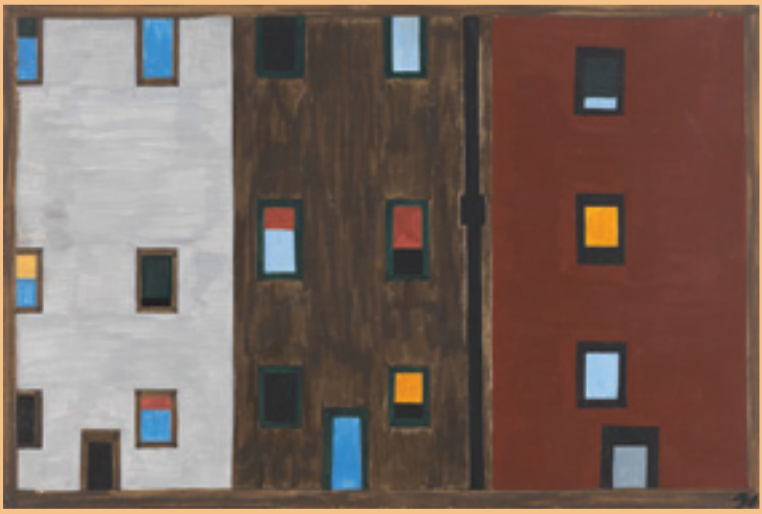

RIGHT TO ASYLUM IN THE REPUBLIC OF SERBIA 2019

Belgrade Centre for Human Rights

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Belgrade, 2020

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CONTENTS

ACRONYMS

AC – Asylum Centre

BCHR – Belgrade Centre for Human Rights

BPS – Border Police Station

CAT – Committee against Torture

CEDAW – Committee on the Elimination of Discrimination against Women

CERD – Committee on the Elimination of Racial Discrimination

CRC – Convention on the Rights of the Child

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

EASO – European Asylum Support Office

FRN – Foreigner Registration Number

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

FL – Foreigners Law

GP – General Practitioner

ICAO – International Civil Aviation Organisation

ICESCR – International Covenant on Economic, Social and Cultural Rights

LA – Law on Asylum

LATP – Law on Asylum and Temporary Protection

LBC– Law on Broder Control

LCRS – Law on Citizenship of the Republic of Serbia

LEF – Law on Employment of Foreigners

LGAP – Law on General Administrative Procedure

LM – Law on Misdemeanours

LSP – Law on Social Protection

MI – Ministry of the Interior

NES – National Employment Service

NGO – Non-governmental organisation
PIN – Psychosocial Innovation Network
RS – Republic of Serbia
RTC – Reception/Transit Centre
RTSL – Road Traffic Safety Law
SGBV – Sexual and gender-based violence
SHIF – Serbian Health Insurance Fund
UN – United Nations
UNESCO – United Nations Educational, Scientific and Cultural Organisation
UNHCR – United Nations High Commissioner for Refugees
UNICEF – United Nations International Children's Emergency Fund

FOREWORD

The Belgrade Centre for Human Rights (BCHR) has been providing legal assistance to asylum seekers and persons who have been granted international assistance from 2012, as the implementing partner of UNHCR in the Republic of Serbia (RS). Those activities, as well as the preparation of this Report, have been implemented under the project *Support to Refugees and Asylum seekers in Serbia,* aimed at improving the refugee protection and access to refugee rights in the RS.

The report on the right to asylum in the RS for 2019 before you has been prepared by the BCHR team based on the experience in providing legal assistance to asylum seekers and persons who have been granted asylum. The Report is based on the review and analysis of the application of the national regulations in the asylum procedure and in other administrative proceedings related to the integration into Serbian society. Additional information was obtained trough our regular cooperation and communication with the state authorities and UNHCR, and on the basis of the Law on Free Access to Information of Public Importance.[1] In some of its parts, the Report looks at the international commitments undertaken by the RS under specific universal and regional instruments that have been ratified. The authors have sought to present the RS asylum system operations in an objective manner, and some of their observations are corroborated with the views of international organisations, United Nations (UN) treaty bodies and special procedures, and the European Court of Human Rights (ECtHR).

The Report outlines various aspects of the right to asylum in the RS, and focuses on the issues that had received particular attention from the BCHR team during 2019. In general, although there has been progress made regarding the exercise of the right to asylum, the asylum system in the RS is still far from being fully functional. That is true particularly considering that asylum seekers and refugees depend heavily on the assistance provided by NGOs, and that the systemic solutions and effective coordination between the state authorities are lacking. In addition, specific legal gaps and inconsistent enforcement of the existing legislation impede the exercise of both the right to asylum and many other refugee rights.

Chapter I provides the statistics obtained from UNHCR and the competent asylum authorities. After that, Chapter II describes the major challenges in accessing the asylum procedure. Chapter III discusses the practice of the Asylum Office (first-instance authority), the Asylum Commission (second-instance authority), and the Administrative Court through an analysis of their activities and the most important decisions. After that, in Chapter IV, the Report describes the

1 *Official Gazette of the RS*, No. 120/04, 54/07, 104/09, 36/10.

asylum seeker accommodation conditions, with a particular focus on detention under close police watch. Chapter V deals with the situation of unaccompanied and separated children, and Chapter VI discusses asylum seekers survivors of sexual and gender-based violence. The protection of these vulnerable groups is still not satisfactory in the RS. Finally, Chapter VII provides an analysis of the various issues faced by the refugees during their integration into Serbian society. The 2019 Committee against Torture (CAT) decision on an individual complaint against the RS on the grounds of extradition of an asylum seeker to Turkey in violation of the principle of *non-refoulement* is provided in a separate Attachment.

Although the RS hosts a certain number of migrants who have not applied for asylum, some of whom may be in need of international protection, this Report focuses on the situation of asylum seekers and persons who have been granted asylum. In some of its parts, the Report also refers to foreigners who have not applied for asylum, without a detailed discussion of their status in the RS. For ease of reading, we have used the term "refugee", which, for the purposes of this Report, refers to asylum seekers and other foreigners in need of international protection.[2] Where relevant, for the sake of better understanding, the authors specifically refer to the exact status of a foreigner in the RS, i.e., whether the person is an asylum seeker or a person who has been granted asylum (refugee protection) or subsidiary protection. In addition, the terms "foreigner" and "migrant" are used throughout the Report. They mean all foreigners in the RS, irrespective of whether they have applied for asylum. In any case, the reader should interpret the meaning of the term in the context of each chapter.

The Report is intended primarily for the state authorities in charge of ensuring the rights of asylum seekers and persons who have been granted international protection in the RS, but also for other professionals and organisations monitoring the refugee law situation. This Report aims to draw attention to certain shortcomings regarding the right to asylum in RS, and to propose solutions for overcoming those issues. In this regard, at the end of each section, we have drafted recommendations. We believe that the report *Right to Asylum in the Republic of Serbia 2019* will contribute to a better understanding of the refugee situation and help the RS authorities in establishing a more efficient asylum system.

This Report was prepared by: Bogdan Krasić (1. Statistics and 7. Integration), Zorana Teodorović (2. Access to the Asylum Procedure), Marko Štambuk (3. Competent Asylum Authorities' Practice), Bojan Stojanović, Goran Sandić, Senka Škero Koprivica (4. Asylum Seeker Accommodation), Nikolina Milić (5. Situation of Unaccompanied and Separated Children), Ana Trifunović (6. Situation of Asylum Seekers Survivors of Sexual and Gender-based Violence), and Milana Todorović (7. Integration). In doing so, they have relied on the assistance provided by Anja Stefanović.

2 Considering they come from unsafe countries or countries affected by war (e.g. Syria, Iraq, Afghanistan, etc.).

1. STATISTICS

All the statistics relating to the first-instance asylum procedure and the number of migrants in the RS have been obtained from the UNHCR Office in Belgrade, which receives official activity reports and statistics from the Ministry of the Interior. The data refers to the period 1 January to 31 December 2019. The Asylum Office (first-instance authority) does not publish the data and the activity reports on the webpage of the Ministry of the Interior.

The Asylum Commission (second-instance authority) and the Administrative Court responded to the BCHR requests for access to information of public importance by providing the requested information for the period from 1 January to 30 September 2019.[3] The data from their responses is provided in this section of the Report.

1.1. Numbers of Asylum Seekers and Other Migrants

In 2019, 12,937 persons expressed their intention to apply for asylum in the RS, i.e., were registered during the asylum procedure. That is an increase relative to 2018, when 8,436 persons intending to apply for asylum were registered over the same period.

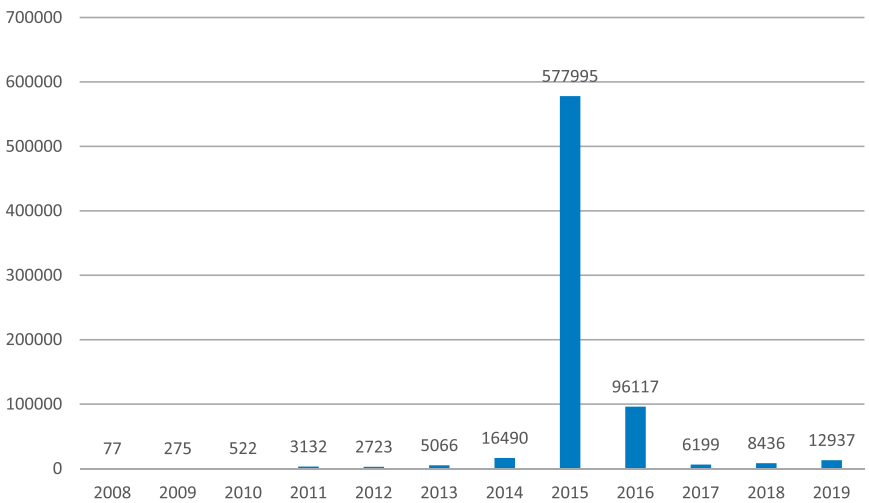
Out of the total number of foreigners who expressed their intention to apply for asylum in the RS in 2019, there were 12,052 men and 885 women. In terms the age structure, 2,939 were children, of whom 823 unaccompanied and separated children. The majority of the unaccompanied and separated children arrived from Afghanistan (605), Pakistan (86) and Bangladesh (44).

The number of persons who expressed their intention to apply for asylum has been on the rise in 2019, and peaked in November. Thus, 389 asylum seekers were registered in January, 467 in February, 693 in March, 720 in April, 1,174 in May, 1,151 in June, 1,562 in July, 1,240 in August, 1,658 in September, 1,120 in October, 1,791 in November and 972 in December.

3 Response by the Asylum Commission No. 27-A-1169–27/18 of 8 November 2019; Response by the Administrative Court No. Su II 17-a 93/19 of 7 November 2019.

Table 1: Locations where intention to seek asylum was registered in 2019, by 31 December 2019.

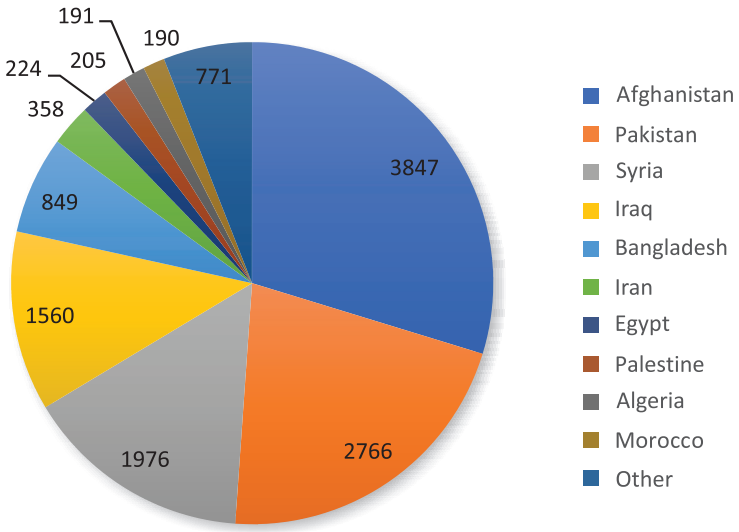
Police Departments	11,784
Border Crossings	1,041
Airport "Nikola Tesla"	68
Shelter for Foreigners	8
Asylum Office	36



Graph 1: Number of expressed intentions to seek asylum, i.e., intentions to apply for asylum, since the establishment of the national asylum system in 2008, by 31 December 2019.

Most of the foreigners who expressed their intention to apply for asylum in the RS in 2019 were nationals of Afghanistan, (3,847), followed by Pakistan (2,766), Syria (1,976), and Iraq (1,560). In addition to these, relatively significant numbers of asylum seekers came in the RS also from Bangladesh (849), Iran (358), Egypt (224), Palestine (205), Algeria (191), Morocco (190), India (149), and Eritrea (125). They are followed by: Somalia (103), Libya (80), Turkey (54), Burundi (52), Yemen (32), Lebanon (18), Tunisia and Sudan (14), China (11), Cuba (9), Cameroon (8), Azerbaijan and Russia (seven from each), Albania, Ghana, Northern Macedonia and Kuwait (six from each), Nepal and Nigeria (five from each), and Bosnia and Herzegovina, Guinea, Jordan and Ukraine (four from each). The smallest number of asylum seekers arrived from the following

countries: Bulgaria, the Comoros, Congo, and Romania (three from each), Chad, Germany, Greece, Kazakhstan, Mali, Myanmar, Senegal, Sri Lanka (two from each), and DR Congo, Georgia, Israel, South Africa, South Sudan, Peru, Sierra Leone, Togo, United States, and the United Kingdom (one from each).



Graph 2: Countries of origin of asylum seekers who expressed intention to apply for asylum in 2019

The statistics in this chapter refer primarily to the asylum seekers who have applied for asylum in the RS. However, according to the UNHCR observations, the number of migrants (including those who did not seek asylum) in the RS in 2019 is slightly higher. Thus, the number of migrants in the RS ranged from 4,500 in January, to 3,000 in August, and 5,850 in December. The number of persons accommodated at the Reception/Transit Centres (RTCs) and Asylum Centres (ACs) was slightly lower and fluctuated in the course of 2019, from 4,200 in January, to 2,400 in August, and 5,200 in December. The number of the identified newly arrived migrants ranged from 694 in January, over 4,123 in November to 1,713 in December. According to the UNHCR data, during 2019, there were 30,216 newly arrived migrants identified in the RS, in total.[4]

4 *Serbia November 2019 Snapshot* (UNHCR), available at: https://reliefweb.int/report/serbia/unhcr-serbia-snapshot-november-2019.

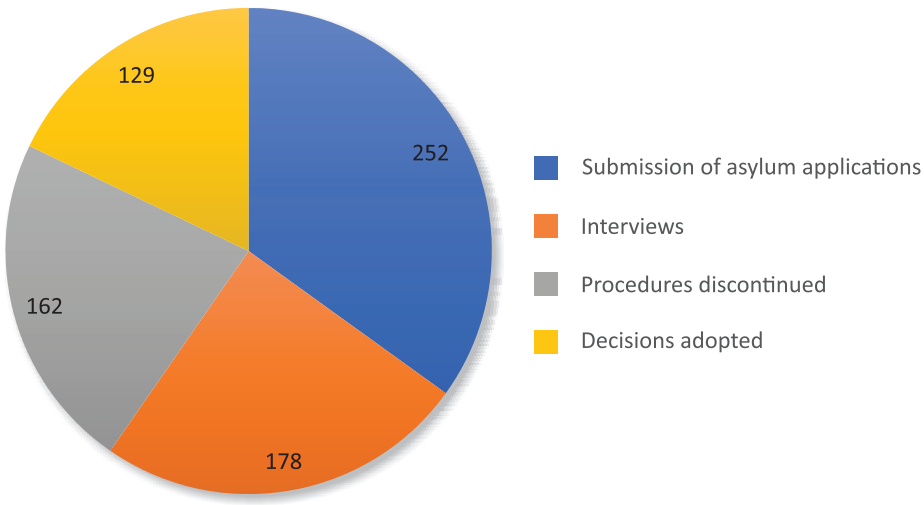
1.2. Asylum Office Activities

In 2019, 252 persons made asylum applications. Out of that number, 78 asylum applications were made to the Asylum Office in writing. The number of asylum applications is slightly lower than in 2018, when 327 applications were made. In 2019, the largest number of asylum applications were made by nationals of Iran (63), Afghanistan (38), Burundi (30), Iraq (19), and Turkey (14).

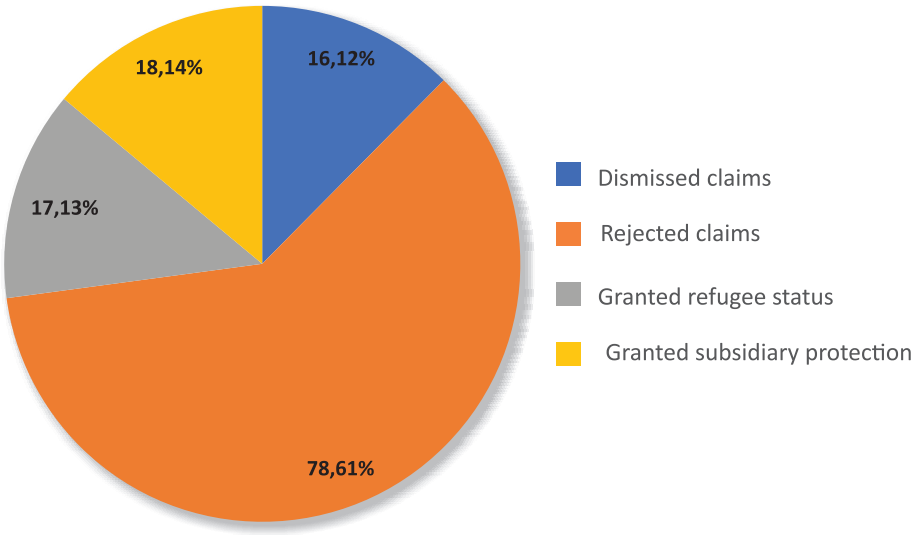
During that same period, the Asylum Office interviewed 178 persons in the course of the asylum procedures. In all, 35 asylum applications were upheld, while 12 asylum applications submitted for 16 persons were dismissed. The first-instance authority rejected 55 asylum applications made for 78 persons. The Asylum Office discontinued the asylum procedure in 133 cases, relating to 162 persons, mostly on the grounds of the asylum seekers having left the RS or the place of residence.

Out of the 35 asylum applications upheld in 2019, the Asylum Office adopted decisions granting refugee status in 17 cases, and subsidiary protection in 18 cases. Refugee status was granted to nationals of Iran (5), Afghanistan (4), Russian Federation (3), Cuba (3), Iraq (1) and China (1). Subsidiary protection was granted to nationals of Syria (6), Iraq (5), Libya (3), Pakistan (2), Iran (1) and Afghanistan (1).

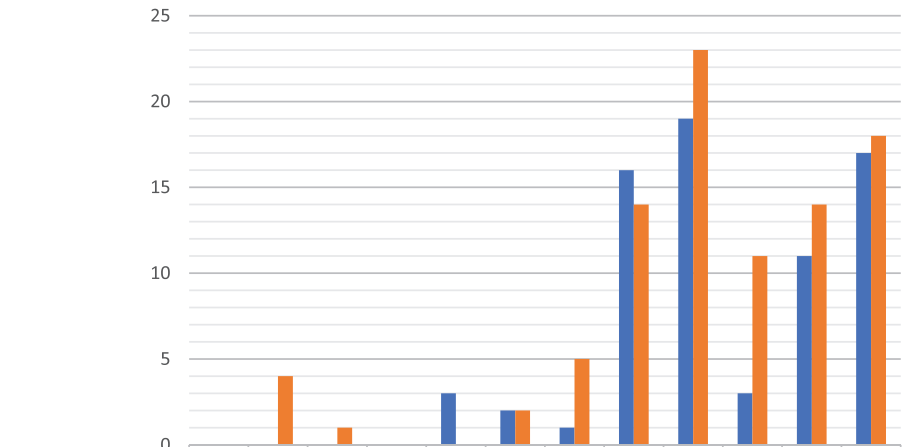
From the establishment of the national asylum system in 2008, as of 31 December 2019, the Asylum Office upheld the asylum applications made by 164 foreigners. Refugee status was granted to 72 persons, while subsidiary protection was granted to 92 persons.



Graph 3: Procedures conducted in 2019 (number of persons).



Graph 4: Decisions adopted in 2019 (number of persons).



	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Asylum	0	0	0	0	3	2	1	16	19	3	11	17
Subsidiary protection	0	4	1	0	0	2	5	14	23	11	14	18

Graph 5: Positive decisions adopted in the asylum procedure by year.

1.3. Asylum Commission and Administrative Court Activities

The Asylum Commission received 45 appeals in the period between January 1 and September 30, 2019. Out of these, 44 were appeals against the decisions of the Asylum Office, and one was filed on the grounds of the first-instance decision not issued within the legally prescribed time limit (administrative silence). During the same period, the Asylum Commission issued 43 decisions in the appeal procedures, of which 27 rejecting and 16 upholding the appeals. The second-instance authority issued one decision reversing the negative first-instance decision and upholding the asylum application.

The Administrative Court received 17 claims against the decisions of the Asylum Commission in the period from 1 January to 30 September 2019. Out of the above number of cases initiated in 2019, at the time of writing this Report, five administrative disputes were resolved by dismissing the claim. In addition, in the above period, the Administrative Court resolved 12 additional administrative disputes that had been initiated in the previous years. Out of that number, only two claims were upheld.

2. ACCESS TO THE ASYLUM PROCEDURE

By ratifying the Convention Relating to the Status of Refugees[5] and its Protocol on the Status of Refugees,[6] the RS has taken the obligation to respect the principle of *non-refoulement,* i.e. the prohibition from returning a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened.[7] In addition, having ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[8] (Convention against Torture), the RS has committed to respecting the principle of *non-refoulement* in the context of the prohibition of torture.[9] That means, *inter alia*, that the RS is under the obligation to ensure access to the asylum procedure to all foreigners who have a well-founded fear of persecution in their country of origin or who would face a real risk of torture if returned to their country of origin or to a third country.[10]

The right to asylum is guaranteed by the Constitution of the Republic of Serbia (the RS Constitution),[11] while the asylum procedure is governed by a separate law – the Law on Asylum and Temporary Protection [12] (LATP). In accordance with the LATP, the Asylum Office (within the Directorate for Foreigners,

5 *Official Gazette of the FPRY – International Treaties and Other Agreements*, No. 7/60.

6 *Official Gazette of the SFRY – International Treaties and Other Agreement*, No. 15/67.

7 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 (Article 33, para. 1 of the Convention Relating to the Status of Refugees).

8 *Official Gazette of the RS FRY – International Treaties and other Agreements*, No. 9/91.

9 No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in risk of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights (Article 3, paras. 1 and 2 of the Convention against Torture).

10 The above universal international treaties are just some of the instruments ratified by the RS that oblige the RS to ensure a specific treatment of persons in need of international protection. The principle of *non-refoulement* is also implicitly stipulated in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Sl. list SCG – International Treaties*, No. 9/03).

11 Article 57 (*Official Gazette of the RS,* No. 98/06). The RS Constitution equates asylum with refugee protection in terms of the refugee definition in Article 1(a) of the Convention on the Status of Refugees.

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

MI) conducts the first-instance asylum procedure and allows foreigners to present all relevant facts relating to the hardships they would face if they were returned to their country of origin or to another country. All procedural issues not specified by the LATP are subject to the provisions of the Law on General Administrative Procedure[13] (LGAP).

Foreigners may access the asylum procedure in the RS by expressing their intention to apply for asylum before an authorised MI police officer. The LATP stipulates that foreigners inside the territory of the RS have the right to express their intention to seek asylum and to apply for asylum in the RS.[14] A foreigner who has expressed his/her intention to seek asylum will be issued a registration certificate by the authorised MI police officer.[15] A foreigner who has been issued the certificate will be referred to an Asylum Centre or another facility designated for the accommodation of asylum seekers, where he/she must report within 72 hours from the issuance of the certificate.[16] The expression of intention is, therefore, the initial step that the foreigner needs to undertake to access the asylum system and that is the basis for his/her lawful stay in the RS.

However, despite a solid legal framework in place, as a result of the established practice of the competent authorities, in some cases, persons who are in need of international protection are unable to apply for asylum. They have not been ensured access to the asylum procedure, even though they are inside the territory of the RS. In this chapter, we will outline the major challenges faced by foreigners in accessing the asylum procedure in the RS.

2.1. Access to the Asylum Procedure in Police Departments and Border Zone

The LATP permits foreigners to express their intention to seek asylum inside the territory of the RS and at border crossings, i.e., at the border zone. In principle, the border police have discretion to decide whom to admit into the RS. However, when carrying out border control, border police officers must ensure that persons in need of international protection have access to the asylum procedure in order to comply with the principle of *non-refoulement*.[17]

During 2019, 12,937 persons expressed their intention to seek asylum in the RS, and were registered in the asylum procedure. As in the previous year, the

13 *Official Gazette of the RS,* No. 18/16 and 95/18 – authentic interpretation.

14 Article 4 of LATP.

15 Article 35, para. 11 of the LATP.

16 Article 35, para. 3 of the LATP.

17 Article 33 in conjunction with Article 31 of the Convention Relating to the Status of Refugees.

largest number of the registration certificates were issued by the police departments in the inland areas of the RS, specifically 11,784 registration certificates. In 2019, a total of 1,041 foreigners expressed their intention to seek asylum in the RS at the border zone.

The total of 12,937 does not reflect the actual number of those who genuinely wish to seek asylum in the RS. This is because the asylum procedure is formally initiated by submitting an asylum application to an authorised officer of the Asylum Office within 15 days from the date of registration.[18] Specifically, in 2019, only 252 persons actually submitted their asylum applications. Based on this information, it can be assumed that the RS is still a transit country for many foreigners who have expressed their intention to seek asylum. However, in some cases, foreigners do not submit the asylum application because of the difficulties they face in trying to do so.[19]

However, in not such a small number of cases, foreigners use the registration certificate to temporarily regulate their legal status in the RS.[20] That means that the intention to seek asylum is expressed also by those who have no genuine wish to seek asylum in the RS and who only wish to legalise their stay in the RS before they can continue their journey to another country. In practice, this places an undue burden on the asylum system and results in the inability of the competent authorities to promptly process the claims of those asylum seekers who genuinely wish to seek international protection in the RS.

On the other hand, those foreign nationals who do not perceive the RS as the country of asylum should certainly be provided with humanitarian assistance, if they meet the legal requirements, without necessarily being allowed access to the asylum procedure. That would allow the competent state authorities and some non-governmental organisations providing assistance to asylum seekers to redirect their resourses to those foreigners who are in need of international protection and who genuinely wish to apply for asylum.

The BCHR has identified several reasons why the asylum seekers in the RS continued to face difficulties in accessing the asylum procedure in police departments and at the border zone in 2019. First of all, the Ministry of the Interior (still) issues the certificate of expressed intention to seek asylum in the Cyrillic alphabet only. The MI police officers, at registration, still do not inform the asylum seekers about their rights and obligations in a language they can understand, and consequently, many foreigners inadvertently fail to take certain procedural steps, which prevents them to access the asylum system.

18 Article 36, para. 1 of the LATP

19 See Section 2.3. Challenges Related to Submitting Asylum Applications.

20 Information obtained during the interviews conducted by the BCHR legal team with a large number of asylum seekers in the RS in 2019.

2.1.1. Issuing Registration Certificates in Serbian

A foreigner who has expressed his/her intention to seek asylum will be issued a registration certificate by an authorised MI police officer.[21] The method and procedure of registration, as well as the contents of the registration certificate, are prescribed by the Rulebook on the Procedure of Registration, Design and Content of the Certificate on Registration of a Foreigner Who Expressed Intention to Seek Asylum[22] (Rulebook on Registration). The certificate indicates that the foreigner has been referred to an Asylum Centre or another facility designated for the accommodation of asylum seekers, where he/she must report within 72 hours from the issuance of the certificate.[23] Exceptionally, a foreigner may also express his/her intention to seek asylum at the Asylum Centre, in another facility designated for the accommodation of asylum seekers, or at the Shelter for Foreigners.[24]

However, the MI issues the registration certificates only in the Serbian language, in the Cyrillic alphabet.[25] Due to the language barrier, i.e., considering that most applicants cannot understand Serbian and do not use the Cyrillic alphabet, they cannot be reasonably expected to understand the contents and the instructions provided in the certificate.

In accordance with the provisions of the LATP, if a foreigner, after having been registered, fails to report at the Asylum Centre or other facility designated for accommodation of asylum seekers within the specified 72-hour period, he/she shall be subject to the regulations governing the legal status of foreigners.[26] That means that unless the foreigner has another legal basis for staying in the RS, he/she will be obliged to voluntarily or forcibly leave the RS. In that way, a person who faces a (potential) risk of persecution or abuse if he/she were returned to the country of origin will not be treated as such by the MI simply because he/she is unable to read the Cyrillic alphabet in the certificate of expressed intention to seek asylum. Consequently, he/she would be subject to the less favourable regulations, which could result in the violation of the principle of *non-refoulement*.[27]

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21 Article 35, para. 11 of the LATP.

22 *Official Gazette of the RS*, No. 42/18.

23 Article 35, para. 3 of the LATP.

24 Article 35, para. 2 of the LATP.

25 Article 8 of the Rulebook on the Procedure of Registration, Design and Content of the Certificate on Registration of a Foreigner Who Expressed Intention to Seek Asylum. The registration certificate form is available in Serbian at: https://bit.ly/34xkK7X.

26 Article 35, para. 13 of the LATP.

27 See further *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, p.13, available at: http://azil.rs/pravo-na-azil-u-republici-srbiji-izvestaj-za-period-januar-jun-2019/.

2.1.2. Informing Asylum Seekers about Rights and Obligations

The frontline police officers and civil servants are obliged to inform asylum seekers about all actions that need to be taken and about their rights and obligations during their stay in the RS.[28] The LATP does not stipulate exactly how foreigners are to be informed about their rights and obligations in practice. However, it is logical that they should be informed in a language they can understand.

Such obligation is specified, *inter alia*, in the UNHCR's document *Reception Standards for Asylum Seekers in the European Union*,[29] which states that, irrespective of where foreigners apply for asylum, they must have access to basic information. This information relates to the asylum procedure, including access to interpretation facilities and legal counselling.[30] Such information may be communicated orally or in writing, in a specially prepared form that the person can understand and sign. It is important that the information is provided in a reliable and complete manner, so as not to mislead the person about his/her status, the measures to be taken against him/her, or the rights and obligations available to him/her during his/her stay in the RS.

In addition, the above UNHCR's document *Reception Standards for Asylum Seekers in the European Union* urges States to inform asylum seekers in writing and without delay of the practical arrangements for their reception and other useful information concerning the asylum procedure and their rights and obligations. The authorities are urged, in particular, to share with asylum seekers all relevant information relating to the asylum procedure.[31]

In their letter[32] sent to the BCHR, the MI states that police officers inform all persons who have expressed their intention to seek asylum of their right to apply for asylum and other rights and obligations, in accordance with Article 56 of the LATP. Based on the experience of the BCHR legal team that represents asylum seekers in the asylum procedure, the Asylum Office staff informs the asylum seeker about his/her rights and obligations during the asylum procedure only when he/she is to submit the asylum application. In addition, they do so before the beginning of the oral hearing in the asylum procedure.

However, the question arises whether other police officers and other civil servants comply with this obligation at registration. Based on the information obtained by the BCHR lawyers during the interviews with their clients, it can be concluded that the asylum applicants are not advised about their rights and

28 Article 56 of the LATP.

29 *Reception Standards for Asylum Seekers in the European Union*, UNHCR (Geneva, July 2000), available at: https://www.unhcr.org/4aa763899.pdf.

30 *Ibid.,* p.7 Section C/II.

31 *Ibid.,* p. 8 Section C/II.

32 Letter of the Ministry of the Interior, Police Directorate, Border Police Administration, No. 26–1991/18 of 6 December 2018.

obligations when they express the intention to seek asylum, and particularly not in a language they can understand.

If a foreigner is not aware of his/her rights and obligations in the asylum procedure, he/she will not be able to act in accordance with the law, and consequently he/she could fail to take certain actions in the asylum procedure (e.g. collect certain evidence, seek legal assistance, refrain from changing the place of residence without notifying the Asylum Office, etc.). A foreigner could fail to apply for asylum at all because he/she mistakenly believes that the RS provides only temporary accommodation for refugees.

2.1.3. Conclusion and Recommendations

The MI's current practice still does not ensure unimpeded access to the asylum procedure in the RS. This conclusion is supported by the fact that the certificate of expressed intention to seek asylum is not issued to foreigners in a language they can understand, and that foreigners are not informed by the police officers about their rights and obligations adequately, i.e. in a way they can understand.

With that regard, the MI should start issuing as soon as possible certificates of registration of the intention to seek asylum in languages that foreigners can understand. The MI police officers should inform asylum seekers about their rights and obligations at registration. This information may be communicated orally or in writing, in a specially prepared form that the foreigner can understand. It is important that MI officers provide information to foreigners in a reliable and complete manner so as not to mislead the foreigner about his/her status or the measures that will be taken against him/her.

Furthermore, the MI and the CRM need to develop brochures indicating important information in the languages that most asylum seekers use and ensure that they are available in all of the MI organisational units and at the asylum seeker accommodation facilities. That would bridge the language barrier between asylum seekers and civil servants (when an interpreter is not present) and further ensure that asylum seekers are informed of their rights and obligations.

2.2. Access to the Asylum Procedure at "Nikola Tesla" Airport

In 2019, the Belgrade Border Police Station (BPS) at "Nikola Tesla" Airport issued 68 registration certificates[33] to foreigners who had expressed their intention to seek asylum in the RS. Out of the total number of registrations, the BCHR lawyers intervened in eleven cases, concerning 23 foreigners, personally by going to the airport or by phone, with the SGP staff. In most cases, the above interventions occur when foreigners claiming they have sought asylum before a Border Police officer are refused entry into the RS.

33 Information provided by UNHCR Serbia.

The persons on whose behalf the BCHR intervened included nationals of Burundi and Turkish Republic. The increase in the number of Burundi nationals coming to the RS may be attributed to the Decision on the Abolition of Visas for Nationals of the Republic of Burundi, which is in effect.[34]

Although, in principle, foreigners may express the intention to seek asylum at "Nikola Tesla" Airport and thus access the asylum procedure, specific legal provisions and the Belgrade BPS practice still suffer from numerous shortcomings. These shortcomings have already been identified in the reports of the RS Ombudsman's National Preventive Mechanism against Torture and the UN Special Rapporteur on Torture, Inhuman and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Special Rapportuer on Torture). Unfortunately, the MI has still not undertaken any substantive measures to eliminate the identified shortcomings, which will be further elaborated below.

2.2.1. Refusal of Entry into the Country without Adequate Procedural Guarantees

Under the FL, the competent authorities are obliged to issue foreigners refused entry into the RS decisions specifying the grounds for refusal of entry and mark the refusal of entry in their travel documents. The decisions on refusal of entry into the RS are bilingual (in Serbian and English).[35] Such decisions may be appealed within eight days from the day of service. The appeals are reviewed by the MI and do not stay enforcement of the decisions automatically, having suspensive effect only when there are special humanitarian reasons or the risk of grave human rights violations if the foreigner were returned to a particular country.[36]

UN Special Rapporteur on Torture noted in his report from January 2019 that the considerations underlying and informing the decision of the Border Police to refuse entry and initiate forcible return were not documented with sufficient precision in individual case files. Besides, none of these deportation decision appeared to be subject to a legal remedy involving an individual assessment of the risk of *refoulement* to a place where the person in question might be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[37]

The UN Special Rapporteur on Torture noted that decisions on refusal of entry, if not properly documented and subjected to independent judicial review, bear

34 *Official Gazette of the RS*. No. 35/18.

35 Decisions on refusal of entry are issued in accordance with the Rulebook on the Design of Forms of Decisions Refusing or Granting Entry into the RS and Entry of Data on Refusal of Entry in the Travel Documents of Foreigners (*Official Gazette of the RS*, No. 50/18). The decision on refusal of entry is an integral part of the Rulebook and is available at: https://bit.ly/33dEaPz.

