Belgrade Centre
for Human Rights

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COMPLEMENTARY FORMS OF INTERNATIONAL PROTECTION IN THE REPUBLIC OF SERBIA

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CONTENT

INTRODUCTION

The document "Complementary Forms of International Protection in the Republic of Serbia" aims to advance alternative legal and administrative issues related to the regulation of status in the area of migration and humanitarian protection. The document also offers recommendations for changes of relevant legislation governing the status of persons who wish to stay in Serbia (or who cannot leave it due to objective circumstances), but do not fulfil the conditions for obtaining refugee status or subsidiary protection. Special emphasis is put on the Foreigners Law,[1] (hereinafter: FL). Most often, the status of these persons should be regulated for humanitarian reasons. With respect to complementary forms of protection, the effective laws of the Republic of Serbia recognise: temporary protection, subsidiary protection, tolerated stay, temporary stay on humanitarian grounds, temporary stay of foreigners assumed to be victims of human trafficking and others.

The Republic of Serbia (RS) has been experiencing migratory flows for many years in a so-called *Western Balkan route*. Although most people on the move in the Balkans stay in short-term transit, the question of closer legal regulation of the status of foreign nationals who irregularly reside in the territory of the RS has been raised. In that sense, the Law on Asylum and Temporary Protection[2] (hereinafter: LATP) stipulates the decisions on granting temporary protection to be passed by the Government of the Republic of Serbia in cases of mass influx of persons coming from countries where their lives, safety or freedom are at risk due to generalised violence, external aggression, internal armed conflict, mass violation of human rights or other circumstances that have gravely obstructed public order and when it is not possible to conduct individual procedures for granting the right to asylum due to such mass influx.[3] To date, the Government has not passed any such decision, not even during the 2015 refugee crisis when a record number of 600,000 migrants[4] transited Serbia, of whom 579,518 persons had expressed intention to seek asylum in Serbia,[5] even if just formally. Though

1 *Official Gazette of the RS*, 24/18 and 31/19.

2 *Official Gazette of the RS*, 24/18.

3 Article 74, LATP.

4 Deutsche Welle, *In 2015 we had 600,000 migrants pass through Serbia*, 2016, available at: p.dw.com/p/1HuuK [web page accessed on 08 October 2019].

5 Government of the Republic of Serbia, *Migration Profile of the Republic of Serbia for 2015*, p. 41, available at: www.kirs.gov.rs/docs/migracije/migracioni%20profil%202015.pdf [web page accessed on 08 October 2019].

the Government had been announcing that it might adopt the by-laws to define tolerated stay stipulated in the new Foreigners Law,[6] this has not taken place as at the time of writing this document at the end of 2019. The persons whose asylum applications had been refused or rejected due to procedural reasons without examination on the merits (e.g., for application of the "safe third country" concept) should be given the possibility to legally regulate their stay in cases of access to rights (e.g., enrolment into schools, access to labour market, possibility to get married). This is particularly relevant in cases when refugees have been ordered to leave the Republic of Serbia, and when they do not hold personal (and/or identification) documents or visas, and are thus unable to leave, even when they want to do that. In such cases, provisions of the Foreigners Law governing the issue of granting approval for temporary stay on humanitarian reasons apply.

As yet, the Republic of Serbia has not been returning migrants or refugees to the countries of origin or to third countries. The impossibility of stay in Serbia on the one hand and the impossibility to leave Serbia on the other, leaves refugees and migrants in a peculiar legal vacuum – a life outside the Serbian system. That additionally exposes them to the risks of human rights violations, and risks to their lives. Since their continued stay becomes irregular, they cannot legally contract employment and earn livelihood, get education, nor enjoy the right to health care. They violate the laws by their very presence. In this case the implications of implementation of different solutions must be reviewed.

This document includes an overview of comparative practice in the European Union (hereinafter: EU) and the analysis of the existing capacities and practice of the Republic of Serbia, notably in the period since the adoption of new laws in the course of 2018, using it as a starting point for deliberations as to what may be expected from Serbia with respect to the provision of other forms of protection to the persons in need of it. We also wish to present the options and benefits of regulating the legal status of persons in need of international protection who have not applied for asylum in Serbia during their stay on its territory or whose applications have been rejected to the Government of the Republic of Serbia. The document offers proposals of the necessary amendments of the current laws.

6 For tolerated stay see chapter 2.3.1.

I DIFFERENT FORMS OF INTERNATIONAL PROTECTION

The 1951 Convention Relating to the Status of Refugees[7] (hereinafter: Refugee Convention) and its 1967 Protocol[8] which were adopted under the auspices of the United Nations, offer a definition of refugees and stipulate the rights and obligations of persons granted *refugee status* – the first group of statuses. Protection that the refugees are entitled to is the widest possible protection granted to persons who fulfil the conditions set out in the Article 1 of the Refugee Convention. The definition highlights protection of persons from political and other forms of persecution. According to the Refugee Convention, a refugee is a person who cannot or does not want to return to the country of origin due to well-founded fear from persecution on the grounds of his/her race, religion, ethnic affiliation, membership of a certain social group or political opinion. However, one may reasonably question whether this framework has become obsolete, since many migrants are not included in this definition due to the very complex and mixed nature of modern migration. As the International Organization for Migration (IOM) stresses, "The principal characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved".[9] However, the rights of different persons migrating must be respected. Therefore, migration and particularly if mass, requires putting in place complementary forms of international protection such as those in the EU which take the form of subsidiary and temporary protection. Complementary protection includes legal and administrative mechanisms to regulate or legalize stay of persons who (as yet) have not been granted, or for certain reasons refugee status cannot be granted, but who – for other reasons or risks – cannot be returned to their country of origin.[10] Although certainly a form of international protection, subsidiary protection, because of its complexity and specificity, remains outside of the scope of this document.[11]

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7 *Official Gazette of the FNRY – International treaties and other agreements*, No. 7/60.

8 *Official Gazette of the FNRY – International treaties and other agreements*, No. 15/67.

9 IOM, *International Dialogue on Migration 2008. Challenges of Irregular Migration: Addressing Mixed Migration Flows, Discussion Note, 96th session*, MC/INF/294, 7 November 2008, para. 6.

10 UN High Commissioner for Refugees (UNHCR), *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000, EC/50/SC/CRP.18, p. 2, available at: www.refworld.org/docid/47fdfb491a.html [web page accessed on 08 October 2019].

11 For more on subsidiary protection, see: Art. 25 LATP and Art. 15 EU Directive 2011/95/EU.

The key principle of international law which is a basis for granting of international protection is the principle of non-refoulement/return.[12] Consequently, the second group of statuses refers to *complementary forms of protection with the inevitable principle of non-refoulement*. This principle of international refugee law has been provided for in Article 33 of the Refugee Convention which reads "No Contracting State shall 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". Still, the interpretation of Article 3 of the European Convention on Human Rights,[13] the interpretation of the Convention against Torture, Inhuman or Degrading Treatment or Punishment by its monitoring body (CAT),[14] as well as the interpretation of Article 7 of the International Covenant on Civic and Political Rights (ICCPR)[15] understand this principle as absolute and that no one – be they a refugee or not – may be returned to a country in which he/she is at risk of torture.[16] Therefore, even if a person is not recognised as a refugee, the fundamental rule is that he/she is protected from removal from the territory of a state if at risk of being exposed to torture. By the same token, the states may grant this status to certain categories of migrants or persons who have close ties with that state. Some states grant protection to migrants in the form of suspension of removal (e.g. Germany,[17] Austria[18] and Ireland[19]), and national protection on medical grounds (e.g. Finland[20] and

12 UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, available at: www.refworld.org/docid/437b6db64.html. [web page accessed on 08 October 2019].

13 See European Court of Human Rights judgments: *SD v. Greece*, App. No. 53541/07 (2009) and *MSS v. Belgium and Greece*, App. No. 53541/07 (2011).

14 *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997, para. 14.5.

15 UNHCR, *Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights*, 1 November 2006, p. 7.

16 In addition to torture, Article 3, European Convention on Human Rights and Fundamental Freedoms also refers to inhuman or degrading treatment or punishment including, inter alia,: state of fear or inferiority which is degrading (*Ireland v. the United Kingdom*, App. No. 5310/71 (1978), p. 66, para. 167), forcing the victim to behave or act against its will or consciousness (Opinion of the Commission in *Greek case*, Chapter IV, p. 186), conditions of detention (*Peers v. Greece,* App. No. 28524/95 (2001).

17 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (hereinafter: Aufenthaltsgesetz), §§ 60.

18 Abschiebungsaufschub, Aliens Act 1997, Articles 56 and 57.

19 Section 3 (11) of the Immigration Act, 1999.

20 Finnish Immigration Service, *Residence permit on other grounds*, available at: migri.fi/en/residence-permit-on-other-grounds1 [web paged accessed on 08 October 2019].

Germany[21]). Others grant national protection for family reasons (e.g. Austria,[22] Germany,[23] Sweden[24]) and to the unaccompanied and separated children (e.g. Hungary[25] and United Kingdom[26]).

The third category of statuses is national protection, which usually entails the *stay* granted to numerous categories of third country nationals for different reasons. Most often outside the asylum procedure and as part of migration policies. Because it is often granted at the discretion of the state, the third category is sometimes referred to as the discretionary form of protection. This includes protection granted to witnesses in criminal proceedings, victims of specific crimes, etc. (e.g. Belgium[27], Bulgaria,[28] Estonia[29]).

This study focuses on the second group of statuses to be called "complementary protection". We shall discuss humanitarian protection and temporary protection in order to determine whether they are suitable to regulating the status of migrants lacking personal documents or asylum seekers who were not granted refugee status, but who are not able to leave the territory of Serbia. Notwithstanding, one must note that temporary protection is a short-term, special solution to mass influx of asylum seekers as opposed to humanitarian protection which is not a momentary or temporary solution but basis for award the protection from return.

