸⁷ Art. 17 RDL.

¹⁸⁸ Art. 19 LAMP.

¹⁸⁹ This practice is not defined by law, but has been identified by the BCHR in cases in which it assisted refugees and asylum seekers in replacing their foreign driving licences with Serbian ones.

the refugees' legal representatives or AO staff intervened, asking the police not to turn the foreign driving licences over to the diplomatic or consular missions.

Recommendation to the competent authorities

With a view to harmonising the RTSL with the LATP, the MOI should submit amendments to the National Assembly clearly defining the course of action to be taken during the replacement of the refugees' and asylum seekers' driving licences with Serbian ones. The Minister of Interior should then amend the accompanying RDL as well. Analogous application of the provisions concerning foreigners temporarily residing in the RS to refugees and asylum seekers would be inadequate and might lead to violations of their rights in the event the RS authorities reveal their status in the RS to their countries of origin.