36 Article 80 in conjunction with Article 83 of the FL.

37 *Visit to Serbia and Kosovo*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, adopted by the UN Human Rights Council, UN. Doc. A/HRC/40/59/Add.1 (25 January 2019), para. 50, available at: https://bit.ly/2YNQy5T.

a great risk of arbitrariness. In certain cases, such decisions may well amount to *refoulement* in violation of human rights law and, in particular, of the prohibition of torture and ill-treatment.[38] The procedure of deporting foreigners refused entry into the RS must be implemented in compliance with procedural guarantees.[39]

During their interventions, the BCHR lawyers noted that the Belgrade BPS officers still did not issue foreigners refused entry individual decisions specifying the grounds why they were refused entry into the RS.[40] Therefore, foreigners, in principle, do not have the possibility of appealing such decisions, because the Belgrade BPS does not issue them in the first place.[41] A decision on refusal of entry has been issued only in one case, that of Turkish national H.I.[42]

The deficiencies identified by the UN Special Rapporteur on Torture were not eliminated in 2019. To the best knowledge of the BCHR, the Belgrade BPS practice leads to the conclusion that the procedure in which foreigners are refused entry into the country is still for the most part implemented in an informal fashion, without compliance with any procedural guarantees.

2.2.2. Expressing Intention to Seek Asylum

In the vast majority of cases in which BCHR lawyers intervened, foreigners expressed the intention to seek asylum at the airport only after the Border Police officers refused them entry into the RS.[43] Under the FL, foreigners not fulfilling requirements for lawful entry may be allowed to enter Serbia for humanitarian reasons, which is precisely why they seek asylum.[44]

When foreigners express the intention to seek asylum at border crossings, police officers are under the obligation to provide them with access to the asylum procedure, register their intention and issue them registration certificates.[45] Most foreigners on whose behalf BCHR intervened were issued the registration certificate, but only after some time, i.e., after they had been detained (in some cases) for several days at the Airport. On the basis of the issued certificates, the persons are referred to the asylum procedure implemented by the Asylum Office.

38 *Ibid.,* para. 51.

39 *Ibid.,* p. 8, Section G.

40 Article 15, para. 2 of the FL. That has been observed only in relation to the foreigners for whom the BCHR lawyers intervened.

41 The right to appeal in such cases is provided by Article 16 of the FL.

42 The BCHR lawyers intervened in this case.

43 It, however, remained questionable whether the foreigners on whose behalf the BCHR intervened actually wished to apply for asylum, given that some of them, once they were granted entry into the RS, no longer maintained contact with the BCHR or expressed interest in the asylum procedure in the RS.

44 Article 15, para. 2 of the FL.

45 Article 35 of the LATP.

Regardless of the fact that a foreigner does not fulfil the requirements for entry into the RS, the Border Police officers are under the obligation to review the potential risks of persecution[46] or treatment violating the prohibition of torture[47] before they return him/her to the country he/she had come from to the RS. Therefore, the competent authority, in this case the Belgrade BPS, must provide the foreigner with access to the procedure in which he/she will relate all the relevant facts of the risks he/she may be exposed to if he/she were returned to the country of origin or any of the countries he/she had passed through on the way to the RS.

The Belgrade BPS officers have to be aware of the fact that their denial of access to the asylum procedure or refusal of entry to foreigners, who have no possibility of appeal, may have severe and irreparable consequences. That is why they need to devote particular attention to foreigners coming from war-torn countries or countries with poor human rights records.

2.2.3. Inadequate Accommodation Conditions at "Nikola Tesla" Airport

The LATP provides for the implementation of the asylum procedure at border crossings or transit areas in airports or inland ports.[48] The Law allows the implementation of the asylum procedure at these venues provided that the asylum seekers are ensured adequate accommodation and food, that their asylum applications may be dismissed as unfounded, and the requisite circumstances are in place to review their applications under the accelerated procedure.[49] Furthermore, the asylum procedure may be conducted at a border crossing in cases when the asylum application may be dismissed without reviewing it on the merits.[50]

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46 In the context of Article 33 of the 1951 Convention Relating to the Status of Refugees.

47 In the context of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

48 Article 41 of the LATP.

49 Under Article 40 of the LATP, if it has been established that: 1) the applicant has presented only the facts that are irrelevant to the examination of the admissibility of the asylum application; 2) the applicant has consciously misled the Asylum Office by presenting false information; 3) the applicant has destroyed or concealed documents establishing his/her identity and/or nationality in bad faith so as to provide false information about his/her identity and/or nationality; 4) the applicant has presented manifestly inconsistent, contradictory, inaccurate, or unconvincing statements, contrary to the verified information about the country of origin, rendering his/her application implausible; 5) the applicant has submitted a subsequent asylum application that is admissible in accordance with Article 46, paras. 2 and 3 of this Law; 6) the applicant has submitted his/her asylum application for the clear purpose of postponing or precluding his/her removal from the Republic of Serbia; 7) the applicant poses a grave threat to national security or public order; 8) it is possible to apply the safe country of origin concept.

50 Article 42 of the LATP lays down that decisions dismissing asylum applications without reviewing them on the merits are to be rendered if it is possible to apply the first country of asylum concept in accordance with Article 43 of the LATP or the safe third country concept in accordance with Article 45 of the LATP.

The Asylum Office does not issue a separate decision allowing the implementation of the asylum procedure in a transit zone, but it is obliged to rule on the submitted application within 28 days from the date of submission.[51] If it fails to do so, it must allow the asylum seeker to enter into the RS and pursue his/her asylum claim in the regular procedure.[52] The applicant is entitled to appeal a decision on his/her asylum application submitted in a transit zone with the Asylum Commission within five days from the date of service.[53]

Provision of adequate accommodation and food for asylum seekers is one of the prerequisites that must be in place to implement the asylum procedure in the transit zone. In its report on its visit to the Belgrade BPS at "Nikola Tesla" Airport, the RS Ombudsman qualified the conditions in the facility in which foreigners refused entry into the RS are detained as substandard in terms of space, furnishing, hygiene, heating and lighting.[54] The UN Special Rapporteur on Torture came to that conclusion in his report as well.[55] In his report, he states, *inter alia*, that persons deprived of liberty in the transit zone must be ensured adequate conditions, respecting their personal dignity.[56]

To the best of BCHR's knowledge, the living conditions in the airport transit zone had not been improved in the course of 2019. The conditions for accommodation of asylum seekers at the airport are still inadequate.[57] That means that the entire asylum procedure cannot be implemented at the airport. Instead, after registering the foreigners' intention to seek asylum at "Nikola Tesla" Airport, the Belgrade BPS officers refer them to a Reception Centre or an Asylum Centre, for further asylum procedure steps.[58]

2.2.4. Conclusion and Recommendations

The Belgrade BPS officers' failure to issue reasoned decisions refusing foreigners entry into the RS is in violation of the provision of the FL.[59] The UN

51 Article 41, para. 5 of the LATP.

52 Article 41, para. 6 of the LATP.

53 Article 41, para. 7 of the LATP.

54 *Report on the visit to the Belgrade Border Police Station at "Nikola Tesla" Airport*, NPM – the RS Ombudsman, Ref. No. 281–83/18, 25 October 2018, p. 5. The Report is available in Serbian at:<https://bit.ly/2YLnT0N>.

55 *Visit to Serbia and Kosovo*, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, adopted by the UN Human Rights Council UN, UN Doc. A/HRC/40/59/Add.1 (25 January 2019), para. 33, available at: https://bit.ly/2YNQy5T.

56 *Ibid.,* para. 108(a).

57 Article 41 of the LATP. Information provided by the Asylum Office officers at the joint UNHCR and Asylum Office seminar for Border Police held in Fruska Gora from 9 to 10 December, 2019.

58 Information provided by the BCHR lawyers who provided legal aid to foreigners detained at "Nikola Tesla" Airport.

59 Article 15 of the FL.

Special Rapporteur on Torture recommended to Serbia, *inter alia*, to ensure that such decisions were properly documented and subjected to independent judicial review. All persons issued such decisions must be informed, in a language they can understand, of their content and their rights, especially their right to a legal remedy. The MI should, as soon as possible, put in place the conditions for the fulfilment of this recommendation and review the possibility of proposing amendments to the FL to facilitate judicial reviews of decisions refusing foreigners entry into the country. Under the law as it stands now, foreigners may appeal such decisions with the MI, which is an administrative authority, albeit their appeals do not have suspensive effect.

The Belgrade BPS current practice indicates that the foreigners' need for international protection has been identified in specific cases. However, there is still a real risk that the BPS officers will not be able to recognise always such need. The Border Police officers must continuously inform themselves of the situation in war-affected countries and countries where human rights are flagrantly violated. With a view to precluding the risk of their failure to recognise *prima facie* refugees, the Border Police need to interview the foreigners about the reasons why they had left their country of origin, always with the assistance of interpreters and in consultation with the Asylum Office staff, before they decide to refuse them entry into the RS. Given that the Border Police may find it complicated to secure an interpreter in each individual case, the MI may wish to consider the possibility of soliciting UNHCR and other organisations to place interpretation services at the disposal of the Belgrade BPS.

Finally, the material conditions in the transit zone still fall short of those required to enable the detention of foreigners and implementation of the asylum procedure at the airport. The MI should provide the conditions for the detention of foreigners at "Nikola Tesla" Airport in accordance with the recommendation of the UN Special Rapporteur on Torture. The fact that the airport premises are privately owned and used only by the border police does not absolve the MI of their responsibility to ensure a dignified treatment of foreigners under their jurisdiction with full respect for their human rights.

2.3. Challenges Related to Submitting Asylum Applications

The LATP provisions stipulate that the asylum procedure is to be initiated by submitting an asylum application to an authorised Asylum Office officer, on the prescribed form, within 15 days of the date of registration at the latest.[60] In addition, the LATP stipulates that if the authorised Asylum Office officer does not enable a foreigner who has expressed his/her intention to submit the asylum application within that time limit, the foreigner may himself/herself fill in the

60 Article 36, para. 1 of the LATP

asylum application form within eight days after the expiry of the 15-day time limit after the date of registration.[61]

The competent authority's discouraging asylum applications made within the statutory 15-day time limit in practice means that the Asylum Office fails to schedule timely the time and place for this official action. This is due to the fact that the Asylum Office officers, who are based in Belgrade, are not present at Asylum Centres on everyday basis. The asylum application can be submitted at the time specified by the Asylum Office, when the first-instance authority officer comes to the facility where the asylum seeker is accommodated to take the his/her statement regarding the reasons for fleeing the country of origin and other circumstances.[62]

The difficulties in terms of accessing the asylum procedure in 2019 were caused also by the first-instance authority not scheduling the official application submission actions on a regular and timely basis. In addition, asylum seekers were able to apply for asylum only at the Asylum Centres, and not in other accommodation facilities (Reception/Transit Centres). Finally, access to the asylum procedure was further impeded by the asylum seekers' inability to submit the asylum application in writing by themselves, without the direct involvement of the Asylum Office officer in the procedure.

2.3.1. Failure to Timely Schedule Official Application Submission Actions

In practice, asylum application is submitted by the asylum seeker's legal representative addressing the Asylum Office in writing, requesting the asylum seeker to be scheduled an appointment to make the asylum application. As of mid-February 2019, the BCHR lawyers, acting as legal representatives, have repeatedly contacted[63] the Asylum Office officials requesting the appointments to be scheduled for more than a dozen persons to submit their asylum applications. For most of the BCHR clients, the Asylum Office would schedule the asylum application appointment only after three months, after having received four, and sometimes five, requests by their legal representatives.[64] Some of the BCHR clients still have not been scheduled the above official action in 2019.

One of the BCHR clients seeking to apply for asylum is an unaccompanied child, an Iranian national. He had been issued the registration certificate on 5 June 2018, and his asylum application was made almost a year later, on 20 May

61 Article 36, para. 2 of the LATP

62 The BCHR has been providing legal assistance to asylum seekers since 2012, and this practice of the Asylum Office has not changed since.

63 BCHR Letter No. 25/25 of 2 April 2019; Letter No. 25/32 of 16 April 2019, and Letter No. 25/45 of 28 May 2019. In addition, the first request for scheduling the official action was sent to the Asylum Office by email on 19 February 2019.

64 Article 36 of the LATP.

2019. Without considering in this Report the impact that this practice of the first-instance authority has had on the child, the authority had an obligation, in this case, to ensure the priority treatment and effective procedure to the child in accordance with the provisions of the LATP.[65]

Finally, in situations when the Asylum Office fails to schedule an appointment for the asylum application, foreigners have no access to the legal remedies specified by the LATP and the LGAP. In accordance with the LGAP provisions, an appeal may be filed against the decision of the first-instance authority,[66] or if the first-instance decision is not adopted within the prescribed time limit (appeal due to administrative silence).[67] In both those cases, the procedure needs to be initiated, i.e., the foreigner needs to submit an application. However, if the Asylum Office fails to schedule the official action initiating the first-instance procedure within the statutory time limit, the procedure would not be formally initiated. Consequently, there would be no access to legal remedy.

2.3.2. Inability to Apply for Asylum in All Accommodation Facilities

In practice, the Asylum Office conducts its official actions only at the Asylum Centres but not in other accommodation facilities under the jurisdiction of the Commissariat for Refugees and Migration (CRM). That means that all persons accommodated in Reception/Transit centres *de facto* have restricted access to the asylum procedure.[68]

If an asylum seeker does not stay at an Asylum Centre but at a Reception/Transit Centre where he/she was referred to at registration,[69] the officers of the CRM would subsequently relocate him/her to an Asylum Centre. Namely, after the asylum seeker's legal representative has submitted a request to the Asylum Office for the official application submission action to be scheduled, the Asylum Office would request the CRM to relocate the respective person to an Asylum Centre. That means that asylum seekers stay at the Reception/Transit Centres until the Asylum Office requests the CRM to relocate them. According to the information obtained by the BCHR, this is an informal practice established by the CRM and the MI.

65 Article 12, para. 9 of the LATP.

66 Article 151, para. 1 of the LGAP.

67 Article 151, para. 3 of the LGAP.

68 In accordance with Article 23 of the LATP, all Asylum Centres and Reception Centres are under the jurisdiction of the CRM.

69 The does not explicitly state that asylum seekers are to be accommodated exclusively in Asylum Centres, but it states that the material reception conditions are to be provided at the Asylum Centre or another facility designated for accommodation of asylum seekers (Article 51 LATP).

Although that is not stipulated by any law, the authors of this Report assume that, in practice, an agreement has been reached between the competent authorities that the Asylum Office would conduct the official application submission action only at the Asylum Centres. All other facilities (Reception/Transit Centres) were established to accommodate migrants staying in the RS without any intention of seeking asylum.[70] However, at the time of registration, the MI police officers refer foreigners who have expressed their intention to seek asylum to the Reception/Transit Centres, regardless of the fact that the Asylum Office does not conduct the asylum procedure in these centres. In practice, that usually happens if, at the moment when the MI registers the foreigner's intention to seek asylum, the Asylum Centre is at full accommodation capacity.

In addition, the BCHR lawyers have noted that, on occasion, the CRM informally refers asylum seekers from the overcrowded Reception/Transit Centres to the Asylum Centres without any prior notification to their legal representatives and the Asylum Office. Notwithstanding the CRM's good intention to place foreigners in one of the facilities where the asylum procedure is conducted, such treatment may put the asylum seekers at a disadvantage. Specifically, both the foreigners' legal representatives and the Asylum Office may lose track of the foreigner[71] who is to apply for asylum[72] and his/her whereabouts. Consequently, the foreigner's stay in the RS may become illegal within the meaning of the provisions of the LATP.[73] That could further result in his/her removal from the RS, which could lead to a breach of the principle of *non-refoulement*.

2.3.3. In Practice Asylum Seekers Cannot Apply for Asylum by Themselves

As noted, under the provisions of the LATP, in the event the Asylum Office does not provide him/her an opportunity to apply for asylum, the asylum seeker may apply for asylum in writing by himself/herself, within eight days from the day of expiry of the 15-day timeline running as of the moment of registration.[74] In the experience of the BCHR lawyers, asylum seekers cannot avail themselves of this legal possibility in practice.

Although, according to the statistics, 78 asylum applications were submitted in writing during 2019,[75] that does not mean that the Asylum Office acted on all

70 See further *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, p.16.

71 See further Ana Trkulja (ed.), *Right to Asylum in the Republic of Serbia 2018*, Belgrade Centre for Human Rights (Belgrade, 2019), p. 72 (hereinafter: *Right to Asylum in the Republic of Serbia 2018*), available in Serbian at http://bit.ly/2Sc7cK9.

72 Such action was recorded also in two other cases, relating to two Iranian families represented by the BCHR lawyers.

73 Article 35, para. 13 of the LATP.

74 Article 36, para. 2 of the LATP.

75 Information provided by UNHCR Serbia.

those applications. Specifically, the BCHR assumes that the above figures provided by the Asylum Office include also the applications submitted by the BCHR clients in writing. However, in practice, the first-instance authority only receives the above applications, without acting upon them, i.e., insists on the oral submission of the application and schedules the appointments when the above action would take place.

In the case of Turkish nationals – K.A.F, A.A.S. and A.B.F – their legal representatives filled in the asylum application forms after interviewing them, and sent them to the Asylum Office.[76] Two weeks later, the Asylum Office notified the legal representatives that the official application submission action would be performed in one of the Asylum Centres in the RS. The Asylum Office obviously fully neglected the fact that the asylum seekers had applied for asylum by themselves with their legal representatives' assistance and in accordance with the LATP. The Asylum Office acted in this way also in 2018, in the case of Iranian nationals.[77]

Another case was recorded in early 2019, when the BCHR legal representatives submitted to the Asylum Office a completed asylum application form for an Iranian woman.[78] One month later, the Asylum Office conducted the official application submission action in this case, ignoring the fact that asylum seeker had already filled in and submitted the asylum application by herself, with the assistance of her legal representative.

Therefore, in practice, asylum seekers are not able to apply for asylum by themselves. It remains unclear how the legislator expects legally unschooled individuals to apply for asylum by themselves since not all of them have access to legal assistance and not all of them are informed of their rights, obligations and the timelines by which they have to take specific procedural actions. This opportunity is further impeded by the fact that the Asylum Office officers are not present at the facilities in which asylum seekers are accommodated on a daily basis, and that they are actually not at the foreigners' disposal to provide them the necessary information and receive their asylum applications.[79]

2.3.4. Conclusion and Recommendations

The current MI practice still does not ensure unimpeded access to the asylum procedure in the RS with respect to applying for asylum. The Asylum Office conducts the application submission actions exclusively at the Asylum Centres, often outside of the statutory timelines. In addition, foreigners are not able to complete an asylum application and submit it to the first-instance authority by themselves.

76 BCHR Letter No. 24/261– 1 of 15 January 2019.

77 BCHR Letter No. 24/204–217 of 11 October 2018.

78 BCHR Letter No. 24/255 of 4 January 2019.

79 Under Article 48 of the LATP, asylum seekers are entitled to legal assistance, while Article 36 of the LATP requires the competent authorities to inform asylum seekers of their rights and obligations, particularly their rights to residence, free interpretation services and legal assistance, and access to UNHCR.

The Asylum Office should conduct the official application submission actions in all accommodation facilities, including Reception/Transit Centres. In this regard, the CRM needs to provide the material and technical conditions for conducting official application submission actions in the course of the asylum procedure in all these facilities. Furthermore, the MI needs to ensure everyday presence of the Asylum Office officers at all accommodation facilities designated for asylum seekers or persons who have expressed their intention to apply for asylum in the RS. Ensuring that an Asylum Office officer is permanently present in all accommodation facilities would have a multiple function. Firstly, all those who have expressed their intention to seek asylum would be properly informed and advised of their rights and obligations, regardless of the type or category of facility in which they were placed when expressing their intention. This would ensure that asylum seekers are informed and that they have a possibility to apply for asylum in a timely manner. The first-instance authority officers would not have to spend additional time and resources for receiving asylum applications. That would ensure that the Asylum Office is no longer in a situation that it cannot comply with the statutory timelines, which would directly affect the length of the asylum procedure.

The Asylum Office needs to comply with the LATP, by allowing foreigners to complete and submit their asylum applications by themselves. The presence of an Asylum Office officer in all facilities designated for the accommodation of asylum seekers would allow foreigners to submit their asylum applications in writing by themselves and to hand them directly to the first-instance authority officer at the accommodation facility.

2.4. Access to the Asylum Procedure during Misdemeanour Proceedings

One the refugee law principles is the principle of non-penalisation for illegal entry or illegal stay. The above principle is stipulated by both the Convention Relating to the Status of Refugee and the LATP.[80] This type of protection is granted to refugees as they are unable to comply with the conditions of legal entry into a particular country, having fled from their countries of origin due to reasons such as persecution, war or serious human rights violations. The princi-

80 Article 31 of the Convention Relating to the Status of Refugees provides that the Contracting States shall not impose any penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the meaning of Article 1, enter or are present in their territory without authorisation, provided they present themselves without any delay to the authorities and show good cause for their illegal entry or presence. In addition, Article 8 of the Law on Asylum and Temporary Protection, provides that a foreigner shall not be punished for illegal entry or stay in the Republic of Serbia, provided that he/she expresses the intention to apply for asylum without any delay and offers a reasonable explanation for his/her illegal entry or stay.

ple of non-penalisation applies to refugees who have taken all reasonable steps to report to the authorities, to do so within a reasonable time and to demonstrate that they have violated the immigration law in order to seek international protection.[81] On the other hand, foreigners who have illegally entered or are illegally staying in the country without having applied for asylum may be penalised for a misdemeanour. In addition, they may be forcibly removed from the country.

The state border protection in the RS is ensured under two laws, the FL and the Law on Border Control (LBC).[82] Both those laws govern illegal crossing of the state border, while the issue of illegal stay is governed by the provisions of the FL. In accordance with the LBC, crossing the state border means any movement of people across the state border. The state border must be crossed at border crossings, with a valid travel document or other document prescribed for crossing the state border, during the working hours of the border crossing point, and in accordance with the international agreement.[83] Crossing the border in any other way is a misdemeanour and it is punishable by a fine and imprisonment. Illegal entry into the RS is also defined in the FL.[84] Illegal stay, for the purposes of the FL, means staying in the RS without a visa, residence permit or other legal basis.[85]

The principle of non-penalisation in the RS is applied by the misdemeanour courts that establish the misdemeanour liability of foreigners for illegal entry or illegal stay.[86] Pursuant to the Law on Misdemeanours (LM),[87] the misdemeanour courts must provide defendants with procedural guarantees. The LM specifically guarantees the right to a defence counsel.[88] The LM provides for the principle of legality[89] and the principle of assistance to ignorant parties,[90] which are particularly relevant for foreigners.

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81 James C. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press (2005), p. 316

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

83 Article 12 of the LBC.

84 Article 14 of the FL. Illegal entry into the RS shall mean any entry away from the place designated for the crossing of the state border, by avoiding border control, without a travel document or another document required to cross the state border, by using another person's, invalid or false travel or other document, by providing untruthful information to the border police, during the period in which the protective measure of removal, i.e., the security measure of expulsion is in effect, i.e., during the period of an entry ban.

85 Article 74 of the FL.

86 Misdemeanour liability is established in relation to Article 121 in conjunction with Article 14 and Article 122 in conjunction with Article 74 of the FL, as well as Article 71 in conjunction with Article 12 of the LBC.

87 *Official Gazette of the RS,* No. 65/2013, 13/2016 and 98/2016 – Constitutional Court Decision.

88 Article 93 of the LM.

89 That principle ensures that no one who is innocent is punished, and that a misdemeanour proceeding is conducted in accordance with law (Article 86 of the LM).

90 Article 90 of the LM.

Based on the testimony of the accused foreigner, the judge must take into account all the circumstances of the case, and in particular, whether the defendant intends to seek asylum in the RS. At that point, the accused foreigner may apply for asylum before the judge, i.e., the court may issue a decision practically allowing him/her access to the asylum procedure, or referring him/her to the competent authority – the Asylum Office.

In addition to explicitly expressing his/her intention, a foreigner may also do so indirectly, on the basis of his/her testimony from which the judge can clearly conclude that he/she is a person in need of international protection. To be able to establish that fact, the judge needs to examine all the reasons for fleeing the country of origin, as well as the reasons for coming to the RS.[91]

In that respect, the misdemeanour courts have a sensitive role, as it is up to them to penalise any violation of the regulations governing the crossing of the state border. On the other hand, there is a need to protect the rights of all persons who meet the requirements to be recognised refugee status in accordance with the international and national regulations. That is why the courts need to have a knowledge of specific regulations and to properly interpret and connect them when assessing whether a misdemeanour proceeding needs to be initiated against a foreigner for illegal entry or illegal stay in the RS, and how such proceeding would be conducted and terminated.[92]

2.4.1. Information Related to Misdemeanour Proceedings

According to the information obtained by the BCHR,[93] in the first nine months of 2019, 1,311 procedures were initiated for illegal crossing of the state border in accordance with the LBC,[94] while 65 procedures were conducted for illegal entry in accordance with the FL.[95] In addition, 848 procedures were conducted for illegal stay in accordance with the provisions of FL.[96] In that same period, 1,080 foreigners were held liable for a misdemeanour of illegal crossing of the state border and 778 were held liable for a misdemeanour of illegal stay in the RS.

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91 *A Guide to the Implementation of Relevant Asylum and Migration Regulations,* Group 484 (Belgrade, 2019), p. 59.

92 Radmila Dragičević Dičić et al, A*pplication of the Principle of Non-penalisation of Refugees in Misdemeanour Proceedings*, Belgrade Centre for Human Rights (Belgrade, 2016), p. 9.

93 The statistics and the copies of anonymised judgments were provided to the BCHR by 45 misdemeanour courts in the RS following requests for access to information of public importance for the period from 1 January to 30 September 2019. At the time of writing of this Report, no judgements have been received from the Belgrade Misdemeanour Court and the Novi Pazar Misdemeanour Court.

94 Article 71 in conjunction with Article 12, para. 2 of the LBC.

95 Article 121 in conjunction with Article14 of the FL.

96 Article 122 in conjunction with Article 74 of the FL.

The precautionary measure of removal of the foreigner from Serbia was pronounced in 93 cases, while an appeal was filed in only 15 cases. Most of the misdemeanour proceedings were conducted before the misdemeanour courts in Sremska Mitrovica (503), Senta (466), followed by Belgrade (247), Novi Sad (176), and Kikinda (113).

The majority of foreigners held liable for a misdemeanour came from Afghanistan (442), Pakistan (138), Iraq (51), Iran (28) and Syria (26). In only 31 cases the misdemeanour courts discontinued the proceedings on the grounds that the foreigners applied for asylum. Such data indicates that the courts apply the principle of non-penalisation of refugees in a small number of cases, while in many cases, nationals of countries that are unsafe or affected by war are penalised.

2.4.2. Analysis of Misdemeanour Court Decisions

The practice of penalising refugees for illegal entry and illegal stay persists in the RS. Although it can be concluded, based on the analysis of individual decisions of the misdemeanour courts, that progress has been made, foreigners in need of international protection, in most cases, continue to be penalised. The decisions of the misdemeanour courts do not indicate how the court came to their conclusion about the reasons for illegal crossing of the state border, illegal entry or illegal stay in the RS, and particularly the reasons for fleeing the country of origin.

a) Identifying Foreigners in Need of International Protection

The misdemeanour courts' practice indicates that, in some cases, the court failed to establish all the circumstances on the basis of which it could find that the procedure should be discontinued and the foreigner reffered to the competent asylum authority. Such treatment was recorded, for instance, at the Preševo Misdemeanour Court, in their judgement[97] stating that the defendant claimed that he had left Afghanistan almost two years ago and that he stayed in Turkey and Greece, for he was persecuted by the Taliban forces in Afghanistan. In this case, the court, having considered only the gravity of the violation found, failed to address the fact that there may be circumstances that could exclude the misdemeanour liability, i.e., that the person should be referred to the asylum procedure. This does not necessarily mean that the judge should have discontinued the proceedings, but rather that the facts should have been fully established. The foreigner was reprimanded in the proceedings.

Further examples of such conduct are contained in the judgment of the Prijepolje Misdemeanour Court,[98] in which Iraqi nationals were found liable for the

97 Judgment of the Preševo Misdemeanour Court No. 3 Pr. 499/19 of 11 July 2019.

98 Judgment of the Prijepolje Misdemeanour Court No.1101/19 of 27 March 2019.

misdemeanour they were charged with. In the reasoning of the above judgment, it was stated, "that the defendants entered from of Montenegro into Serbia and wanted to go to Belgrade to seek asylum". In this case, the court completely ignored the fact that the foreigners had in fact expressed their intention to apply for asylum. The court should have issued a decision discontinuing the proceedings and should have referred the foreigners to the asylum procedure. However, the court, having found "there were no circumstances during the proceedings that would exclude or call into question the defendants' misdemeanour liability", held the foreigners liable and sentenced them to pay a fine.

The Negotin Misdemeanour Court judgement against Iraqi nationals[99] indicated that a police inspector was heard as a witness, stating that in the repeated proceedings it was established that, "at no point in the proceedings have they expressed their intention to apply for asylum in the RS". The Negotin Misdemeanour Court found the Iraqi nationals liable, without imposing a sentence for the misdemeanour, having imposed a reprimand.

The position taken by the Sremska Mitrovica Misdemeanour Court[100] is an example that the court, when finding the facts, takes into account the asylum seeker's country of origin. Namely, in the above case, the court discontinued the proceedings in the case of a Syrian national because there were reasons to apply the principle of non-penalisation for illegal entry or illegal stay.[101] In the disposition of the decision, the RS MI police officer is instructed to take over the conduct of the proceedings and act in accordance with the LATP. The court stated in the reasoning of the judgement that, considering that the defendant came from a refugee-generating country, it could be reasonably assumed that he was in need of international protection. In addition, the court found that the foreigner had expressed the intention to seek asylum in the course of the misdemeanour proceedings.

b)Right to Defence

The right to a defence is guaranteed by the LM.[102] That implies that the court must give an opportunity to the defendant to speak out on all the facts and evidence he/she is charged with and to be informed of the right to a counsel. However, in the majority of judgments pertaining to foreigners in need of international protection, the foreigners have been heard only with regard to the circumstances of the misdemeanour – illegal entry, i.e., illegal stay.[103] In the

99 Judgment of the Negotin Misdemeanour Court No. I-2 Pr. 111/19 of 6 February 2019.

100 Judgment of the Sremska Mitrovica Misdemeanour Court No. I-1 Pr. Number 1587/19 of 27 March 2019.

101 Article 8 of the LATP.

102 Article 93 of the LM.

103 For example, such practice has been recorded at the Valjevo Misdemeanour Court, in Judgement No. 6 Pr. No.294/19 of 21 January 2019, and Judgement No. 3 Pr.No.3169/19 of 21 June 2019, as well as at the Smederevo Misdemeanour Court, in Judgement No. 06 Pr. No. 1651/19

judgments, the misdemeanour courts find that the defendants most often acknowledge the allegations from the application, i.e. misdemeanour application, and that they do not intend to apply for asylum in the RS, because they intend to reach the desired destination country, transiting through the RS.

The courts failed to seek statements from foreigners about the circumstances of their fleeing the country of origin. They failed to establish the reasons why foreigners entered or stayed illegally in the RS, whether they reported to the police and expressed their intention to apply for asylum, and if not, why not. Foreigners were not questioned about the circumstances on the basis of which the court could establish whether they were ignorant parties who should be advised of their right to international protection in the RS. The aforementioned omissions call into question the application of the principle of *non-refoulement*, considering that some judgments imposed the precautionary measures of removal of the foreigner. In the first nine months of 2019, 93 precautionary measures of removal of the foreigner from the RS were imposed.[104]

The right to use one's language as provided by the LM[105] is the basis of the right to a defence in a broader sense.[106] The provisions of this Article stipulate that all parties and other participants in proceedings who are not RS nationals have the right to follow the course of the proceedings through an interpreter and to use in the course of the proceedings their native language or a language they can understand. In must be clearly stated in the reasoning of the judgement whether that right was respected.

Based on the brief reasoning in most judgments,[107] it cannot be concluded whether an interpreter was present during the hearing of the defendant or not. In addition, it cannot be concluded whether the defendant could understand the language in which the proceedings was conducted.

The practice of the Preševo Misdemeanour Court in several dozen cases is controversial in terms of the right to use one's language. Namely, in their judg-

of 27 March 2019, and Judgement No. 05 Pr. No. 4674/19 of 20 September 2019, at the Senta Misdemeanour Court, in Judgement No. II-5 PR. 47/2019 of 15 January 2019, etc.

104 According to the statistics, precautionary measures of removal were imposed by the following misdemeanour courts: Aranđelovac (1), Beograd (1) of the Loznica (26), Negotin (10), Niš (30), Novi Sad (2), Paraćin (1), Požarevac (1), Prijepolje (9), Valjevo (1), Vršac (10) and Zaječar (1).

105 Article 94 of the LM.

106 Radmila Dragičević Dičić, et.al., A*pplication of the Principle of Non-penalisation of Refugees in Misdemeanour Proceedings*, Belgrade Centre for Human Rights (Belgrade, 2016).

107 Examples of such practice have been recorded at the Smederevo Misdemeanour Court in Judgement No. 06 Pr. 1651/19 of 27 March 2019, as well as at the Šabac Misdemeanour Court in Judgement No. 9 Pr. 1426/19 of 14 March 2019, at the Sremska Mitrovica Misdemeanour Court, Judgement No. I-2 Pr. 5991/19 of 6 September 2019, at the Prijepolje Misdemeanour Court, Judgement No. 7 Pr. 1115/19 of 2 April 2019, at the Negotin Misdemeanour Court, Kladovo Court Division, Judgement No. I-2 Pr. 111/2019 of 6 February 2019.

ments,[108] the court states that the identity of the defendants was not established, while other facts have been established on the basis of a questionnaire completed by the defendant himself in his native language. What remains unclear is how the court was able to read or translate that information unless they hired a translator/interpreter. In case there was a translator/interpreter hired, the court certainly failed to indicate that.

An interesting practice has been identified in the proceedings before the Novi Sad Misdemeanour Court. In several cases,[109] the court issued decisions discontinuing the misdemeanour proceedings as there were no interpreters for the Pashto and Urdu languages on the list of court-sworn interpreters, and it was not possible to conduct the misdemeanour proceedings. The court acted properly in considering that without an interpreter they were unable to guarantee the defendant the right to a defence in accordance with the LM.

The right to use one's language is also indirectly linked to the right to appeal, considering that for a defendant to be able to avail himself/herself of the legal remedy, the decision would have to be translated into a language he/she can understand. Based on the information provided by all the misdemeanour courts in the RS, out of 2,224 proceedings before the misdemeanour courts, only 15 cases were appealed. Such information may indicate that most foreigners did not avail themselves of the legal remedy, as they did not understand the content of the decision, and therefore the provision on legal remedy.

2.4.3. Conclusion and Recommendations

With respect to persons coming from war-affected areas, when penalising them for misdemeanours, the courts still do not examine thoroughly the circumstances that could lead to the exclusion of the misdemeanour liability. In terms of the right to a defence, the judges only hear the defendants with regard to the circumstances of the misdemeanour. The courts generally do not consider the circumstances that might indicate those persons are in need of international protection. The misdemeanour courts, in their judgments, do not state in each individual case whether an interpreter was hired during the misdemeanour proceedings and whether the defendant could understand the language in which the proceedings were conducted.

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108 Judgments of the Preševo Misdemeanour Court: No. b2 Pr. 186/19 of 26 February 2019, No. 2 Pr. 65/2019 of 17 January 2019, No. 2 Pr. 64/2019 of 17 January 2019, No. 3 Pr. 499/2019 of 11 July 2019, etc.

Article 8 of the LATP.