The status of foreigners in the Republic of Serbia is governed by the Foreigners Law, being a special law, the Law on Asylum and Temporary Protection, Law on General Administrative Procedure[30] and many others applicable in cases when the Foreigners Law does not govern a certain issue. While the Foreigners

21 Aufenthaltsgesetz – AufenthG, §§ 7.

22 Aufenthaltstitel für Familienangehörige, www.wien.gv.at/english/e-government/documents/residence/indefinite-leave/family-members.html [web page accessed on 08 October 2019].

23 Aufenthaltsgesetz, §§ 27–36.

24 Utlänningslag, Section 3a.

25 Act LXXX of 2007 on Asylum, §§ 45, Hungary, 2016.

26 See, e.g. Department of Education: *Safeguarding Strategy Unaccompanied asylum seeking and refugee children*, available at: assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656425/UASC_Safeguarding_Strategy_2017.pdf [web page accessed on 08 October 2019].

27 Arrêté royal relatif à la reconnaissance des centres spécialisés dans l'accueil et l'accompagnement des victimes de traite et de certaines formes aggravées de trafic des êtres humains et à l'agrément pour ester en justice, 18 April 2013, available at: http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=13–05–22&numac=2013203053 [web page accessed on 08 October 2019].

28 Bulgaria, Национална програма за предотвратяване и противодействие на трафика на хора и закрила на жертвите за 2019 г.

29 Estonia Aliens Act, Chapter IV3, RTI 1993, 44, 637, Section 14.

30 *Official Gazette of the RS*, 18/16 and 95/18 – original interpretation.

Law sets out conditions for entry, moving, stay and return of foreigners, the others apply to the issues not provided for in FL. The Foreigners Law and the Law on Asylum and Temporary Protection were adopted in March 2018, replacing the earlier Foreigners Law[31] and the Asylum Law.[32]

31 *Official Gazette of the RS*, 97/08.

32 *Official Gazette of the RS,* 109/07.

II THE CONCEPT OF TEMPORARY PROTECTION

Temporary protection resulted from the absence of an adequate solution for each individual (potential) asylum seeker coupled with the justified ambition for the national asylum system to become and remain sustainable. The actual circumstances may prevent the state authorities from allowing immediate access to asylum procedures to all the persons in need of international protection. Notwithstanding different systems of temporary protection in different legal systems, the common feature of any temporary protection is the fact that there is a possibility of awarding protection to groups or special categories of persons, on temporary basis,[33] in order to protect their fundamental human rights pending a sustainable solution. This is an "interim measure" aimed at safeguarding the basic human rights and providing the minimum relative to protection acquired with the Refugee Convention-awarded refugee status.

The legal regime of temporary protection first emerged as a consequence of large displacement caused by the armed conflict in former Yugoslavia in the '90s of the 20th century. The European Community states – the present European Union – further developed temporary protection to accommodate for similar situation of mass migrations resulting from armed conflict or grave human rights violations. The United Nations High Commissioner for Refugees (hereinafter: UNHCR) closely monitored the response of the European states to the Yugoslav crisis and adopted a document with its observations on the development of such a protection regime in Europe. According to conclusions of UNHCR, the European states set off with five main standpoints relative to temporary protection effected at the time of the Yugoslav crisis:

a) It was a protection measure in the circumstances of large migration flows;
b) There are basic temporary protection standards;
c) The beneficiaries are defined as per their need for international protection;
d) The focus is on return as the suitable solution; and
e) Temporary protection entails international protection interventions which include response and prevention.[34]

The key elements that temporary protection on the European Community territory was based on due to Yugoslav conflict, are:

33 UNHCR, *Note on Temporary Protection in a Broader Context*, 1 January 1994.
34 *Ibid.*

- Right to access to territory of the country of refuge;
- Respect of *non-refoulement* and fundamental human rights;
- Repatriation when circumstances allow for it.[35]

The beneficiaries of temporary protection are persons who are evidently entitled to refugee status in line with the Refugee Convention, as well as persons who do not immediately appear to be entitled to it, as opposed to individual assessment in line with the Refugee Convention, temporary protection is based on categories, groups or scenarios – allowing for an efficient and flexible response at times of crisis.[36]

Temporary protection, per se, is a form of international protection implemented in response to the situations characterised by large influx of persons in search of international protection, complex and mixed migration including rescue-at-sea operations and other situations calling for international protection, mainly due to humanitarian catastrophes. The underlying logic of this institute of international law is of humanitarian nature: human rights must be protected while at the same time leaving the asylum system as functional as possible in situations when it is impossible to process all the asylum applications – since the standard is to grant international protection on an individual basis. Temporary protection is complementary to refugee protection, i.e., it adds to it and is based on it, thus ensuring protection from immediate expulsion.[37]

Temporary protection represents a suitable instrument of international protection to bridge potential gaps both in international refugee law and in refugee and migrant protection regimes.

2.1. Legal framework in international law

There are several instruments in the international law to equip the states in handling and responding to humanitarian crises and situations of large mixed influx as adequately as possible. In this context, multisectoral and regional approaches are encouraging as opposed to one-sided and *ad hoc* actions. Thus in 2012 and 2013, two round tables on temporary protection and stay were organised under the auspices of the United Nations High Commissioner for Refugees,[38] both aiming to develop minimum standards of temporary protection.

35 *Ibid.*

36 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, p. 3, available at: www.refworld.org/docid/52fba2404.html [web page accessed on 08 October 2019].

37 *Ibid.*, p. 8.

38 UNHCR, *Roundtable on Temporary Protection, 19–20 July 2012, San Remo, Italy, Summary Conclusions*, available at: www.refworld.org/docid/506d908a2.html [web page accessed on 08 October 2019].

The results are *soft law* standards – with no legal obligation, and steady development of this form of international protection, since it is taking place under the auspices of UNHCR.

Absence of a binding definition of temporary protection is somewhat downplayed by existence of minimum general standards implied by protection, such as that temporary protection represents an exclusively humanitarian and not a political act; that the arrangements are temporary and results-oriented; that access to territory is allowed to the vulnerable populations; and that – in absence of a more adequate form of protection – minimum standards of international refugee law are maintained.[39]

Globally, the UNHCR Executive Committee adopted several conclusions and opinions on temporary protection, standards and beneficiaries. Recalling the Conclusion no. 22 of 1981 on protection of asylum seekers in situations of mass influx[40] and taking into account the international human rights law, UNHCR adopted Guidelines on Temporary Protection or Stay Arrangements which set out the main standards of treatment in temporary protection (documented temporary right to stay on the territory, protection from arbitrary detention, non-discrimination, access to accommodation, food and medical assistance, safety of person, special care for unaccompanied or separated children, special care of persons with disabilities, as well as access to UNHCR).[41]

At the Refugee and Migrant Summit held on 19 September 2016, all the Member States of the United Nations General Assembly, unanimously adopted the New York Declaration on Refugees and Migrants thus confirming their political will to ensure protection of refugees and migrants.[42] This Declaration, *inter alia*, includes commitment to protect the human rights of all refugees and migrants regardless of their status, to ensure the right to education, prevent violence and strengthen the positive contribution of migrants to the economic and social development of host communities. It also provides for burden-sharing in times of crises and large refugee movements, and encourages sustainable approaches that invest into empowerment of refugees and host communities.

UNHCR, Roundtable on Temporary Protection, 15–16 July 2013, Concept Note, available at: www.unhcr.org/5284cf2b9.html [web page accessed on 08 October 2019].

39 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, p. 2, available at: www.refworld.org/docid/52fba2404.html [web page accessed on 08 October 2019].

40 UNHCR, ExCom, *Protection of Asylum-Seekers in Situations of Large-Scale Influx*, No. 22 (XXXII), 21 October 1981, available at: www.refworld.org/docid/3ae68c6e10.html [web page accessed on 08 October 2019].

41 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, p. 4.

42 UN General Assembly, *New York Declaration for Refugees and Migrants*, A/RES71/1.

With the *Global Compact on Safe, Orderly and Regular Migration*, which was adopted as a result of the New York Declaration, states committed themselves to reducing the vulnerability factor in migration, and as one of the basic activities in this regard they envisaged "development of accessible and rapid procedures for the transition from one to one other legal status and informing migrants of their rights and obligations in order to avoid situations of irregular status."[43]

However, temporary protection sometimes means the status of national protection which implies time-bound protection for humanitarian reasons for persons not covered by the Refugee Convention. Importantly, these forms of temporary protection are not necessarily related to the situations of mass influx.[44] In such situations, the legal basis for legalisation of status rests in the fundamental human rights which guarantee humanitarian assistance and protection. Consequently, the international human rights law recognised that all persons have certain, basic rights that must be protected at all times.[45] The minimum rights are: right to life, freedom from torture and ill-treatment, freedom from servitude and forced labour, right to a fair trial and right to freedom of thought, belief and religion.[46]

International law also sets out the obligations of the beneficiaries of temporary protection to respect the laws and regulations of host countries, and the additional obligation of the state itself to gradually increase the scope of rights enjoyed by its beneficiaries in absence of a timely and adequate solution to replace temporary protection.[47] Temporary protection, as a form of complementary protection, must not be used by the states to bypass or reduce the protection provided for by the Refugee Convention.[48] Even when a person does not fall under the protection of international refugee law, it is important to note that these gaps are filled by the international human rights law.

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43 Belgrade Centre for Human Rights, Globalni kompakt o sigurnim, uređenim i regularnim migracijama, available at: http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2013/04/GLOBALNI-KOMPAKT.pdf [web page accessed on 08 December 2019].