109 Judgments of the Novi Sad Misdemeanour Court: No. 15 PR 3976/2019 of 4 April 2019, No. 15 PR 3967/2019 of 4 April 2019, No. 1 PR 2610/2019 of 9 March 2019, No. 1 PR 2609/2019 of 9 March 2019, No. 1 PR 2559/2019 of 6 March 2019, No. and 15 PR 3976/2019 of 4 April 2019, etc.

If there are basic indications that the defendant is a person in need of international protection, the court needs to thoroughly examine whether there are circumstances for the application of Article 8 of the LATP, i.e., Article 31 of the Convention Relating to the Status of Refugees, as well. The court needs to adequately explain in their decisions the existence (or lack) of such circumstances. This is true even when it concerns persons who do not wish to seek asylum in the RS, but have provided the reasons for their illegal entry or illegal stay in the RS, which, in principle, may be considered the grounds for the refugee protection.[110]

In assessing whether the principle of non-penalisation for illegal entry or illegal stay could be applied to the defendant, the court also needs to take into account the generally known facts. These are the facts reported by the media about the state of war and/or human rights violations that do not have to be supported by specific evidence.

In all proceedings, and particularly in the proceedings where potential refugees appear as defendants, judgements need to be supported by a detailed reasoning. Pursuant to the LM, in the reasoning of the judgment, the court must state the contents of the request for initiation of the proceedings, the established facts, including the underlying evidence, the rules on which the judgment is based, and the reasons for each item in the judgment.[111] The misdemeanour courts should state clearly in their judgements whether in the course of the proceedings against foreigners an interpreter or another person was provided to ensure that the proceedings is conducted in a language that the defendant could understand.

In addition, in the provision on legal remedy, the court should provide the foreigner with clear instructions as to the authority to which the appeal should be filed, the timeline for the appeal, and the manner in which it should be filed.[112] The decision must be translated in full into a language that the foreigner can understand.

110 In this case, the court would apply directly Article 31 of the Convention Relating to the Status of Refugees. For example, in the Judgment of the Misdemeanour Court of Appeal, Niš Division, No. II 210 Pr 66/15 of 1 April 2015, the court held that, although the defendant did not seek asylum in the RS and was fleeing the war-affected area, there were grounds to apply the provisions of the international conventions accordingly.

111 Article 254, para. 4 of the LM.

112 Article 254, para. 5 of the LM.

3. COMPETENT ASYLUM AUTHORITIES' PRACTICE

In accordance with the LATP, the asylum authorities in the RS include the Asylum Office, the Asylum Commission, and the Administrative Court. The first-instance asylum procedure is conducted by the Asylum Office, an organisational unit of the Ministry of the Interior, within the Directorate for Foreigners. Appeals against the Asylum Office's decision are reviewed by the Asylum Commission, composed of the Chairperson and eight members. Final decisions of the Asylum Commission may be appealed before the Administrative Court.

In 2019, a total of 35 persons were granted international protection in the RS. Taking into account the number of decisions and official actions taken, as in the past, the Asylum Office has had the most active role in the asylum procedure. Specifically, it is the only asylum authority that directly established facts through conducting oral hearings, as other authorities did not interview asylum seekers. This part of the Report will analyse the activities of the competent asylum authorities and the individual decisions made in 2019 that reflect the positions of the Asylum Office, the Asylum Commission, and the Administrative Court. In these cases, the asylum seekers were represented by the BCHR staff.

3.1. First-instance Procedure

In general, during 2019, the BCHR has noted progress in the Asylum Office practice. It is also important to note that the first-instance authority granted international protection on different grounds. This implies that, during 2019, foreigners were granted asylum because they feared persecution on the grounds of their gender,[113] religion,[114] political beliefs,[115] nationality,[116] or membership in a particular social group.[117] In addition, in some cases, the Asylum Office has particularly taken into account the psychologists' reports on the mental state and the vulnerability of asylum seekers when assessing the credibility of their claims.

However, the implementation of the first-instance procedure still shows a number of shortcomings, which will be described in more detail below. That refers primarily to the application of the less favourable law in the asylum proce-

113 Asylum Office Decision No. 26–1216/18, 26–1217/18 and 26–1218/18 of 12 February 2019.

114 Asylum Office Decision No. 26–1395/18 of 5 February 2019.

115 Asylum Office Decision No. 26–1260 /18 of 13 March 2019.

116 Asylum Office Decision No. 26–2050/17 of 12 September 2019.

117 Asylum Office Decision No. 26–787/19 of 29 May 2019.

dure and to the incomplete assessment of evidence. In addition, the first-instance procedure is not conducted in a timely manner. According to the BCHR data, the first-instance procedures completed in 2018 and 2019 lasted an average 283 days, some even exceeding the timelines specified by the LGAP and the LATP.

3.1.1. Application of the More Favourable Law and Grounds for Dismissing Asylum Applications

In addition to the LATP, in 2019, the Asylum Office also applied the preceding LA, bearing in mind that some procedures had been initiated before June 2018, when the LATP that currently governs the asylum procedure in the RS entered into force.[118] The competent authorities are under the obligation to apply the LATP in all cases initiated at the time the LA was in effect[119] if the provisions of the new law are more favourable for the asylum seeker in the particular case.[120] This is particularly relevant when it comes to the implementation of the safe third country concept.

Specifically, the Asylum Office may dismiss an asylum application without examining whether the asylum seeker is eligible for asylum by applying the safe third country concept or the safe country of origin concept. However, that should not result in a denial of access to the asylum procedure or a breach of the principle of *non-refoulement*.[121] In all such cases, the competent authority must be satisfied that the protection the asylum seeker may enjoy in another country is indeed effective. In any case, the asylum seeker must be given the opportunity to demonstrate that the other countries in which he/she stayed or which he/she transited on the way to the RS are not safe in his/her case.[122]

The safe third country concept is one of the main reasons why, in the period from 2008 to 2018, only 156 persons received asylum in the RS.[123] Based on the preceding LA, the competent asylum authorities made a large number of decisions dismissing the claims[124] in the cases of the asylum seekers who came to the RS from the countries declared by the RS Government to be safe under the

118 See further *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, p. 28, as well as *Right to Asylum in the Republic of Serbia – Periodic Report for July-September 2019*, Belgrade Centre for Human Rights, p. 11, available in Serbian at: www.azil.rs.

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

120 Article 103 of the LATP.

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

122 See further on the application of the safe third country concept: *Right to Asylum in the Republic of Serbia 2012*, pp. 28–31, Belgrade Centre for Human Rights (Belgrade, 2013), available in Serbian at: https://bit.ly/36605sz.

123 See further: *Right to Asylum in the Republic of Serbia 2018*, pp. 43 – 47.

124 In accordance with Article 33 of the LA.

Decision of the Government of the Republic of Serbia on Establishing the List of Safe Countries of Origin and Safe Third Countries.[125] The list includes all the RS neighbouring countries. While the asylum authorities sporadically reviewed the merits of claims made by foreigners who had come to Serbia from North Macedonia or Bulgaria, the percentage of decisions dismissing the claims remained high (approximately 70% in 2017).[126]

a) The Position of the Committee against Torture on the Safe Third Country Concept

The extent to which the application of the safe country of origin concept and the safe third country concept was detrimental to both the asylum seekers and the RS is confirmed by the decision of the Committee against Torture (CAT) in the case of Cevdet Ayaz, a Turkish citizen of Kurdish nationality. Specifically, on 3 August 2019, the CAT adopted a decision[127] finding the RS in violation of Articles 3 and 22 of the Convention against Torture. The violation of the Convention against Torture in based on a number of flaws in the RS extradition authorities' actions during their examination of the fulfilment of the requirements for extraditing Mr. Cevdet Ayaz to Turkey, as well as during the examination of his asylum application.

Article 3 of the Convention prohibits the expulsion of individuals to countries where they would be at risk of torture (the principle of *non-refoulement*). The CAT emphasised that the Šabac Higher Court, the Novi Sad Court of Appeals, and the Justice Minister had failed to rigorously examine Mr. Ayaz's allegations that he would be tortured in Turkey, and that his own confession extorted under such circumstances was used as evidence in the criminal proceeding against him.[128]

The CAT came to the same conclusion with respect to the asylum authorities in the RS,[129] which had failed to review Mr. Ayaz's asylum application on the merits, applying the old LA. The acting asylum authorities had taken the view that Montenegro, where Mr. Ayaz had stayed prior to arriving to the RS, should be responsible for reviewing his asylum claim.[130] The CAT found that none of the listed authorities had invested efforts in examining the serious allegations of torture or the applicant's claims that his confession extorted by torture had been used in the criminal proceedings against him in Turkey.

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

126 For a detailed analysis of the application of the safe third country concept, see: *Right to Asylum in the Republic of Serbia 2018*, pp. 43–47.

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

128 *Ayaz v. Serbia*, paras. 4.8–4.11. and 9.9.

129 *Ibid.*

130 Article 33, para. 1, Item 6 of the LA.

This decision was taken exclusively on the basis of Montenegro being in the safe countries list adopted by the RS Government. The competent asylum authorities failed to consider the fact that Montenegro did not readmit Mr Ayaz to their territory and provided him no guarantees that his asylum application would be reviewed. Following the asylum procedure, which had not yet been validly terminated,[131] the RS found that the conditions for extradition had been met and extradited Mr. Ayaz to Turkey.

Therefore, the CAT found that none of the listed authorities had invested efforts in examining the serious allegations of torture or the applicant's claims that his confession extorted by torture had been used in the criminal proceedings against him in Turkey. The RS Government considers Turkey a safe country of origin. The CAT further noted that none of the RS authorities examined the general circumstances related to the state of human rights in Turkey and Mr. Ayaz's individual circumstances to establish whether he would actually be at risk of torture if he were returned to Turkey.[132]

In addition, the RS failing to act upon the interim measure issued by the CAT on 11 December 2017 was in violation of Article 22 of the Convention. The interim measure called upon Serbia not to extradite Mr. Ayaz to Turkey until the proceedings before the CAT is terminated.[133] By ignoring the CAT's request for interim measures, the RS had "impeded the comprehensive examination by the CAT of a complaint relating to a violation of the Convention against Torture".[134]

This case is an excellent illustration of the consequences of the asylum authorities' application of the safe country of origin and safe third country concepts without reviewing the merits of the asylum claim, especially when they fail to diligently examine the general information about the asylum seekers' countries of origin and their personal circumstances. The CAT called upon the RS to provide adequate compensation to Mr. Ayaz and explore ways and means of monitoring the conditions under which Mr. Ayaz was detained in Turkey, and to take other steps to prevent similar violations occurring in the future.[135]

b) Progress in Terms of Application of the More Favourable Law

The LATP, which governs the application of the safe third country concept differently, prevents, to an extent, the recurrence of the above case that was decided by the CAT. Under the LATP, a safe third country denotes a country in which the asylum seeker is safe from persecution as defined in Article 24 of the

131 In this case, the asylum procedure was not validly terminated as the applicant was extradited to Turkey before the Administrative Court could decide on his asylum application.

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

133 See further Vesna Petrović (ed.) *Human Rights in Serbia 2017*, Belgrade Centre for Human Rights (Belgrade, 2018), pp. 39–40. Available in Serbian at: https://bit.ly/348bgjh.

134 *Ayaz v. Serbia,* para. 7.3.

135 *Ibid.,* paras. 10–12.

LATP,[136] i.e., from the risk of serious harm.[137] The safe third country must guarantee the asylum seeker protection against *refoulement*, including access to effective asylum procedure.[138] In establishing whether a specific country may be considered safe, the competent authorities must evaluate each asylum application individually and obtain assurances from that country that they will readmit the asylum seeker to their territory and review his/her asylum application. If the safe third country refuses to readmit the foreigner whose asylum application in the RS was dismissed, the RS asylum authorities are under the obligation to review his/her asylum application on the merits.[139]

The entry into force of the above provisions led to the improvement of the Asylum Office's practice to an extent. Thus, the number of cases in which it reviewed the merits of asylum applications increased significantly by the end of 2018. However, these cases primarily regarded persons who had applied for asylum after the LATP came into force. The Asylum Office, on the other hand, continued to apply the safe third country concept in cases opened at the time the LA was in force. Such practice is in contravention of the LATP, which, as already noted, lays down that it shall apply whenever its provisions are more favourable for the asylum seekers.[140]

Thus, the first-instance authority applied the LA dismissing the asylum application filed by a single mother from Iran, X, and her underage daughter Y, on the grounds that they had stayed in Turkey, on their way to the RS. The BCHR requested that the LATP should be applied in this case,[141] as it was more favourable for the asylum seekers. However, the Asylum Office issued a decision on the basis of the LA, without explaining why it considered that there was no room to apply the provisions of the LATP. The above omission was noted in the appeal upheld by the Asylum Commission. In this case, the Asylum Commission has taken a significant position regarding the application of the more favourable law.[142]

136 The right to asylum, or refugee status, shall be granted to the applicant who is outside his/her country of origin or habitual residence, and who has a well-founded fear of being persecuted for reasons of race, sex, language, religion, nationality, membership to a specific social group or political opinion, and who is unable or, owing to such fear, or unwilling to avail himself/herself of the protection of that country.

137 Serious harm shall consist of the threat of death by penalty or execution, torture, inhuman or degrading treatment or punishment, as well as serious and individual threat to life by reason of indiscriminate violence in situations of international or internal armed conflict, Article 25, para. 2 of the LATP.

138 Article 45, para. 1 of the LATP.

139 Article 45, para. 5 of the LATP.

140 *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, p. 26. Available in Serbian at: https://bit.ly/2Lgh7fx.

141 Specifically, the possibility of applying the LATP also in the cases initiated before the effectiveness of that law is foreseen if its provisions are more favourable for the asylum seeker in the respective case (Article 103 of the LATP).

142 See Section 3.2.2. Positive View on Discontinuation of Procedure and Application of the More Favourable Law.

On 12 September 2019, the Asylum Office issued the decision granting asylum to Chinese national X.Y., irrespective of the fact that he had passed through Turkey on his way to Serbia.[143] As that is the first asylum seeker originally from this Asian country who has been granted asylum in Serbia, it could be said that that was a precedent in the work of the first-instance authority. While this landmark decision was analysed in the BCHR third quarterly report,[144] considering its importance for the asylum procedure in Serbia, we believe that it should be considered in this report as well.

X.Y. is Uyghur, a member of a minority Turkic ethnic group. They are predominantly Muslim, and live mostly in China, i.e., in the Autonomous Province of Xinjiang. Uyghurs are often persecuted by the Chinese authorities, their freedom of movement is restricted, and they are often victims of torture. In addition, according to some allegations, Uyghurs are interned in the so-called political re-education camps.[145] X.Y. had been interned in such a political re-education camp since January 2015, where he was forced to perform various forms of physical labour, in addition to attending mandatory political education classes. He claimed before the Asylum Office that he had been repeatedly arrested, and that he had suffered various forms of physical abuse, which made fear for his life. During interrogations, the police would slap him, hit him with metal bars and brake his fingers.[146] After years of such hardships, in 2016, X.Y. paid a lot of money for a passport[147] and succeeded in fleeing China. He went to Turkey, where he spent approximately 15 months, before coming to Serbia.

The Asylum Office had initially dismissed X.Y.'s asylum application by applying the provisions of the LA,[148] because he had arrived in the RS from Turkey. Specifically, the initial decision states that Turkey was on the list of safe third countries adopted in accordance with the RS Government Decision from 2009,[149] which meant that it complied with the international refugee protection principles and that the asylum seeker could have been granted asylum there.[150]

143 Asylum Office Decision No. 26–2050/17 of 12 September 2019.

144 See further *Right to Asylum in the Republic of Serbia, Periodic Report for July-September 2019*, Belgrade Centre for Human Rights, pp. 22–26, available in Serbian at: http://azil.rs/azil_novi/wp-content/uploads/2019/11/Pravo-na-azil-u-RS-jul-septembar-2019.pdf.

145 See further, *China: Situation of Uyghurs*, Austrian Centre for Country of Origin and Asylum Research and Documentation (April 2016), available at: http://www.ecoi.net/file_upload/90_1462195747_accord-2016–04-china-uyghurs.pdf.

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

147 Uyghurs cannot obtain passports like other citizens. See further, *China: Passports Arbitrarily Recalled in Xinjiang,* Human Rights Watch (21 November 2016), available at: https://www.hrw.org/news/2016/11/21/china-passports-arbitrarily-recalled-xinjiang.

148 Asylum Office Decision No. 26–2050/17 of 4 December 2017.

149 *Official Gazette of the RS,* 67/09.

150 See further, Sonja Tošković (ed.), *Right to Asylum in the Republic of Serbia 2017*, Belgrade Centre for Human Rights (Belgrade, 2018), pp. 51–59, available in Serbian at: http://azil.rs/azil_novi/wp-content/uploads/2018/04/Pravo-na-azil-u-Republici-Srbiji-2017.pdf.

The first-instance authority did not consider the claims made by the legal representative, indicating the worrying situation of the Uyghurs in Turkey and the risk of their deportation to China.

Following the administrative dispute,[151] the Asylum Office reviewed the X.Y.'s asylum application. In the repeated proceedings, the Asylum Office considered thoroughly the applicant's allegations and international reports on the status of Uyghurs in China, and upheld his asylum application. Interestingly, in their new decision, the first-instance authority did not mention at all that the asylum seeker had come to Serbia from Turkey, although that was the reason why they had initially dismissed his asylum application. As opposed to the first decision, this one was adopted under the LATP, which contains more favourable provisions on the application of the safe third country concept.[152]

The provisions of the LATP required the Asylum Office to review the merits of the asylum application, regardless of which country the asylum seeker passed through on his way to the RS. However, this applies primarily to those persons who made their asylum application under this law. When it comes to asylum applications submitted in accordance with the LA, the first-instance authority needs to take into account the applicable LATP and resolve the administrative matter in accordance with the law that is more favourable for the asylum seeker.

3.1.2. Findings of Fact and Assessment of Evidence

In examining asylum applications on the merits, the Asylum Office is under the obligation to collect and consider all the relevant facts, evidence and circumstances. In addition to the facts and evidence produced by the asylum seeker, the first-instance authority must take into account, in particular, the current reports on the situation in the asylum seeker's country of origin and, if needed, the countries he/she had transited. The Asylum Office should take into account, in particular, the laws and regulations of these countries, and their application in practice.[153]

The above information is contained in various relevant sources, such as the UNHCR, the European Asylum Support Office (EASO), and other human rights organisations. In examining an asylum application on the merits, it is important to take into account the asylum seeker's situation and personal circumstances, including his/her gender and age.[154] On the other side, in specific circumstances, the asylum seeker's statement can be considered credible even if is not corroborated by evidence.[155]

151 Administrative Court Judgement No. U 6310/18 of 27 August 2018.

152 Article 45 of the LATP.

153 Article 32 of the LATP.

154 Article 32, para. 2, Items 1–3 of the LATP.

155 Article 32, para. 4, Items 1–5 of the LATP.

a) Incomplete Assessment of Evidence

During 2019, the BCHR saw the Asylum Office decisions rejecting the claims, explained by the selective consideration and interpretation of the available evidence.[156] Under the LGAP, the authorised official is under the obligation to make a decision after a conscientious and careful assessment of each piece of evidence and all of the evidence combined, as well as based on the results of the entire procedure.[157] However, in the above decisions, the first-instance authority did not so consider the evidence produced by the asylum seekers' legal representatives.

For example, that is how the Asylum Office acted in the case of A.A., a child from Afghanistan, whose asylum application was rejected.[158] He claimed that he had left his country of origin because Afghanistan, including all parts of the country, was not safe. He also noted that in Kabul there were many killings, the schools were routinely bombed, and that the Taliban were threatening the civilian population, which is at risk.[159] His legal representative made a submission in the course of the procedure, pointing to the reports by the relevant international organisations and bodies, indicating that the situation in Afghanistan was very volatile, as evidenced by a large number of civilian casualties. For example, in June 2017, the CAT expressed a deep concern about the general culture of impunity in Afghanistan, with the perpetrators of the most heinous human rights violations, including torture, still sitting in the executive government.[160]

However, in that case, the first-instance authority based its decision on the EASO report from April 2019 on the key socio-economic indicators in Kabul, Herat and Mazari Sharif, stating that a large number of returnees was returning to those cities and considered them safe. On the other hand, the Asylum Office disregarded the information from that same report indicating that the number of returnees to Afghanistan was steadily declining and that in September 2018 there were five times fewer returnees compared to 2017.[161] Only one conclusion can be drawn from that, and that is that the security situation in Afghanistan was deteriorating day by day. In addition to that, the Asylum Office did not consider a more recent report on Afghanistan from June 2019, which was published by EASO. That report discusses the numerous suicide attacks across Afghanistan in 2018, tar-

156 For such practice by the Asylum Office, see further *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, available in Serbian at: https://bit.ly/2Lgh7fx and *Right to Asylum in the Republic of Serbia, Periodic Report for July-September 2019*, Belgrade Centre for Human Rights, available in Serbian at: https://bit.ly/2s47hXf.

157 Article 10 of the LGAP.

158 Asylum Office Decision, No. 26–932/19, of 30 September 2019.

159 *Ibid.*, p. 8.

160 *Concluding Observations on the Second Periodic Report of Afghanistan*, CAT, UN. Doc. CAT/C/AFG/CO/2 (12 June 2017), paras. 7, 11 and 15. Available at: https://bit.ly/2nMsLX1.

161 *Afghanistan: Key socio-economic indicators, Focus on Kabul City, Mazar-e Sharif and Herat City, Country of Origin Information Report*, EASO (April 2019), p. 14, available at: https://bit.ly/2pgVR18.

geting civilian population.[162] This report must have been available to the first-instance authority, as it was under the obligation to obtain the most up-to-date information on the asylum seeker' country of origin of the asylum seeker whose asylum application it was reviewing. Bearing in mind that the asylum seeker was an unaccompanied child, the BCHR also referred to Save the Children research establishing whether returning unaccompanied and separated children to Afghanistan could be considered safe. The research found that there were "concerning gaps in the implementation of safeguards in children's returns and, more broadly, call into question the appropriateness of such returns to Afghanistan".[163] However, the Asylum Office did not considered any of the above reasons before they reached the first-instance decision. This calls into question the legality of that decision. The appeal procedure is ongoing, and it remains to be seen how the Asylum Commission will find this practice by the first-instance authority.

In another case of Libyan national R., the Asylum Office also incompletely assessed the evidence about the security situation in Libya and rejected the asylum application in September 2019.[164] The first-instance authority, in this case, departed from their previous view on the state of general insecurity in Libya. The Asylum Office did not consider the evidence that the asylum seeker would be at risk of persecution if he were returned to Libya, as a supporter of Muammar Gaddafi. It has to be noted that, in a number of earlier cases,[165] the Asylum Office had clearly held that a state of general insecurity reigned in Libya. In this case, however, the Asylum Office rejected R.'s asylum application.[166]

The first-instance authority did not consider the evidence produced by the applicant's legal representatives (reports by international organisations, newspaper articles, news published on online portals, etc.), nor did it explain in its decision why it failed to do so. In addition, The Asylum Office failed to mention any specific reports by international organisations that apparently led them to

162 *Afghanistan: Security Situation, Country of Origin Information Report*, EASO (June 2019), p. 69, available at: https://bit.ly/35mtYVX.

163 *From Europe to Afghanistan: Experiences of Child Returnees*, Save the Children (2018), p. 50, available at: https://bit.ly/2IKmSRp.

164 Asylum Office Decision No. 26–1389/17 of 16 September 2019.

165 Decisions of Asylum Office No. 26–4099/15 of 7 August 2015, No. 26–5792/14, 26–5793/14, 26–5794/14 of 3 August 2016, No. 26–812/16 of 29 September 2016, No. 26–5489/15 of 20 October 2017, and No. 26–222/15 of 3 July 2018.

166 Article 30, para. 1, Item 2 of the LA provides that an asylum application is unfounded if it has been established that the applicant does not meet the conditions for recognising the right to asylum or granting subsidiary protection, particularly if the allegations in the asylum application, which relate to the facts that are relevant for the asylum decision, contrary to the allegations made at the asylum seeker's hearing or contrary to other evidence produced during the proceedings (if, contrary to the allegations in the asylum application, it has been established during the proceedings that the asylum application was filed with the sole purpose of delaying deportation, that the asylum seeker came to the country for purely economic reasons, etc.).

establish that Libya was a safe country for the asylum seeker. The first-instance authority, without any valid reasoning, departed from the current practice and the position they had taken on the general security situation in Libya. The decision rejecting the claim was taken contrary to UNHCR's views on Libya,[167] which the first-instance authority should respect if it wants to ensure proper application of the LATP and protection of the refugee rights.

The Asylum Office is under the obligation to review the current reports, i.e., to collect all the necessary information from various relevant sources, as well as to assess them in their entirety. Consideration only of documents and reports in support of the rejection or dismissal of an asylum application leads to wrong and insufficient findings of fact.

b) Thorough Assessment of Evidence Results in Lawful and Proper Decisions

Some first-instance decisions are good practice examples of the proper assessment of evidence. However, these decisions also indicate the inconsistent Asylum Office practice in terms of the findings of facts, considering that the first-instance authority does not always assess carefully and fully the evidence in all cases.

In February 2019, the Asylum Office issued a decision upholding the asylum application of a three-member family from Iran.[168] They had been granted asylum because they were recognised as *sur place* refugees.[169] This decision by the Asylum Office is interesting because the grounds for granting refugee status in the RS was the asylum seekers' changing their religion after they had left their country of origin. The Asylum Office established that asylum seekers would be at risk of persecution on the grounds of their religion if they were returned to Iran due to circumstances arising after they had left the country of origin. The first-instance authority substantiated its decision with the reports by international NGOs, including Amnesty International and Human Rights Watch, the ECtHR judgements, and other relevant sources.

In May 2019, the Asylum Office furnished to the BCHR its decision upholding the asylum application by Afghani national B.B.[170] The first-instance authority found that the applicant was at risk of persecution in his country of origin on the grounds of his ethnicity and on the grounds of his membership in a particular social group.[171] B.B. had been a target of verbal and physical assaults by the Taliban because he worked in various ministries and because he is an ethnic Tajik. That is

167 *UNHCR Position on Returns to Libya – Update II*, UNHCR (September 2018), p. 20, available at: https://bit.ly/2MVIQSg.

168 Asylum Office Decision No. 26–1395/18 of 5 February 2019.

169 Article 27 of the LATP on the *sur place* principle lays down, *inter alia*, that a well-founded fear of persecution may be based on the events that took place after the asylum seeker had left the country of origin.

170 Asylum Office Decision, No. 26–787/19 of 29 May 2019.

171 Article 26, para. 1, Items 1 and 5 of the LATP.

supported also by the fact that UNHCR had recognised that Afghan public servants could be in need of international protection on account of their justified fear of persecution by non-state agents.[172] That was pointed out to the Asylum Office by the BCHR legal team, but on the other hand, the Asylum Office itself consulted various reports of the relevant international institutions and organisations assessing the security situation in Afghanistan. In this case, the first-instance authority acted in compliance with the LGAP and properly assessed the evidence.[173]

The analysed decisions show that in some cases the Asylum Office can find the facts carefully and fully by evaluating all the relevant country of origin reports. It is evident, however, that the first-instance authority still lacks a uniform approach to reviewing country of origin reports and other evidence produced in the course of the asylum procedure. Therefore, the first-instance authority should harmonise its practice in terms of proper assessment of evidence and act in accordance with the LATP and the LGAP.

3.1.3. Failure to Timely Conduct Procedure

The timelines stipulated by the LATP are inextricably linked to the principle of procedural effectiveness, as specified by the LGAP.[174] They are necessary to ensure the continuity of the procedural actions, prevent overly long procedures, and provide legal certainty to asylum seekers.

The LATP stipulates that the first-instance authority must take a decision on an asylum application in the regular procedure within three months from the date of the asylum application or admissible subsequent asylum application.[175] Exceptionally, the above timeline may be extended by additional three months, provided that the asylum seeker is notified without any delay about the extension and that he/she is informed about the timeline in which he/she can reasonably expect the decision to be taken.[176]

Exceptionally, the three-month timeline may be extended by additional three months if that is necessary to ensure the full and proper review of the asylum application.[177] If, due to a temporarily uncertain situation in the asylum seeker's country of origin, it can be reasonably expected that the decision cannot be taken within the specified timelines, authorised officials of the Asylum Office must check the situation in the asylum seeker's country of origin on quarterly basis, and within a reasonable time, inform the asylum seeker of any delay in

172 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan*, UNHCR (30 August 2018).

173 Article 10 of the LGAP.

174 Article 9 of the LGAP.

175 Article 39, para. 1, of the LGAP.

176 *Ibid*., para. 2, Items 1 and 2.

177 *Ibid*., para. 3.

taking the decision.[178] In such a case, the decision must be taken no later than 12 months after the date of the asylum application.[179]

The BCHR has been notified by the Asylum Office about the extension of the timeline for the adoption of the first-instance decision in only two cases. However, in the other cases in which the BCHR represented asylum seekers, the Asylum Office exceeded that timeline without notifying the asylum seekers.

The most obvious example of the overly long first-instance procedure was observed by the BCHR in a case that took as long as 796 days to resolve. A Libyan national A. had applied for asylum on 19 July 2017, but was not interviewed until 31 May 2018. The Asylum Office issued its decision on 16 September 2019, more than two years after the initiation of the procedure.[180] It has to be noted that the legal representative has repeatedly unsuccessfully addressed the first-instance authority requesting that the case be resolved.[181]

In the case of an unaccompanied underage child from Afghanistan,[182] the BCHR filed an appeal for administrative silence,[183] considering that the first-instance procedure had been pending since 2018. During that time, the asylum seeker and his legal representative were not informed of the reasons for delaying the decision or of the timeline in which they could reasonably expect the first-instance decision to be taken. Since the asylum seeker was an unaccompanied child, in accordance with the LATP, he had the right to special procedural safeguards. Such special procedural guarantees include the obligation of the acting authority to take into account the best interests of the child,[184] and process all asylum applications made by unaccompanied children on a priority basis.[185] However, the Asylum Office did not have the best interests of the child in mind in this case, as it failed to process his asylum application as a priority.

The specificity of the asylum procedure itself and the complexity of the case can never be a reason for overly long procedure or a justification for not respecting the timelines for decision-making. The BCHR believes that the timelines set by the LATP are reasonable and leave sufficient time for any case to be resolved. Unjustifiably long first-instance procedures discourage asylum seekers from perceiving the RS as the country that could provide them protection.

178 *Ibid*., para. 5.

179 *Ibid*., para. 6.

180 Asylum Office Decision, No. 26–1389/17 of 16 September 2019.

181 See further *Right to Asylum in the Republic of Serbia, Periodic Report for July-September 2019*, Belgrade Centre for Human Rights, pp. 9–12.

182 Case No. 26–1437/18.

183 If the authority fails to issue a decision within the prescribed time limit, an appeal against such action may be filed after the expiration of that time limit, and not later than within one year after the expiration of that time limit (Article 153, para. 2, of the LGAP).

184 Article 10 of the LATP.

185 Article 12, para. 9 of the LATP.

a) Importance of Multidisciplinary Approach to Decision-Making

Asylum seekers, refugees and migrants often face stressful or traumatic experiences, and cultural and language barriers in their country of residence. A 2019 research[186] found that 79% of refugees in RS were in need of some form of psychological support. Understanding and applying psychological sciences in the refugee status determination process is crucial to ensure due process and reduce the risk of denying protection to persons who are in real need of protection.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes that it should be recalled that an applicant for refugee status is usually in a particularly vulnerable situation. He/she finds himself in an alien environment and may experience serious difficulties, both technical and psychological, in submitting his/her asylum application. His/her application should therefore be examined with an understanding of his/her particular needs.[187] The requirement to assess the credibility of each person's asylum claim individually, taking into account their personal circumstances, means that the assessment should be made through a multidisciplinary prism, including legal, cultural, psychological and sociological disciplines.[188]

Specifically, in the asylum procedure, frequently due to incomplete material evidence or lack of credible material evidence, the decision is made only based on the asylum seeker's testimony and the impression he/she has left on the competent officer. That is why psychologists can have a crucial role in helping asylum seekers to document their experiences and better present their case before the Asylum Office. In addition, in terms of the principle of providing specific procedural and reception guarantees specified by the LATP,[189] the BCHR legal team believes that the Asylum Office should also consider the asylum seeker's psychologist's mental health report when considering the merits of his/her asylum application.

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186 *Psychological Well-being of Refugees and Asylum Seekers in Serbia – 2019 Research Report*, Psychosocial Innovation Network (Belgrade, 2019), available in Serbian at: https://bit.ly/2rt1dak.

187 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR, HCR/IP/4/Eng/REV.1 (Geneva, January 1992), para. 190, available at: https://www.unhcr.org/4d93528a9.pdf.

188 *Beyond Proof – Credibility Assessment in EU Asylum Systems*, UNHCR – European Refugee Fund (May 2013), available at: https://www.unhcr.org/51a8a08a9.pdf.

189 Article 17 of the LATP stipulates: In the course of the asylum procedure, one should take into account the specific circumstances of the persons requiring special procedural or reception guarantees, such as children, unaccompanied children, persons with disabilities, elderly persons, pregnant women, single parents with underage children, victims of trafficking, severely ill persons, persons with mental disorders, and persons who were subjected to torture, rape, or other serious forms of psychological, physical or sexual violence, such as women who were victims of female genital mutilation. Special procedural and reception guarantees shall serve to provide the appropriate assistance to the applicant who, due to his/her personal circumstances, is not able to benefit from the rights and obligations under this Law without appropriate assistance.

In early 2019, the Asylum Office adopted the decision granting for the first time international protection in the RS, referring, *inter alia,* to the asylum seeker's psychological status report. ON that occasion, the first-instance authority adopted the decision granting asylum to an unaccompanied boy from Iraq.[190] In the course of the procedure, the BCHR furnished the report on the asylum-seeking child's psychological well-being, prepared by the psychologists of the Psychosocial Innovation Network (PIN). The psychologist's report[191] indicates that the boy tried to commit suicide due to the accumulated problems related to him having left his family behind and the hardships he had faced on his way to and during his stay in the RS. After working with psychologists, his condition had improved, but it was noted that he had a high level of vulnerability. The psychologist's recommendation indicates that it is essential to ensure continuity of support for the asylum seeker, including a safe, predictable and supportive environment, taking into account his age and the traumatic experiences he has experienced. In addition, at the request of the legal representative, the Asylum Office sought the guardianship authority's findings and opinions on the best interest of the child, and consulted the guardianship authority when deciding in this case. In adopting its decision, the Asylum Office followed the guidelines specified in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status,*[192] which states that, when deciding upon asylum applications made by unaccompanied children, there is a need to consult child psychology experts. The multidisciplinary approach applied by the first-instance authority in reviewing the merits of the asylum application made by the Iraqi boy has significantly improved the quality and appropriateness of the decision it adopted.

In another case, the Asylum Office adopted a decision granting subsidiary protection to Afghani national Z.Z.[193] Z.Z. left his country of origin as an underage child because of the problems he had had with the Taliban. To enable the first-instance authority to consider all the circumstances of this case as thoroughly as possible, the legal representatives provided also the report on the asylum seeker's psychological well-being.[194] In the reasoning of the decision granting subsidiary protection, the first-instance authority concludes that, if the asylum seeker were returned to Afghanistan, there is a risk that his stress management mechanism might collapse, as well as a risk of the development of traumatic symptomatology. This risk exists particularly considering the asylum seeker's age and the severity of the traumatic experiences he had experienced. The Asylum

190 Asylum Office Decision No. 26–2348/17 of 28 January 2019.

191 PIN Psychological Well-being Assessment Report of 10 December 2018.

192 *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR (Belgrade, April 2017).

193 Asylum Office Decision No. 26–2643/17 of 30 January 2019.

194 PIN Psychological Well-being Assessment Report of 5 October 2018.

Office came to these conclusions on the basis of the psychological report and, after interpreting other evidence, made a decision granting the asylum claim.

Another positive decision in 2019, in which the Asylum Office consulted the psychologist's report, was made in the case of a three-member family from Cuba. On 13 March 2019, the Asylum Office issued a decision granting asylum.[195] The report assessing the psychological well-being of the father of the family was prepared on 21 November 2018[196] and it was provided to the Asylum Office. It assesses the asylum seeker's psychological condition as stable, prompted by a feeling of general safety and security of the whole family after their arrival in the RS. However, it was also found that there was a risk that his condition might change, given the severity of the hardships and the traumatic experience he had gone through. The psychological assessment indicated that it was essential to ensure a responsive, supportive and safe environment, as well as adequate conditions for the achievement of his life goals. The Asylum Office took into account that assessment and stated in its decision that it was unequivocally established that the applicant, with respect to traumatic symptomatology, obviously feared returning to his country of origin. In addition to the facts presented by the applicant in the course of the procedure, and the evidence provided by the BCHR staff, the above psychological assessment further contributed to the positive decision of the Asylum Office in this case.

However, in the above case of underage A.A. from Afghanistan,[197] the Asylum Office departed from such practice, rejecting his asylum application.[198] His legal representative provided a psychotherapist's report stating that the psychological condition of the underage A.A. was bad, and that there was a risk that it might be exacerbated by the experiences that he had gone through as a child in his country of origin, including his age, but also the described circumstances. The child's psychological condition is a key factor that must be taken into account when deciding on his/her asylum claim, which the Asylum Office failed to do in this case. On 20 August 2018, the Belgrade City Social Work Centre – Palilula Department, submitted to the first-instance authority the report on the best interests of the underage A.A. The guardianship authority gave its expert opinion on his developmental needs to ensure that he could exercise his rights and, in particular, the right to life, survival and development guaranteed to him by Article 6 of the Convention on the Rights of the Child (CRC).[199] The report states, *inter alia*, that in the best interest of A.A. – given his physical and spiritual developmental needs – is that he is granted international protection in

195 Asylum Office Decision No. 26–1260 /18 of 13 March 2019.

196 PIN Psychological Well-being Assessment Report of 21 November 2018.

197 See Section 3.1.2. Findings of Fact and Assessment of Evidence.

198 Asylum Office Decision No. 26–932/19 of 30 September 2019.

199 *Official Gazette of SFRY – International Treaties*, No. 15/90 and *Sl. list SRJ – International Treaties*, No. 4/96 and 2/97.

the RS. However, the first-instance authority did not consider the best interests of the child, which it was required to do in accordance with the LATP[200] and the CRC.[201] It remains unclear why the first-instance authority, in the case of underage A.A., did not act similarly as in the case of the unaccompanied boy from Iraq.

Accordingly, the Asylum Office departed from the multidisciplinary approach it had practiced in early 2019 for no apparent reason. It should be taken into account that the outcome of the procedure itself affects the applicants' psychological condition and well-being. In any case, it is important that asylum authorities consider and accept the opinions of experts in other fields when assessing the credibility of asylum applications. This is especially important when it concerns members of particularly vulnerable asylum seeker populations.

3.1.5. Conclusion and Recommendations

The LATP greatly contributed to the abolition of the practice of automatic application of the safe third country concept, guiding the Asylum Office to start reviewing the merits of asylum applications regardless of which countries the asylum seekers had passed through on their way to the RS Serbia. However, it has primarily done so with respect to asylum applications filed in accordance with the LATP. As per asylum applications filed in accordance with the LA, the Asylum Office must also bear in mind the current LATP and resolve the administrative matter applying the provisions that are more favourable for the asylum seeker.

In any case, when it assesses the risks asylum seekers may face if they return to a safe third country, the Asylum Office must take into account the general situation in that country and the asylum seekers' individual circumstances. This is particularly relevant in cases where the asylum seekers are additionally vulnerable because of their age, gender or form of violence they had been subjected to. When it adopts its decisions, the Asylum Office should take into account the opinions of psychologists and, if necessary, other experts. Such a multidisciplinary approach would contribute to proper and sufficient findings of fact.

The Asylum Office lacks a uniform approach to considering country of origin reports as evidence in the asylum procedure. The first-instance authority should align its practice in terms of proper assessment of evidence and act in accordance with the LATP and the LGAP. In addition, the Asylum Office should make its decisions within the time limits prescribed by law and process the applications made by particularly vulnerable foreigners on a priority basis.

200 Article 10 of the LATP.

201 Article 3 of the CRC.

3.2. Second-instance Procedure

The Asylum Commission conducts the appeal review process for the decisions of the first-instance authority. The Asylum Commission is independent in its work and decides by a majority vote of the entire membership. To be appointed Chairperson or member of the Asylum Commission, a person must be an RS citizen, a law graduate, and he/she must have minimum five years of professional experience and knowledge of the human rights regulations. The Chairperson and members of the Asylum Commission are appointed by the RS Government for a term of four years.[202]

In its partial response to a request for access to information of public importance,[203] the Asylum Commission notified the BCHR that, in the period from 1 January to 30 November 2019, it had received 45 appeals. Out of that number, 44 appealed the decisions of the Asylum Office, and one was filed on the grounds of the first-instance decision not issued within the statutory timeline (administrative silence). In that same period, the Asylum Commission passed 43 decisions in the appeals procedures, including 27 decisions rejecting the appeal, and 16 decisions upholding the appeal. Interestingly, the second-instance authority passed one decision overturning the negative first-instance decision and upholding the asylum application.

The Asylum Commission refused to deliver to the BCHR the decisions it made in the period from 1 January until the end of September 2019 concerning asylum seekers not represented by the BCHR. Specifically, the Asylum Commission holds that the requested decisions contain the asylum seekers' personal information, and that the asylum seekers have not given their written consent for the disclosure of their information in accordance with the Law on Free Access to Information of Public Importance.

Such arguments point to the non-transparent approach by the Asylum Commission, as the above information could have been anonymised, fully preserving the confidentiality. In order to analyse the practice of the competent asylum authorities, an identical request was also sent to the Administrative Court, which furnished their judgments to the BCHR not including the asylum seeker's personal information.

Although, in 2019, the second-instance authority in one case overturned the first-instance negative decision and directly upheld the asylum application, this practice is an exception. Since its establishment in April 2008,[204] the Asylum

202 Government Decision 24 Number119–2520/17 establishing the Asylum Commission (*Official Gazette of the RS,* No. 29/17*)*.

203 Response by the Asylum Commission No. 27-A-1169–27/18 of 8 November 2019.

204 The Asylum Commission was established on 17 April 2008 under the Government Decision 119–643/2008.

Commission has made such decision only in two other cases. The first time in 2010, and the second time in 2016.[205]

The second-instance authority relies in its work mainly on the country of origin and transit country facts established by the Asylum Office. In addition, since 2008, the Asylum Commission has never held an oral hearing, i.e., it has not interviewed asylum seekers. All asylum authorities can be informed directly, in oral hearings, of the facts relevant for making the proper and lawful decision. In this regard, the BCHR believes that the Asylum Commission should take a more active role in the asylum procedure by starting to establish the facts on its own and conduct oral hearings. The second-instance authority should monitor on a continuous basis the situation in the applicants' countries of origin and in the transit countries.

In 2019, in specific cases, the second-instance authority did not contribute to the sufficient and proper findings of facts in the asylum procedure. On the other hand, the Asylum Commission has adequately corrected the practice of the first-instance authority on other issues. Specifically, the Asylum Commission has taken a clear position on the mandatory fulfilment of the legal conditions for discontinuing procedure, as well as on the obligation of the Asylum Office to terminate the procedures initiated before the entry into force of the LATP under the provisions of the law that is more favourable for the asylum seekers.[206] The following section of the Report provides an analysis of individual decisions of the Asylum Commission, which illustrate the above positions taken by that authority in 2019.

3.2.1. Insufficient Findings of Fact

On 1 April 2019, the Asylum Commission adopted a decision dismissing an appeal filed by a four-member family from Kashmir,[207] and upheld the first-instance decision[208] finding the family ineligible for asylum in the RS. The asylum seeker couple are members of different religions communities and they fled Kashmir because neither their families, nor their traditional and conservative community, accepted their civil union.[209] The asylum seeker also claimed that he had been tortured on several occasions by the soldiers of the Indian and Pakistani armies, which had been fighting for control over Kashmir for decades[210] The Asylum Office held that the family failed to demonstrate whom the specific risk they were exposed to emanates from and for what reasons. They also failed to prove what problems they would face in Kashmir because of their different religions.[211]

205 Asylum Commission Decision No Až – 25/09 of 23 April 2010, and Asylum Commission Decision No. Až – 06/16 of 12 April 2016.

206 Article 103 of the LATP.

207 Asylum Commission Decision No. Až – 07/19 of 1 April 2019.

208 Asylum Office Decision No. 26–1262/18 of 8 February 2019.

209 Minutes of the Oral Hearing held on 18 October 2018.

210 *Ibid.*

211 Asylum Office Decision No. 26–1262/18 of 8 February 2019.

The Asylum Commission upheld the above conclusion of the first-instance authority stating that it had reviewed all the relevant international reports regarding the situation in India and interconfessional marriages in the case file. However, the second-instance authority failed to take into account the drastic deterioration of the security situation in Kashmir, which occurred after the appeal was filed. Namely, the tensions between India and Pakistan started to grow after a Pakistani militant group *Jaish-e-Muhammad* killed 42 Indian security forces in India-administered Kashmir on 14 February 2019.[212] India retaliated by launching air strikes on the group's strongholds in Pakistan. The situation further escalated at the contact line between Indian and Pakistani forces in the contested Jammu and Kashmir region, where the asylum seekers come from.[213] In addition, the Islamic State claimed in May 2019 that it had for the first time established a "province" in India, after a conflict between its militia and the Indian security forces in Kashmir.[214] These conflicts were too intense for the Asylum Commission to ignore them.

The legal representatives alerted the Asylum Commission to those facts in their subsequent submissions. The second-instance authority could have taken them into account, as provided for in the LGAP,[215] given that these developments, which ensued after the completion of the first-instance procedure, were of relevance for the adoption of a proper decision in this administrative matter. The decision of the Asylum Commission was contested in a claim that was filed. At the time of writing this Report, the administrative dispute was still pending.

In July 2019, the Asylum Commission ruled[216] upholding the decision of the Asylum Office[217] rejecting the asylum application made by Afghan national Z. The asylum seeker and his family had received death threats from the Taliban and the so-called Islamic State in Afghanistan because his two older brothers worked in state institutions. Namely, the lives of civil servants and their families in Afghanistan are in constant danger because they are branded infidels by the rebel forces. The Asylum Office held that the events described by Z. during the procedure could not be qualified as persecution. In addition, the Asylum Office concluded that the treatment Z. had been subjected in the country of origin fell

212 "Brief overview of Pakistani-Indian conflict on February 26–27 (Map)", *South Front* (27 February 2019), available at: <http://bit.ly/2JvObQ2.

213 "India and Pakistan exchange artillery strikes in Kashmir area, casualties reported", *South Front* (2 March 2019), available at: http://bit.ly/2JIoJWi.

214 „Islamic State claims 'province' in India for first time after clash in Kashmir", *Reuters* (11 May 2019). Available at: https://www.reuters.com/article/us-india-kashmir-islamic-state/islamic-state-claims-province-in-india-for-first-time-after-clash-in-kashmir-idUSKCN1SH08J.

215 Article 167, para. 3 of the LGAP stipulates that the second-instance authority decides upon the appeal on the basis of the facts established by the first-instance or the second-instance authority.

216 Asylum Commission Decision No. Až-47/18 of 2 July 2019.

217 Asylum Office Decision No. 26–1278/17 of 17 April 2019.

below the standard of torture or inhuman or degrading treatment and that he would not be subjected to such treatment in case he returned to Afghanistan. The Asylum Commission upheld all these views, concluding that the Asylum Office had properly qualified the facts in this legal matter.[218]

Z.'s legal representatives are of the view that the Asylum Commission reneged on its obligation to control the work of the first-instance authority. Namely, the Asylum Commission failed to examine all the claims in Z.'s appeal and merely upheld the Asylum Office's views in the first-instance decision.[219] Nothing in the Asylum Commission's explanation indicates how it had concluded whether the Asylum Office's findings of fact were consistent with the information from the impartial sources of information produced by Z.'s legal representatives during the first-instance procedure.[220] The impression is that neither of the asylum authorities had adequately examined the existence of a real risk that Z.'s human rights would be violated in case he returned to his country of origin, taking into account his individual circumstances in the context of the persistent indiscriminate violence in Afghanistan.

In its decision from July 2019,[221] the Asylum Commission stated that it had reviewed a number of international reports on the situation in Afghanistan, referred to in the appeal and the submission[222] made on behalf of Z. by the BCHR lawyers. However, from the contents of the explanation of the decision, it is unclear why the facts in these reports could "in no way" be linked to Z. and why they would not result in a different decision in this case. Furthermore, the only sources, i.e. reports by international organisations, the Asylum Commission mentioned in its decision are exclusively those referred to by the Asylum Office in its decision rejecting the claim.[223] The Asylum Commission merely confirmed the Asylum Office's views by quoting the same excerpts from two reports by international organisations, – EASO[224] and UNICEF,[225] but not the other reports submitted by Z. The Asylum Commission and thus disregarded the claims in the appeal and the reports on the state of human rights and the security situation in Afghanistan submitted by Z. and alerting to a high degree of violence, internal unrest and gross violations of fundamental human rights.

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

219 See: *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, pp. 34–36, available in Serbian at: https://bit.ly/2PrXqEg.

220 Article 167, para. 3 of the LGAP.

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

222 Submission by Legal Representative, No. 23/168 of 13 June 2019.

223 Asylum Commission Decision, No. Až-47/18 of 2 July 2019, p. 7. See also: *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, pp. 34–36, available in Serbian at: https://bit.ly/2PrXqEg.

224 *Afghanistan Key Socio-Economic Indicators, Focus on Kabul City, Mazar e Sharif and Herat City, Country of Origin Information Report,* EASO (April 2019), available at: https://bit.ly/36eakvN.

225 *Child Notice Afghanistan 2018*, UNICEF (The Hague, 2018), available at: https://bit.ly/2Ng8GRw.

Bearing in mind the security situation in Afghanistan, the position taken by the Asylum Commission that all the facts and circumstances relevant to the proper and lawful decision in this administrative matter have been fully and thoroughly considered cannot be accepted. In its decision, the Asylum Commission acted in violation of the LGAP,[226] as it failed to take into account all the claims in the appeal. The fact that the Commission did not consider whether the facts determined by the Asylum Office were consistent with the information contained in the international reports on the security situation in Afghanistan is crucial. That is why, in this case, the findings of fact are wrong and insufficient and the law has not been applied properly. The procedure before the Administrative Court is pending.

3.2.2. Positive View on Discontinuation of Procedure and Application of the More Favourable Law

In the case of C.C., asylum seeker from Afghanistan, the Asylum Office discontinued the procedure on the grounds that the asylum seeker allegedly left the Asylum Centre where he was accommodated on his own initiative.[227] C.C. failed to notify the first-instance authority about it within the statutory time limit, which consists the grounds for the discontinuation of the procedure in accordance with the provisions of the LA, which was applicable in that case.[228]

The aforementioned was established on the basis of the first-instance authority's insight into the CRM's report on the situation at the Krnjača Asylum Centre. However, C.C. he did not actually leave the above Asylum Centre, he was just not present during the evening call, and the BCHR appealed that decision. The Asylum Commission overturned the decision of the Asylum Office and remanded the case for reconsideration on the grounds that the first-instance authority could discontinue the procedure exclusively if the summons or other relevant letters were not successfully served on the asylum seeker.[229] Considering that the Asylum Office had not previously taken any such procedural action, in accordance with the position taken by the Asylum Commission, in accordance with the LA and the LGAP, the procedure could not have been discontinued.

In several decisions, the Asylum Commission reiterated its position on the application of the more favourable law when adopting first-instance decisions for the asylum seekers who made their asylum application at the time the LA was in effect.[230] The second-instance authority pointed out that the provision

226 Article 158, paras. 1, 3 and 4 of the LGAP.

227 Asylum Office Decision No. 26–1278/17 of 10 September 2018.

228 Article 34, para. 1 of the LA.

229 Asylum Commission Decision No. Až-47/18 of 19 November 2018.

230 Asylum Commission Decision No. Až – 26/18 of 12 July 2019, Asylum Commission Decision No. Až-26/19 of 11 October 2019, and Asylum Commission Decision No. Až-49/18 of 5 November 2018.

of Article 103 of the LATP requires the first-instance authority, when it decides on asylum applications submitted during the effectiveness of the LA, to consider which law is more favourable for the asylum seekers.

In the case of a single mother from Iran X. and her underage daughter Y., the first-instance authority applied the LA, even though the BCHR had requested that the provisions of the LATP should be applied,[231] being more favourable for the asylum seekers. The Asylum Office dismissed their asylum application in accordance with the LA on the grounds that, on their way to the RS, they had stayed in Turkey, and that Tukey was a safe third country. However, the Asylum Office adopted the decision in accordance with the LA, and furthermore it did not explain why it considered there was no room to apply the provisions of the LATP.

Following the appeal, the second-instance authority argued that Article 103 of the LATP required the Asylum Office to examine which law was more favourable for the asylum seekers who had applied for asylum at the time the LA was in force.[232] It went on to say that the Asylum Office should provide a clear and comprehensible explanation why it had applied one of the two laws, i.e., to explain to the asylum seekers why one or the other law was applied in their case. In the opinion of the Asylum Commission, the failure of the Asylum Office to provide such an explanation was in violation of Article 103 of the LATP to the asylum seekers' detriment.

It is important that the Asylum Commission maintain a consistent position on the application of the more favourable law, considering that the BCHR has highlighted this omission by the Asylum Office in several other appeals. In those cases, at the time of writing this Report, the second-instance authority's decision was still pending.

3.2.3. Conclusion and Recommendations

The Asylum Commission's main duty is to control the lawfulness of the Asylum Office's activities. By reviewing the contested first-instance decisions, the second-instance authority should contribute to the proper implementation of the asylum procedure and the improvement of the first-instance authority's practice. With a view to improving the quality of the asylum procedure, the Asylum Commission should pay equal attention to both the violations of the procedural rules and proper application of substantive law.

In addition, asylum seekers coming to the RS are fleeing politically unstable or war-affected countries, where the situation is changing on a daily basis. The asylum authorities should therefore regularly and closely monitor the developments

231 Namely, the possibility of applying the LATP in cases initiated before the entry into force of that Law is foreseen if its provisions are more favourable to the asylum seekers (Article 103 of the LATP).

232 Asylum Commission Decision No. Až – 26/18 of 12 July 2019.

in those countries during the asylum procedure. In all individual cases, the Asylum Commission is under the obligation to independently and continuously review the situation in the asylum seekers' countries of origin, as well as in the transit countries, rather than rely exclusively on the views the Asylum Office expresses in its decisions. The Asylum Commission should also hold oral hearings and obtain directly the facts of relevance for the adoption of proper and lawful decisions.

3.3. Administrative Court

The asylum procedure in the RS provides also for the possibility of judicial protection.[233] An administrative dispute may be brought against the final decisions of the Asylum Commission by filing a claim with the Administrative Court. Filing a claim stays enforcement of the decision taken in the administrative procedure.[234]

The Administrative Court does not have specialised departments that handle disputes in asylum cases. Since the establishment of the asylum system in the RS in 2008, the Administrative Court has never issued a decision directly upholding an asylum application. In all the proceedings in which the claim was upheld, the case was remanded to the Asylum Commission for reconsideration. In addition, the Administrative Court has never held an oral hearing in the asylum proceedings. Asylum seekers wait for the judgement even up to a one year.

In the period from 1 January to 30 September 2019, the Administrative Court received a total of 17 claims against the decisions of the Asylum Commission. Out of the above number of cases related to claims filed in 2019, at the time of writing this Report, the Administrative Court resolved five administrative disputes by rejecting the claims.[235] In addition, in that same period, the court resolved 12 additional administrative disputes that had been initiated in previous years, upholding only two out of 12 claims.[236]

On the basis of an analysis of the judgments reviewed by the BCHR, it can be concluded that, in 2019, the Administrative Court in most cases dismissed the claims in the disputes concerning dismissed asylum applications by applying the safe third country concept. The safe countries referred to in these cases were Turkey, Bulgaria and Romania. [237]

233 Article 96 of the LATP.

234 *Ibid.*

235 Judgements U 1883/19, U 2774/19, U 5037/19, U 10053/19 and U 11314/19.

236 Judgements U 13512/16, U 19901/18 (upheld claims); U 13320/16, U 3543/18, U 6118/18, U 8442/18, U 11906/18, U 12941/18, U 16335/18 (rejected claims); U 15028/16 (dismissed claims); U 3938/18 (discontinued procedure), and U 11617/18 (case resolved otherwise).

237 For example, Bulgaria is the safe country referred to in Judgements U 8442/18 of 8 March 2019, and U 11906/18 of 22 August 2019, while Turkey is referred to in Judgement U 2774/19 of 5 July 2019.

3.3.1. Application of the Safe Third Country Concept

The Administrative Court thus rejected a claim filed by the Belgrade Centre for Human Rights on behalf of Afghan national M.M., whose asylum application was dismissed because he had entered the RS from the Republic of Bulgaria.[238] The Administrative Court failed to elaborate why it considered that Bulgaria was a safe third country for M.M, and merely reiterated the first-instance and second-instance authorities' views on the issue. The Court completely disregarded the asylum seeker's allegations that while he was in Bulgaria, although he was underage at the time, he was deprived of liberty and abused by the police. His legal representatives also argued that Bulgaria was not safe for M.M., because the Bulgarian authorities had not treated him personally in compliance with the international refugee protection standards. Furthermore, the reports by the UN treaty bodies highlighted the dismal situation of refugees in Bulgaria. Notwithstanding, the Administrative Court rejected the claim without further examination.[239]

In two Administrative Court judgements[240] rejecting the claims, the Court found that the asylum applications had been properly dismissed because the applicants had passed through Turkey and Romania on their way to the RS. Both the asylum applications were made at the time the LA was in effect. Interestingly, in the reasoning in both judgments, the Administrative Court stated that, considering that, according to the Decision on Establishing the List of Safe Countries of Origin and Safe Third Countries,[241] Turkey and Romania were on the list of safe third countries, the respondent authority was not under the obligation to establish whether those countries were actually safe or not. The Administrative Court found that the respondent authority was under the obligation to accept that as an established fact, considering that these countries were on the list established by the RS Government.

Such reasoning of the Administrative Court cannot be considered valid because it justifies the automatic application of the safe third country concept, on the grounds of which the CAT has just found the RS responsible for violations of Article 3 of the Convention against Torture.[242] The competent asylum authorities are under the obligation in each case to determine individually whether a particular country is safe for the applicant or not, taking into account his/her allegations and all relevant international organisations' reports. Given that the LATP no longer prescribes the application of the list of safe third countries, we hope that the Administrative Court will also review this practice.

238 Judgement U 11906/18, of 22 August 2019.

239 See further *Right to Asylum in the Republic of Serbia, Periodic Report for July-September 2019*, Belgrade Centre for Human Rights, pp. 31–34, available in Serbian at: https://bit.ly/2s47hXf.

240 Judgements U 10053/19 and U 13320/16.

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

242 See Special Supplement: Decision of the Committee against Torture.

3.3.2. Upheld Claims

One of the two Administrative Court's decisions upholding the claims was adopted in the case of an asylum seeker represented by the BCHR lawyers. The Administrative Court delivered the judgment[243] upholding the BCHR's claim filed on behalf of Syrian national M.O. The Court quashed the contested decision[244] of the Asylum Commission and remanded the case to the Asylum Commission for reconsideration for failure to consider all the allegations in the appeal. Specifically, the asylum application, which M.O. made in 2015, was rejected by the Asylum Office[245] due to the fact that he had passed through Montenegro in which he allegedly applied for asylum.[246] In this case, the safe third country concept was applied in accordance with the preceding LA. The lawfulness of the first-instance authority's decision was upheld by the Asylum Commission.

In the administrative dispute, M.O. challenged the fact that, during his five-day stay in Montenegro, he had applied for asylum, claiming that in Montenegro he only received a document entitled "confirmation" from their police. The Montenegrin competent authorities did not advise M.O. of his rights and obligations as an asylum seeker, nor did they provide him with an interpreter, which is why the delivery of the above document could not be considered applying for asylum. In addition, since his arrival to the RS in 2015, M.O. has fully integrated into Serbian society and remained firmly committed to continuing his life in the RS.[247] During his stay in the RS, as a recognized victim of human trafficking, for a certain period, M.O. was under the protection of the NGO Atina,[248] after which he established an association for assistance to vulnerable persons in the RS.

In the proceedings before the Administrative Court, M.O. pointed out that the Asylum Commission failed to consider the allegation in his appeal that his stay in Montenegro could not be a relevant ground for dismissing his asylum application, since he had integrated into Serbian society and regarded the RS as the country of asylum. The Administrative Court, in deciding upon the claim, took these facts into account, as well as the circumstance that M.O. came from Syria, and found that the claim was well-founded. The Court quashed the decision of the Asylum Commission and ordered the second-instance authority to reconsid-

243 Judgement U 13512/16 of 31 January 2019.

244 Asylum Commission Decision No. Až-34/16 of 15 August 2016.

245 Asylum Office Decision No. 26–3638/15 of 21 June 2019.

246 Article 33, para. 1, Item 5 of the Law on Asylum.

247 M.O. has been engaged as a cultural mediator and interpreter for the Arabic language by the international organisation Save the Children at several Reception/Transit Centres and Asylum Centres in the RS. In addition, over the four-year period, M.O. had learned Serbian, and left the Krnjača Asylum Centre where he was accommodated as an asylum seeker with the intention of starting an independent life and started a romantic relationship with an RS citizen.

248 As he was targeted by the organised crime groups operating in the Krnjača Asylum Centre area, M.O. spent some time in the safe house run by the NGO Atina.

er, in particular, in the repeated proceedings, the allegations in the appeal that M.O. had integrated into Serbian society, that he came from Syria and wished to remain in the RS.

This decision of the Administrative Court is significant for two reasons. Firstly, the Court pointed out to the Asylum Commission that it had to rule on all the allegations in the appeal. Secondly, the Court explicitly stated in this decision that the asylum seekers' wish to remain in the RS and the degree of their integration into Serbian society were relevant factors in reviewing asylum applications on the merits.

In the other case in which the Administrative Court upheld the claim, the BCHR lawyers did not represent the asylum seeker and have no detailed information on the case, only an anonymised decision submitted by the Court to the BCHR based on the request for access to information of public importance. The Administrative Court upheld the claim[249] and remanded the case of the asylum seeker X.X to the Asylum Commission. The Administrative Court pointed out that the Asylum Commission failed to consider all the evidence provided in support of the appeal. It was also found that the second-instance authority failed to consider the latest evidence and reports by international organisations regarding the security situation in the country of origin in the second half of 2017, which was relevant for assessing whether the applicant fulfilled the conditions to be granted subsidiary protection, considering that a foreigner can be granted subsidiary protection, *inter alia*, if upon his/her return to the country of origin, his/her life, security or freedom would be at risk due to generalised violence caused by an internal armed conflict.[250]

Specifically, the Administrative Court also found that the Asylum Office issued its decision based on only one EASO report from 2016, which was no longer current and did not reflect the security situation in the country of origin at the time of the decision. The Asylum Commission upheld the lawfulness of such first-instance decision, which was not acceptable for the Administrative Court. The Court quashed the second-instance decision and remanded it to the Asylum Commission for reconsideration, holding that it would be more cost-effective and expedient that the shortcomings are removed by the Asylum Commission, following up on the Court's observations in the judgment.

This decision of the Administrative Court is an example of good practice. Firstly, the Court has pointed out clearly to all the relevant asylum authorities that they need to consider the current security situation reports on the country of origin of the asylum seeker. As noted above, insufficient findings of fact, i.e., selective assessment of evidence – relevant reports, is an illegal practice of both the Asylum Commission and the Asylum Office. Secondly, the Administrative

249 Judgement U 19901/18 of 10 January 2019.

250 Article 2 of the LA.

Court drew the attention of the Asylum Commission that, in order to make a lawful decision, it had to rule on all the allegations in the appeal, and that it should not rely entirely on the facts established in the first-instance proceedings.

3.3.3. Conclusion and Recommendations

As previously, the Administrative Court has not ruled in full jurisdiction[251] in the cases concerning asylum applications. Considering that the Administrative Court, which has the jurisdiction to rule on the lawfulness of the final administrative enactments in all administrative areas, is overburdened,[252] and that it does not have specialised asylum departments, such current practice in the asylum procedures should not be surprising. The Administrative Court has taken a problematic view on the application of the safe third country concept on the basis of the LA, which is contrary to the principle of *non-refoulement*. On the other hand, in two cases, the Court properly pointed out to the Asylum Commission how it should consider the allegations in the appeals and the facts.

With the view of improving the overall RS asylum system, the BCHR believes the Administrative Court needs to start hearing asylum seekers and reviewing asylum applications in full jurisdiction. The former would contribute to the proper findings of fact in each case, while the latter would contribute to a more cost-effective proceeding. In addition, based on its judgment in the case of Syrian national M.O., the Administrative Court should take its positions so that they influence the RS to reverse the practice of applying the safe third country concept in a way that might result in violations of the principle of *non-refoulement.*

251 When deciding on a dispute in full jurisdiction, the court not only annuls the disputed administrative enactment, but also resolves the administrative matter on the merits, effectively replacing that enactment with its judgement. In other words, after having discussed and established the facts, the court does not remand the administrative matter to the repeated administrative procedure, but resolves it directly by delivering its judgment.

252 At the conference "Regulations in the Field of Asylum and Migration: First Year of Application", organised by Group 484, at the Metropol Hotel, 26 November 2019, Zorica Kitanović, Administrative Court Judge, stated that the reason the Administrative Court was overloaded was a huge number of cases, and insufficient number of acting judges.

4. ASYLUM SEEKER ACCOMMODATION

4.1. Facilities under CRM Jurisdiction

Under the LATP, one of the asylum seekers' rights is the right to material reception conditions.[253] The material reception conditions specified by the LATP include accommodation, food, clothing, and cash allowance for personal needs.[254] The LATP provides that the CRM is responsible to provide the material reception conditions to asylum seekers.[255] The CRM provides the accommodation to asylum seekers and migrants in Asylum Centres (ACs) and in Reception/Transit Centres (RTCs) that the RS Government establishes by its decision.[256]

In 2018, the RS Government adopted the Strategy for Combating Irregular Migration in the Republic of Serbia for the period 2018 to 2020.[257] The document emphasises in several places the need to ensure adequate accommodation for migrants inside the Republic of Serbia.[258] However, the accommodation conditions are not satisfactory at all of the facilities under the jurisdiction of the CRM. In addition, a number of migrants are still staying in the informal settlements in the vicinity of border crossings.

Bearing in mind the Republic of Serbia's European integration process, there is a need to comply with the asylum and migration standards prescribed by EU law. Thus, the RS authorities, and in the case of asylum and migration particularly the CRM, are under the obligation to respect the EASO standards,[259] and act in accordance with the prescribed standards when they accommodate asylum seekers and migrants. With regard to the accommodation of migrants, the European Commission noted that the RS is making efforts to provide the basic living conditions and services for all migrants inside its territory. According to the European Commission, there are 16 functional facilities in the RS that can accommodate 6,000 persons. They accommodate between 80% and 90% of mi-

253 Article 48 of the LATP.

254 Article 50, para. 1 of the LATP.

255 Article 23 of the LATP.

256 Article 51 of the LATP.

257 *Official Gazette of the RS,* No. 30/18.

258 See sections 5.3. and 6.1. of the Strategy for Combating Irregular Migration in the Republic of Serbia for the period 2018 to 2020.

259 European Asylum Support Office standards applicable to reception conditions: EASO *Guidance on Reception Conditions: Operational Standards and Indicators*.

grants. However, others rough sleep in harsh conditions in the areas close to the Hungarian and Croatian borders and in downtown Belgrade.[260]

In 2019, the BCHR legal team regularly visited asylum seeker facilities to provide free legal assistance. In this chapter, we will briefly explain the difference between ACs and RTCs, especially with regard to asylum seekers' ability to exercise their rights in such facilities. In addition, we will describe in more details the situation of asylum seekers in individual ACs.

4.1.1. Reception/Transit Centres

Bearing in mind the situation that emerged in 2015, when the refugee-migrant crisis intensified, and which, in a somewhat milder degree, has continued to this day, the RS has made efforts to address the problem of the large number of migrants inside its territory.[261] For that purpose, Reception/Transit Centres were established throughout the RS. According to the LATP, the Government, in addition to establishing ACs, should designates by decision one or more accommodation facilities other than Asylum Centres, which are run by the CRM as well.

There are 14 RTCs in the Republic of Serbia, of which, in 2019, 11 were active and three currently idle, not receiving beneficiaries – due to cost-cutting efforts.[262] At the end of November, Preševo RTC started receiving beneficiaries in large numbers again (over 600 in the first few days after its opening), increasing the number of active RTCs at the end of the year to 12. The total accommodation capacity in currently active RTCs is 3,240 persons. With the advent of cooler weather, there has been a noticeable increase in the occupancy rates at RTCs, some of which have significantly exceeded the designed number of migrants.[263]

The BCHR legal team conducts regular monthly visits to the following RTCs: Adaševci, Bosilegrad, Bujanovac, Pirot, Obrenovac, Principovac, Vranje, and other centres, as needed. In 2019, the BCHR legal team was able to regularly visit the RTC residents, with the approval of the CRM, and to provide legal advice to persons wishing to be informed about the right to asylum in the RS. While the LATP does not specify whether the MI should refer the registered asylum seekers after

260 *Serbia 2019 Report, Commission Staff Working Document*, European Commission (29 May 2019), p. 38.

261 See Belgrade Centre for Human Rights reports *Right to Asylum in the Republic of Serbia* for 2015–2018. The reports are available in Serbian at: www.azil.rs.

262 The RTCs are located in the following towns: Adaševci, Bosilegrad, Bujanovac, Dimitrovgrad, Divljana, Kikinda, Obrenovac, Preševo, Pirot, Principovac, Sombor, Subotica, Šid and Vranje. The RTCs in Preševo, Dimitrovgrad and Divljan were idle during 2019.

263 For example, Bujanovac Reception/Transit Centre, which, according to the UNHCR data, in October 2019, had 311 accommodated persons relative to the designed capacities of 220 persons. Source: UNHCR Serbia, *Centre profiling – Bujanovac RTC*, available at: http://www.unhcr.rs/CentreProfiling/site_profiles.php?search=Bujanovac&submit=Select.

they have expressed their intention to seek asylum to an RTC or an AC, the practice shows that, in most cases, the MI refers asylum seekers primarily to RTCs. In the BCHR's experience, the RTCs mostly accommodate persons who wish to continue their journey, i.e., those foreigners who do not consider the RS as the country of destination. Unless they are asylum seekers, these foreigners do not have a formal permission to stay in the RS in accordance with the applicable regulations.

With the exception of the Obrenovac RTC, all RTCs are located close to the RS borders with the neighbouring countries. All RTCs are open-type facilities, which means that the migrants can move around without any restrictions, i.e., they can leave at their own accord. The location of the RTCs, i.e., their proximity to the border, does not make them a conducive environment for those who genuinely wish to seek asylum in the RS.

The Asylum Office does not conduct the formal asylum procedures in RTCs and the foreigners accommodated in RTCs have virtually no access to the asylum procedure.[264] Foreigners seeking to apply for asylum have to wait to be relocated to an AC (where the asylum procedure is conducted) for weeks, and even months, which discourages them from staying in the RS. Asylum seekers accommodated in RTCs often remain invisible or stay out of the focus of the Asylum Office. With that respect, there is a need to speed up the relocation process from RTCs to ACs of all persons who wish to apply for asylum in the RS, or that the Asylum Office starts to conduct the asylum procedure in RTCs as well.