44 See, e.g.: J. Thorburn, *Transcending Boundaries: Temporary Protection and Burden Sharing in Europe*, 1995, vol. 7, no. 3, International Journal of Refugee Law, p. 461.

45 Dimitrijević Vojin et al, *International Human Rights Law*, second edition, Belgrade Centre for Human Rights, 2007, p. 129.

46 Dimitrijević Vojin et al, *International Human Rights Law*, second edition, Belgrade Centre for Human Rights, 2007, p. 128–129.

47 UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, p. 4.

48 Executive Committee of the High Commissioner's Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) – 2005*, 7 October 2005, No. 103 (LVI), (b), (k) and (l).

2.2. Legal framework in the law of the European Union

An important facet of modern refugee laws in many European Union states is the existence of provisions related to the situations of mass influx. Temporary protection regime represents group protection that the states use to prevent bottlenecks in the asylum system while at the same time ensuring protection to those in need. Due to implementation of different regimes, and at the peak of mass influx of refugees from former Yugoslavia in 1990s, a need emerged to develop a uniform solution at the level of the European Community.[49] As the states implemented different regimes, the European Commission proposed a Joint Action[50] in 1997 aimed at harmonisation of temporary protection status in the EU. Continuation of normative regulation of this area in the EU is Temporary Protection Directive (TPD), adopted in 2001, following the Amsterdam Treaty and the proposal to establish a Joint European Asylum System in Tampere in 1999.[51] The general objectives of the Temporary Protection Directive are to define the minimum standards for granting temporary protection in situations of mass influx of migrants and to support establishment of balance in reception of these persons among the Member States. However, the specific objectives are to avoid overburdening of national asylum systems and ensure immediate access to protection of the rights of migrants.

Article 2(a) of the Directive on Temporary Protection defines "temporary protection" as a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection. In addition, Article 2(d) of TPD states that "mass influx" means arrival in the European Community, the European Union today, of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme. This is a very broad definition and it gives the Member States big discretionary powers. The key difference between the protection regime as per TPD and the conventional refugee protection is that the persons that temporary protection applies to need not enter into the asylum procedure, but enjoy protection in the EU MS they are in.

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49 European Commission, *Study on the Temporary Protection Directive*, ICF, January 2016, p. 4.

50 European Commission, *Commission proposal on Joint Action for Temporary Protection of Displaced Persons,* available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_97_178 [web page accessed on 08 October 2019].

51 Council Directive 2001/55/EC, 20 July 2001.

On activation of the Directive on Temporary Protection, each Member State is obliged to ensure the rights stipulated in Articles 8–16, such as: issuance of residence permit, issuance of documents, registration of personal information, independent employment or employment in enterprises, access to adequate housing, social protection, the necessary medical and other assistance, access to education, family unity, protection of unaccompanied and separated children etc. In order to activate the Directive, the qualified majority in the Council must establish existence of a situation of a mass influx of migrants at the proposal of the European Commission.[52] This protection shall remain in effect for one year with the possibility of extension up to two six-month periods.[53]

The beneficiaries of temporary protection certainly continue to have the right to apply for asylum.[54] If a person fails to submit an asylum application or if he/she receives a negative decision from the competent authorities, the Directive on Temporary Protection itself does not exclude the possibility of forced removal.[55]

The introductory statement no. 12, of the EU Return Directive, EU is explicit "The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed," but that "their basic conditions of subsistence should be defined according to national legislation". However, there are certain provisions that are also relevant to the situation of migrants who cannot be returned. Thus Article 6(1) provides for the obligation of Members States to issue a decision on return to every foreigner illegally residing on their territory, without prejudice to the number of exemptions. Still, the Member States have the discretionary right to issue residence permits to irregular migrants with the obligation not to issue decisions on return in such cases. The Return Directive also provides for the possibility of suspension of the decision on return during the period of validity of the residence permit.[56] The Directive requires the States to take into account the physical condition or mental capacity of foreigners as well as technical reasons for deferring removal from territory (e.g., lack of transportation capacities, absence of identification document). In such cases, a decision on return may be simply reactivated following expiry of the validity of a residence permit, with no need to issue a new decision on return. This provision does not introduce an obligation to issue a temporary residence permit in a situation when the return of irregular migrants is not possible. According to Article

52 Article 5, para. 1, Temporary Protection Directive.

53 Article 4, para. 1, Temporary Protection Directive.

54 Article 17, Temporary Protection Directive.

55 Article 22, Temporary Protection Directive.

56 Article 6, para. 4 Return Directive.

14(2) of the Return Directive, the States must ensure a confirmation in writing that the decision on return will not be enforced for the time being. The only situation in which the States must defer removal is when that act would constitute a violation of the principle of *non-refoulement*.

2.3. Legal framework in the Republic of Serbia

Temporary protection was first standardised in the legislation of the Republic of Serbia in the 2008 Asylum Law.[57] The same form of protection is provided in the 2018 Law on Asylum and Temporary Protection.[58] This section of the document will present the basic characteristics of legal framework in the area of temporary protection. The comparisons with the 2008 Asylum Law which was in effect up to recently will be made in cases of a different legal solution set out in the LATP.

LATP mentions temporary protection for the first time in para. 9, Article 2 which offers definitions of the key concepts, and is regulated in detail in Articles 74–76, section VII of LATP (*Temporary Protection*). The Law provides a very generalised definition of temporary protection as protection awarded by the Government decision in situations of mass influx of persons who cannot be returned to the country of origin or permanent residence.[59] This protection is granted in the presence of risk that the authorities are unable to conduct effective asylum procedures in each individual case due to mass influx of persons.[60] These persons are foreigners who were forced to leave their countries of origin or permanent residence, who had been evacuated and cannot return to a stable and safe life due to the situation prevailing in that country and in particular: 1) persons who have left the territory where armed conflict or localised violence prevail; 2) persons exposed to the serious threat of mass human rights violations or who are victims of such violations of those rights.

Temporary protection may be granted for a maximum period of one year, but may be extended by additional six months and exceptionally by one year,[61] which is a deadline shorter than the one provided in the 2008 Asylum Law which stipulates that temporary protection may be extended "if reasons for temporary protection persist".[62]

57 *Official Gazette of the RS*, 109/07.
58 *Official Gazette of the RS*, 24/18.
59 Article 2, para. 9, LATP.
60 Article 74, LATP.
61 Article 75, LATP.
62 Article 36, para. 5 Asylum Law.

Temporary protection ceases upon expiry of the period it was approved for or when the reasons for which it had been granted cease to exist, the decision on which shall be passed by the Government. However, it may cease on the basis of a decision taken by the Asylum Office, if it has been established that there are grounds for exclusion.[63]

The persons granted temporary protection in line with LATP actually enjoy the same rights as provided for in the earlier Asylum Law. Thus, Article 76, LATP states the main rights of the persons granted temporary protection.

A person who has been granted temporary protection shall have the right to:

1) residence during the period of the validity of temporary protection;
2) a personal document confirming his/her status and the right of residence;
3) healthcare, in accordance with the regulations governing healthcare for foreigners;
4) labour market access during the period of the validity of temporary protection, in accordance with the regulations governing the employment of foreigners;
5) free primary and secondary education in state schools, in accordance with separate regulations;
6) legal aid, under the conditions prescribed for the Applicants;
7) freedom of religion, under equal conditions that apply to the nationals of the Republic of Serbia;
8) collective accommodation in facilities designated for such purpose;[64]
9) appropriate accommodation for persons who need special reception guarantees, in accordance with Article 17 of this Law.[65]

LATP stipulates that the competent authority may, in justified cases, allow family reunification in the Republic of Serbia and grant temporary protection to the members of family of the person who was granted this form of protection. The persons granted temporary protection are to respect the legal system of the Republic of Serbia.[66] Notwithstanding mass influx of migrants in 2015, the Government has hitherto not passed a single decision on temporary protection.

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63 Article 75, LATP.

64 While the right to housing was generally guaranteed in the previous law (Article 38, para. 7 FL), the new provision defines it as the right to collective accommodation in the designated facilities, and the decision on accommodation of persons granted temporary protection is passed by the Government at the proposal of the Commissariat.

65 Article 76, LATP.

66 *Ibid*.

2.3.1. Tolerated stay

Tolerated stay is very similar to temporary protection in the legal framework of the Republic of Serbia. Tolerated stay is governed by the Foreigners Law, introducing for the first time in the Article 124(2) the possibility that – at the proposal of the Ministry of Interior – in case of *special circumstances* related to *illegal presence of a large number of foreigners* on the territory of Serbia, who *cannot be returned* to the country of origin on the basis of application of principle of *non-refoulement*, or who cannot leave the Republic of Serbia due to the circumstances beyond their control – the Government shall adopt a by-law governing their tolerated stay on the territory of Serbia, with limited duration. The Government has not passed a regulation defining tolerated stay until the time of writing of this paper in 2019, and tolerated stay has not been specified in secondary legislation. In other words, there are as yet no criteria as to what constitutes special circumstances in view of which the Minister of Interior may propose passing of a regulation in case of presence of a large number of people. There is neither by-law defining the period of tolerated stay, nor a set of rights and obligations of the persons granted tolerated stay. It is important that this category of protection in the Republic Serbia be defined both because of migrants and refugees, as well as because of the state and state authorities. Once tolerated stay is regulated, the state authorities will be prepared for timely response and fulfilling the international obligations of the Republic of Serbia at minimum negative consequences for migrants or refugees and the capacities and the responsibility of state authorities.