The reception conditions in RTCs are not at the same level as in ACs. There are many reasons why that is so, from underinvesting, overcrowdedness, overstretched capacities, and a large fluctuation of persons accommodated in the RTCs in the border areas (particularly in Adaševci, Šid and Principovac). Most of the facilities designated as RTCs are older buildings, with insufficient reception facilities and not always satisfactory sanitary conditions. That general rule does not apply to the Bosilegrad RTC, which had a part of the building renovated in early 2019, and has rooms that are fully adapted for persons with disabilities.

The majority of foreigners interviewed by the BCHR lawyers at the RTCs did not wish to stay in the RS. They stated that it was important for them that the RTCs were located near the border. In that context, the RS policy of accommodating migrants and asylum seekers in those RTCs is unclear.

4.1.2. Asylum Centres

The LATP stipulates that asylum seekers should be accommodated in one of the ACs, which are managed by the CRM. The RS Government is required to establish, at the proposal of the CRM, one or more ACs, whose internal organisation and job establishment is managed by the CRM.[265] The AC procedures

264 See Section 2.3.2. Inability to Apply for Asylum in All Accommodation Facilities.

265 Articles 35 and 51 of the LATP.

are governed by a secondary regulation: the House Rules at Asylum Centres and Other Asylum seeker Accommodation Facilities.[266] Admission to ACs is governed by the Rulebook on Asylum Seekers Medical Check-ups on Admission to Asylum Centres or Other Asylum Seeker Accommodation Facilities.[267]

According to the BCHR assessment, the difference between an AC and an RTC is of a legal nature. Specifically, in ACs, the asylum procedure, i.e., receiving asylum applications and interviewing foreigners, is available. However, as stated above, the MI refers the registered asylum seekers to RTCs, and they are in turn relocated to ACs. This usually occurs when the legal representative informs the MI and the CRM that the foreigner in question is genuinely interested in applying for asylum or when that is otherwise established by the competent authorities. This practice is completely unclear, considering that in 2019 there were vacancies in all ACs.

The BCHR believes that it would be more cost-effective and expedient to accommodate asylum seekers immediately after they express the intention in ACs, where the official actions in the course of the asylum procedure are conducted. In addition, due to the initial accommodation in an RTC and subsequent relocation to an AC, the overall asylum procedure is unreasonably long. Finally, asylum seekers are thus exposed to the additional costs of travelling from one centre to another.

At the time of writing this Report, the existing ACs were located in Banja Koviljača, Bogovađa, Krnjača, Sjenica and Tutin. In the Asylum Centres, the CRM accommodates all asylum seekers regardless of their sex, age or other personal characteristics. The Sjenica AC mostly accommodates unaccompanied children, and a number of unaccompanied children are accommodated at the Krnjača AC as well.

The Law on Migration Management[268] stipulates that migration management is to be carried out in accordance with the principles of balanced and planned economic development and the prohibition of artificial changing of the ethnic composition of the population. It is noticeable that ACs are generally located outside the populated areas or at the outskirts of towns or cities. With the exception of the Krnjača AC, all ACs are away from Belgrade, where the Asylum Office has its headquarters, which often affects the scheduling of the procedural actions in the course of the asylum procedure.[269]

That distance influences the integration opportunities, i.e., integration of foreigners into the social, economic and cultural life in the RS. In addition, many ACs are located in isolated or economically devastated areas, which impedes the use of local community services. Communication between migrants and the lo-

266 *Official Gazette of the RS,* No. 96/18.

267 *Official Gazette of the RS*, No. 57/18.

268 *Official Gazette of the RS*, No. 107/12–4.

269 See Section 2.3.1. Failure to Timely Schedule Official Application Submission Action.

cal population is achieved mainly through the inclusion of children asylum seekers in the education system and through various NGO activities.[270]

All ACs are open-type facilities, meaning that the asylum seekers are free to leave the AC without any special permission, unless they have been imposed movement restrictions in accordance with the law.[271] The asylum seekers are allowed to leave the AC for a 72-hour period with a permission of the AC management. If they do not return within that period, the CRM's practice is to remove their names from the list of persons accommodated at the AC, which futher affects their asylum procedure. Specifically, after the AC management submits to the MI information on the names deleted from the list of persons accommodated at the AC, the Asylum Office issues a decision discontinuing the asylum procedure, unless it receives from the asylum seeker a notification of the change of his/her residence address.[272]

The following section of the Report provides brief descriptions of the situation of asylum seekers in individual ACs. The BCHR legal team has focused on the ACs, considering that these are the primary facilities for accommodation of those asylum seekers who genuinely wish to apply for asylum in the RS, and that that is where the Asylum Office conducts the official actions. The position of asylum seekers in individual ACs is presented through a combination of the official CRM and UNHCR reports, personal observations of BCHR legal team, and the impressions of the AC residents.

a) Banja Koviljača Asylum Centre

The Banja Koviljača AC is located 151 km away from Belgrade. The closest public services, primary school and police are approximately 1 km away from the AC in Banja Koviljača. The AC is located in an urban area, in the vicinity of a large town, Loznica. The AC in Banja Koviljača is the first Asylum Centre established in the RS, in 2008. The AC accommodation capacity is 120 persons.[273] Asylum seekers share rooms, while families are usually provided a separate room by the AC management. Bathrooms and toilet facilities are shared as well. There are eight shower boxes on each floor (4 for men and 4 for women) per 35 persons on average. In 2019, the number of persons accommodated at the AC did

270 *Strategy for Coordinated Action by Local Actors in Migrant Protection*, Belgrade Centre for Human Rights, (Belgrade, 2019), p. 9.

271 The LATP, in Article 77, stipulates the grounds for restriction of movement (e.g. when there is a need to establish someone's identity, protect security and public order) and in Article 78, provides a list of the measures that may be used to restrict movement (e.g. prohibition of leaving the Asylum Centre, regular reporting to police).

272 Article 47, para. 2, Item 3, of the LATP.

273 UNHCR Serbia, *Centre Profiling – Banja Koviljaca AC,* available at: http://www.unhcr.rs/CentreProfiling/site_profiles.php?search=Banja+Koviljaca&submit=Select (last accessed on 25 November 2019).

not exceed the maximum accommodation capacity. That means that at any time during the year there were vacancies in this AC.

The AC has eight indoor cameras inside the facility, and eight outdoor cameras, and the AC gate is locked during the night. The AC has own heating system and it does not depend on the external heat supply. Asylum seekers are provided meals three times a day, and the meals are specially adjusted to their religious and health needs. The AC has a TV room, a dining room, a classroom for children, a tailor shop and a hair salon. That ensures that the facility can meet diverse asylum seekers' needs. The asylum seekers interviewed by the BCHR legal team did not complain about the facilities they have available at the AC. The only complaint they made was that the internet signal was not strong enough in all parts of the building, and that they often had to stay in the TV room or in the lobby in order to be able to use the internet.

The general impression is that the AC is tidy and clean, and as such, it is adequate for both singles and family accommodation. There is room for improvement of the accommodation conditions, including wall painting and improving the contents in the common rooms.

At the Banja Koviljača AC, there are a GP and a nurse present, with the support of the International Organisation for Migration (IOM) and monitoring by the Danish Refugee Council. Medical check-ups are available on all working days, and the GP can intervene in urgent cases 24/7 as she herself stays at the AC in Banja Koviljača. The asylum seekers represented by the BCHR legal team in the asylum procedure did not complain about the AC health services and rated them as adequate.

School-age children are able to attend the local primary school on a regular basis, while secondary schools are located 7 kilometres away from the AC, in the town of Loznica. A number of children at the AC attend preschool institutions and the primary school, in the immediate vicinity of the AC. One child attends high school in Loznica, and the cost of public transportation to Loznica is covered by UNHCR.

Free legal aid providers are regularly present at the Banja Koviljača AC. Those include the BCHR, Danish Refugee Council and Asylum Protection Centre lawyers, who make regular and extraordinary visits to the Centre. According to the AC management, each foreigner who comes to the AC first has an informative interview with the manager, and the interpretation assistance is provided by one of the asylum seekers accommodated at the Centre. While there are no interpreters present at the AC, they come to the AC together with the NGOs, which perform various activities at the centre.

In the BCHR's experience, the Banja Koviljača AC does not have a special designated room for legal aid providers. When all special purpose rooms (TV

room, tailor room or the classroom) are occupied, legal counselling takes place in the lobby or outside, which is also problematic in terms of protecting the asylum seekers' privacy.

On the other hand, at the Banja Koviljača AC, there is always an Asylum Office officer present, who issues ID cards to asylum seekers and organises the submission of asylum applications. The Asylum Office officers from Belgrade come to Banja Koviljača to conduct the asylum procedure interviews. However, that is reflected in the duration of the asylum procedure, as the Asylum Office has its headquarters in Belgrade, and the procedural actions at the Banja Koviljača AC are not conducted frequently enough. In addition, the practice that one officer receives the asylum seeker's asylum application, while another officer interviews him/her may affect the asylum application credibility assessment. The BCHR believes that it is necessary for one first-instance authority officer to have direct insight into the foreigner's behaviour during all the procedural actions in which his/her statement is taken. That would allow the officer to get a more complete picture of the asylum seeker's personal circumstances and his/her emotional state.

b) Bogovađa Asylum Centre

The Bogovađa AC is located 70 km away from Belgrade, in the facilities of the former "Red Cross Children's Resort". The distance between the Bogovađa AC and public services is 11 km. The AC itself is not located in an urban area, i. e., it is located in a weekend village surrounded by forest. This makes it difficult for the asylum seekers to use all the services they need, with the exception of attending the primary school. The nearest shop is 2–3 kilometres away.

The AC accommodation capacity is 200 persons, and at the time of writing this Report, there were 103 asylum seekers accommodated at the Bogovađa AC.[274] Asylum seekers share rooms, bathrooms and toilet facilities, but families are usually provided a separate room by the AC management. The AC has a common TV room. The meals at this AC are regular, three times a day, and are served in the common dining room. However, the BCHR clients have expressed concern about the lack of halal food standards.

The AC is not physically fenced off, it has video surveillance, and the security staff are present. Within the AC grounds, there are several separate buildings for different purposes, one of which is used by the AC management, doctors, the Asylum Office inspectors, and the Red Cross staff. The largest building is used for asylum seeker accommodation, and there is also a facility that is used by charity organisations, such as *Caritas*, to carry out their activities. There is a children's playground in the courtyard.

274 CRM, *Centre Profiling – Republic of Serbia*, p. 6, available at: http://www.CRM.gov.rs/media/uploads/Azil/profili-centara/PC-SR-2019–10.pdf.

At the Bogovađa AC, there is a GP present, and for specialist examinations, the asylum seekers are taken to Lajkovac or to Valjevo. Access to healthcare services outside the AC is impeded due to the lack of transportation means and drivers for that purpose. The doctor is present during the working days, but faces difficulties in his work if there are no interpreters brought to the AC by some of the civil society organisations.

There are various workshops held at the AC, usually organised by *Caritas* or the Red Cross. In 2019, there were special workshops for children and young people held in AC, as well as language classes. At the Bogovađa AC, there were also Group 484 staff and the PIN organisation staff present, and organised workshops for children, i.e., psychological counselling for children and adults. The primary school is located near the AC, and asylum seekers have no difficulty reaching it. Throughout the year, the Crisis Response and Policy Centre interpreters were regularly present at the AC.

Access to free legal aid is provided through civil society organisations. The BCHR practice during regular monthly visits and preparations for the interviews is to have an interpreter accompanying the legal counsels. During their regular visits in 2019, the BCHR legal team generally had a separate room provided where they interviewed the interested persons. In other cases, counselling was performed, in agreement with the management, for example, in the dining room or outdoors when the weather and privacy concerns permitted it.

In the BCHR's experience, the Asylum Office regularly visits the Bogovađa AC to conduct the asylum procedure. The official actions of receiving asylum applications and holding interviews are performed relatively frequently, which may be due to the proximity of this AC to Belgrade.

c) Sjenica Asylum Centre

The Sjenica AC is located in the administrative building of the "Vesna" textile factory, approximately 250 km away from Belgrade. The facility has been operating as an AC since March 2017. Its distance from Belgrade (5–6 hours by car) and the underdeveloped road infrastructure pose particular difficulties for the NGOs that provide various forms of assistance to asylum seekers. In addition, the location of this AC is probably one of the reasons why the Asylum Office does not conduct regularly the official actions there, sometimes even for months.

This AC accommodation capacity is 250 persons.[275] In the course of 2019, the number of accommodated asylum seekers did not exceed 150 persons. The building that houses the Sjenica AC has 27 rooms,[276] which the asylum seekers share, as well as shared bathrooms and toilet facilities. The management sometimes places

275 UNHCR Serbia, *Centre Profiling – Sjenica AC,* available at: http://www.unhcr.rs/CentreProfiling/site_profiles.php?search=Sjenica&submit=Select (last accessed on 25 November 2019).

276 *Ibid.*

families in separate rooms. Within the AC, there is a children's area, a TV room, and a playground in front of the building. Meals are provided to asylum seekers three times a day, and are specially adjusted to their religious and health needs.

The AC is used to accommodate mostly unaccompanied children, which is the MI and the CRM practice that has yet to be formalised. According to the information obtained by the BCHR, the Sjenica AC accommodates only the persons who declare as children. The initial placement of unaccompanied children at the Sjenica AC, in the original old facilities, could not be considered an example of good practice. The former factory building was old and dilapidated. However, during 2019, the old part of the building was reconstructed and a new part was built. That has improved the accommodation conditions for children to an extent. The entrance to the building was reconstructed, and the part of the building where the kitchen, dining room and bedrooms are located was renovated. The new part of the building provides more privacy and plenty of accommodation space. The children accommodated at the AC are satisfied with the organised activities. They mainly complain that Sjenica is a small town, and that consequently they are limited mostly to the AC grounds and the surrounding area.

In the second half of 2019, one room that was previously used by the AC management was redecorated and given to social workers to use.[277] That has made it easier for the Social Work Centre to perform their everyday activities at the AC. The guardians can now talk to children, perform counselling, keep documentation and hold meetings there. The room is also used for legal counselling of children interested in the asylum procedure in the RS.

A GP is available at the AC on all working days. If necessary, children are referred for specialist examinations, accompanied by their guardian and an interpreter, to the health centre or other medical facilities. All unaccompanied children interviewed by the BCHR were informed of the possibility of using medical services. All children are medically examined upon their arrival to the AC.[278] That can be considered a good practice example.

The local primary school and the vocational high schools are available to all unaccompanied children. In discussion with the unaccompanied children and their guardians, the BCHR received information that the usual practice is to have children enrolled in school in the course of the school year, after they have had some time to adapt after their arrival to the AC. However, most children stop attending classes soon after the enrolment, justifying it with communication problems, i.e. the language barrier, and partly because they do not plan to stay in the RS in the long-term.[279]

277 Information obtained during the BCHR legal team's visit to the AC on 16 October 2019. Available at the BCHR archives.

278 Minutes of the interviews are available at the BCHR archives.

279 Minutes of the interviews with the BCHR clients are available at the BCHR archives.

In front of the AC, children can engage in sports activities (collective ball sports). At the AC, there is a TV room and internet access, and children spend a part of their daily activities in that room. The rooms are spacious and allow for holding workshops for a large number of children. However, in the old part of the building, the TV room is neglected, and needs to be redecorated. In addition, it would be good to introduce additional facilities such as, for example, a computer room. That would allow the children to use the internet in their spare time, and to participate in the distance learning programmes.

Throughout the year, the Crisis Policy and Response Centre interpreters were present at the Sjenica AC. Farsi interpreters were available most of the time, and interpreters for other languages were available as needed. The Serbian language classes are also available at the AC.

During 2019, at the Sjenica AC, unaccompanied children and other accommodated persons had access to free legal assistance provided by non-governmental organisations. Legal counselling was generally held at the AC management office, which later became the office of the Centre for Social Work staff, or in the dining room. In the course of legal counselling, lawyers advise children in the presence of their guardian, throughout the interview, and during all interviews, there is an interpreter provided for the child's native language or a language that the child can understand best.

At the Sjenica AC, there is no Asylum Office officer present at all times. In principle, asylum seekers are able to apply for asylum at this AC. However, according to the experience of the BCHR team, in 2019, the Asylum Office staff came to the Sjenica AC only a few times to organise the submission of asylum applications or oral hearings. Such practice is particularly problematic given that the AC accommodates children whose asylum applications should have priority over all other asylum procedures.[280]

d) Tutin Asylum Centre

The Tutin Asylum Centre is located in a new facility in Velje Polje, 295 km away from Belgrade. It takes an average of 5–6 hours to get to the Tutin AC from Belgrade, travelling on the roads in bad condition. Coming to the Tutin AC and leaving the centre might prove especially difficult during the winter months, when the roads are often impassable.

The capacity of the facility is 200 persons.[281] Asylum seekers share rooms, while families are usually provided a separate room by the AC management. Bathrooms and toilet facilities are shared as well. In 2019, the occupancy did not reach full capacity. The AC building in Tutin is a modern and clean building

280 Article 12 of the LATP.

281 UNHCR Serbia, *Centre profiling – Tutin AC,* available at: http://www.unhcr.rs/CentreProfiling/site_profiles.php?search=Tutin&submit=Select (last accessed on 25 November 2019).

with a common TV room, a dining room, and a children's playground. It was commissioned in March 2018. It also has rooms adapted for stay and movement of persons with disabilities (albeit only on the ground floor of this one-storey building). However, for technical reasons, persons with disabilities cannot access the first floor of the AC, and can only move on the ground floor of the building.

The AC provides three meals a day. The asylum seekers interviewed by the BCHR legal team have confirmed that food is provided regularly and that it is varied, but that sometimes it is not calorie-sufficient for those participating in specific additional activities (sports, physical labour, etc.). It has been emphasised that the CRM takes particular care of the food for religious purposes.[282]

Asylum seekers are provided adequate clothing and footwear, which they receive from the AC management. During their stay at the AC in Tutin, they receive hygiene packages including the basic hygiene products. The Tutin AC management has informed the BCHR legal team that they occasionally receive donations from both organisations and individuals from the surrounding towns.[283]

The BCHR clients did not complain about the accommodation conditions at the Tutin AC. During their visits, the BCHR legal team has witnessed that the hygiene in the common areas is well maintained, and that the asylum seekers use the playground and the other available facilities.

A GP is available at the AC on all working days, from 8am to 4pm. In case of need for specialist examinations or emergency medical treatment, asylum seekers are taken to the local hospital in Tutin, which is approximately 4 km away from the AC, or to the hospital in Novi Pazar. In case of emergency, upon request, a doctor and a medical technician come to the AC.[284] That practice can be considered a positive example.

Children accompanied by their parents who are accommodated at the Tutin AC are able to attend primary and secondary school. All educational institutions are located in Tutin, i.e., several kilometres away from the AC. The AC management also organises other informal activities at the AC. Numerous workshops are organised within the children's corner, and there are various courses organised for adults (sewing, hairdressing). The asylum seekers are satisfied that they have the opportunity to improve their knowledge and practical skills in those courses.

The AC does not ensure interpreters for the languages predominantly spoken by the accommodated persons on a daily basis, which poses a difficulty in the daily communication between the accommodated persons and the management and other civil servants visiting the AC. The usual practice is that organisations providing free legal aid or other assistance bring their own interpreters to the AC with them.

282 Minutes of the interviews are available at the BCHR archives.

283 Minutes of the interviews are available at the BCHR archives.

284 Minutes of the interviews are available at the BCHR archives.

At the AC in Tutin, free legal aid providers were present throughout the year. The BCHR legal teams were present at the AC, during their regular and extraordinary visits. The AC Tutin management provides the legal aid providers with a room where they can conduct confidential interviews with asylum seekers, and often give up their own offices when there are no other adequate premises available.

The Tutin AC is one of those ACs that are far away from the Asylum Office headquarters in Belgrade. In 2019, the first-instance authority officers did not visit the Tutin AC regularly to conduct the official asylum procedure actions. The last official action for a BCHR client was conducted in mid-March 2019. At the time of writing this Report, some BCHR clients have been waiting for more than 10 months to submit their asylum application or for an oral hearing.

Such practice discourages asylum seekers from staying in the RS. Asylum seekers have generally complained to their legal representatives about the long period of time that goes between applying for asylum and the interview. Those who have been interviewed often contacted their legal representative by telephone asking when the first-instance decision would be made. Due to the overly long asylum procedure at the Tutin AC, the largest number of asylum seekers leave the AC.

e) Krnjača Asylum Centre

The Krnjača AC is approximately 4 km from downtown Belgrade. The Krnjača AC accommodation facilities are located within the "PIM Ivan Milutinovic" construction company grounds. In the vicinity of the AC, there is a bus stop linking the AC with downtown Belgrade, and the buses run every 20 minutes. The proximity to Belgrade provides greater employment and integration opportunities for the asylum seekers, which has positive effects on their attitude to seek asylum in the RS.

The Krnjača AC inherited the infrastructure of the former "Krnjača" Collective Centre, which served to accommodate refugees from former Yugoslavia. Although some efforts have been made to reconstruct the accommodation facilities, special purpose rooms and ancillary facilities, Krnjača AC consists of barracks with different levels of equipment, cleanliness and adequacy.

The AC capacity is 1.000 persons.[285] During 2019, the occupancy did not exceed 651 persons, which was recorded in February.[286] Asylum seekers share rooms in the barracks. There is a separate barrack at the AC for unaccompanied children. In addition, there are separate barracks for families. The AC gates are locked in the evening, and the asylum seekers who are employed often cannot

285 UNHCR Serbia, *Centre Profiling – Krnjaca AC.* Available at: http://www.unhcr.rs/CentreProfiling/site_profiles.php?search=Krnjaca&submit=Select.

286 CRM, *Centre Profiling – Republic of Serbia*, p. 14. Available in Serbian at: http://www.CRM.gov.rs/media/uploads/Azil/profili-centara/PC-SR-2019–02.pdf.

get back to the AC before the gate is locked. The AC has a common TV lounge and a dining room where the asylum seekers are provided three meals a day. The meals are specially adjusted to their religious and health needs. Children who go to school get a school snack as well.

At the Krnjača AC, a GP is available on all working days, from 8 am to 8 pm. In case of need for specialist examinations, asylum seekers are referred by the AC doctor to one of the medical facilities in Belgrade. The Krnjača AC ensures the transport of the accommodated asylum seekers to medical facilities in the city with the assistance of the IOM. In practice, there is a problem of unavailability or insufficient number of interpreters in case of need for specialist visits, as specialist doctors request that the interpreters should be present.

The unaccompanied and children accompanied by their parents accommodated at the Krnjača AC, have access to primary and secondary education. However, not all accommodated children participate in the RS education system. The AC has a hair salon and a tailor shop, and civil society organisations organise various courses in the common premises so that accommodated asylum seekers can improve specific crafts or languages.

Throughout the year, the Crisis Policy and Response Centre interpreters were regularly present at the AC. That, and especially learning Serbian, gives the asylum seekers an opportunity to integrate more easily into Serbian society. In addition, the organisations providing legal aid regularly visit the Krnjača AC. The BCHR legal team also makes extraordinary visits to the AC, if the need arises. The lawyers had adequate conditions for conducting confidential interviews with their clients, as the AC has offices specifically designated for the NGO activities. In the rare case that these offices are occupied, the centre management would generally give their offices to the BCHR to use for a limited period of time.

The Krnjača AC is located relatively near the Asylum Office headquarters in Belgrade. At this AC, the official asylum procedure actions are conducted more frequently than in all other ACs.

4.1.3. Conclusion and Recommendations

In 2019, asylum seekers were accommodated in both ACs and RTCs. However, at the RTCs located in the border areas, foreigners are not able to submit asylum applications. Bearing in mind that genuine asylum seekers strive to integrate into society as quickly as possible, the MI referring asylum seekers to RTCs despite the fact that ACs had vacancies in 2019 cannot be considered good practice. While it is clear that the MI has to separate the persons seeking asylum from those who have other intentions, the RS must provide the minimum conditions to both those categories, respecting their dignity. The MI should refer asylum seekers exclusively to the ACs where the official asylum procedure actions are conducted. Alternatively, the Asylum Office should conduct the asylum procedure at all accommodation facilities.

Adequate health care and sanitary conditions must be provided in all RTCs, considering that the country no longer hosts tens of thousands of migrants, as during the 2015 crisis. The CRM should improve the RTC accommodation conditions. In case of increased need to accommodate migrants, the existing RTC capacities should not be overloaded, and the Government and the CRM might wish to consider activating the idle RTCs and opening new RTCs.

On the other hand, the basic material accommodation conditions (overnight accommodation and stay, food, health care, etc.) were provided to asylum seekers in all ACs. However, in the ACs located far away from Belgrade, the Asylum Office conducts the official actions on a non-regular basis, which also calls into question the asylum procedure in these facilities. Their distant location limits the asylum seekers' opportunity to integrate into society and their access to various institutions (school, health centre, etc.).

In terms of location, it is imperative that all ACs should be located closer to urban areas. The CRM needs to either propose to the RS Government the establishment of new ACs in the vicinity of major towns, or in cooperation with the line ministry, provide good and regular transportation so that the asylum seekers can easily travel to school, health facilities, workplace, etc. In addition, the MI, in cooperation with the CRM, needs to ensure that the Asylum Office staff is present at all ACs on a continuous basis, to allow the asylum procedure to be conducted within the specified timelines at all ACs.

In all asylum seeker accommodation facilities, meals were provided on a daily basis and regularly. There is a need to make additional efforts to take into account the quality of food, as well as to respect the halal food standards or special medically prescribed diets.

In 2019, with regard to the operations of ACs, a specialisation was observed in terms of the Senica AC being used to accommodate unaccompanied children, which is not the most adequate solution.[287] The CRM, in cooperation with the line ministries, needs to improve the accommodation conditions for specific vulnerable asylum seeker populations, and particularly for persons with disabilities. For the time being, only the Tutin AC is adapted for persons with disabilities to an extent.

Interpreters are available at ACs only in the course of the activities carried out by civil society organisations. It is imperative that the CRM ensures that interpreters are available at all ACs on a continuous basis, taking into account the language structure of the accommodated persons. If it is not possible for the CRM to ensure that interpreters are physically present at ACs, it may wish to consider using online video applications.

287 See section 5.5.2. Special Reception Guarantees.

4.2. Shelter for Foreigners – Placement under Close Police Watch

The Shelter for Foreigners (Shelter) is a facility for placement of foreigners who have been refused entry into the RS, and foreigners against whom rulings ordering their deportation, removal or return have been issued but cannot be enforced immediately.[288] Foreigners are ordered by the competent authority, i.e. Border Police, in accordance with the law, to stay in this facility under close police watch.[289] The Shelter is under the jurisdiction of the MI.

The Shelter is used for holding foreigners and asylum seekers. Foreigners are ordered to stay at the Shelter by the Asylum Office,[290] as well as by the regional police departments and border police.[291] All foreigners held at the Shelter must be treated in accordance with the Constitution of the Republic of Serbia, ratified international treaties,[292] and other relevant regulations, and their human rights must be respected irrespective of their personal characteristics or legal status.

Under the LATP, an asylum seeker may be held at the Shelter[293] for the purpose of establishing his/her identity or nationality, the relevant facts, evidence and circumstances underlying his/her asylum application, which could not be established without restricting the asylum seeker's movement. In addition, the Asylum Office may order an asylum seeker to stay at the Shelter to ensure that he/she is present during the asylum procedure when it can reasonably be assumed that he/she has applied for asylum for the sole purpose of avoiding deportation, as well as to protect the RS security and public order. In addition, an asylum seeker may be ordered to stay at the Shelter until it is decided in the asylum procedure whether he/she will be allowed to enter into the RS.[294]

An asylum seeker may be held at the Shelter only if it is established in the individual assessment that the purpose of the movement restriction cannot be achieved by any other measure.[295] That means that asylum seekers may be ordered to stay at the Shelter only as a measure of last resort. In this regard, the Asylum Office is required to first consider other movement restriction measures provided for by the LATP.[296]

The FL and LATP stipulate legal remedies against the decisions ordering stay at the Shelter. Thus, the FL stipulates that the decisions of the competent

288 Article 3, para. 1, Item 28 of the FL.

289 Article 87 of the FL.

290 Articles 77 and 78 of the LATP.

291 Article 87 of the FL, and Article 7 of the House Rules.

292 Here, first of all, one has to take into account Article 5 of the ECHR.

293 Article 78, para. 1, Item 1 of the LATP.

294 Article 77, para. 1, Items 1–5 of the LATP.

295 Article 78, para. 2 of the LATP.

296 Article 78, para. 1, Items 1, 2, 4 and 5 of the LATP.

authority or the border police ordering persons to stay at the Shelter and the decision on the extension of stay at the Shelter cannot be appealed.[297] However, such decisions may be challenged in an administrative dispute brought before the Administrative Court within eight days from the date of service of the decision.[298] The Administrative Court is required to decide on the claim within 15 days from the date of the claim,[299] and the claim does not stay enforcement of the decision.[300] The LATP provides that a decision on restriction of movement may be appealed to the competent higher court within eight days from the date of service of the decision.[301]

In the course of providing legal assistance to asylum seekers held at the Shelter for Foreigners in Padinska Skela, the BCHR team has identified several challenges. Firstly, the legal nature of ordering persons to stay in this facility is more in keeping with the regime of deprivation of liberty. Furthermore, the treatment of the foreigners staying at the Shelter does not guarantee them access to all their rights. In addition, they do not always have the opportunity to seek asylum during their stay at the Shelter, especially because, in many cases, they are deprived of their right to legal assistance. The above issues will be described in more detail in the following section.

4.2.1. The Legal Nature of Placement of Foreigners in the Shelter

The RS legislation qualifies the placement in the Shelter as restriction of movement. Thus, Chapter VIII of the LATP[302] stipulates, *inter alia*, the grounds for restriction of movement,[303] including the restraining measures.[304] However, one should not lose sight of the fact that there is a clear distinction between restriction of movement and deprivation of liberty – it is reflected in the degree or intensity of the restraining measures, rather than in their character or substance.[305] Although the legislature has defined the placement in the Shelter as restriction of movement, this placement cannot be qualified as such, considering its nature and duration.

Specifically, the qualification of a measure imposed against a foreigner or an asylum seeker in the international law should include both the objective and the

297 Article 90, para. 1 of the FL.

298 Article 90, para. 2 of the FL.

299 Article 90, para. 4 of the FL.

300 Article 90, para. 3 of the FL.

301 Article 78, para. 5 of the LATP.

302 Articles 77–80 of the LATP.

303 Article 77 of the LATP.

304 Article 78 of the LATP.

305 Migration and International Human Rights Law, *Practitioners Guide No. 6, supplemented edition*, International Commission of Jurists (2017), p. 201, 202. See: *Guzzardi v. Italy*, ECtHR, Application No. 7367/76 (1980), para. 93.

subjective element. The objective element implies the type and duration of the measure; its effects and method of administration; the possibility of the foreigner to leave the facility without notifying the authorities; the area to which movement is restricted; the extent of social contacts the foreigner is allowed to have; reporting obligations and sanction in case of non-compliance. The subjective element implies that the person did not consent to the measure.[306]

It should also be taken into account that deprivation of liberty in the international human rights law is not determined by reference to the qualification in the national law, but rather takes into account the actual restrictions imposed on the person concerned. A qualification of an accommodation facility in the national law as a "reception", "remand" or "accommodation" centre is not decisive. What is crucial is the cumulative effect of the restraining measures, regardless of what they are called and whether they resemble detention.[307] Such qualification of the nature of placement in a facility has been confirmed also by the ECtHR case law.[308]

During their stay at the Shelter, the foreigners are not free to leave the Shelter on their own accord. Their stay at the Shelter is limited to the room in which they are accommodated, and to the Shelter common rooms and the courtyard. Furthermore, their communication with the outside world is restricted (they can only use the official Shelter management telephone and a telephone booth).[309]

The FL stipulates that a foreigner's stay at the Shelter should be as short as possible, and that, during his/her stay at the Shelter, it must be sufficiently evident that the foreigner can be forcibly removed. Under the FL, the total length of a foreigner's stay at the Shelter cannot exceed 180 days.[310] The measure of holding an asylum seeker at the Shelter, in accordance with the provisions of the LATP, can last as long as the reasons stated in Article 77 of the LATP exist,[311] but

306 Marko Davinić and Ivana Krstić, *A Guide to the Implementation of Relevant Asylum and Migration Regulations*, Group 484 (Belgrade, 2019), p. 135.

307 Migration and International Human Rights Law, *Practitioners Guide No. 6, supplemented edition*, International Commission of Jurists (2017), p. 201.

308 *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application No. 30471/08 (2009), paras. 125–127; *Amuur v. France*, ECtHR, Application No. 17/1995/523/609 (1996), para. 42; *Ashingdane v. United Kingdom*, ECtHR, Application No. 8225/78 (1985), para. 42.

309 Information obtained during the interview with the Shelter management, conducted on 14 October 2019. Available at the BCHR archives.

310 Article 88, para. 2, Item 4 of the FL.

311 Those reasons include: establishing identity or nationality; establishing material facts, evidence and circumstances underlying the asylum application, which cannot be established without the restriction of movement, particularly if there is a risk of absconding; ensuring the asylum seeker's presence in the course of the asylum procedure, if there are reasonable grounds to believe that his/her asylum application was submitted with a view to avoiding deportation; ensuring the protection of security of the Republic of Serbia and public order in accordance with law; and deciding, in the course of the procedure, whether the asylum seeker has a right to enter the territory of the Republic of Serbia.

it cannot exceed three months. Exceptionally, the Asylum Office may extend an asylum seeker's stay at the Shelter for additional three months.[312]

Therefore, given the intensity and duration of the restrictions, foreigners held at the Shelter are *de facto* deprived of liberty. That is why they have to be treated in accordance with the regulations governing the status of persons deprived of liberty and in accordance with the recommendations of the relevant international bodies. These include primarily the recommendations of UNHCR where it refers to asylum seekers deprived of liberty.[313] In addition, in accordance with the RS Constitution, all foreigners who have been deprived of liberty have to be brought to justice within 48 hours.[314] However, the practice at the Shelter, to the best of the BCHR legal team's knowledge, is contravention of that provision of the Constitution. Specifically, foreigners are placed in the Shelter under the decisions of the Asylum Office or Border Police ordering their placement in the Shelter,[315] without having been brought before the competent court. This practically means that foreigners held at the Shelter for Foreigners are arbitrarily deprived of liberty by decision of the executive authority without adequate procedural guarantees.

4.2.2. Treatment of Foreigners at the Shelter

Bearing in mind the foreigners held at the Shelter can include also asylum seekers, the MI police officers assigned to the Shelter must treat them in accordance with the regulations governing the rights of asylum seekers. Specifically, they need to ensure, as a minimum, that they can exercise all the rights guaranteed by the LATP.[316] They should also be allowed to exercise other rights under the FL[317] and the Rulebook on Rules of Stay and House Rules at Shelter for Foreigners[318] (Rulebook on House Rules). On the other hand, foreigners held in the Shelter are obliged to respect the prescribed house rules.[319]

312 Article 78, para. 4 of the LATP.

313 *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum seekers,* UNHCR (1999), available at: http://www.unhcr.rs/media/Revidirane%20smernice%20o%20kriterijumima%20i%20standardima%20koji%20se%20pr.pdf; Detention Guidelines – Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum seekers and Alternatives to Detention, UNHCR (2012), available at: https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html.

314 Article 29, para. 2 of the RS Constitution.

315 Article 87, para. 1 of the FL.

316 Articles 48–57 of the LATP.

317 Article 91 of the FL.

318 *Official Gazette of the RS,* 42/2018.

319 Article 5 of the Rulebook on House Rules. This article specifies in detail the daily activity schedule for foreigners held at the Shelter. Article 6 of the Rulebook on House Rules prescribes the rules of stay for foreigners, i.e., their obligations during their stay at the Shelter.