In comparison, tolerated stay in the majority of European legal systems is defined somewhat differently than in the Republic of Serbia. In the European countries, tolerated stay represents an alternative or is complementary to humanitarian status /humanitarian stay, and not to temporary protection as in the Republic of Serbia. In the majority of European countries tolerated stay is one of the several forms of protection and is granted in practice mostly either because a foreigner cannot be returned to the country of origin for practical reasons (e.g. the country of origin refuses to take him back) or because such return would constitute a violation of the principle of *non-refoulement*. The basis for the states to grant tolerated stay are often the same or similar to other forms of subsidiary protection, but "sets of rights" accompanying this form of stay are frequently more limited than for refugee status or classic subsidiary protection.[67]

67 See: European Migration Network, *Ad-hoc query on implementing tolerated-stay*, 8 April 2014.

III THE CONCEPT OF HUMANITARIAN PROTECTION

Irrespective of existence of several forms of international protection (refugee status, complementary protection, discretionary (national) forms of protection), the persons in need of protection often do not fall into any of the above categories or it is unclear which form of protection they should be granted. In his *Report to the UN General Assembly* from April 2016, the United Nations Secretary General stated that many people are compelled to leave their homes for reasons that do not fall within the refugee definition in the 1951 Convention.[68] These migrants are often members of vulnerable groups (forced to leave their homes due to e.g. climate changes, natural catastrophes, extreme deprivation, etc.) and the states must respect their human rights and allow them to enjoy these. With respect to these groups, it is imperative to establish legal mechanisms by which that the states they are in (be they countries of transit or of destination) facilitate respect of their human rights. The mechanisms are mostly based on humanitarian grounds and respect of their human rights.

In practice, humanitarian protection as a mechanism of protection based on humanitarian needs or human rights respect is granted by states' judicial or administrative authorities. One of the frequent challenges related to humanitarian protection is absence of general consensus on how to classify it: as a) complementary protection; b) discretionary protection; c) something else. At the heart of all these forms of humanitarian protection are the motives of humanity and respect of human rights, and in particular the principle of *non-refoulement*, enshrined in international human rights law and related to absolute protection.

It is generally understood that humanitarian reasons for protection constitute the basis for temporary stay in the countries which they regulate in their legislations. As the majority of temporary stays, humanitarian stay normally lasts for as long as the reasons for its granting exist.

3.1. Legal framework in international law

In this case, the international human rights law, and in particular the principle of *non-refoulement* based in interpretation of international conventions governing protection of human rights represents the international legal framework.

68 Report of the Secretary General, A/70/59, para. 18, available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20 [web page accessed on 08 October 2019].

This is especially true of the conventions on torture and the right to life, such as the UN Convention against Torture, and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment,[69] the International Covenant on Civic and Political Rights[70] and the European Human Rights Convention. Protection on humanitarian basis and/or human rights respect is deeply rooted in the principle of *non-refoulement* of international human rights law.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has established several basis for granting humanitarian (temporary) stay in practice, including "absolute prohibition of return in line with international human rights law stemming from the right to life and prohibition of torture and other inhuman or degrading treatment or punishment" and the "risk from human rights violations in case of return to the country of origin as a different and broader basis than prohibition of return".[71]

In this place we consider it important to note that the definition of the principle of *non-refoulement* may vary depending on the branch of international law it belongs to. The key difference lies in the personal domain of application, as according to the international human rights law, the personal domain of protection from return includes all the people under the jurisdiction of a state in case when a person is faced with a grave risk in the country where he/she would be returned and not only to asylum seekers/refugees. Still, this protection does not mean that a person it was granted to will automatically be granted refugee status and all the other rights enjoyed by refugees.

In international refugee law, the protection from return is set out in Article 33 of the Refugee Convention stating "no state party shall expel or forcibly return, in any way, a refugee to the borders of a territory where his life or freedom would be at risk on the grounds of his race, religion, nationality, membership of a social group or his political opinion" with the exception that this right may not be invoked by those considered to present a threat for the state security or who have committed an especially grave crime.[72]

The protection granted by the international human rights law is applicable in all territories on which a state is able to establish jurisdiction over all the persons, and consequently in high seas considered not to belong to any coun-

69 *Official Gazette of the SFRY – International Treaties*, no. 9/91.

70 *Official Gazette of the SFRY*, no. 7/71.

71 OHCHR, DLA Piper, *Admission And Stay Based On Human Rights And Humanitarian Grounds: A Mapping Of National Practice*, 2018, p. 4, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf [web page accessed on 08 October 2019].

72 Article 33, Refugee Convention.

try.[73] The protection provided for by international human rights law makes no exception with respect to persons who may not be expelled, for as long as there exists a serious threat in a place he would be expelled to. The personal domain of application of any form of international protection must be interpreted and phrased so that it respects the international standards and relevant instruments of international human rights law.

There is a multitude of humanitarian protection actors, but the primary obligation to protect human rights is conferred on the states. In line with specific mandates, the states may be supported by organisations such as UNHCR and the International Committee of the Red Cross (ICRC), as well as non-governmental humanitarian organisations.

3.2. Legal framework in the law of the European Union

Since its establishment, the European Union has sought to become a single legal space. Since the creation of a single market and introduction of a common space of freedom, security and justice, the EU has sought to regulate movement of persons through its single area and thus the movement of third country nationals. The European Union is developing a common migration policy with a view to efficiently managing migratory flows.[74] The EU Member States' (MS) migration policy including visa regime, aims to limit access to their territory for third country nationals, and consequently application for international protection. In their national legislation, a certain number of MS provide for reception and humanitarian stay or resettlement programmes for third country nationals, whether they had regulated this issue through humanitarian visas or other regulations based on international protection.[75] The law of EU *per se* does not define humanitarian reception or stay, and consequently humanitarian protection. It is noteworthy that the only short stay of foreigners with regular travel documents is regulated in the current EU legislation, while the policies related to regulation of a shorter stay of foreigners holding diplomatic, official, refugee passports and regulation of longer stay, permanent residence and naturalisation remain in the

73 See judgements of the European Court of Human Rights: *Medvedev and Others v. France,* App No. 3394/03 (2010) and *Hirsi Jamaa and Others v. Italy*, App No. 27765/09 (2012).

74 Article 79, Treaty on the Functioning of the European Union*, Official Journal of the European Union*, C 202/77.

75 European Commission, EMN Study 2016: *Resettlement and Humanitarian Admission Programmes in Europe – what works?* p. 4, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_resettlement_synthesis_report_final_en.pdf [web page accessed on 08 October 2019].

domain of national law of Member States. There are exceptions even for a shorter stay – the MS have bilateral agreements offering preferential conditions relative to calculation of the length of stay of the nationals of certain states.

Not only has humanitarian protection not been defined in EU law, but it remains outside of it.[76] For instance, the Qualifications Directive in para. 15, Preamble states that it does not include "the third country nationals or stateless persons whose stay in the territory of MS is allowed, not because they need international protection but due to personal or *humanitarian reasons* on discretionary grounds".[77] In addition, MS considered issuance of humanitarian visas its sovereign prerogative, and thus humanitarian visas are not covered by a Visa Code[78] because it governs visas for a shorter ("tourist") stay. Since humanitarian visas require longer stay, they remain in the exclusive mandate of EU MS. The view that humanitarian visas remain outside the EU law domain was ascertained by the European Union Court of Justice in its Ruling of 7 March 2017 in *X and X* case.[79]

3.3. Legal framework in the Republic of Serbia

In the Republic of Serbia, humanitarian protection has been defined in the Foreigners Law as a form of temporary stay for humanitarian reasons. The law defines temporary stay as a residence permit issued to a foreign national and it may be issued to a foreigner who intends to stay in the Republic of Serbia for more than 90 days. There are 14 grounds for granting temporary stay, and temporary stay for humanitarian reasons as a form of temporary protection may be granted to foreigners deserving special consideration related to:

1) their family, cultural or social links to the Republic of Serbia or degree of integration, particularly in view of education, work or language proficiency;
2) deferral of forcible removal of a foreigner for one year or more;

76 European Migration Network, European Commission programme offers a working definition of humanitarian protection "A form of non-EU harmonized protection nowadays normally replaced by subsidiary protection, except in some EU Member States". See more: EU Commission, *Asylum and Migration Glossary 6.0*, 2018, p. 196.

77 Para. 15 of the Preamble, 2011/95/EU, available at: http://data.europa.eu/eli/dir/2011/95/oj (our italics) [web page accessed on 08 October 2019].

78 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13. јул 2009 establishing a Community Code on Visas (Visa Code), Regulation No 810/2009.

79 CJEU, X and X v État belge, 7 March 2017, available at: http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-638/16%20PPU [web page accessed on 08 October 2019].

3) a foreigner who is a victim of a serious criminal offence who have been involved in the action to enable irregular migration and who cooperate with the police and the judiciary, and his presence is necessary in the criminal proceedings or he is participating in an investigation as a witness or a plaintiff;
4) a minor foreigner who has been abandoned, who is a victim of organised crime or has for other reasons lost parental care or company;
5) if serious and legitimate personal reasons of humanitarian nature, existing interests of the Republic of Serbia or international commitments made.[80]

For this status to be granted, a foreigner must fulfil certain conditions – to hold: a valid personal or official passport, proof of having sufficient funds for his stay in the Republic of Serbia, health insurance, proof of justified request for temporary stay and proof of payment of an administrative tax. However, this status may be granted exceptionally to a foreigner who for justified reasons does not fulfil the above-listed conditions.[81]

Temporary stay for humanitarian reasons may be granted for a period of minimum six months and maximum one year, and may be subject to extension in case of persistence of circumstances it was granted for.[82] A temporary stay sticker shall be inserted into a travel document of foreigner granted temporary protection for humanitarian reasons,[83] or it is exceptionally granted by a decision in case the foreigner does not hold a valid travel document.[84]

80 Article 61, para. 1, Foreigners Law.

81 Article 26, Rulebook on detailed conditions for obtaining temporary residence, layout of request for approval of temporary residence, layout and method of insertion of a sticker on temporary residence into a foreign travel document (*Official Gazette of the RS*, no. 72/18) states that specific circumstances "may refer to lack of a travel document that a foreigner may not have been able to obtain for justified reasons (e.g., war in the country of origin of the foreigner or due to other reasons he did not have control over), to the difficult financial situation of the foreigner that was beyond his power, i.e., that the foreigner did not regulate his stay in the Republic of Serbia due to especially difficult medical reasons, his age or justified family or personal situation".