The FL stipulates the Shelter's obligation to provide any foreigner access to the information on house rules and rules of stay in a language he/she can understand, or can be assumed to understand.[320] The same is provided for in the Rulebook on House Rules.[321] In August, the BCHR printed and laminated the Rulebook on House Rules, which was translated by the MI into Arabic, English, French, Macedonian, German, Russian, Spanish and Urdu. The Shelter management made the above Rulebook on House Rules available to the persons staying at the Shelter in accordance with the provision of the FL by placing it on the notice board in the dining room, which the foreigners use three times a day.

Upon the reception at the Shelter, a foreigner is designated a room where he/she will stay, and given personal hygiene and bed linen items.[322] Foreigners stay in rooms equipped with own sanitary blocks, and with sufficient natural and artificial lighting, which must be well aired, clean, dry, and warm in the winter months.[323]

In 2019, the reconstruction and expansion of the Shelter's capacity were continued and intensified. The bedrooms, the kitchen, the dining room, and the Shelter management offices were renovated.[324] The Shelter accommodation facilities have been modernised, improving the working conditions for the staff. Due to the construction works, the foreigners staying at the Shelter had to move from their day rooms and bedrooms to other rooms on several occasions.

a) Clothing and Food

The Rulebook on House Rules prescribes that a foreigner, during his/her stay at the Shelter, wears his/her personal clothing and footwear. If a foreigner does not have appropriate clothing and footwear, police officers would provide him/her, immediately or no later than within 48 hours, with appropriate clothing, donated by humanitarian organisations or the Red Cross.[325]

In an interview with the Shelter management, the BCHR legal team was informed that the foreigners staying at the Shelter were ensured the conditions as prescribed by law. None of the foreigners at the Shelter interviewed by the legal team complained about their treatment in this regard.[326]

320 Article 91, para. 2, Item 9 of the FL.

321 Article 2, para. 1 of the Rulebook on House Rules.

322 Article 10 of the Rulebook on House Rules.

323 Article 11, para. 1 of the Rulebook on House Rules.

324 Information obtained during an interview with the Shelter management, conducted on 14 October 2019.

325 Article 13 of the Rulebook on House Rules.

326 Information obtained during an interview with the Shelter management, conducted on 14 October 2019. In 2019, the BCHR legal team made seven regular visits, represented asylum seekers staying at the Shelter in one procedural action, and conducted three legal consultations with foreigners at the Shelter.

The foreigners at the Shelter are provided three meals a day – breakfast, lunch and dinner, taking into account their health condition and religious customs.[327] Meals are eaten in the Shelter dining room, and no food is provided outside the dining room, unless it is required by religious practices, illness or other reasons, in which case the house rules and diet regime may be modified.[328]

b) Availability of Interpreters

With regard to the presence of interpreters at the Shelter, the BCHR team has noted that they were not available to foreigners. Although their presence is necessary to facilitate communication between the foreigners and the Shelter staff, there is a lack of interpreters particularly for the languages most commonly spoken by the foreigners held at the Shelter (Arabic, Farsi, Urdu).

In their daily communication with the foreigners, the Shelter staff communicate in English, or if any of the foreigners speaks Serbian, in Serbian. In addition, the foreigners assist one another in communicating with the Shelter staff.[329] This practice can be problematic, given that it compromises the privacy of a foreigner who is in need of an interpreter. As a result, the foreigner is put in a dependent position in relation to another foreigner who is helping him/her as his/her interpreter. In situations where there are no English speaking foreigners, communication with the Shelter management in virtually impossible.

c) Health Services

Under the FL, all foreigners at the Shelter are entitled to emergency medical care.[330] However, there is no GP permanently present at the facility. The Shelter management informed the BCHR legal team that, if the need arises, they took foreigners to see a GP or a specialist. The Shelter management informed the BCHR legal team that there would be a GP present at the Shelter from January 2020.[331]

In terms of psychological support, the foreigners held at in the Shelter do not have a psychologist available either on a permanent or on an occasional basis.[332] Given that they are deprived of liberty, and that asylum seekers have been

327 Information obtained during an interview with the Shelter management, conducted on 14 October 2019.

328 Article 20, para. 3 of the Rulebook on House Rules.

329 Information obtained during an interview with the Shelter management, conducted on 14 October 2019.

330 Article 91, para. 2, Item 4 of the FL.

331 Information obtained during an interview with the Shelter management, conducted on 14 October 2019. Available at the BCHR archives.

332 Information obtained during an interview with the Shelter management, conducted on 14 October 2019. Available at the BCHR archives.

through traumatic experiences, they need access to psychotherapy if they wish so. This is particularly important considering that, during their stay at the Shelter, they are isolated from the outside world, which can affect their mental state.

d) Outdoor Exercise and Contact with Outside World

The Rulebook on House Rules provides that foreigners must be allowed to spend at least two hours a day outdoors, during which time they should be able to move freely and participate in social and sports activities. Outdoor exercise is monitored by the Shelter police officers.[333] According to the manager, the practice at the Shelter is as follows: the foreigners are allowed to move freely in the Shelter courtyard, weather permitting. The foreigners interviewed by the BCHR team confirmed this.

With regard to the foreigners' contact with the outside world, the Rulebook on House Rules provides that, upon his/her reception to the Shelter, a foreigner is entitled to one free telephone call to the diplomatic or consular mission of his/her country of nationality.[334] However, such practice is inadequate when it applies to asylum seekers, as they often do not wish to have any contact with the authorities of the country where they were persecuted.[335]

The foreigners are entitled to daily telephone calls at their own expense. Telephone calls are made from a public telephone booth at the Shelter.[336] In an interview with the Shelter management, the BCHR legal team was informed that the foreigners were not able to use the telephone booth for several months in 2019 due to technical problems. After that, a new problem occurred in terms of the lack of telephone cards they needed to be able use the telephone booth. Namely, telephone cards were not available at the Shelter, and had to be purchased by police officers outside, at the request of foreigners. Although police officers would usually oblige these requests, telephone cards were not easy to find on sale. However, the Shelter management did allow the foreigners to use the official telephone, except for international calls.[337] The foreigners who did not have sufficient financial means were also allowed to use the official telephone at the Shelter, if there were justified reasons for the requested calls. On those occasions, in accordance with the provision of the Rulebook on House Rules, the telephone call could last maximum five minutes.[338]

333 Article 17 of the Rulebook on House Rules.

334 Article 24 of the Rulebook on House Rules.

335 Information obtained during the BCHR legal team's interviews with asylum seekers.

336 Article 24, para. 2 of the Rulebook on House Rules.

337 Information obtained during an interview with the Shelter management, conducted on 14 October 2019. Available at the BCHR archives.

338 Article 24, para. 5 of the Rulebook on House Rules.

The inability to use public telephone booth on a regular basis results in violations of the right of the persons held at the Shelter to talk to anyone they wish to talk to, at their own expense.[339] In addition, having to use the official telephone undermines the foreigner's privacy. Namely, even when the Shelter management allows a foreigner to use the official telephone, it is unlikely that they would leave him/her alone in the management office to make the call. The privacy of telephone conversations is also guaranteed by the Rulebook on House Rules, except where the manager or the person designated by the manager denies the foreigner the right to secrecy of the telephone conversation in order to obtain identity information or other information concerning the foreigner's return to the country of origin.[340]

4.2.3. Right to Legal Assistance and Access to the Asylum Procedure

Under the LATP provision, a foreigner in need of international protection may express his/her intention to seek asylum before an MI officer deployed at the Shelter.[341] The usual practice is that, after a foreigner addresses the Shelter's officers with the intention of seeking asylum, the Shelter management notifies the Asylum Office. The Asylum Office in turn issues a certificate to the foreigner certifying that he/she has expressed the intention to seek asylum. During 2019, eight persons expressed their intention to seek asylum at the Shelter.[342]

The LATP stipulates that asylum seekers are entitled to information and free legal assistance.[343] Additionally, the FL guarantees foreigners access to a lawyer and the right of NGOs and international organisations to visit the Shelter.[344] In 2019, the BCHR legal team set up posters at the Shelter to inform potential asylum seekers about the legal team contacts, and provided leaflets on asylum rights in four languages (English, Arabic, Farsi and Urdu). It is crucial that the foreigners at the Shelter have access to legal assistance to ensure that they are informed of their rights and obligations, and in particular their right to seek asylum in the RS.

In this regard, in the previous years, upon their arrival to the Shelter, the BCHR lawyers were allowed by the Shelter management to provide legal counselling to the foreigners who were nationals of the most common countries of origin of refugees. That was done in accordance with the provisions of the Rulebook on House Rules, which stipulated that the visits had to be announced at

339 Article 24, para. 2 of the Rulebook on House Rules.
340 Article 24, para. 3 of the Rulebook on House Rules.
341 Article 35, para. 2 of the LATP.
342 Statistics provided by the UNHCR.
343 Article 56 of the LATP.
344 Article 91, para. 2, Items 3 and 8 of the FL.

least one day earlier, and that they could last for even longer than 60 minutes,[345] which was respected in practice. For years, the BCHR legal team visited the Shelter periodically and, on those occasions, they spoke to the Shelter management and the foreigners held at the Shelter. Their visits were arranged by telephone. However, between January and July 2019, it was increasingly difficult for the BCHR legal team to schedule regular visits to the Shelter. Specifically, the Shelter management informed the BCHR that in the future they had to announce their visits in writing through the Cabinet of the Minister of the Interior. In practice, this meant waiting for several weeks for their response, which actually meant that the foreigners could not receive legal assistance in a timely manner.

Daily communication with the management and the lawyers' visits to the Shelter and obtaining information about the origins of the persons held at the Shelter are significant for several reasons. Firstly, to ensure that the foreigners held at the Shelter are advised of the right to asylum. Secondly, to ensure that the foreigners are able to exercise their right of access to the asylum procedure in the RS through their legal representatives. Thirdly, to prevent forcible removal of foreigners who are at risk of persecution or abuse in the country of origin by ensuring them access to the asylum procedure.[346]

Since July 2019, the BCHR legal team has received the approval of the Cabinet of Ministers to visit the Shelter once a month and interview the Shelter management, with a prior announcement of the visit by telephone. However, even after the procedure for announcing visits was "normalised", the Shelter management did not provide to the BCHR lawyers on the day of the visit the information on the number of foreigners held at the Shelter and their nationality, or on what grounds these persons were held at the Shelter. In addition, the Shelter management did not allow the BCHR legal team to interview the foreigners during the visits. During every visit, the BCHR lawyers would bring their interpreters with them. Considering that the foreigners at the Shelter do not have interpreters or lawyers available to them on a regular basis, such conduct of the Shelter in 2019 cannot be considered legal, as the foreigners were not able to have legal counselling in a timely manner in a language they could understand.[347]

345 Article 22, para. 4 of the Rulebook on House Rules.

346 A foreigner may not be forcibly removed to a territory where he/she would be under threat of persecution on the grounds of his/her race, sex, sexual orientation or gender identity, religion, ethnicity, nationality, membership of a particular social group or his/her political views. Article 83, para. 1 of the FL.

347 Article 13 of the LATP stipulates that an asylum seeker who does not understand the official language of the asylum procedure shall be provided free interpretation services into his/her native language, i.e., a language that he/she can understand.

In addition, any legal counselling that the BCHR legal team provided during 2019 to the foreigners and asylum seekers held at the Shelter was conducted only after those persons had managed to contact the BCHR by telephone. The BCHR visited two foreigners on several occasions and provided them legal counselling. In the first case, the BCHR legal team provided legal counselling to a national of the Republic of India.[348] After legal counselling, he did not wish to seek asylum in the RS. In the second case, the BCHR legal team provided legal counselling to a Turkish national.[349] After he expressed his intention to seek asylum in RS before the BCHR lawyers, the BCHR legal team notified the Shelter management about it, which in turn notified the Asylum Office. The Turkish national was granted access to the asylum procedure. In November 2019, the Asylum Office conducted the official application submission action in that case, and on the following day, the asylum seeker was released from the Shelter and relocated to an Asylum Centre.

Although the BCHR team has been able to provide legal assistance to those foreigners who contacted it directly, the BCHR does not have a comprehensive view of the MI practice towards the foreigners held at the Shelter in 2019. Additionally, the MI did not respond to a request for access to public information submitted by the BCHR. In the request, the BCHR requested from the MI 2019 information on the number of asylum seekers held at the Shelter, their sex and nationality, the number of MI police officers employed at the Shelter, and the number of persons who applied for asylum and who had their oral hearing in the asylum procedure during their stay at the Shelter.[350] In this respect, the MI practice has remained non-transparent.

4.2.4. Conclusion and Recommendations

The Asylum Office and other competent authorities continued the practice of ordering the placement of foreigners at the Shelter that has the legal nature of deprivation of liberty, without bringing the foreigners before the competent court within the statutory time limit of 48 hours. When considering the possibility of placing an asylum seeker at the Shelter, the Asylum Office needs to consider other alternative forms of restriction of movement, before ordering the foreigner to stay at the Shelter. In addition, Serbian Parliament needs to revise the legal solutions, at the proposal of the RS Government, by having the orders of placement at the Shelter and the duration of such placement decided by the competent court within 48 hours from the issuance of the order on placement at the Shelter.

348 Legal counselling was conducted on 28 June 2019.

349 Legal counselling was conducted on 21 October 2019.

350 Request for Access to Information of Public Importance, Number 10–394/19 of 18 October 2019.

The MI needs to ensure daily presence of a GP at the Shelter, at least for limited periods of time, as well as regular visits by psychologists who would interview the persons held at the Shelter. This can also be ensured through a cooperation with the non-governmental organisations providing psychosocial support.

In addition, there is a need for the MI to ensure that interpreters for the languages most commonly spoken by the foreigners held at the Shelter are present and available at the Shelter on a regular basis. That would ensure the foreigners are clearly informed of their rights and obligations and that they are able to communicate freely with the Shelter staff.

The MI should allow the foreigners to use the telephone regularly and easily and to communicate with the outside world, except in the cases requiring otherwise for security reasons. In an era of highly developed digital technology, for example, this could be ensured through the introduction of Wi-Fi internet in the premises of the Shelter, and allowing the foreigners to use mobile phones.

In 2019, the cooperation between the Shelter and the BCHR was not professional and it was not in accordance with the law. The procedure for scheduling regular visits to the Shelter was very slow and, during their visits to the Shelter, the lawyers did not have access to all the foreigners held at the Shelter. As a result, the foreigners were unable to obtain legal assistance in a timely manner, unless they had contacted UNHCR, BCHR or other legal assistance providers themselves. The Shelter management should ensure that the foreigners have unimpeded and timely access to legal assistance. That would ensure that all persons in need of international protection who are held at the Shelter are informed of the right to asylum in the RS.

In addition, the Shelter management does not provide information about their activities related to the placement of foreigners and their treatment. The MI should make available to all interested parties[351] and, in particular, to the actors providing legal assistance, information on the number and nationality of the foreigners held at the Shelter.

351 In accordance with the Law on Free Access to Information of Public Importance.

5. SITUATION OF UNACCOMPANIED AND SEPARATED CHILDREN

The RS needs to protect migrant children to the same extent and in the same way as the permanently residing children in the RS. This obligation stems from the national legislation that treats all children equally, but also from the CRC, as the most important international instrument relating to the protection of the rights of the child, which has been ratified and directly implemented by the RS.[352] The CRC requires all the RS authorities to respect and ensure the rights of every child within the RS territory and jurisdiction, without discrimination on any grounds.[353]

While the legal framework guaranteeing the protection for children in the RS is at a relatively high level, the legal provisions are not sufficiently respected in practice. That was identified, *inter alia*, also by the UN treaty bodies.[354] Although the child protection system has been improved to an extent compared to the pre-2017 period, thanks to the support of civil society organisations, a number of problems persist. The key problems identified by the BCHR arise from the untimely identification of unaccompanied and separated children, the lack of quality guardianship protection, and the lack of appropriate alternative child care models. Furthermore, unaccompanied and separated children face additional problems with respect to the asylum procedure and the misdemeanour proceedings. This Chapter will describe how these problems were manifested in 2019.

5.1. Identification of Children

The immediate identification of unaccompanied and separated children is the first step in providing the priority protection measures. It focuses on discovering unaccompanied children and a preliminary assessment of their needs and best interests to ensure that the children can be referred to adequate support

352 Article 16, para. 2 of the RS Constitution.

353 Article 2 of the CRC.

354 See, for example, *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, Committee on the Rights of the Child (hereinafter: CRC Committee), UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), available in Serbian at: http://bit.ly/2XeQH0X; and *Concluding Observations on the Third Periodic Report of Serbia*, CRC Committee, UN Doc. CCPR/C/SRB/CO/3 (Geneva, 10 April 2017), available in Serbian at: http://bit.ly/2FKEF9H.

services.[355] The starting point for the identification is the existence of qualified staff who would identify children in the field, i.e., in the refugee and migrant informal settlements, and make further referrals. In accordance with the instructions of the line Ministry of Labour, Employment, Veteran and Social Affairs (Ministry of Labour), that is a duty of the field social worker, who should identify and coordinate the child's support until the arrival of the professional social worker[356] from the Social Work Centre.[357]

5.1.1. Problems Identified in Practice

Some Social Work Centres had not hired field social workers to identify children due to financial restrictions, even though they had a large number of refugees and migrants inside the territory under their jurisdiction.[358] On the other hand, professional social workers made outreach visits only at the invitation of the MI. Interestingly, the field social workers in Belgrade did not carry out any *proprio motu* outreach activities relating to direct identification of unaccompanied and separated children.[359] They acted only in the cases of the children who had been brought by the civil society organisations' staff from the informal settlements to the "Miksalište" facility.[360]

In addition to the lack of adequate children identification system, in 2019, no records were made of the children[361] who entered into the RS based on the recommendation of the Committee on the Rights of the Child.[362] The identifi-

355 *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC Committee, UN. Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), paras. 31–32.

356 In accordance with Article 31 of the Rulebook on the Organisation, Norms and Standards of Operation of Social Work Centres (*Official Gazette of the RS*, No. 59/08, 37/10, 39/11 – separate rulebook, 1/12 – separate rulebook, and 51/19), the guardianship authority is the caseworker, and his/her responsibility is to evaluate and coordinate the process of assessing the needs of the respective beneficiary, take measures and coordinate taking protection and support measures, using the capacities of the guardianship authority and other local community services and resources.

357 Instruction on Procedures of Social Work Centres – Guardianship Authorities for the Accommodation of Unaccompanied Migrant/Refugee Children, Ministry of Labour, Employment, Veteran and Social Affairs, No. 019–00–19/2018–05 (Belgrade, 12 April 2018), Section II, para. 3, available at: https://bit.ly/338wJb5.

358 *Challenges in the Asylum and Migration system: The Situation of Particularly Vulnerable Populations*, Group 484 (Belgrade, 2019), pp. 32 and 33.

359 Minutes of the Child Protection Working Group meeting, UNICEF, Belgrade, 1 November 2019.

360 *Ibid*.

361 Recording refers to the entry of the child's data into the database that can be accessed by all agents responsible for the protection of children's rights.

362 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7. mart 2017), para. 57(a), available at: http://bit.ly/2XeQH0X.

cation of children continues to take place on an *ad hoc* basis, rather than on a systematic basis, as mandated by the CRC.[363] In the absence of the official comprehensive data on the number of migrant children staying in the RS, various authorities and organisations maintained their own statistics – for their own needs – on the number of children to whom they had provided services.[364] While such data is based largely on estimates, it can be used to illustrate this issue.

According to the UNHCR data, from the beginning of 2019 until the end of October, 3,064 unaccompanied and separated children arrived in the RS.[365] In that same period, the MI registered in accordance with the LATP[366] only 640 unaccompanied and separated children, mainly from Afghanistan (72%) and Pakistan (11.6%). Those children have expressed their intention to apply for asylum in the RS. However, the CRM accommodated all migrants in ACs and RCs, irrespective of whether they sought asylum or not. According to their data, from the beginning of the year until the end of October 2019, there were 1,907 unaccompanied and separated children in five ACs and thirteen RCs,[367] i.e., 49.3% of the total number of children to whom the CRM provided accommodation during the respective period. On the other hand, the Save the Children data indicates that, in the first six months alone, 1,970 refugee children arrived in the RS, approximately 90% of whom were not accompanied by their parents.[368]

The comparison of the above data indicates that the number unaccompanied and separated children identified by UNHCR and Save the Children in the field was considerably higher the number of children placed in the facilities under the jurisdiction of the CRM. It can be seen also that a large number of unaccompanied children stayed in the RS without a regulated legal status, which was noted also by the European Commission.[369] Currently, the only way for this group of children to regulate their stay in the RS is to enter the asylum proce-

363 *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC Committee, UN Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), paras. 31–40.

364 The CRM, the Ministry of Labour, UNHCR, and civil society organisations collected separately data on the persons they had provided services to, while the MI recorded only persons who expressed their intention to apply for asylum in the RS.

365 Detailed monthly statistics are available on the UNHCR website at <http://www.unhcr.rs/en/dokumenti/izvestaji/unhcr-serbia-updates.html> and at <https://bit.ly/2LkIrZY>.

366 Article 35 of the LATP.

367 The CRM's response to the BCHR's request for access to public information 019–5048/1–2018, of 13 November 13, 2019.

368 Cf. Ivan Tasić, *Refugees and Migrants at the Western Balkans Route Regional Overview, January – March 2019*, Save the Children (April 2019) p. 9, available at: https://bit.ly/33gx4IC, and Katarina Jovanović, *Refugees and Migrants at the Western Balkans Route Regional Overview, April – June 2019,* Save the Children (July 2019), p. 9, available at: https://bit.ly/2OdsEy5.

369 *Serbia 2019 Report Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the*

dure. Assuming that a number of migrant children did not genuinely wish to apply for asylum in the RS, that does not mean that they had to stay in the RS without being able to regulate their legal status otherwise.

5.1.3. Conclusion and Recommendations

An effective system in place for identifying and recording all children entering into the RS is a precondition for providing protection. As noted above, unaccompanied and separated children are particularly at risk of violations of their basic human rights. There can be no legitimate justification for the fact that hundreds of children stay in the RS virtually illegally. That is why all the state authorities responsible for frontline work with these children must pay special attention to them.

To ensure that, the key state authorities – the Ministry of Labour, the CRM and the MI – need to act in a coordinated manner to ensure that all unaccompanied children are identified and recorded. The MI should regulate the legal status of each child within the meaning of the FL and the LATP provisions, in cooperation with the guardianship authority. The Ministry of Labour, in cooperation with the Directorate for Foreigners within the MI, may wish to consider granting children without regulated legal status humanitarian protection or another form of legal residence in accordance with the provisions of the FL.[370]

5.2. Inadequate Guardianship Protection

The CRC guarantees children such protection and care as is necessary for their well-being.[371] As the minimum standard of protection, no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time.[372]

An efficient guardianship system is the basis for extending protection to and guaranteeing the rights of unaccompanied and separated children. The guardianship role is comprehensive and involves supporting the child's development and pursuing his/her best interests through ensuring access to health care, psychosocial support, education, alternative care, and other rights. Every unaccompanied or separated child should be appointed a temporary guardian without delay to facilitate the prompt development of his/her care plan and the identification of provisional and lasting arrangements for the child in accordance with his/her best interests.[373]

Committee of the Regions, 2019 Communication on EU Enlargement Policy, SWD(2019)219 (Brussels, 29 May 2019) pp. 41–42, available in Serbian at: https://bit.ly/2XWxfYQ.

370 Article 40 of the FL.

371 Article 3, para. 2 of the CRC.

372 *Guidelines for the Alternative Care of Children: Resolution Adopted by the General Assembly*, UN Doc. A/RES/64/142 (New York, 24 February 2010), para. 19, available at: http://bit.ly/2X57t2k.

373 Articles 135 and 137 of the Family Law, *Official Gazette of the RS*, No. 18/05, 72/11 and 6/15.

The procedure of placing a child under guardianship is, by its nature, an urgent procedure,[374] initiated *ex officio* by the guardianship authority or at the initiative of the state authorities, associations or citizens.[375] The guardianship authority is under the obligation to issue the decision on placement under guardianship immediately and not later than 30 days from the date it become aware of the need for guardianship.[376]

The Ministry of Labour has further clarified the legal provisions in their Instruction issued in 2017[377] and partially revised in 2018.[378] After reviewing this document, custody of unaccompanied and separated migrant children appears to mean primarily finding adequate accommodation for the child. On the other hand, there is no emphasis on the long-term planning of safeguard procedures with consideration of each child's best interests, as mandated by the CRC.[379]

With the exception of children placed in social protection institutions,[380] less than 16% of the unaccompanied and separated children from the Krnjača AC[381] were placed under temporary guardianship under the decision of the guardianship authority.[382] In practice, a child is placed under guardianship only if it is necessary to carry out a certain procedure (the asylum procedure, a medical intervention, etc.) or transport the child from one place to another, which requires the presence of his/her guardian. The registration certificate of the child's intention to apply for asylum in the RS was often the grounds for the placement of the child under temporary guardianship. Therefore, only after a child is registered in the asylum procedure, the guardianship authority with local

374 Article 332 of the Family Law.

375 Article 339 of the Family Law.

376 Article 332, para. 4 of the Family Law.

377 Instruction on Procedures of Social Work Centres and Social Protection Institutions for Accommodation of Beneficiaries for Provision of Assistance and Accommodation of Unaccompanied Migrant Children, Ministry of Labour, Employment, Veteran and Social Affairs, No. 011-00–00682/2017–1 (Belgrade, 10 October 2017), available in Serbian at: https://bit.ly/2KILIlx.

378 Instruction on Procedures of Social Work Centres – Guardianship Authorities for the Accommodation of Unaccompanied Migrant/Refugee Children, Ministry of Labour, Employment, Veteran and Social Affairs, No. 019–00–19/2018–05 (Belgrade, 12 April 2018), Section II, para. 3, available in Serbian at: https://bit.ly/338wJb5.

379 See further: Nevena Milutinović, *Institute of guardianship for unaccompanied children or children separated from parents/guardians, Analysis of the situation and recommendations for improvement*, Save the Children (Belgrade, 2019), available in Serbian at: https://bit.ly/2P1Exrm.

380 In the territory of Belgrade, only 91 children stayed in these institutions from the beginning of 2019 until the end of October. For more information, see the section on alternative child care.

381 For more information about the number of children accommodated in the Krnjača AC, see the section on alternative child care.

382 This conclusion was drawn on the basis of the information provided by the City Social Work Centre in Belgrade, indicating that 377 unaccompanied children were placed under temporary guardianship from the beginning of the year until the end of October 2019; Response to the BCHR's request for access to information of public importance, No. 550/414, of 18 November 2019.

jurisdiction would appoint a temporary guardian for the purpose of conducting the asylum procedure.[383] That is not only in contravention of the provisions of the CRC and the Family Law, it also contravenes the LATP, which provides that the registration of a child in the asylum procedure should take place only after the child has been appointed a temporary guardian.[384]

To conclude, irrespective of the regulations that are in place in the RS, there are systemic problems in terms of their implementation. This was, *inter alia*, identified two and a half years ago by the Committee on the Rights of the Child, which recommended the RS to ensure full inclusion of unaccompanied and separated children in the existing protection system.[385] The Committee on Human Rights, having found that unaccompanied and separated children did not have access to guardians, recommended that the RS should provide these children with adequate guardianship protection and treatment in accordance with the best interests of the child.[386] From their perspective as the legal representatives in the asylum procedure, the BCHR team has noted a number of systemic issues, which will be described in more detail below.

5.2.1. Inadequate Capacities of Guardianship Authority

The most common excuse for the lack of a prompt response by the guardianship authorities is the lack of professional staff, work overload, and the lack of transportation means and logistic capacities.[387] This problem has been recognised in the recent years also by the Ministry of Labour,[388] but it appears that not much has been done to address it.

Through requests for access to information of public importance, the BCHR concluded that Social Work Centres still do not have sufficient human resources.

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383 Ministry of Labor's response to the request for access to information of public importance, No. 07–00–00989/2018–15, of 9 November 2018.

384 Article 11 of the LATP and Article 5, para. 2 of the Rulebook on the Procedure of Registration, Design and Content of the Certificate on Registration of a Foreigner Who Expressed Intention to Seek Asylum (*Official Gazette of the RS*, No. 42/18).

385 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), para. 57(b), available in Serbian at: http://bit.ly/2XeQH0X.

386 *Concluding Observations on the Third Periodic Report of Serbia*, CRC Committee, UN Doc. CCPR/C/SRB/CO/3 (Geneva, 10 April 2017), paras. 32–33, available in Serbian at: http://bit.ly/2FKEF9H

387 This conclusion was drawn on the basis of the numerous interviews with the guardianship authority's professional social workers and temporary guardians in the course of 2019.

388 *Study: Human and Social Resources Management in Social Work Centres in the Republic of Serbia Including Presentation of Applied Research Methodology and Results of Conducted Current Status Analyses,* Ministry of Labour, Employment, Veteran and Social Affairs, JN 10/2018 – updated version (Belgrade, 16 July 2018), p. 13, available in Serbian at: https://bit.ly/2QJHnlX.

This leads to professional social workers and guardians being overloaded with work, which is certainly reflected in the availability and quality of care provided to unaccompanied and separated children. It also reflects on the health and motivation of the persons acting as guardians, leading to a fast "burn out". In this way, the system actually loses the skilled workers it has invested in, who, because of their experience would be able to provide adequate care to the children.

In the first quarter of 2019 alone, the Belgrade City Social Work Centre issued 350 decisions placing unaccompanied and separated children under temporary guardianship, five decisions on immediate temporary custody, and no collective custody decisions.[389] At the same time, 13 persons acted as temporary guardians, and two caseworkers were assigned to work with unaccompanied and separated children.[390] This means that, in the first quarter of 2019, one guardian in the territory of Palilula municipality had to care for at least 26 children, i.e., one caseworker was responsible for more than 175 children. By way of comparison, the minimum standards for child protection in humanitarian actions stipulate that one caseworker should not be responsible for more than 25 children,[391] as this reduces the quality of his/her work. Here, it should be noted also that the work of guardians and caseworkers with migrant children in 2019 was funded mainly through civil society organisation projects, which is not a systemic and sustainable solution.[392]

5.2.2. Unlawful Practice of Sjenica Social Work Centre

Under the Family Law, Social Work Centres may either appoint temporary guardians for unaccompanied and separated children[393] or directly undertake that duty.[394] However, the Sjenica Social Work Centre has been adopting decisions placing the unaccompanied and separated children accommodated at the Sjenica AC under collective guardianship.[395] As a form of collective guardian-

389 Response to the BCHR's request for access to information of public importance, No. 550–139 of 22 April 2019.

390 *Ibid*.

391 *Minimum Standards for Child Protection in Humanitarian Action*, Child Protection Working Group (2012), p. 138, available in Serbian at: http://ideje.rs/CPMS.pdf.

392 UNHCR, the competent authorities and the non-governmental organisation IDEAS piloted a guardianship programme including trained and supervised professional guardians in Belgrade and Sjenica, whose remuneration was fully funded by the above organisations.

393 Under Article 132, para. 2, Item 4 of the Family Law, the guardianship authority is required to appoint a temporary guardian to a foreign national who is or has property in the RS.

394 Article 131 of the Family Law provides for the possibility of direct guardianship, which implies that the guardianship authority itself acts as the guardian if that is in the best interests of the child. Under the decision on the direct performance of the guardian duties, a professional from the guardianship authority is appointed to perform the guardian duties on the behalf of the guardianship authority.

395 See, for example, Decision of the Sjenica Social Work Centre, No. 560–64, of 22 January 2019.

ship, under the Family Law, only the director or a member of staff of a residential social protection institution, i.e. not a Social Work Centre, may be appointed a guardian of all the wards accommodated in such institution, if that is in the interest of the wards.[396] Therefore, this practice of the Sjenica Social Work Centre is in violation of the law.

Furthermore, the collective guardian of all children at the Sjenica AC is one person, often charged with looking after dozens of children.[397] Guardianship protection is an extremely complex process requiring of the guardians to establish a trusting relationship with the children and to act in their best interests. The question arises whether one individual, who is taking all the guardianship protection measures with respect to a large number of children, is capable of performing his/her guardianship duties adequately and in the interest of his/her wards.

5.2.3. Conclusion and Recommendations

The Ministry of Labour, i.e., the Social Work Centres under its jurisdiction, have the obligation to place each unaccompanied and separated child under temporary guardianship and prepare his/her care plan in accordance with the assessment of the best interests of the child to ensure that a durable solution is found. While, in some cases, it is impossible to establish immediately what is in the best interest of the child in terms of a durable solution, there is a need to continuously take steps towards that.

Appointment of temporary guardians for all children and thorough assessment of their best interests are prerequisite for extending other forms of protection to the children. Pursuant to the international commitments, ensuring an adequate guardianship system is primarily the responsibility of the state. On the other hand, the current human resources of the guardianship authorities – which are insufficient – caring for unaccompanied and separated children are almost fully funded through civil society projects. Therefore, they are not sustainable in the long-term, as it remains uncertain how long the funds allocated for the existing number of professional guardians would be available. In that sense, the relevant Ministry of Labour must provide the children with the adequate level of protection through long-term and sustainable programmes, as well as invest additional efforts in improving such protection.

396 Article 130 of the Family Law.

397 This conclusion was drawn after review of decisions on collective guardianship of asylum-seeking children represented by the BCHR lawyers. Namely, Decision No. 560–855 of 27 November 2018 placed 77 Afghani children under collective guardianship by M.L., while Decision No. 560–64 of 22 January placed another 35 Afghani children under collective guardianship by that same person.

5.3. Inconsistently Implemented Regulations during the Asylum Procedure

The LATP provides for special protection of the rights of the child in the asylum procedure.[398] The legal provisions relating to the asylum procedure, to a great extent, are in line with the international standards, although this cannot be said for their implementation. This section will describe how individual LATP provisions were implemented in 2019.

5.3.1. Principle of the Best Interests of the Child

The principle of the best interests of the child is one of the core values underlying the CRC, and it pervades the application and interpretation of all other rights guaranteed by that international instrument.[399] According to the Committee on the Rights of the Child, the assessment of the child's best interests consists of evaluating and balancing all the elements necessary to make a decision in a particular situation for the benefit of the child.[400]

The reasoning why a particular decision was made must indicate explicitly the facts regarding the circumstances of the child.[401] If the decision differs from the child's opinion, the decision maker must clearly explain why such a decision is in the best interests of the child.[402] In addition to assessing the child's current safety and integrity,[403] the decision maker must evaluate the future risk of injury and other consequences of the decision.[404]

Until the entry into force of the LATP, the asylum authorities did not consider the best interests of the child in their decisions.[405] In addition, based on the practice of the BCHR, which has been representing children in the asylum procedure since 2012, that the only procedural guarantee for children was often the mere presence of their temporary guardian during official actions.

Unlike the preceding LA, the LATP explicitly guarantees that its provisions must be implemented in accordance with the principle of the best interests of the

398 For more details, see: *Right to Asylum in the Republic of Serbia 2018*, pp. 49–55.

399 *General comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration (Article 3, para. 1),* CRC Committee, UN Doc. CRC/C/GC/14 (Geneva, 29 May 2013), para. 1.

400 *Ibid.*, para. 47.

401 *Ibid*., para. 97.

402 *Ibid*.

403 *Ibid*.

404 *Ibid.*, para. 74.

405 This conclusion was drawn on the basis of the analysis of all decisions of the Asylum Office and the Asylum Commission from 2008 to 2018 that were obtained following requests for access to information of public importance.

child.[406] This provision incorporated into the text of the law has contributed to an extent to adjusting the practice of the acting authorities in unaccompanied and separated children asylum cases. Although the LATP does not explicitly provide that the officials deciding in the asylum procedure must take into account the opinion of the guardianship authority, this obligation is stipulated in the Family Law. Namely, when deciding on the protection of a child's rights,[407] the findings and opinion[408] of the guardianship authority must be obtained. Considering that in the asylum procedure it is decided, *inter alia*, on the protection of the child's rights, the acting authorities would have to obtain the opinion of the guardianship authority.