82 Article 61, para. 3, Foreigners Law.

83 Article 29, Rulebook on detailed conditions for obtaining temporary residence, layout of request for approval of temporary residence, layout and method of insertion of a sticker on temporary residence into a foreign travel document, *Official Gazette of the RS,* no. 72/18.

84 Article 44, para. 6, Foreigners Law.

IV COMPARATIVE EXPERIENCES AND JURISPRUDENCE IN THE AREA OF COMPLEMENTARY PROTECTION

4.1. Experiences of the EU Member States

The criteria adopted by the states in order to define the scope and the beneficiaries of complementary protection differ. They range from the criteria related to risks of torture, poor medical conditions, family unity to those related to persons for whom repatriation is not a humane option due to persistent trauma, welfare of children or persistence of practical obstacles to removal from territory – criteria for "tolerated stay".[85] According to the 2010 data of the European Migration Network, tolerated stay is recognised in 15 EU Member States: Austria, Belgium, Czech Republic, Finland, Germany, Hungary, Ireland, the Netherlands, Poland, Portugal, Republic of Slovakia, Slovenia, Spain, Sweden and The United Kingdom.[86] These MS define tolerated stay in different ways and also in different legal instruments. The level of the recognised rights also varies among the Member States.

The term "humanitarian protection" in the United Kingdom corresponds to the term "subsidiary protection" in the European Union law. In Germany, Italy and Finland humanitarian protection and subsidiary protection represent separate and different concepts. In Italy and Germany, humanitarian protection stands for reception and stay of refugees on the basis of international law or for humanitarian or political (only in Germany) circumstances. In Finland, humanitarian protection is granted to foreign nationals who cannot return to the country of origin due to environmental reasons, security situation, armed conflict or human rights violations. Austria and Spain use the term "residence on humanitarian basis".[87]

Tolerated status is often granted to persons whose removal from the territory of a state is not possible for practical reasons. In Austria, if a person has

85 COM (2008) 359 final, Communication of the Commission to the European Parliament, Council; European Economic and Social Committee and the Committee of Regions. A Common Immigration Policy for Europe: Principles, actions, instruments, Brussels, 17 June 2008, p. 35.

86 Data taken from European Migration Network, Synthesis Report, *The Different National Practices Concerning Granting of Non-EU Harmonised Protection Statuses*, 2010, p. 61–73.

87 EU Commission, *Asylum and Migration Glossary 6.0*, 2018, p. 196.

tolerated stay of minimum one year, residence permit may be issued if he/she does not represent a threat to public order and state security or if he/she had not been convicted for a criminal offence.[88] Czech Republic, for instance, grants tolerated stay to persons unable to leave its territory due to obstacles beyond their control.[89] In Finland, tolerated stay is possible upon expiry of temporary residence permit when removal of a third country national is still not possible or when such removal would expose the person to capital punishment, torture, persecution or other treatment at variance with human dignity or wherefrom he/she would be sent to such a territory.[90]

Germany issues "temporary suspension of removal" to foreigners who are legally bound to leave the state but whose stay is tolerated because removal is impossible for factual reasons, legal reasons, reasons related to international law, humanitarian reasons, urgent humanitarian reasons or personal reasons. Humanitarian or personal reasons include hitherto duration of stay of third country nationals in Germany, his/her economic and social integration and an adverse combination of personal and economic circumstances. This category of foreigners may legalise their stay by applying for one of the three types of residence permits: with a view to employment, on humanitarian grounds or for well integrated youth and adolescents. The possibility of issuance of a residence permit is also provided in cases of successful economic integration following several years of stay.[91]

In the Netherlands, temporary residence permits may be issued to a third country nationals who cannot leave its territory for reasons beyond their control; to third country nationals who tried to leave the country unsuccessfully; to an unaccompanied or separated child who had exhausted all legal remedies; and to third country nationals who cannot leave the country for medical reasons.[92] In Poland, tolerated stay is granted to third country nationals on the basis of protection needs, if they are faced with a risk to their life, freedom or personal safety, ill treatment, if they could be forced to work or deprived of the right to a fair trial or punished for no legal basis at all in case of return; or a violation of

88 OHCHR, *Admission and Stay Based on Human Rights and Humanitarian Grounds: A Mapping of National Practice*, 2018, p. 8.

89 Centre for Migration Issues*, Guide for Aliens in the Czech Republic*, p. 13.

90 OHCHR, *Admission and Stay Based on Human Rights and Humanitarian Grounds: A Mapping of National Practice*, 2018, p. 11.

91 European Migration Network, *Ad-hoc query on implementing tolerated-stay*, 8 April 2014, p. 4, available at: ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/illegal-immigration/549_emn_ahq_on_implementing_tolerated_stay_03072014_en.pdf [web page accessed on 08 October 2019].

92 European Migration Network, *Ad-hoc query on implementing tolerated-stay*, 8 April 2014, p. 6.

the right to family life; or a violation of the right of the child to such an extent that it would constitute a serious threat to physical or mental development of the child.[93]

In Portugal, the right to removal of third country nationals may be limited for family reasons if he/she were born and live in Portugal; if he/she lived in Portugal until the age of ten and still live in it; if he/she hold a valid guardianship of underage children who hold Portuguese citizenship and live in Portugal; if he/she have underage children – third country nationals with residence in Portugal – and are efficiently performing their parental duties, are responsible for their subsistence and education.[94]

In Slovakia, tolerated stay may be granted when there are obstacles to expulsion or it is not possible; if a foreigner is an unaccompanied or a separated child; or when this is necessary for reasons of respect of the right to private and family life. The obstacles to removal exist in cases of: a threat to life of a foreign national; risk of torture, cruel, inhuman or degrading treatment or punishment; risk of capital punishment related to a potential criminal procedure; risk to freedom of a foreign national with the exception of a foreigner whose conduct is threatening to the state security, or if he/she had been convicted for an especially grave crime and represent a threat for the Republic of Slovakia.[95]

Finally, in The United Kingdom a person may be granted a discretionary residence leave of up to only six months, subject to active review and a leave for the maximum three years if he/she is not eligible for asylum or humanitarian protection but whose return to the country of origin would result in violation of the provisions of the European Convention on Human Rights (mostly due to risk of torture, medical condition, for family reasons and denial of religious liberty).[96]

The approach of the states varies with respect to the rights and obligations stemming from the tolerated stay status. Generally, three categories of systems exist: 1) the states where foreigners obtain official deferral of removal orders which grant them additional rights until return as compared to other foreigners (e.g. Greece, Switzerland, Germany); 2) the states where foreigners obtain an official or *de facto* deferral of the removal order, but are granted no additional rights (e.g. Luxemburg, Denmark, Estonia); and 3) the states where foreigners receive neither a written document nor additional rights (e.g. Austria, Belgium,

93 The Netherlands, The Foreigners Act of 12 December 2013 (Journal of Laws 2013, No. 0, item 1650).

94 OHCHR, *Admission and Stay Based on Human Rights and Humanitarian Grounds: A Mapping of National Practice*, 2018, p. 20.

95 European Migration Network, *Ad-hoc query on implementing tolerated-stay*, 8 April 2014, p. 8.

96 Home Office, *Asylum Policy Instruction Discretionary Leave*, 2015.

Bulgaria).[97] The states mainly differ in ensuring the right of access to the labour market. Interestingly, a foreigner in 2013 Bulgaria whose expulsion order had not been executed one year later and who is still on its territory, has the right to work until the enforcement of expulsion – when the reasons due to which his/her life and freedom had been threatened cease to exist.[98]

4.2. Jurisprudence

Most of jurisprudence is founded on the practice of the European Court of Human Rights and the Court of Justice of the European Union. Asylum seekers who do not qualify for international protection but have life-threatening medical problems (defined as life-threatening within three months in case the treatment must be stopped or suspended), have the possibility to apply for regular residence permits not related to their flight. This practice originates from the ECtHR judgement in the case *Paposhvili v. Belgium*.[99] An asylum seeker from Georgia in Belgium claimed that removal to Georgia would expose him to risk on his life and physical wellbeing and violate his right to respect of family life. The applicant claimed to be a victim of potential violation of Articles 2, 3 and 8 of the Convention. According to Rule 39 of the Court Rules of Procedure, the Court requested the Belgium Government not to remove the applicant pending completion of the appeals procedure. The applicant had arrived in Belgium in 1998 and had been convicted for a number of offences including theft, over the years. His asylum application had been rejected in 1999. The applicant had repeatedly, albeit with no success, tried to regulate his stay invoking exceptional bases and duration of his stay, medical conditions and risks to his children. He had been diagnosed with chronic leukaemia of lymph nodes that the Antwerp University Hospital described as life-threatening with life expectancy between three and five years. In the meantime, the applicant was accommodated in the shelter for foreigners where he was visited by a doctor who concluded that his condition was not sufficiently monitored. When his medical condition deteriorated, the doctor wrote a certificate stating that return to Georgia would expose the patient to inhuman and degrading treatment and that lack of treatment could result in patient's death due to the illness or the effects of a grave infection. The applicant was diagnosed also with active pulmonary tuberculosis in 2000, a chronic obstructive pulmonary disease, hepatitis C in 2006 and he had had a

97 Point of no Return, Factsheet, *Unreturnable Migrants in Detention,* in *EU Law and Policy*, p. 7, available at: http://pointofnoreturn.eu/wp-content/uploads/2013/12/PONR_Factsheet_EU_2_HR.pdf [web page accessed on 08 October 2019].

98 European Migration Network, *Ad-hoc query on implementing tolerated-stay*, 8 April 2014.

99 *Paposhvili v. Belgium*, ECtHR, Application no. 41738/10, Judgement of 13 December 2016.

stroke in 2015. The Court found violation of Article 3 of the Convention if he were to be removed to Georgia without the Belgian authorities assessing, in line with this Rule, the risk he would be exposed to in light of information on his medical condition and availability of adequate treatment in Georgia; violation of Article 8 of the Convention if he were to be removed to Georgia without the Belgian authorities assessing, in line with this Rule, the effect of his removal on the right to respect family life, bearing in mind his medical condition.[100]

In the case of the Court of Justice of the European Union *Chavez-Vilchez and Others,*[101] the Court heard the appeals of eight third country nationals – mothers of minor nationals of the Netherlands whose daily welfare they were in charge of, against the Dutch authorities who had rejected their applications for social welfare and child allowance on the basis of absence of the right to residence. The Court concluded that "Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium".[102] Also that "Article 20 TFEU must be interpreted as not precluding a Member State from providing that the right of residence in its territory of a third-country national, who is a parent of a minor child that is a national of that Member State and who is responsible for the primary day-to-day care of that child, is subject to the requirement that the third-country national must provide evidence to prove that a refusal of a right of residence to the

100 Ibid, para. 52.

101 Court of Justice of the European Union, *C-133/15 – Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*, 10 May 2017, available at: curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-133/15 [web page accessed on 08 October 2019].

102 Judgement of 10 May 2017, *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others,* C-133/15, ECLI:EU:C:2017:354, para. 79.

third-country national parent would deprive the child of the genuine enjoyment of the substance of the rights pertaining to the child's status as a Union citizen, by obliging the child to leave the territory of the European Union, as a whole. It is however for the competent authorities of the Member State concerned to undertake, on the basis of the evidence provided by the third-country national, the necessary enquiries in order to be able to assess, in the light of all the specific circumstances, whether a refusal would have such consequences".[103]

Taking into consideration to described practice and the legal framework in the European Union, and although Serbia is not yet a member of the EU, it is important to note that Serbia would be bound by the jurisprudence of the CJEU in the near future when the accession process is finished. By the same token, since it has been an EU candidate country since 2012, Serbia agreed to harmonise its legislation with the *EU acquis* and adopt it fully until the date of membership of the EU.

103 *Ibid*.

V OTHER FORMS OF LEGAL STAY IN THE REPUBLIC OF SERBIA

The status and the position of foreigners in the Republic of Serbia is governed by two laws: the Foreigners Law and the Law on Asylum and Temporary Protection. The Constitution of the Republic of Serbia guarantees that in line with international agreements, the foreigners have all the right in line with the Constitution and the law, except those that only the citizens of Serbia have in accordance with the Constitution and the law.[104] While we analysed the status and the rights of the persons eligible for international protection above, it is important to note also the status of asylum seekers whose applications have been rejected or refused. When an application for international protection has been rejected or refused, and a person is not in the country on some other basis, he/she will have to leave the Republic of Serbia within a timeframe defined in the said decision. FL further sets out that a foreigner, failing to leave the Republic of Serbia voluntarily in a given timeframe, would be forcibly removed. Until the time of removal of a foreigner from the Republic of Serbia, he/she may be accommodated in a Shelter for Foreigners.

FL recognises three types of legal stay of foreigners: 1) stay up to 90 days, 2) temporary stay and 3) permanent residence. The Foreigners Law regulates the types of stay of foreigners in detail.

Temporary residence may be granted on the grounds of: 1) Employment; 2) School or learning Serbian language; 3) Studies; 4) Participation in international exchange programmes for pupils or students; 5) Specialist, professional training and practice; 6) Scientific research or other scientific or educational activity; 7) Family reunification; 8) Performing religious service; 9) Treatment or care; 10) Ownership over immovable property; 11) Humanitarian stay; 12) Status of presumed victim of trafficking in human beings; 13) Status of victim of trafficking in human beings; 14) Other legitimate reasons in accordance with the law or an international treaty.[105]

FL provides for temporary residence on the basis of family reunification of a foreigner whose nuclear family member is a national of the Republic of Serbia, a refugee, a foreigner with temporary residence or permanent residence permit

104 Article 17, Constitution of the Republic of Serbia, *Official Gazette of the RS*, no. 98/06.

105 Article 40, Foreigners Law.

in the Republic of Serbia.[106] It is granted for a period of one year and may be extended for the same period of time.

FL provides for a special status of children born on the territory of the Republic of Serbia, whose both parents are foreigners, with an obligation that their parents, guardians or legal representatives apply for temporary residence permit of a child within three months from the time of his/her birth.[107] In that case, temporary residence is granted for the duration of the temporary residence of a parent, guardian or legal representative in case one of the parents, a guardian or a legal representative of the child is a foreigner with permanent residence.

Relative to the 2008 Foreigners Law, a novelty introduced here is *independent stay* of a foreigner who is a member of nuclear family of a national of the Republic of Serbia, foreigners granted temporary residence, permanent residence in the Republic of Serbia and who have stayed in the Republic of Serbia for four consecutive years.[108] In the same way, if that person had temporarily resided in Serbia for a period of three consecutive years on the basis of family reunification, he/she may be issued a permit for independent stay in case of death of a national of the Republic of Serbia or a foreigner with whom the right to family reunification was exercised. Exceptionally, a foreigner who has been granted temporary residence for family reunification over a period of time shorter than four years, and who is a victim of domestic violence may be granted independent stay. Independent stay shall be granted for a period of one year and extended for the same period.

Victims of trafficking in human beings and foreigners presumed to be the victims shall be granted temporary residence.[109] If a person is identified as a victim of trafficking in human beings, the Centre for Protection of the Victims of Trafficking in Human Beings shall conduct an evaluation of the situation and the needs of the victim and inform him/her about the conditions for obtaining temporary residence and other rights. This status shall help the victims to recover and freely decide on further cooperation with the Centre, the court, prosecutor's office or police. The decision on return shall not be passed during this period.

Temporary residence for humanitarian reasons and temporary residence of the victims of trafficking in human beings may be terminated: 1) If the foreigner who was granted temporary residence has actively, voluntarily and on own initiative renewed contact with the persons suspected of committing a criminal offence in the area of trafficking in human beings and irregular migration, or if

106 Article 55, Foreigners Law.

107 Article 58, para. 1, Foreigners Law.

108 Article 59, Foreigners Law.

109 Articles 63 and 62, Foreigners Law.

it is determined that the report of these criminal offences was false or unfounded; 2) If the foreigner who has been granted temporary residence has stopped cooperating, or has used deceit in the process of cooperation; 3) When this is required by the reasons of safeguarding the security of the Republic of Serbia and its citizens; 4) When the judicial authorities decide to suspend proceedings.[110]

When deciding on an application for temporary residence, or application for the extension of temporary residence, the competent authority shall specifically evaluate the circumstances of each individual case, and take into consideration personal, family, economic and social circumstances, as well as the previous duration of stay of the foreigner.[111] The state authority shall also give due consideration to a threat that an applicant presents to the safety of the Republic of Serbia and its citizens.

5.1. Foreigners who may not be forcibly removed from the territory of the Republic of Serbia

As already mentioned, no one may be forcibly removed or returned to the territory of a country where he/she is at risk of persecution. This prohibition is absolute if a person would be subjected to death penalty, torture or very serious human rights violations,[112] and it is guaranteed by the Constitution.[113] FL also sets out that an unaccompanied minor shall not be forcibly removed, unless in case when the competent body is convinced that the minor would be returned to a family member, guardian, or adequate child care institution.[114] Removal is deferred in three cases: 1) When the foreigner's identity has not been established, and not through a fault of his own; 2) When it is not possible to transport the foreigner from the Republic of Serbia; 3) If serious difficulties emerge, related to psychological, physical or health status of the foreigner.[115] Such a foreigner is entitled to a temporary identity card as well as to an urgent medical assistance and may exercise the right to primary education (in case of children).

Deferral of mandatory removal is approved for the period of maximum one year, which may be extended by a competent authority.[116]

110 Article 64, Foreigners Law.
111 Article 65, Foreigners Law.
112 Article 83, para. 3, Foreigners Law.
113 Article 39, Constitution of the Republic of Serbia.
114 Article 83, para. 4, Foreigners Law.
115 Article 84, Foreigners Law.
116 Article 85, para. 1, Foreigners Law.

VI SITUATION IN THE REPUBLIC OF SERBIA

The refugee crisis on the Western Balkans route opened up numerous questions that the decision-makers must solve in order to establish an efficient system of protection of refugee and migrant human rights. A total of 579,518 migrants who expressed intention to seek asylum in the Republic of Serbia were registered in 2015 only.[117] The major influx took place between October and December 2015.[118] A Mixed Migrations Working Group was established on 5 June 2015 to monitor, analyse and discuss the issues related to mixed migrations in Serbia.[119] The executive authorities adopted a Plan of Action in September that same year and began opening temporary reception centres to allow for emergency reception of persons who did not wish to seek asylum in Serbia. The Western Balkans route was officially closed in March 2016 following the EU – Turkey Agreement. However, the movement of migrants continued albeit at a lower scale. In the spring 2016, between 150 and 200 persons a day continued entering Serbia, but their exit was prevented by very restrictive practices of the neighbouring EU MS, resulting in prolonged stay of migrants in Serbia.[120] According to the estimates, 2,420 migrants and refugees were accommodated in the facilities managed by the competent authorities (14 transit/reception centres, 5 asylum centres) as at August 2019,[121] while in November 2019 that number increased to 4,398.[122] The full data on ethnicities are currently available for 2018. In 2018, the nationals of

117 Government of the Republic of Serbia, *Migration Profile of the Republic of Serbia for 2015*, p. 41.

118 Mixed Migration Flows in the Mediterranean and Beyond, Compilation of Available Data and Information, Serbia (IOM, reporting period for 2015) https://www.iom.int/sites/default/files/situation_reports/file/Mixed-Flows-Mediterranean-and-Beyond-Compilation-Overview-2015.pdf [web page accessed on 08 October 2019]. The highest number of refugees was registered to be coming from the following countries: Syria (301.533), Afghanistan (160.831), Iraq (76.003), Iran (11.578) and Pakistan (9.090).