One of the first decisions that has adequately considered the best interests of the child is the ruling of the Asylum Commission on the appeal against the decision[409] of the Asylum Office discontinuing the procedure in the case of an unaccompanied child from Afghanistan. The child applied for asylum at the time the LA was in force. Repealing the decision of the Asylum Office, the Asylum Commission pointed out that by adopting the appealed decision the law was violated at the child's detriment. In the reasoning of their decision, the Commission stated that the child was entitled to special care and that the asylum authorities had the obligation to act in his best interests. In addition, the Asylum Commission pointed out that in this case, but also in all other cases of unaccompanied and separated children who made the asylum application at the time the LA was in force, the LATP should be applied as a generally more favourable law compared to the LA.

During 2019, the Asylum Office implemented the provisions of the LATP properly in several cases, protecting the interests of the child in the asylum procedure.[410] In the decision of 28 January 2019, the Asylum Office looked at the circumstances surrounding the persecution of an unaccompanied child from Iraq from the perspective of the child's best interests, taking into account the opinion of a psychologist.[411] The case of an unaccompanied Afghani child's asylum application was handled in a similar manner.[412] In that case, in the reasoning of its decision granting asylum, the first-instance authority paid particular attention to the findings and opinion of the guardianship authority.[413] It took

406 Article 10 of the LATP.

407 Article 270 of the Family Law.

408 Article 62 of the Rulebook on the Organisation, Norms and Standards of Operation of Social Work Centres provides that the caseworker prepares his/her findings and expert opinion if the findings of the assessment are required by the court, other authority or institution.

409 Asylum Commission Decision, No. Až-49/18, of 5 November 2018.

410 See Asylum Office Decision, No. 26–329/18, of 23 December 2018, and Asylum Office Decision, No. 26–2348/17, of 28 January 2019.

411 Asylum Office Decision, No. 26–2348/17, of 28 January 2019, pp. 7–8.

412 Asylum Office Decision, No. 26–784/18, of 20 November 2019.

413 *Ibid.*, p. 5.

into account particularly the fact that the asylum seeker was only 13 years of age when he fled the country of origin.[414]

By adopting a fairly broad interpretation of the Guidelines for the Alternative Care of Children adopted in 2010 by the UN Resolution (Guidelines)[415] in several cases, the Asylum Office has taken the view that children who have reached 18 years of age during the asylum procedure should be granted special procedural guarantees in the asylum procedure.[416] Namely, the Asylum Office emphasised that in terms of the best care for the child, care must be taken of the children in the "transitional period", until such time they are sufficiently mature to be able to adequately care for themselves.[417]

By contrast to such a liberal interpretation of the "soft" law, in several other cases, the Asylum Office did not take into account even the reports provided by the legal representatives and the guardianship authority, let alone volunteered arguments on in favour of the unaccompanied child's interests. Thus, in its decision of 30 September 2019,[418] the Asylum Office demonstrated a fundamental misunderstanding of the concept of the best interests of the child, stating the following:

> The acting authority has paid particular attention to the fact that A.A. is an unaccompanied child. However, this fact cannot be crucial to the decision itself, given that Afghanistan has signed and ratified numerous international human rights protocols and conventions, including the UN Convention on the Rights of the Child of 28 March 1994, and that the national legislation focuses on child protection.[419]

In that case, the Asylum Office rejected the child's asylum application even though the child was unable to return and resettle safely in Afghanistan. By failing to assess properly the risk that his rights would be violated if he were returned to Afghanistan and by failing to explain why such a decision was in his best interest, the Asylum Office violated the rules of procedure and put the child at risk of a violation of the principle of *non-refoulement*. In the case of A.A, the Asylum Office

414 *Ibid*.

415 *Guidelines for the Alternative Care of Children: Resolution, Adopted by the General Assembly*, A/RES/64/142 (New York, 24 February 2010), available in Serbian at: https://bit.ly/2P8E3OM. As its title implies, the Guidelines refer to children's placement in the social care system or in foster care, and not to the asylum procedure. A provision allowing children who have reached the age of legal adulthood to continue to use alternative child care services in the so-called transitional period (para. 28) was interpreted by the Asylum Office as the grounds for applying special procedural guarantees in the asylum procedure.

416 See, for example, Asylum Office Decision No. 26–2348/17, of 28 January 2019, and Asylum Office Decision No. 26–2643/17 of 30 January 2019.

417 Asylum Office Decision, No. 26–2643/17, of 30 January 2019, p. 7, and Asylum Office Decision, No. 26–2348/17 of 28 January 2019, p. 8.

418 Asylum Office Decision, No. 26–932/19, of 30 September 2019.

419 *Ibid*.

merely found that Afghanistan had ratified the Convention on the Rights of the Child and other international human rights instruments. However, what the Asylum Office failed to do – and was obliged to do – is to investigate to what extent Afghanistan respects and protects children's human rights in practice.

With respect to the Asylum Office's assessment that the best interests of the child cannot be crucial to its decision, is has to be underlined that, according to the CRC, the best interests of the child must be of primary importance in all decisions concerning the child.[420] The expression "of primary importance" indicates that the best interests of the child must take precedence over all other factors.[421] The Asylum Office also failed to provide a legally relevant explanation as to why returning A.A. to Afghanistan would be in his best interest, as well as how the various elements relevant to the assessment of the best interest (which were not identified) were weighed.[422] In addition, the Asylum Office in that case ignored the findings and opinion of the Belgrade City Social Work Centre – Palilula Department, submitted to that authority on 20 August 2019. In doing so, the first-instance authority violated not only the rules of asylum procedure,[423] but also the CRC and its Article 3, which is the pillar of the international legal protection of children.

To conclude, the Asylum Office applies properly the LATP and takes into account the opinion of the guardianship authority only when it takes positive decisions in the asylum procedure. Naturally, that does not mean that the proper application of the law leads solely to positive decisions adopted. Any decision based on the law, positive or negative, should include an assessment of the possible consequences of that decision on the child. In addition, the Asylum Office would have to show how the rights of the child were taken into account in the decision-making process. In that respect, it must provide a justification as to why the conclusion of the Asylum Office is in the best interests of the child, on what criteria it is based, and how different interests of the child have been weighed against other considerations.[424]

5.3.2. Conducting Official Actions without Temporary Guardians Present

The LATP provides that an unaccompanied child must be assigned immediately a temporary guardian to represent the child's interests in the asylum procedure.[425] It is explicitly stipulated that an unaccompanied child is to express his/

420 Article 3, para. 2 CRC.

421 *General comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration (Article 3, para. 1),* CRC Committee, UN Doc. CRC/C/GC/14 (Geneva, 29 May 2013), para. 37.

422 *Ibid.*, para. 46.

423 Article 10 of the LATP.

424 *General comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration (Article 3, para. 1),* CRC Committee, UN Doc. CRC/C/GC/14 (Geneva, 29 May 2013), para. 6.3.

425 Article 12 of the LATP.

her intention to seek asylum in the presence of his/her temporary guardian.[426] In addition, the Rulebook on Registration[427] provides for the registration of unaccompanied children in the presence of the temporary guardian appointed by the competent Social Work Centre.[428]

However, according to the BCHR's experience, in 2019, children also expressed their intention to apply for asylum and were registered by the police officers without the presence of their temporary guardian. In the best scenario, a representative of the Social Work Centre would appear *ex officio* to sign a registration certificate for a child who has expressed his/her intention to apply for asylum. Upon leaving the police station, the child would be handed back to the field social worker in charge of further procedures concerning the child to be provided emergency accommodation, medical examination and the like. Only when all this is concluded, the child would be appointed a temporary guardian. Such practice by the competent authorities is not only unlawful, it is also contrary to the principle of respecting the best interests of the child, as provided for in the provisions of the LATP and the CRC. In addition, it is in contravention of the Family Law, which stipulates that an unaccompanied and separated child is to be appointed a guardian[429] in the emergency procedure.[430]

Such unlawful practice[431] by the MI and the Social Work Centres can be illustrated by the case of an Afghani child who had been registered on 23 March 2019 and was appointed a temporary guardian only on 15 April 2019. In addition, this child made his asylum application with an authorised officer of the Asylum Office,[432] also without the presence of his temporary guardian, which is unlawful.[433] In addition, on 19 June 2019, an authorised officer of the Asylum Office attempted to hold the oral hearing in the asylum procedure without the presence of the temporary guardian that, at that point, had been appointed to the child, at a time when the child still did not have a legal representative in the asylum procedure. Although the caseworker[434] from the guardianship authority

426 Article 12, para. 5 of the LATP.

427 *Official Gazette of the RS*, No. 42/18.

428 Article 5, para. 2 of the Rulebook.

429 Article 132, para. 2, Item 4 of the Family Law.

430 Article 332, para. 1 of the Family Law.

431 That is in violation of Article 11 of the LATP, which stipulates that the intention to seek asylum on behalf of a child is to be expressed by his/her parent or guardian. For example, a certificate of registration of a foreigner who has expressed the intention to apply for asylum in the RS No. 454/2018/2018 was issued on 26 October 2018 to an unaccompanied child from Afghanistan without having being signed by his temporary guardian.

432 The asylum application in Case 26–932/19 was filed on 10 April 2019, five days before the child had a temporary guardian appointed in accordance with the law.

433 Article 12 of the LATP.

434 The caseworker actually instructs the work of the temporary guardian, who must report to the caseworker and obtain his/her consent to perform specific activities or legal actions. The

appeared at the official action, the child did not know that person, and that person – not knowing the child's individual circumstances – was unable to take care of his interests in the best possible way. Due to all that, the child stated at the oral hearing that he wanted to testify exclusively in the presence of his temporary guardian and that he requested that his right to a legal counsel in the asylum procedure should be respected. Following that, the Asylum Office officer discontinued the oral hearing until these conditions were met.[435]

The presence of a guardian during all legal actions concerning the child is mandatory.[436] This obligation arises also from the provisions of the CRC.[437] However, it can be noted that in 2019 the unlawful practice of the police officers registering children before they have been appointed a temporary guardian continued. Additionally, it has been noted that the official asylum procedure actions were conducted without the presence of the child's temporary guardian.

5.3.3. Overly Long Procedure

The LATP prescribes that the asylum procedure must take into account the specific situation of the persons requiring special procedural or reception guarantees, including unaccompanied and separated children.[438] The obligation of the competent authorities to provide an unaccompanied child with special procedural provisions in the asylum procedure arises not only from the LATP, but also from the provisions of the ratified CRC.[439]

In accordance with the LATP, children have a right to appropriate assistance, and the same applies to asylum seekers who, given their personal circumstances, are incapable of exercising their rights and obligations.[440] Such a broad and imprecisely defined provision leaves much room for different interpretations in the course of its application. In the cases when the BCHR lawyers acted as legal representatives in the asylum procedure, this provision was seldom applied. In one case, the Asylum Office properly terminated the oral hearing of an unaccompanied child because the acting officer considered that the child was no table to properly

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temporary guardian's duties include monitoring the quality of the services provided to the child, assisting the child in making decisions through timely provision of all relevant information, and taking care of the best interests of the child.

435 Minutes of the event, No. 26–932/19, of 19 June 2019.

436 Article 12 of the LATP.

437 *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC Committee, UN. Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), para. 33.

438 Article 17, para. 1 of the LATP.

439 See, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC Committee, UN. Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), paras. 64–78.

440 Article 17, para. 2 of the LATP.

participate in that procedural action due to health concerns. The oral hearing was postponed until the child had undergone the necessary medical examinations.[441]

As a procedural guarantee, the LATP provides that the procedures relating to asylum applications made by unaccompanied children should take priority over all other procedures.[442] However, from the BCHR's experience, this provision is hardly ever respected in practice. Namely, the children represented by the BCHR lawyers in the asylum procedure had been waiting for several months for the Asylum Office to schedule their oral hearings in the asylum procedure.[443]

An example that can illustrate that is that of an unaccompanied child from Afghanistan who had applied for asylum on 21 September 2018, and was interviewed only six months after that, but was still waiting to be served the first-instance decision at the end of November 2019.[444] Another unaccompanied child from Afghanistan, who had expressed the intention to seek asylum on 31 August 2017,[445] made the asylum application only on 21 September 2018.[446] This occurred only after the child was appointed a legal representative, who intervened with the Asylum Office for the child to be scheduled an appointment to apply for asylum without delay.[447] In the third case, an unaccompanied child from Iran was also scheduled the appointment to submit the asylum application almost a year after he had expressed his intention to seek asylum.[448]

The asylum procedures for all children are unreasonably long. By 20 November 2019, the BCHR received only one first-instance decision for a child from Afghanistan who had applied for asylum in 2019.[449] As for all other cases, the Asylum Office informed the BCHR, acting as the legal representative in the asylum procedure, only in one instance that its decision would be delayed. That letter stated that the decision could not be reached within the legal timeline

441 Minutes of the Oral Hearing in Case No. 26–379/19 of 29 May 2019.

442 Article 12, para. 9 of the LATP.

443 For example, for a child who had made the asylum application on 21 September 2018 (No. 26–1437/18), the oral hearing was held six months later, on 22 March 2019. By the end of June 2019, the first-instance decision in the asylum procedure still had to be made. In addition, for a child who had made the asylum application on 18 September 2018 (No. 26–1547/18), the oral hearing was held on 5 February 2019. The other children had to wait for the oral hearing for two to three months, on average (cases No. 26–218/19 and 26–932/19).

444 The case registered with the Asylum Office under No. 26–1437/18.

445 Certificate of expressed intention to seek asylum, No. 1855/2017/2017 of 31 August 2017.

446 The case registered with the Asylum Office under No. 26–1437/18.

447 The BCHR Intervention of 17 August 2018.

448 The case was registered with the Asylum Office under No. 26–1271/19; the child had expressed the intention to seek asylum (No. 1216/2018/2018) on 5 June 2018, and had the asylum application submission appointment scheduled only on 20 May 2019.

449 This case is analysed in more detail in the part of the Report on the best interests of the child in the asylum procedure.

"considering the complexity of the asylum seeker's testimony and the complexity of the application, in order to collect detailed information on the country of origin and verify the credibility of the testimony".[450]

On the other hand, in a number of cases – processed at the same time as the cases of the children represented by the BCHR – the Asylum Office made its decision very quickly, "leaving aside" the cases of unaccompanied and separated children.[451] The processing of asylum applications appears not to be prioritised. In addition, the speed of decision making depends on other factors, including the expediency of the acting first-instance authority officer.

5.3.4. Conclusion and Recommendations

Although the LATP has formally improved the asylum procedure to an extent, the shortcomings that existed before it entered into force are still present in practice. The information provided in this section indicates that police officers register unaccompanied and separated children in the absence of their temporary guardians. Such a practice of the competent authorities directly violates the provisions of the CRC,[452] LATP,[453] and the Family Law.[454] In addition to the issues identified at registration, the asylum procedure relating to children's asylum applications is unreasonably long, and the Asylum Office applies the LATP safeguard provisions to children inconsistently.

By contrast, the MI should ensure that the basic principles of child protection arising from the RS's international obligations and the national regulations are consistently respected whenever the police officers take official actions concerning unaccompanied and separated children. At all stages of the asylum procedure and in particular when deciding on asylum applications made by children, the Asylum Office must take care of the child's best interests and must take into account the opinion of the guardianship authority.

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450 Letter No. 26–218/19 of 10 May 2019.

451 In the case relating to the asylum application made by a Syrian adult on 31 October 2018, the Asylum Office issued a decision within six months and nine days (the case was registered with the Asylum Office under No. 26–1731/18). In addition, in the case relating to the asylum application made by an Afghani adult on 28 March 2019, the Asylum Office issued the first-instance decision within just two months and two days (the case was registered with the Asylum Office under number 26–787/19). Furthermore, following the asylum application made on 28 August 2018 by an adult from Afghanistan, the Asylum Office issued a decision within five months and three days (the case was registered with the Asylum Office under number 26–2643/17).

452 *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin*, CRC Committee, UN. Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), paras. 33–38.

453 Article 12 of the LATP.

454 Article 11 and Article 137 of the Family Law.

5.4. Children in Misdemeanour Proceedings

In accordance with the available information provided to the BCHR by the misdemeanour courts, from the beginning of the year until 30 September 2019, 267 juveniles[455] were found guilty of illegal crossing of the state border and illegal stay in the RS, pursuant to the LBC[456] and the FL.[457] Over 77% of them were convicted of crossing or attempting to cross the state border outside the designated border crossing points, or without a valid travel document. In none of the proceedings against juveniles[458] did the misdemeanour courts apply the principle of non-penalisation of refugees for illegal entry or stay in the RS.[459]

As early as 2015, the UN Committee against Torture pointed out to the RS authorities the issues in the area of misdemeanour sanctions imposed on migrants and the lack of respect for the minimum procedural guarantees in the misdemeanour proceedings.[460] It had been pointed out, *inter alia*, that the RS had the obligation to guarantee each migrant access to independent, professional and free legal assistance and an interpreter in the misdemeanour proceedings. Four years later, it appears that the issues identified by the Committee persist.

By analysing the misdemeanour judgments concerning unaccompanied and separated children,[461] the BCHR found that in most *proprio motu* cases, the courts have taken into account the defendant's age, but only with regard to imposing educational measures instead of sanctions.[462] However, a large number of judgments demonstrate a lack of other procedural guarantees applicable to juveniles in the misdemeanour proceedings, although the court has a duty to ensure that ignorance or lack of learning of parties does not go to the detriment of their respective rights.[463]

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455 While the BCHR uses the term "child" to refer to all persons under the age of 18, the term " juvenile" will be used in this section because of the terminology used in the Law on Misdemeanours itself and in the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings.

456 Article 71, para. 1 of the LBC.

457 Article 121 in conjunction with Article 14, and Article 122 in conjunction with Article 74 of the FL.

458 This information was obtained on the basis of an analysis of the decisions provided to the BCHR by the misdemeanour courts following requests for access to information of public importance.

459 In accordance with Article 31 of the Convention Relating to the Status of Refugees, and Article 8 of the LATP.

460 *Concluding observations on the 2nd periodic report of Serbia*, Committee against Torture, CAT/C/SRB/CO/2* (Geneva, 3 June 2015), para. 14.

461 The BCHR has obtained the copies of the judgments through requests for access to information of public importance.

462 Article 74 of the LM.

463 Article 90 of the LM.

5.4.1. Obtaining Guardianship Authority's Opinion

While the misdemeanour proceedings against juveniles are considered urgent, the urgency of the proceedings must by no means justify the absence of the safeguarding procedural guarantees, and in particular, the absence of proper guardianship protection. Before imposing any re-education measure or sanction, the court is required to obtain the opinion of the competent guardianship authority.[464] Only if the competent guardianship authority fails to provide its opinion within 60 days, the court may reprimand of fine the juvenile without considering the opinion of the guardian authority.[465]

All juveniles in the misdemeanour proceedings are subject to the provisions of the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings accordingly.[466] That law stipulates that the questioning of a minor must be held in the presence of his/her parent or guardian,[467] and that he/she must have a defence counsel available throughout the proceedings.[468] In addition, in order to establish the circumstances necessary for imposing re-education measures, the court is required to examine the juvenile's guardian and other persons who could provide the necessary information.[469] In accordance with the above regulations, the guardian is required to act in the best interests of the child and to ensure that the misdemeanour proceedings is not conducted to the detriment of the juvenile's respective rights.

From a large number of judgments, it cannot be concluded whether the questioning was conducted in the presence of the juvenile's guardian or whether the court took into account the opinion of the guardianship authority on the psychophysical condition of the juvenile when sentencing. In addition, in the reasoning of some decisions it is stated that the court had taken into account the official note by the guardianship authority, on the basis of which it found that the juvenile did not need to be appointed a guardian. An illustrative example of this practice is the judgment[470] of the Loznica Misdemeanour, the Mali Zvornik Department, of 16 May 2019, which states:

> In the course of the evidence hearing, the court examined (...) the official note of the Social Work Centre, dated 16 May 2019, which indicated that the questioning was conducted with (...), an older juvenile, who was psychophysically normal,

464 Article 292, paras. 1–2 of the LM.

465 Article 292, para. 3 of the LM.

466 Article 291, para. 2 of the LM.

467 Article 54 of the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings, *Official Gazette of the RS*, No. 85/05.

468 Article 49, para. 1 of the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings.

469 Article 78 of the LM.

470 Judgement of the Loznica Misdemeanour Court, Mali Zvornik Department III-11 Pr. 1606/19 of 16 May 2019.

> healthy and capable of taking care of himself and intellectually capable of grasping the consequences of his decisions and travelling in the company of an adult compatriot, and the court is of the opinion that the juvenile does not need a guardian and that he can move independently and leave the territory of the Republic of Serbia.[471]

From the reasoning of the judgment, it is apparent that the guardianship authority actually concluded that the juvenile, originally from Syria, a country affected by war and general violence, did not need a guardian.[472] The guardianship authority in this case did not even have a whole day to be acquainted with the child in relation to whom it had to give its findings and opinion. Specifically, it is evident from the reasoning of the judgment that the misdemeanour was committed on the same day the misdemeanour proceedings was conducted, the assessment was carried out, the guardian's opinion was issued, and the judgement was delivered. The judgement does not even contain any information on whether the juvenile, given that he is from Syria, has been informed by the guardianship authority or by the court of his right to asylum in the RS.

Furthermore, the judgement of the Zrenjanin Misdemeanour Court[473] states that a "worker of the Zrenjanin Social Work Centre" was present during the hearing of a juvenile from Afghanistan. However, the representative of the guardianship authority stated during the hearing that the guardianship authority was not able to deliver an opinion because the person in question was a foreign national. The reasoning of the judgment does not indicate that the representative of the guardianship authority took care of the best interests of the child, since he stated in court that he "had no information about the juvenile offender". That is exactly why the guardianship authority should have carried out a procedure to get acquainted with the personal circumstances of the juvenile whose interests he was obliged to represent, before the misdemeanour proceedings.

Inadequate practice has also been identified in the proceedings of the Loznica Misdemeanour Court. In its judgment of 20 March 2019, this court stated that, after examining the official note by the guardianship authority, it found that the juvenile was capable of taking care of himself on his own.[474] Similarly as in the above cases, the misdemeanour proceedings was conducted on the same day the misdemeanour was committed. Therefore, the Social Work Centre did not even have a whole day at their disposal to get acquainted with the personal circumstances of the juvenile it was obliged to take care of. In addition, the reasoning of the judgment does not indicate whether the juvenile had a temporary guardian or whether the guardian was present during the hearing.

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471 *Ibid*.

472 See, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin,* CRC Committee, UN Doc. CRC/GC/2005/6 (Geneva, 1 September 2005), paras. 33–38.

473 Decision of the Zrenjanin Misdemeanour Court 7PRM 73/2019 of 4 July 2019.

474 Decision of the Loznica Misdemeanour Court 7Prm. 8/19 of 20 March 2019.

In accordance with such practice by the Loznica Misdemeanour Court, a sixteen-year-old unaccompanied child from Afghanistan was rejected, *inter alia*, the right to be questioned in the presence of his guardian.[475] He was ordered, without the presence of his temporary guardian or a defence counsel, a precautionary measure of removal of the foreigner without the assessment of the risk that his rights would be violated in the country to which he was going to be returned.[476] On the same day, the Šabac Police Department issued a decision to the juvenile cancelling his stay in the RS and ordered him to leave the RS within seven days.[477] This decision was served to the unaccompanied minor and not to his temporary guardian, who, as it is stated in the decision, was not present at all.

As the principle of the best interests of the child is the guiding principle for the protection of children in all proceedings and activities, we are of the opinion that there are no justifiable reasons to deny a child the right to a guardian in the misdemeanour proceedings. Guardianship protection is the minimum safeguarding procedural guarantee for unaccompanied refugee and migrant children.

5.4.2. Right to Counsel and Use of Language

All persons charged with committing a misdemeanour are entitled to a defence counsel of their own choice, and the court is obliged to inform them of that right at the initial hearing.[478] The Law on Misdemeanours stipulates that a decision cannot be based on the testimony of the defendant who has not been informed of his/her right to counsel of his/her choice.[479] In case of juveniles, the court has an obligation to provide them with a counsel with special qualifications in the field of the rights of the child.[480]

The analysed judgments do not even indicate that the children had a defence counsel in the misdemeanour proceedings. In addition, no decision of misdemeanour court that the BCHR had access to contains information that the juvenile has been informed of his/her right to counsel. It has to be pointed out again that the courts have a duty to ensure that ignorance or lack of learning of

475 Article 49 of the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings, which applies accordingly to the misdemeanour proceedings involving juveniles.

476 Under Article 308 of the LM, in conjunction with Article 65 of the Law on Misdemeanours, and Article 122, para. 2 of the Foreigners Law.

477 Decision of the MI, Police Directorate, Šabac Police Department, Department for Foreigners and Suppression of Irregular Migrations No. 26–43/2019 of 20 March 2019.

478 Article 93, para. 3 of the LM.

479 Article 200, para. 4 of the LM.

480 Article 49, para. 2 of the Law on Juvenile Criminal Offenders and the Protection of Juveniles in Criminal Justice Proceedings, which applies accordingly to the misdemeanour proceedings involving juveniles.

parties does not go to the detriment of their respective rights.[481] Considering that they were not entitled to counsel, it is reasonable to assume that the juveniles did not have the opportunity to avail themselves of a legal remedy either.

Parties to the misdemeanour proceedings have the right to interpretation in the course of the proceedings into their native language[482] or, alternatively, into another language they can understand well enough to be able to follow the course of the proceedings.[483] Interpretation during the proceedings is performed by an interpreter designated by the court conducting the misdemeanour procedure, who is on the list of court-sworn interpreters or, if this is not possible, by another person with the consent of the party.[484]

The majority of misdemeanour court decisions that the BCHR has reviewed[485] do not indicate that the juvenile was informed of his/her right to interpreter and conduct of the proceedings in his/her native language or a language he/she can understand.[486] As stated above, the court has a duty to ensure that ignorance or lack of learning of parties does not go to the detriment of the juvenile's respective rights.[487]

In one case, which will be described in more detail below,[488] the proceedings before the Bačka Palanka Misdemeanour Court were conducted against an unaccompanied child from Afghanistan who spoke only Pashto.[489] Considering that he did not speak the language of the misdemeanour proceedings (Serbian), and that the court did not provide him a Pashto interpreter, the boy was not aware even that there were misdemeanour proceedings conducted against him. Thus, he did not even understand what misdemeanour he had been charged with and what rights he had in that misdemeanour proceedings.[490]

While the reasoning of some of the decisions state that the juvenile gave testimony through an English interpreter, often the name of the interpreter is not indicated.[491] Some decisions indicate the name of the interpreter, but not

481 Article 90 of the Law on Misdemeanours.

482 Article 94, para. 3 of the LM.

483 Article 94, para. 4 of the LM.

484 Article 94, para. 6 of the LM.

485 See, for example, Decision of the Niš Misdemeanour Court 18 Prm 46/19 of 20 March 2019, Decision of the Zrenjanin Misdemeanour Court 7 Prm 73/2019 of 4 July 2019, Judgement of the Loznica Misdemeanour Court, Mali Zvornik Department III-6 Prm 3506/19 of 24 September 2019, etc.

486 Article 94, para. 5 of the LM.

487 Article 90 of the LM.

488 See Section 5.4.4. A Case Illustrating Misdemeanour Proceeding Irregularities.

489 Judgment of the Bačka Palanka Misdemeanour Court 3 No. PR. 65/19 of 14 January 2019.

490 Information obtained during an interview with a child at the Novi Sad District Prison on 15 January 2019.

491 See, for example, Decision of the Loznica Misdemeanour Court 7 Prm. 8/19 of 20 March 2019.

the language into which he/she interpreted.[492] In addition, the decisions usually do not indicate even the information on whether the interpreter is on the list of court-sworn interpreters or whether, if the interpretation is performed by another person, he/she has taken an oath before the court.[493]

In addition to these examples of inadequate practice, the BCHR has had insight into decisions that represent good practice. An example that can be singled out is the decision of the Senta Misdemeanour Court, Kanjiža Department. Specifically, a misdemeanour proceeding against a juvenile from Afghanistan was discontinued because he could understand only Pashto and therefore it was not possible to conduct the proceedings.[494]

5.4.3. Lack of Assessment of the Risk of Refoulement

In the context of the misdemeanour proceedings, a violation of the principle of *non-refoulement* may occur in the event of the imposition of a precautionary measure of removal of the foreigner, without a prior assessment of the risk of violation of that principle.[495] Similar as in previous years,[496] in 2019, the misdemeanour courts imposed precautionary measures of the removal of the foreigner to juveniles,[497] with the judgments not indicating whether the risk of a violation of the principle of *non-refoulement* if that sanction was enforced had been assessed. In a judgment[498] of the Niš Misdemeanour Court, which is not an isolated case,[499] the following is stated in the reasoning:

> Considering that the juvenile defendant cannot prove their identity and that they are foreign nationals who are domiciled abroad, and that, in the court's judgment, there is reasonable doubt that they will try to avoid the enforcement of the sanction imposed, the judgement in respect of them will be enforced before it becomes

492 See, for example, Decision of the Niš Misdemeanour Court 18 Prm. 39/19 of 14 March 2019, and Decision of the Niš Misdemeanour Court 18 Prm. 46/19 of 20 March 2019.

493 Article 87, paras. 3–4, and Article 119 of the Criminal Code (*Official Gazette of the RS*, No. No. 85/05, 88/05 – correction, 107/05 – correction, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19) in conjunction with Article 99 of the Law on Misdemanors.

494 Decision of the Senta Misdemeanour Court, Kanjiža Department II-5 PRM 38/2019 of 4 February 2019.

495 Radmila Dragičević Dičić et al, A*pplication of the Principle of Non-penalisation of Refugees in Misdemeanour Proceedings*, Belgrade Centre for Human Rights (Belgrade, 2016), p. 15.

496 *Ibid.*

497 See, for example, Judgement of the Niš Misdemeanour Court 19 Pr. No. 1084/19 of 21 February 2019, Judgement of the Niš Misdemeanour Court, 21 Pr. No. 4464/19 of 16 May 2019, Decision of the Loznica Misdemeanour Court 7 Prm 8/19 of 20 March 2019, Decision of the Loznica Misdemeanour Court 7 Prm 50/19 of 23 September 2019.

498 Judgement of the Niš Misdemeanour Court 19 Pr. 1084/19 of 21 February 2019.

499 In addition to the previous, see also Judgement of the Niš Misdemeanour Court 19 Pr. 14464/19 of 16 May 2019.

> final, specifically where it refers to imposing the precautionary measure of removal of the foreigners from the territory of the Republic of Serbia for a period of one year, pursuant to Article 308, para. 1, Item 1 of the Law on Misdemeanours.

A similar reasoning for imposing a precautionary measure of removal of the foreigner can be found in the practice of the Loznica Misdemeanour Court.[500] The court judgments state:

> The judgement will be enforced before it becomes final within the meaning of application of Article308, paragraph 1 of the Law on Misdemeanours, considering that the defendants are foreign nationals, and that they could impede the execution of the fines if they are not executed before the finality.[501]
>
> ...
>
> The juvenile is hereby imposed a precautionary measure of removal of the foreigner from the territory of the Republic of Serbia for a period of 1 (one) year, to be executed by the authority of the MI of the Republic of Serbia IMMEDIATELY, before this decision becomes final, in accordance with Article 308 of the Law on Misdemeanours, and in relation to Article 65 of the Law on Misdemeanours, and Article 121, paragraph 2 of the Foreigners Law.[502]

Imposing precautionary measures of removal of the foreigner to unaccompanied juveniles for whom it can be reasonably presumed that they are in need of international protection (considering that they come from countries affected by war or general violence) is not in line with the international standards.[503] By ordering the judgment to be enforced before it becomes final, the court denied this juvenile the right to appeal with suspensive effect regardless of judgment's far-reaching consequences and without having assessed the risk of *refoulement*. The ECtHR case law requires that the assessment of the risk of violations of *non-refoulement* (Article 3 of the ECHR) in the event of returning a child to a particular country be conducted in the light of the best interests of the child.[504] In addition, the threshold for determining whether there is a real risk of torture or ill-treatment in the case of refugee children is much lower, as children are members of a particularly vulnerable refugee population.[505]

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500 See, for example, Decision of the Loznica Misdemeanour Court 7 Prm 8/19 of 20 March 2019, Decision of the Loznica Misdemeanour Court 7 Prm 50/19 of 23 September 2019.

501 Judgement of the Loznica Misdemeanour, Mali Zvornik Department, III-11 Pr. No. 1606/19 of 16 May 2019.

502 See, for example, Decision of the Loznica Misdemeanour Court, 7 Prm 8/19, of 20 March 2019, and Decision of the Loznica Misdemeanour Court, 7 Prm 50/19, of 23 September 2019.

503 Article 33 of the Convention Relating to the Status of Refugees.

504 *C.A.S. and C.S. v. Romania,* ECtHR, Application No. 26692/05 (2012), para. 72; *Neulinger and Shuruk v. Switzerland*, ECtHR, Application No. 41615/07 (2010), para. 135; *Kanagaratnam and others v. Belgium*, ECtHR, Application No. 15297/09 (2011), paras. 62 i 67; and *Popov v. France*, ECtHR, Applications No. 39472/07 and 39474/07 (2012), para. 91.

505 *Tarakhel v. Switzerland*, ECtHR, Application No. 29217/12 (2014), para. 119.

5.4.4. A Case Illustrating Misdemeanour Proceeding Irregularities

The seventeen-year-old unaccompanied child tragically killed in Belgrade[506] in early June came to the limelight in January 2019 when he had been arbitrarily deprived of liberty under a decision of the Bačka Palanka Misdemeanour Court in January 2019.[507] After interviewing the boy and reviewing his case file, the BCHR lawyers identified a number of irregularities in the work of the police and the Court, resulting in the violation of his fundamental human rights.

When the boy had been pushed back by the Croatian police to the RS, his identity and age were incorrectly recorded in the police records and the court case files.[508] In the misdemeanour proceedings initiated and terminated on that same day before the Bačka Palanka Misdemeanour Court, during which no interpreter was made available,[509] the acting judge stated in the reasoning of his judgment that the boy had waived his right to appeal, and issued a decision[510] replacing the fine he had imposed by a ten-day prison sentence. Such replacement of a fine by a sentence of imprisonment of a child, which is in contravention of the Law on Misdemeanours,[511] occurred precisely because the police officers had incorrectly established the boy's age.

Given that the boy did not speak the language in which the misdemeanour proceedings were conducted (Serbian), and was not provided a Pashtu interpreter, he did not understand that his personal information had been established incorrectly, nor was he aware that the misdemeanour proceedings were conducted against him, of the charges levelled against him or of his rights in the misdemeanour proceedings.[512]

The boy was not ensured the right to an effective legal remedy either. Although he did not speak Serbian, the judgment stated that he had been *informed of the judgement orally* (Italics ours) and provided a brief explanation of the judgement, and informed of his right of appeal.[513] The judgment also stated that

506 Jelena Zorić, "Case of Killed Migrants: Minors without Protection – Easy Prey for Smugglers", *N1* (Belgrade, 9 June 2019), available in Serbian at: http://bit.ly/2LtEPpr.

507 Decision of the Bačka Palanka Misdemeanour Court, 3 Pr. No. 65/19, of 14 January 2019.

508 Namely, although Z.N. was appointed the boy's temporary guardian by the Belgrade City Social Work Centre – Palilula Department (Decision No. 57100–12378/18 of 24 December 2018, which became final on 11 January 2019), in its judgment the Bačka Palanka Misdemeanour Court said that he was of age.

509 Judgement of the Bačka Palanka Misdemeanour Court, 3 No. PR. 65/19 of 14 January 2019.

510 Decision of the Bačka Palanka Misdemeanour Court, 3 Pr. No. 65/19 of 14 January 2019.

511 Replacement of an outstanding fine by a sentence of imprisonment may not be ordered in case of fines imposed on minors and legal entities (Article 41, para. 6).