119 Decision on forming the Mixed Migrations Working Group 05 Ref. No. 02–6733/2015, 2015. The Working Group was comprised of the Minister of Labor, Minister of Interior Affairs, Minister of Health, Minister of Defense and Minister without portfolio in charge of EU accession. The administrative tasks of the Working Group were handled by the Ministry of Labor, Employment, Veteran and Social Policy.

120 UNHCR, *Serbia Response Plan* (Regional Refugee and Migrant Response Plan for Europe, January – December 2017) p. 3, http://www.unhcr.rs/media/docs/2017/januar/RRMRP-Srbija.pdf web page accessed on 08 October 2019].

121 UNHCR, *Serbia*, Snapshot, August 2019.

122 UNHCR, *Serbia*, Snapshot, November 2019.

Afghanistan made up 50% of the total registered population of migrants who entered Serbia, the nationals of Pakistan 18%, and Iraq 5%. The nationals of Syria were registered in 5% of the cases and of Iran in 7% of the cases.[123] The remaining 15% were the nationals of 49 different countries (Bangladesh, India, Libya, Palestinian territories, Somalia, Algiers, etc.).[124]

Notwithstanding the migrant crisis in the spring 2015, the Government of Serbia had not opted to grant them temporary protection. However, the Government is aware of mixed migrations and therefore committed (since September 2015) to provide humanitarian protection not only to the foreigners deserving and in need of international protection in the form of refugee status or subsidiary protection, but also to economic migrants. Still, sometimes even those deserving of international protection do not apply for asylum in Serbia for several reasons including poor economic situation, inefficient asylum procedure, absence of ability to integrate into the society, as well as absence of refugee communities. A special problem is that the asylum system is not very efficient and that the procedure lasts longer than expected,[125] resulting in asylum seekers remaining in Serbia for a limited period of time and establishing connections with the country pending final decision.

In the period since the beginning of implementation of the 2008 Law on Asylum and up until the end of September 2019, a total of 642,790 persons expressed intention to seek asylum in RS.[126] Since 2008, the competent authorities of the Republic of Serbia reviewed asylum applications of 161 persons, granting the right to asylum to 70 and subsidiary protection to 91 persons.[127] In the majority of cases decided in line with the 2008 Law, the asylum applications were rejected based on a wide application of the so called "safe third country" concept without consideration of the merits of applications. In cases of an effective negative decision on the asylum application, if the person is not in the country on

123 IOM, *Mixed Migration Flows in the Mediterranean*, January 2019, available at: www.iom.int/sites/default/files/dtm/mediterranean_dtm_20190305.pdf [web page accessed on 08 October 2019].

124 See: Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia – Report for January-June 2019,* p. 7.

125 According to Article 39 LATP, a decision on the asylum application should be passed no later than three months from the date of lodging of the application. However, the cases in which the BCHR lawyers were proxies, the average time for the decision amounted to 262 days. See more in: Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia – Report for January-June 2019*, p. 40.

126 Belgrade Centre for Human Rights, *Right to Asylum in the Republic of Serbia – Report for July-September 2019*, p. 4, available at: http://azil.rs/en/right-to-asylum-in-the-republic-of-serbia-periodic-report-for-july-september-2019/[web page accessed on 08 October 2019].

127 *Ibid.,* p. 5.

some other basis, he/she must return the asylum seeker identity card and leave the Republic of Serbia within the period stated in the decision.

The Foreigners Law sets down that if a foreigner fails to leave the Republic of Serbia voluntarily in the prescribed period, he/she would be forcibly removed from its territory.[128] This rarely takes place in practice. The resulting situation may be very discouraging, particularly since the state neither ensures for the unsuccessful asylum seekers to start the procedure in the "safe third" country nor to be removed. There are no estimates on the number of foreigners illegally residing in Serbia while deprived of the possibility to legalise their status. If the Government of Serbia were to implement "tolerated stay" in practice, the State would have a better idea and control over the migrants present in its territory. In this situation, if their status were more favourable through legalisation of stay, the migrants would be more willing to express their wishes – be it to apply for asylum or to wait for a propitious moment to resume their journey. It would be good for the safety of the State to know the number and the intentions of persons staying in its territory illegally, and positive for foreigners granted tolerated stay to have their rights and obligations defined.

It remains unclear in which concrete cases would the provisions on temporary stay on humanitarian grounds or those on tolerated presence on the territory of the Republic of Serbia apply. This issue should be regulated in by-laws, precisely for the fact that the detailed conditions on granting of tolerated stay are not defined in the law.

128 Article 81, Foreigners Law.

VII ISSUES RELEVANT TO INTEGRATION OF FOREIGNERS IN SERBIA

Traditionally, there are several solutions for the residence of foreigners on a state territory. In addition to voluntary return to the country of origin or resettlement into a third country, the third solution is integration into the local society of the host country.[129] Integration of foreigners is not an easy process for any state. It is a "complex and gradual process involving legal, economic, social and culturological dimensions".[130] Foreigners bring their own experiences and knowledge to the country of destination, and thus may create new opportunities and contribute to the development of it. Since the onset of the migrant crisis to the present day, the Republic of Serbia has been facing a relatively high number of foreigners who, even if formally, express intention to seek protection in it, and with many persons not included into the legal system and who, due to their irregular status, are either legally invisible or obliged to leave the country. Refugees and asylum seekers enjoy many rights under the same conditions as its citizens (right to work, right to education, etc.) and thus the obligation for the Republic of Serbia to ensure, if formally, the rights guaranteed in the 1951 Refugee Convention and the international human rights law. However, many other categories of foreigners and persons who enjoy one of the forms of complementary protection as yet do not have access to the mechanisms to exercise their rights.

With respect to the persons granted the right to asylum, whether they were granted refugee status or subsidiary protection, the Law on Asylum and Temporary Protection guarantees their right to integration assistance within the capacities of the Republic of Serbia.[131] It further states that their integration is conducted in line with the regulations related to migration management[132] – which is the Law on Migration Management.[133] The RS legal framework for integration recognises foreigners who were granted the right to asylum. Several

129 Belgrade Centre for Human Rights, *Institutional mechanisms for integration of persons granted asylum – Analysis of legal framework in the Republic of Serbia with an overview of the relevant European Union directives and the existing solutions of EU Member States with the advanced integration systems*, 2016, p. 3.

130 *Ibid.,* p. 4.

131 Article 71, Law on Asylum and Temporary Protection.

132 Article 23, Law on Asylum and Temporary Protection.

133 Law on Migration Management, *Official Gazette of the RS*, No. 107 of 9 November 2012.

integration-related acts were adopted (Decree on accommodation,[134] Decree on integration of persons granted asylum into social and cultural life[135]). Labour market access has been ensured for refugees as well as to asylum seekers under certain conditions, in line with the Law on Employment of Foreigners.[136]

The Law on Employment of Foreigners recognizes several categories of persons including foreigners granted the right to asylum, foreigners granted subsidiary protection, foreigners seeking asylum, foreigners granted temporary protection and victims of trafficking in human beings.[137] The *foreigners granted humanitarian stay* have *not* yet been recognized in this Law. Such a legal solution points to several paradoxes and deficiencies that require change and improvement. Namely, persons granted temporary residence for humanitarian reasons are not recognized by the Law on Employment of Foreigners and cannot contract employment under facilitated conditions, while theoretically having an obstacle-free path to obtain citizenship of the Republic of Serbia. The persons granted temporary residence for humanitarian reasons may, in future, regulate their stay on some other basis or finally become foreigners with permanent residence. The latter have the right to apply for Serbian citizenship. On the other hand, refugees and, under certain conditions asylum seekers as well, may contract employment through facilitated procedure for obtaining work permits, but – pursuant to the current regulations governing citizenship – do not have even a theoretical possibility to access naturalisation from asylum. With respect to citizenship, humanitarian stay is more favourable. However, it is worse from the aspect of the right to work. We recommend that also persons with humanitarian stay be entitled to this right, as are other categories of foreigners. Opening up a possibility of facilitated exercise of the right to work to the persons granted humanitarian stay allows this form of protection also to provide an opportunity for long-term and full integration into the social life – a condition for the assessment of the merits of applications for humanitarian stay defined in the Rulebook on Detailed Conditions for Obtaining Temporary Residence.[138] The current legal solution providing no possibility for persons granted humanitarian stay to obtain a personal work permit, reduces opportunities for full integration which is one of the pre-

134 Decree on criteria for establishing priority accommodation of persons granted the right to asylum or subsidiary protection and conditions for the use of temporary housing: 63/2015–20, 56/2018–10.

135 Decree on integration of persons granted asylum into social, cultural and economic life: 101/2016–29, 56/2018–10.

136 Law on Employment of Foreigners, *Official Gazette of the RS*, 31 of 29 April 2019.

137 For whom temporary residence is granted in line with Articles 62 and 63, Foreigners Law.

138 Article 26, Rulebook on detailed conditions for obtaining temporary residence, layout of request for approval of temporary residence, layout and method of insertion of a sticker on temporary residence into a foreign travel document, *Official Gazette of the RS*, 24/18.

requisites for the very granting of humanitarian stay. The possibility to obtain a personal work permit would represent an adequate solution because the persons eligible for humanitarian stay in Serbia often have diplomas which have not been validated or they have no qualifications. Adopting such a solution would enable these persons to seek employment themselves while already holding personal work permits, thus making it easier for them to contract employment, and for the State and the potential employers to employ them.

With respect to travel documents, LATP provides that asylum seekers and refugees shall be issued identity cards and travel documents.[139] This ensures the right to freedom of movement within the borders of the state, but in certain cases outside these borders as well. FL provides for issuance of a foreigners identity card, regardless of whether they have permanent or temporary residence, and no valid travel document.[140] Relative to the right to a travel document, the situation of refugees is nominally better than that of foreigners who e.g., were granted humanitarian stay and who do not have their own travel documents. LATP provides for the right to travel documents of persons who have been granted asylum or subsidiary protection,[141] but this right cannot be exercised in practice because the state authorities have not passed a by-law defining the content and the layout of travel documents for this category of foreigners by the moment of writing this study. On the other hand, it is set down that foreigners granted humanitarian stay should have a sticker – proof of this status – placed in their travel document.[142] Foreigners granted humanitarian stay but without the travel document shall have their humanitarian stay approved by a decision. In this case, for the same legal status and scope of rights based on humanitarian stay, two distinct legal realities exist: 1) a foreigner has his/her passport and is able to travel outside Serbia; and 2) a foreigner does not have a passport and his freedom of movement outside the Serbian territory is limited. It follows that in order to allow foreigners granted temporary residence on humanitarian grounds to freely move outside the borders of the Republic of Serbia, the current provision of FL must be changed so as to make it possible for a foreigner to return to RS in case he/she leaves it. Article 95, Foreigners Law defines types of travel documents for foreigners including a travel document for stateless persons and for a foreigner.

Although both the Foreigners Law (Article 97) and the Rulebook on the Layout and Procedure for Issuing a Travel Document for Foreigners[143] recognize the right to issue a travel document for foreigners, their provisions are not

139 Articles 89–91, Law on Asylum and Temporary Protection.

140 Article 102, Foreigners Law.

141 Article 91, Law on Asylum and Temporary Protection.

142 Article 44, Foreigners Law.

143 *Official Gazette of the RS*, 80/18–3.

sufficiently elaborated and explicit enough to conclude from their text that persons with an approved residence permit for humanitarian reasons are entitled to a travel document if they do not have their own passport. The current legal provisions are broadly set for a variety of situations, and yet many situations may remain outside their scope. The Rulebook in Article 8 envisages the existence of justifiable circumstances and serious humanitarian reasons as a basis for issuing a travel document for foreigners. This provision is not sufficiently clear and needs to be elaborated in order to guarantee these documents to persons with a humanitarian residence based on the ordinance. In this regard, it is necessary to amend the Rulebook in order to explicitly stipulate the possibility of obtaining a travel document for persons who have been granted temporary residence for humanitarian reasons but do not have their own passport or travel document.

Recommendation for the authorities of the Republic of Serbia is to provide in the relevant regulations as a regular – not exceptional – possibility for the right to a travel document for persons who were granted temporary residence permits for humanitarian reasons. It is necessary that persons, who have their own passport, can also return to the Republic of Serbia, not just leave it. In order to fulfil its purpose, such a document would necessarily have to serve not only for going abroad but also for returning back to the Republic of Serbia. If the possibility of a return trip outside Serbia for persons who have been granted a humanitarian residence by a decision or an ordinance is to be introduced, it is necessary to consider a longer duration of the travel document, from the current 30 days[144] to the same length as the ID card for foreigners, which is issued for the same term.

144 Article 98, par. 2, Foreigners Law.

VIII RECOMMENDATIONS FOR A MORE FLEXIBLE APPROACH

Due to numerous above described reasons, the Republic of Serbia still lacks a fully adequate response and a set of by-laws related to foreigners illegally staying in the country. This issue calls for an urgent solution in the majority of cases in order to ensure protection of foreigners' human rights and allow for the possibility that they organise their life while in Serbia. Similarly, from the aspect of state security interests, it is important to know who is staying on the territory of Serbia and the reasons for such stay. This is not possible at the moment when a relatively high number of persons is still present without their legal status being defined in any way. However, the number of foreigners in this situation has significantly dropped relative to the period before the closure of the WB route. Therefore, the lack of capacities of the state authorities to implement the status determination procedure in each individual case are no longer convincing and the state authorities must start implementing them without further delay.

The Law on Asylum and Temporary Protection sets out the rights and obligations of asylum seekers and refugees. It also defines in detail temporary protection, although the duration of such protection remains unchanged. It is positive that LATP recognizes the right to access the labour market for the persons granted this form of protection. We also welcome the explicit permission of family reunification in the Republic of Serbia introduced by LATP as well granting of temporary protection to the family members of persons enjoying this form of protection.

FL defines more accurately the reasons for granting temporary residence, including humanitarian stay. It also recognizes family reunification. Moreover, it governs the special status of children born on the Serbian territory, but its implementation is limited only to the parents who legally reside in the country. FL also provides for independent stay and stay for humanitarian reasons.

(The new) Foreigners Law, explicitly in para. 2, Article 124 states that the Government would adopt a by-law governing tolerated presence of foreigners on the territory of the Republic of Serbia. However, this does not seem adequate, for it is stated only in the final provisions of the Law. Tolerated stay and the rights and obligations of foreigners while they are holding this status should be

defined. Article 124, Foreigners Law states only that this possibility is given to "the foreigners who cannot be returned to their country of origin because of the application of the non-refoulement principle, or who cannot leave the Republic of Serbia because of circumstances that do not depend on them". It is true that these two categories of migrants definitely deserve to fall into the scope of tolerated stay. However, this status may be recognized only in situations of illegal presence of a large number of foreigners. Consequently, there needs to be a clearer distinction between this institute and temporary protection recognized by LATP. Watmore, recognition of this status represents a discretionary right of the Government which grants it at the proposal of the Ministry of Interior as is the case with temporary protection and additionally blurs the distinction between these two concepts.

The Belgrade Centre for Human Rights welcomes endorsement of new laws in 2018 and their more liberal approach relative to the earlier solutions. However, since the beginning of the implementation of these laws, the Belgrade Centre for Human Rights has in its activities and analyses come to certain conclusions as to what needs to be done in order for these solutions to be fully functional.

Bearing in mind the above, **we recommend**

With respect to **temporary residence on humanitarian grounds**:

- Endorse a Law on Changes and Amendments of the Law on Employment of Foreigners or an appropriate by-law, where the persons granted temporary residence for humanitarian reasons would be the holders *also* of personal work permits, thus allowing for the possibility for their long-term and full integration into the social and legal life of Serbia;
- Closely define conditions in the relevant provisions for the possibility of granting permanent residence in special cases for reasons of humanity in accordance with Article 68 of the FL for persons granted temporary residence for humanitarian reasons;
- Allow for naturalisation of the foreigners granted the right to asylum through changes of the Citizenship Law, so that the situation of the holders of this primary form of protection is not less favourable than that of the holders of complementary forms of protection;
- It is necessary for the Ministry of Interior, with the support of social welfare institutions, to urgently grant temporary residence for humanitarian reasons to all unaccompanied and separated children in the territory of the Republic of Serbia in accordance with the principle of the best interests of the child, regardless of other circumstances such as the degree of integration and length of their stay;

– The Rulebook on the layout of the form and the procedure for issuing a travel document for a foreigner should be thoroughly amended in order to clearly foresee the possibility of issuance of a travel document and/or "return" travel document for the category of foreigners granted temporary residence for humanitarian reasons by a decision, having in mind the constitutional guarantee of freedom of movement, enshrined in Article 39 of the Constitution of the Republic of Serbia;

With respect to **tolerated stay**:

– Introduce detailed provisions on tolerated stay into the Foreigners Law, after the consultations on who may be granted this status. The comparative review shows that this status is recognized to different categories of migrants. It would be advisable that it include also: the migrants with school-age children, until the end of a school year; the migrants who cannot leave the country because of an illness and/or treatment or pregnancy; the migrants who intend to marry a third country national legally residing in the territory of Serbia or a national, etc.;
– A comparative analysis shows different approaches that the states take to these statuses. The persons granted tolerated stay in Serbia should be allowed as wide as possible scope of rights, since it was established that these are the foreigners who cannot leave the country during the process of granting tolerated stay itself. In this situation it is in the interest of all to give them the right to exercise the right to work and have the possibility to integrate. Short of that, there is a risk of repetition of experiences of several Western European states which hesitated in integration and allowing access to rights to the persons who could not be removed from their territories and thus a considerable number of them became psycho-socially vulnerable;
– Freedom of movement is one of the fundamental human rights guaranteed by numerous international instruments, as well as in the Constitution of the Republic of Serbia. Therefore, it is important to issue identity cards to the persons granted "tolerated stay" and allow for residence at a private address in case of absence of legally prescribed basis for restriction of their movement;
– Define the exact duration of tolerated stay. This is important both from the aspect of ensuring certainty and dignity of migrants. In other words, the migrants with tolerated stay cannot hold this status indefinitely. The comparative analysis has shown that should the grounds

for this status to have been granted even after the period of 1–3 years since such granting persist, the foreigner should be given the possibility to apply for regular temporary residence that could be converted into permanent residence in case he/she is eligible. Therefore, the Foreigners Law should be more flexible, and provide for the possibility of conversion of the status.

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