512 Information obtained during the interview of the child in the Novi Sad District Prison on 15 January 2019.

513 Judgement of the Bačka Palanka Misdemeanour Court, 3 No. PR. 65/19, of 14 January 2019.

he had been handed a transcript of the operational part of the judgment, that he had not asked for a written copy of the judgment, and that he had *waived his right of appeal* (Italics ours).[514]

Therefore, the boy was deprived of his right to a fair trial,[515] the right to be informed in a language he can understand of the nature and reasons of the acts he was charged with and the evidence collected against him,[516] the right to equal protection of his rights, and the right to a legal remedy.[517] Furthermore, he was denied the right to a defence counsel, i.e. legal assistance,[518] he was deprived of the right to the inviolability of his physical and mental integrity[519] and the right to life liberty and security of person in conjunction with the special rights of the child.[520] The competent authorities should take this case as a warning and make additional efforts to provide at least the minimum procedural guarantees to unaccompanied and separated children.

5.4.5. Conclusion and Recommendations

Children prosecuted for misdemeanours for illegally crossing the state border or for illegal stay in the RS faced the lack of the procedural guarantees specified by the regulations governing the treatment of children in the misdemeanour proceedings. The most common problems were reflected in the inadequate role of the guardianship authority in the proceedings, i.e., the misdemeanour proceedings conducted in the absence of the guardian. On the other hand, unaccompanied and separated children were denied the right to a defence counsel, and therefore it is not reasonable to expect that they were able to avail themselves of any legal remedies.

In addition, the analysis of the decisions of the misdemeanour courts which acted against children shows that in most cases the children were not provided with an interpreter for a language they could understand sufficiently to be able to follow the proceedings. In addition, the misdemeanour courts continued to impose precautionary measures of removal of the foreigner to children without a prior assessment of the risk of violation of the principle of *non-refoulement*.

All misdemeanour courts in the RS need to fully ensure the application of the procedural guarantees relating to the conduct of misdemeanour proceedings against unaccompanied and separated children. They need to involve the guardian-

514 Italics ours.

515 Article 32 of the RS Constitution.

516 Article 33 of the RS Constitution.

517 Article 36 of the RS Constitution.

518 Article 67 of the RS Constitution.

519 Article 26 of the RS Constitution.

520 Article 27, paras. 1–3 of the RS Constitution in conjunction with Article 64, para. 3 of the RS Constitution, and the guarantee on the special protection of children without parental care enshrined in Article 66, para. 3 of the RS Constitution.

ship authority in every proceeding and take into account their opinion on the best interests of the child when making their decisions. The misdemeanour courts need to secure a defence counsel to juvenile offenders and to inform them about their right to asylum in the RS. The misdemeanour courts must ensure that proceedings are conducted in a language that children can understand and should not impose precautionary measures of removal of the underage foreigner from the RS before assessing whether there is a risk of a violation of the principle of *non-refoulement*.

5.5. Challenges Related to Alternative Child Care

Children temporarily or permanently deprived of their family environment must be provided alternative care in accordance with the law if that is in their best interests.[521] The scope of protection the RS is required to provide to children does not depend on the child's legal status. That also ensues from the provisions of the ratified CRC.[522]

Pursuant to the Guidelines, states should ensure alternative care options for emergency, short-term and long-term child care.[523] In that respect, priority should be given to family-based and community-based arrangements,[524] such as foster care. Decision-making on alternative care should be based on rigorous assessment, planning and review, through the established structures and mechanisms, and should be carried out in individual procedures, by a multidisciplinary team of qualified professionals, wherever possible.[525]

This entire procedure is adequately regulated by the national legislation. Under the Family Law, a decision on who would care for the child is made only by the guardianship authority that has undertaken guardianship protection measures and appointed a temporary guardian for the child.[526] The guardianship authority is required to reach a provisional conclusion on accommodation provided to the child within 24 hours from the moment it has become aware of the need for guardianship.[527] In the procedure for deciding on alternative accommodation, the child's right to form and express his/her own opinion must

521 Article 20 of the CRC stipulates that such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable child care institutions. Alternative child care denotes all care provided outside the child's family. The alternative child care modalities are laid down in the Family Law and the Social Protection Law (*Official Gazette of the RS*, No. 24/11).

522 Article 2 of the CRC and Article 20 in conjunction with Article 2 of the CRC.

523 *Guidelines for the Alternative Care of Children, Resolution adopted by the General Assembly,* UN General Assembly, UN Doc. A/RES/64/142 (New York, 24 February 2010), para. 53.

524 *Ibid*., para. 52.

525 *Ibid*., para. 56.

526 Article 125, para. 3 of the Family Law.

527 Article 332, para. 2 of the Family Law.

be respected and taken into account in the decision-making.[528] In addition, the Social Protection Law[529] stipulates that unaccompanied and separated children, in accordance with the assessment of their best interests, may be placed with their relatives or foster families, residential care, a shelter or in other types of accommodation facilities in accordance with the law.[530] This Law recognises as vulnerable populations, *inter alia*, unaccompanied foreign nationals and unaccompanied stateless persons, as well as survivors of human trafficking.[531]

The Instruction of the Ministry of Labour lays down the detailed criteria that the guardianship authority needs to apply when deciding on the placement of unaccompanied or separated children.[532] According to the Instruction, children should be referred to ACs only if they are over 16 years of age and if their guardians have applied for asylum on their behalf. In addition, the ACs must fulfil special requirements for the accommodation of children and satisfying all their needs and the guardianship authority must conclude that such placement is in their best interest.[533] In the event that these requirements are not fulfilled, the Instruction envisages a number of alternative placement arrangements. It that respect, placement in a foster family (priority in case of children under 14) and placement in a residential social protection institution or a health institution may be considered until such time there is no longer a need for the provision of such protection.[534] All residential institutions and foster families taking in unaccompanied children must ensure their safety and must provide them health care, accommodation, clothing, basic hygiene facilities and adequate nutrition.[535] Furthermore, they must provide the children with recreational activities, education and upbringing in accordance with the relevant regulations.[536]

The LATP stipulates that all asylum seekers, without any distinction, are to be placed in the ACs or other designated accommodation facilities established under decisions of the RS Government, which are under the jurisdiction of the CRM.[537] In June 2019 alone, there were 474 unaccompanied and separated chil-

528 Article 12 of the CRC.

529 *Official Gazette of the RS*, No. 24/11.

530 Article 47 of the Social Protection Law.

531 Article 41, para. 2, Items 7–8 of the Social Protection Law.

532 Instruction on Procedures of Social Work Centres – Guardianship Authorities for the Accommodation of Unaccompanied Migrant/Refugee Children, Ministry of Labour, Employment, Veteran and Social Affairs, No. 019–00–19/2018–05 (Belgrade, 12 April 2018), Section II, para. 3, available in Serbian at <https://bit.ly/338wJb5>.

533 *Ibid*.

534 *Ibid.*, p. 3.

535 *Ibid*.

536 *Ibid*.

537 Article 51 of the LATP.

dren accommodated in those centres.[538] Most of them were accommodated at the AC in Krnjača,[539] which is neither a residential institution, nor a centre used exclusively to accommodate children. The following part will illustrate the challenges related to the practice of inadequate and unsafe placement of unaccompanied and separated children.

5.5.1. Inconsistently Implemented Regulations

As already noted, decisions of the relevant guardianship authorities, which have undertaken the guardianship protection measures, are the only valid legal grounds for selecting the modality of the children's placement. This is primarily in accordance with the provisions of the Family Law,[540] which governs family protection in the RS.

In practice, the initial decision on where the children would be accommodated is usually taken by the MI, which registers their intention to seek asylum in accordance with the LATP and orders them to report to an AC or RTC within 72 hours.[541] The decision on which centres the children would be referred to is adopted depending on which AC has free capacities, in accordance with the information communicated to the MI by the CRM.[542] In addition, in accordance with its internal policies, the CRM often refers children who were not registered under the LATP to one of the facilities under its jurisdiction, most commonly to the Sjenica AC. The children the BCHR interviewed stated that their views had not been taken into account in that procedure.

Placement of children in ACs and RTCs is not conducted in keeping with individual assessments of their best interests by the guardianship authorities, wherefore such practice is unlawful. In its observations on Serbia's 2017 periodic reports, the Committee on the Rights of the Child recommended that the RS should provide unaccompanied and separated children accommodation in foster families or other accommodation facilities suitable for their age, gender and needs.[543] The selection of the modality of accommodation for the children must be based on the individual assessments of their best interests.[544]

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538 Minutes of the Child Protection Working Group meeting, *UNICEF* (Belgrade, 7 June 2019).

539 *Ibid*.

540 Article 125, para. 3.

541 This conclusion was drawn on the basis of the information obtained during the outreach activities of the BCHR lawyers, and in discussions with the temporary guardians and their wards in Belgrade and in Sjenica.

542 *Ibid*.

543 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), para. 57(b), available in Serbian at <http://bit.ly/2XeQH0X>.

544 *Ibid*.

By adopting the Action Plan for Chapter 24 in March 2019, the RS Government committed to the improvement of accommodation conditions in asylum centres in accordance with the EASO standards.[545] On the other hand, in early June 2019, the CRM started transferring unaccompanied and separated children from the Krnjača AC to the Sjenica AC.[546] In accordance with the indicators that are integral part of the EASO Guidelines from December 2018,[547] the Sjenica AC cannot be considered an adequate solution for unaccompanied children due to its distance from the available public infrastructure. Social protection services in Sjenica are insufficiently developed.[548] In discussions with individual guardians, the BCHR has learned that in some cases the temporary guardian had not even been informed that his/her ward had been moved to Sjenica.

According to the information provided by the CRM, a decision has been taken to refer all newly arrived children directly to the Sjenica AC, as soon as they are registered.[549] It remains unclear whether the best interests of every individual child will be assessed before they are referred to this AC.

The state has a positive obligation to take all appropriate measures to ensure adequate alternative care for children temporarily or permanently deprived of their family environment.[550] In the absence of well-developed foster care services, as a transitional solution, the placement of children in separate centres, tailored to their needs and guaranteeing their security is the least that could be done to reduce the risks to their lives and safety. The accommodation conditions for the refugee children must be suitable to their age to ensure that the children are not exposed to "stress and anxiety, with particularly traumatic consequences".[551]

5.5.2. Special Reception Guarantees

The special reception guarantees within the meaning of the LATP imply that unaccompanied children who have already made their asylum application and who reside at an Asylum Centre are to be provided, exceptionally, alternative accommodation in accordance with the decision of the guardianship authority.[552] That includes social protection institutions or placement with another

545 *Action Plan for Chapter 24: Justice, Freedom and Security: Update,* RS Government Negotiation Group for Chapter 24: Justice, Freedom and Security (Belgrade, March 2019), Objective 2.3.6, available in Serbian at: https://bit.ly/2OAW3kE.

546 Minutes of the Child Protection Working Group meeting, *UNICEF* (Belgrade, 7 June 2019).

547 *EASO Guidance on reception conditions for unaccompanied children: operational standards and indicators*, EASO (Valetta, December 2018), available at: https://bit.ly/2NY8kRi.

548 See also Section 5.2.2. Unlawful Practice of Sjenica Social Work Centre.

549 This refers to the registration in the asylum procedure, i.e., registration of a foreigner who has expressed his/her intention to seek asylum in the RS, in accordance with Article 35 of the LATP.

550 Article 20 of the CRC.

551 *Tarakhel v. Switzerland*, ECtHR, Application No. 29217/12 (2014), para. 99.

552 Article 52, para. 2 of the LATP.

accommodation service provider or a family.[553] Those would be social protection institutions[554] or facilities managed by civil society organisations, under the approval of the Ministry of Labour.[555] The total capacity of those social institutions is approximately seventy persons.[556] Such accommodation is financed from the RS budget, from the funds allocated for asylum seeker accommodation, i.e., through the CRM.[557]

Children asylum seekers are rarely provided alternative accommodation within the meaning of the LATP provisions, mainly due to insufficient capacity of the social institutions. Consequently, most children actually stay at ACs and RTCs, as shown by the available Ministry of Labour data. On 3 June 2019, in the RS, in the facilities under the jurisdiction of the CRM and in the social institutions, there were 510 children recorded, with as much as 88.8% of them accommodated in the Krnjača AC and in the Sjenica AC.

In 2019, the children relocated from an AC or an RTC to a social protection institution or other care arrangement were mostly those who had been in the RS for a long time, who were enrolled in the educational system and who wished to remain in the RS. Even that was possible only if there were vacancies in the social institutions and if the management of those institutions agreed to admit the children. On the other hand, it the transitional period, i.e., during their stay at the AC or the RTC, children often decide to leave the RS. Without a guardian taking care of their rights, without an obligation to attend high school regularly,[558] and without accommodation that is appropriate to their needs, it is not surprising that most children do not perceive the RS as the country where they want to remain.[559]

In addition to ACs and RTCs, some children were placed in children re-education facilities, whose operative units are centres for placement of unaccompanied and separated children,[560] and were imposed re-education measures. In one

553 Article 52, para. 2 of the LATP.

554 Operational units of the Belgrade Institute for Child Education and the Niš Institute for Youth Education, as well as "Jovan Jovanović Zmaj" Home for Children without Parental Care in Belgrade.

555 Those include the Jesuit Integration House *Pedro Arrupe* of the Jesuit Refugee Service charity in Belgrade, and BorderFree Association House of Rescue in Loznica.

556 A total of seventy places, including: 15 places in the Belgrade Institute for Child and Youth Education, 15 places in the Niš Institute for Youth Education, 10 places in "Jovan Jovanović Zmaj" Home for Children without Parental Care in Belgrade, 15 places in the BorderFree Association House of Rescue in Loznica, and 15 places at the Jesuit Integration House *Pedro Arrupe* of the Jesuit Refugee Service charity in Belgrade.

557 Article 52, para. 5 of the LATP.

558 Under Article 71 of the RS Constitution, secondary education is not mandatory, it is only free.

559 See Section 5.1. Identification of Children.

560 The Belgrade Institute for Child and Youth Education and the Niš Institute for Youth Education, as social protection institutions (Decision on Social Protection Institution Network, *Official Gazette of the RS*, No. 51/08) expanded the activity in 2008 under the decision of the

of those institutions in Niš, by the end of October 2019, there were 118 children, with the shortest duration of their stay being one day and the longest being 77 days.[561] In a same type institution in Belgrade, there were only 44 children.[562] As primarily semi-open type re-educational institutions in charge of protecting children and youth in conflict with the law and children and youth with behavioural disorders, these institutions cannot be considered suitable for unaccompanied and separated children. Therefore, there is a need to work on finding alternatives to such accommodation and developing family-based accommodation services, especially for younger children.

"Jovan Jovanović Zmaj" Home for Children without Parental Care has been providing accommodation for unaccompanied and separated children since October 2019.[563] From the beginning of 2019 until 31 October, there were only ten children staying at this institution with a capacity of 13 persons.[564] The children interviewed by the BCHR, who had been accommodated there for some time, rated their stay at the Home for Children without Parental Care very positively.

In addition to those institutions, unaccompanied and separated children also stayed at the Jesuit Integration House *Pedro Arrupe* in Belgrade. From early 2019 until the end of October, the Jesuit Integration House housed 45 unaccompanied and separated children, only a few of whom stayed there for longer than six months. During that same period, 24 children were accommodated in the House of Rescue in Loznica.[565]

RS Government. In addition to the Centre for Placement of Children and Youth with the Imposed Re-education Measure of Referral to Education Institution, the institutions now also have a new operational unit – Centre for Placement of Juvenile Foreigners Unaccompanied by Parents or Guardians, with the capacity to accommodate 15 children.

561 Response following the BCHR request for access to information of public importance, sent by email on 22 November 2019.

562 Information received from the management of the operational unit during a visit to the institution on 25 November 2019.

563 *Right to Asylum in the Republic of Serbia 2018*, pp. 61–62, available in Serbian at <https://bit.ly/2XOXGzD>.

564 Response by the "Zvečanska" Centre for Protection of Infants, Children and Youth, under which "Jovan Jovanović Zmaj" Home for Children without Parental Care operates, following a request for access to information of public importance, No. 5784/1, of 6 November 2019.

565 Children are accommodated in these facilities under protocols on cooperation concluded between the Ministry of Labor and NGOs. A protocol between the Ministry of Labour and the Jesuit Refugee Service on cooperation on improving assistance and support to the most vulnerable migrant populations and applicants for international protection in the RS was signed on 23 March 2017. As stated in the Ministry's announcement, the Cooperation Protocol relates primarily to the activities on the implementation of the project "Integration House for Vulnerable Refugee Populations" for unaccompanied children and particularly those identified as victims of human trafficking, torture, captivity or abuse. For more details, see: <https://bit.ly/2KIBGkx>. For more information about the house for migrant and refugee children in Loznica, see: <https://bit.ly/35lgmsZ>.

In 2019, temporary guardians often raised the problem of their inability to find adequate accommodation for their wards.[566] In BCHR's experience, the authorities place only very young children or children recent survivors of grave forms of violence in residential institutions or in foster care as soon as they establish their identity.[567] The lack of vacancies in social institutions, which are more suitable for the accommodation of children, as opposed to ACs and RTCs, often prevented the temporary guardians to provide the child adequate and safe accommodation, in accordance with their mandate.

5.5.3. Underdeveloped Foster Care Services

Although the RS had committed by ratifying the CRC to developing family-based arrangements for unaccompanied and separated children, very little has been done in that regard. Foster care services are underdeveloped, to say the least.[568] Only one child in the territory of Belgrade was in foster care in 2019.[569] That child had been in foster care since 2017, which means that in 2019 no child had been eligible for placement in family-based accommodation for the first time, despite the fact that there were 23 families on the list of eligible foster parents for unaccompanied children.[570]

As a reminder, in 2017, the Belgrade Centre for Foster Care and Adoption, in cooperation with international organisations International Rescue Committee and Save the Children, trained more than 90 foster parents to care for unaccompanied migrant children.[571] In that institution is 2019 Operating Plan, there is no mention of migrants and refugees at all.[572]

Although the Committee on the Rights of the Child made a recommendation to the RS two and a half years ago to improve foster care for unaccompanied chil-

566 The BCHR reached this conclusion based on the frontline work with unaccompanied and separated children and their temporary guardians in the course of 2019.

567 In 2019, there was only one child in foster care.

568 Through a request for access to information of public importance, the BCHR learnt that there were only 23 foster families trained to care for unaccompanied and separated children in the entire RS, that all of these families were within the jurisdiction of the Belgrade Centre for Foster Care and Adoption (City of Belgrade, Kolubara and Mačva Districts), as well as that in 2019 only one child was in foster care, and had been placed in foster care on 11 April 2017; Response by the Belgrade Centre for Foster Care Adoption following a request for access to information of public importance, No. 2497–560/19–2/19, of 7 November 2019.

569 Response by the Belgrade Centre for Foster Care and Adoption following a request for access to information of public importance, No. 2497–560/19–2/19, of 7 November 2019.

570 *Ibid.*

571 *2018 Operating Plan*, Belgrade Centre for Foster Care Adoption (Belgrade, February 2018), p. 16, available in Serbian at: https://bit.ly/2r8KV6n

572 *2019 Operating Plan*, Belgrade Centre for Foster Care Adoption (Belgrade, February 2019), available in Serbian at: https://bit.ly/32Ukxuh.

dren through development of foster care and accommodation suitable for the age, gender and needs of children, it appears that that has yet to be done.[573] It should not be forgotten that, since 2015, the RS has not invested effectively in addressing this issue and has often sought *ad hoc* and systemically unsustainable solutions.

5.5.4. Challenges Related to Care for Children with Psychological Difficulties

Many children with whom the BCHR has worked showed signs of post-traumatic stress disorder and other psychological distress due to experiences associated with leaving the country of origin. That was indicated by the psychologist or psychiatrist reports used in the asylum procedure as the grounds for ensuring additional procedural guarantees for the respective children.

In 2019, there were situations when children, who had already been staying in one of social care institutions, began to exhibit unsocial behaviours or have serious mental health issues. After a child was hospitalised at the "Dr. Laza Lazarević" Clinic for Psychiatric Disorders, the social care institutions were generally unwilling to readmit him/her because of the lack of skilled staff to care for the child around the clock. In one case, a child who had survived severe forms of violence in the country of origin and tried to commit suicide on several occasions found himself in a situation that no institution was willing to admit him to be accommodated there.[574] Thanks to the enormous efforts of his temporary guardian, the child was placed in an institution in Belgrade, although even the guardianship authority had previously agreed for the child to be placed, after his release from the Clinic for Psychiatric Disorders, at the Sjenica AC, where he did not know anyone and where there were no conditions for his adequate care.

That is not an isolated case. In the recent years, many children with psychological issues relating to the reasons why they had been forced to flee their countries have passed through the RS. However, there are still no specialised placement services for children with emotional, psychiatric and behavioural difficulties, although this was one of the recommendations made by the Committee on the Rights of the Child back in 2017.[575]

5.5.5. Safety and Security in Asylum Centres and Reception Centres

Most unaccompanied and separated children still stay in general-type ACs that are used to accommodate adults as well. When children are placed at these

573 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), para. 57(b), available in Serbian at: http://bit.ly/2XeQH0X.

574 The BCHR became aware of the case during its work with unaccompanied and separated children and their temporary guardians.

575 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), para. 57(b).

ACs, a comprehensive assessment of the suitability of the accommodation to the individual needs of the child is seldom conduced. Due to the nature of accommodation at the centres under the jurisdiction of the CRM, unaccompanied and separated children staying there are exposed to numerous risks. Such accommodation is not safe for them.

The case, which unfortunately resulted in the killing of a child, is described in a previous BCHR Periodic Report.[576] This event from June 2019 raised the issue of security at ACs and RTCs, bearing in mind that many of the centres do not have permanent security or have insufficient security staff.[577]

Based on a statement by a CRM representative for the Serbian media only one day after the killing, it appears that the CRM was aware of the risk the boy was exposed to, but that not enough had been done to protect the child.[578] Specifically, the Commissioner stated that "the child was close to a group of extremely problematic young men who had for the past year [...] harassed not only their own circle, but other migrants as well".[579] With that in mind, the CRM should have officially reported the violence to the competent authorities and to the child's guardian. He should have done so especially if he was aware that someone was "violence prone"[580] and that an incident was likely to happen. It has to be noted that the Council of Europe Special Representative for Migration and Refugees in his report warned that the management of the centres under the jurisdiction of the CRM was generally hesitant to report any allegations of serious crimes in those centres to the police.[581]

These and other problems have for several years now been alerted to by the Committee on the Rights of the Child,[582] the Human Rights Committee,[583] and

576 *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, pp. 55–58.

577 This conclusion was drawn on the basis of the information obtained during the Belgrade Human Rights Centre team's field visits to asylum centres and other centres for accommodation of refugees, migrants and asylum seekers.

578 "Cucić for RTS: Months-Long Abuse Preceded the Migrants' Murders", *RTS* (Belgrade, 7 June 2019), available in Serbian at: http://bit.ly/2LSAqwu

579 *Ibid*.

580 *Ibid*.

581 *Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary, 12–16 June 2017*, Council of Europe, SG/Inf(2017)33, (Strasbourg, 13 October 2017), Section 4.1, available at: https://bit.ly/2DcAJwy.

582 *Concluding Observations on the Combined Second and Third Periodic Reports of Serbia*, CRC Committee, UN Doc. CRC/C/SRB/CO/2–3 (Geneva, 7 March 2017), para. 57(b).

583 *Concluding Observations on the Third Periodic Report of Serbia*, CRC Committee, UN Doc. CCPR/C/SRB/CO/3 (Geneva, 10 April 2017).

the UN Special Rapporteur on Torture.[584] The conditions for the reception of unaccompanied and separated children in the centres under the jurisdiction of the CRM raise serious concerns in terms of the children being at risk of violence, sexual abuse and exploitation or human trafficking.[585]

In 2019, the Centre for the Protection of Victims of Trafficking in Human Beings identified 15 migrant children from Iran, Afghanistan and Pakistan as alleged victims of human trafficking,[586] including two girls, an Afghani and an Iranian. There were two victims of human trafficking formally identified, while other proceedings were pending. Both cases related to labour exploitation of Afghani boys. Considering that this institution only acts in relation to the reported potential cases of trafficking in human beings, we can assume that the actual number of such cases was higher.

The competent authorities should have taken all of the above as a serious warning and should have provided without delay separate accommodation facilities for unaccompanied and separated children, fully tailored to their needs. The focus should certainly be placed on the development of family-based accommodation arrangements, including foster care.

5.5.6. Children Staying in the Street and in Informal Settlements

Many children had spent days and nights in informal refugee settlements for various reasons – from trying to avoid smugglers pressuring them, to refusing to be accommodated in the remote AC in Sjenica.[587] These sites were located in close proximity of the main bus station and under the Old Sava Bridge in Belgrade, as well as in the RS border areas, such as in Šid.

Children, and especially unaccompanied children, were often left to fend for themselves outside of the protection system, similarly as in the previous years. The BCHR frequently met in the filed children under the age of 14 who were completely alone or accompanied by strangers, who were often under the age of

584 *Visit to Serbia and Kosovo, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the UN Human Rights Council, UN Doc. A/HRC/40/59/Add.1 (Geneva, 25 January 2019), available at: https://bit.ly/2QPs635.

585 *Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary, 12–16 June 2017*, Council of Europe, SG/Inf(2017)33 (Strasbourg, 13 October 2017) Section 4.1.

586 Response by the Centre for the Protection of Victims of Trafficking in Human Beings following the BCHR request for access to information of public importance, No. 2013/1/19, of 9 December 2019.

587 Detailed monthly statistics are available on the UNHCR website at <http://www.unhcr.rs/en/dokumenti/izvestaji/unhcr-serbia-updates.html> and at <https://bit.ly/2LkIrZY>.

18 as well. While the authorities in the protection system[588] were aware of that situation, they failed to ensure an adequate response, despite the repeated interventions by the organisations providing humanitarian assistance to children in the field.

In discussions with the competent authorities, the BCHR often received the answer that these children did not actually want to stay in the RS. In addition, these authorities stated that they did not have the mechanisms and that they were not able to influence the movements of unaccompanied children, or in any way force them to use any of the institutions or social care services available to them in the RS.[589]

However, it has to be noted that, regardless of whether or not a child wishes to stay in the RS, his/her best interest, life and safety are paramount and must be protected. Refugee children are often exposed to manipulations and blackmail by smugglers. In addition, due to the negative experiences they have had on their way to the RS, they often distrust the state institutions. The child's opinion must be taken into account, but if that opinion undermines his/her right to safety and protection from abuse and exploitation – which is frequently connected with the illegal crossing of the border – the primary concern should be ensuring his/her protection. The child needs to be explained why it is in his/her best interest to be taken away from the street, offering him/her adequate accommodation suitable to his/her age, gender and needs. The child's insisting on staying out of the protection system, in inhumane conditions, surrounded by smugglers, should in no way justify the lack of adequate accommodation and care for that child.[590]

Nearly two years after the establishment of the informal settlement within the former "Grafosrem" factory, the police in Šid conducted an action on 22 November 2019 to relocate 150 migrants,[591] including 28 unaccompanied children.[592] However, unaccompanied and separated children, along with other migrants, still rough sleep on the streets of Belgrade. In October 2019 alone,

588 The field social workers hired by the Ministry of Labour, Employment, Veteran and Social Affairs are present, together with the CRM representatives, at the "Miksalište" facility in Belgrade, in the vicinity of the refugees and migrants' informal settlements.

589 Ana Šuvalja Pešić, "Underage Migrants Invisible to the System", *RTS Online* (Belgrade, 7 June 2019), available in Serbian at: http://bit.ly/2xKObVN.

590 *Khan v. France*, ECtHR, Application No. 12267/16 (2019) paras. 87–88.

591 "Šid: Action to Relocate Illegal Migrants Conducted (Video)", *STV Sremska televizija* (Šid, 22 November 2019), available in Serbian at: http://sremska.tv/2019/11/sid-akcija-pocela-ilegalne-migrante-izmestaju.

592 This information was obtained from a local Social Work Centre participating in the relocation. According to the information provided by UNHCR, six boys under the age of 14 were placed in social care institutions, while 22 older boys were placed in the Sjenica AC.

there were 920 migrants rough sleeping, of whom 450 were in the downtown Belgrade.[593]

5.5.7. Conclusion and Recommendations

The protection system for unaccompanied and separated children may be assessed as generally inadequate and non-complying with the international instruments ratified by the RS. The recommendations of the Committee on the Rights of the Child and the Committee on Human Rights have yet to be followed up, as unaccompanied children continue to be accommodated at ACs and RTCs together with adults. That is in most cases done without an individual assessment of the child's needs, and the children are placed in ACs and RTCs only on the grounds that they are migrants or asylum seekers.

The analysis presented in this Report clearly shows that the RS still has a lot to do also when it comes to improving the system of alternative care for unaccompanied and separated children. ACs and RTCs, organised as they are now, cannot be considered adequate for accommodation of unaccompanied and separated children. The reasons for that, for the most part, include the lack of security, the accommodation of the children together with adults they do not know, and the fact that they are not constantly manned by experts in child protection.

The first and most urgent step that needs to be taken to ensure the protection of these children is to place them in facilities where their safety and security will be guaranteed. The CRM may wish to propose to the RS Government to establish such centres that would be used to accommodate only unaccompanied and separated migrant children. In these centres, the Ministry of Labour and the CRM need to ensure the presence of professionals who can take care of the interests of children as specified by the law. In addition, the CRM, in cooperation with the Ministry of Health, needs to ensure the presence and services of child psychiatry specialists in the centres, if there is a special need for that in individual cases.

593 *UNHCR Serbia Update October 2019*, UNHCR (Belgrade, November 2019), p. 2, available at: https://data2.unhcr.org/en/documents/download/72391.

6. SITUATION OF ASYLUM SEEKERS SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE

According to UNHCR, the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions, i.e., the grounds for granting international protection. Such approach is crucial in order to evaluate properly asylum seekers' claims.[594] Gender-related asylum claims relate typically to acts of sexual violence, domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination persons of different sexual orientation.[595] Gender-related asylum claims are made by both women and men, although due to particular types of persecution, they are more commonly made by women, and that is why this section of the Report will focus more on the situation of women.[596] However, gender-related asylum claims are made also by men.[597]

Gender-based violence can occur in the context of armed conflicts, *en route* or in the country in which the individual applied for asylum and wishes to settle. In addition to the basic needs that are common to all refugees and migrants, victims of gender-based violence need special protection from manipulation and sexual and physical abuse and exploitation. They also need protection from gender-based discrimination.[598]

In the RS, there is still a number[599] of women migrants and asylum seekers who arrived alone, with their children or accompanied by men for whom it is difficult to ascertain whether they are their husbands or relatives. A number of them were subjected to violence either in their country of origin, *en route* or upon arrival in the RS. However, there are no official data on the number of such women.

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594 *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, HCR/GIP/02/01 (7 May 2002), paras. 1 and 2, available at: https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html.

595 *Ibid.*

596 *Ibid.,* para. 3.

597 In 2019, the BCHR lawyers represented an unaccompanied underage child from Afghanistan who was a victim of sexual abuse by the armed forces in the country of origin.

598 *Guidelines on the Protection of Refugee Women*, UNHCR (Geneva, July 1991), para. 3, available at: https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html.

599 The competent RS authorities still had not established full records of migrants in the RS in 2019, both of those who had applied for asylum and those who had not. Therefore, there are no data on the exact number of migrant women and girls in the RS territory.

The reason why such data is not available is that many of them are apprehensive about reporting violence out of fear from or dependence on their abusers, or out of shame and embarrassment. Some are not even aware that they are victims and perceive the treatment they are subjected to as normal and common. In addition, the collection of representative information on the number of refugees in the RS who are survivors of gender-based violence has been further hindered by the language barrier, suspicions and mistrust.[600]

According to the BCHR data, women accounted for 885 of all foreigners whose intention to seek asylum in the RS was registered in 2019, and that number included 315 underage girls, of which 7 were unaccompanied underage girls.[601] However, the number of women migrants present in the RS, who have not expressed the intention to seek asylum, i.e., who have not been registered by the MI, is much higher than the above figures.[602]

In the first eleven months of 2019, the BCHR lawyers provided free legal assistance to 685 migrant women, 42 of whom were registered in the asylum procedure. During the year, the BCHR female lawyers represented 16 persons who had survived some form of sexual and gender-based violence. Despite the fact that the number of gender-related asylum claims filed by the BCHR's clients during 2019 is not large, those are all sensitive cases worthy of attention, and some of them will be described in this chapter of the report.

Although sexual and gender-based violence is the grounds for granting refugee protection in the RS,[603] the BCHR legal team has noted that the systemic protection of SGBV victims is still generally underdeveloped. In addition, there

600 The non-governmental organisation Atina conducted a pilot survey of 162 migrant women and girls in the period from 13 April to 15 May 2017. The survey results indicated that 64% of the respondents had been exposed to physical violence, while 24% had experienced sexual violence, i.e., a total of 109 respondents had survived some form of violence. See: *Violence against Women and Girls in the Refugee and Migrant Population in Serbia*, Atina (Belgrade, 2017), available in Serbian at: http://atina.org.rs/sites/default/files/Nasilje%20nad%20%C5%BEenama%20i%20devoj%C4%8Dicama%20u%20migrantskoj%20populaciji%20u%20Srbiji.pdf.

601 The statistics were provided by the UNHCR.

602 This conclusion was drawn on the basis of the information obtained by the BCHR during their regular visits to Asylum Centres and Reception Centres throughout the RS.

603 Under Article 28 of the LATP, the acts regarded as persecution in accordance with Article 24 of this Law (Right to Asylum) must be sufficiently serious in nature or repetition that they constitute a serious violation of fundamental human rights, in particular the non-derogable rights specified under Article 15, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or an accumulation of various measures, including violations of human rights, which are sufficiently severe as to affect an individual in a similar manner. In that respect, the acts of persecution may be, in particular, physical or mental violence, including sexual and gender-based violence, and acts of a gender-specific or child-specific nature.

is a degree of misunderstanding and lack of sensitivity among the competent authorities responsible for the protection of refugees, which will be discussed in more detail below.

6.1. Gender and Sex as Grounds for Refugee Protection

Persecution on grounds of gender or sex is not explicitly mentioned as one of the grounds for refugee protection in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. However, it is widely accepted that gender or sex can influence, or dictate, the type of persecution. The refugee definition, properly interpreted, therefore covers gender-related claims.[604]

Back in 1991, UNHCR recommended a broad interpretation of the refugee definition to include also individuals persecuted on the grounds of sex or gender.[605] UNHCR defines sexual and gender-based violence (SGBV) as violence directed at a person on account of his/her gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other forms of deprivation of liberty.[606] In addition, the UN Special Rapporteur on violence against women, its causes and consequences, emphasised in 2000 that state authorities need to adopt and implement guidelines recognising gender-related persecution as grounds for women to claim asylum.[607]

The RS Constitution guarantees the right to refugee protection (asylum) to foreign nationals and recognises sex or gender as grounds of persecution. The LATP explicitly recognises sex or gender as grounds of persecution and as grounds for asylum in the RS.[608] Under the LATP, acts of persecution may include physical or mental violence, including sexual and gender-based violence,[609] as well as acts of a gender-specific nature.[610]

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604 *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UNHCR, HCR/GIP/02/01 (7 May 2002), para. 6.

605 *Guidelines on the Protection of Refugee Women*, UNHCR, ES/SCP/67 (Geneva, July 1991), available at: http://bit.ly/2Jrhzpk.

606 *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, UNHCR (May 2003), available at: www.refworld.org/docid/3edcd0661.html.

607 *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women,* UN Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2000/68, (29 February 2000), para. 122(f), available at: https://undocs.org/E/CN.4/2000/68.

608 Article 24 of the LATP.

609 Article 28, para. 2, Item 1 of the LATP.

610 Article 28, para. 2, Item 6 of the LATP.

Under the LATP, depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sex, gender, gender identity or sexual orientation.[611] Membership to a particular social group constitutes one of the grounds of persecution defined in this Law.[612] When assessing whether a person has a well-founded fear of persecution, it is immaterial whether he/she actually possesses the gender identity characteristic attracting the persecution, provided that such a characteristic is attributed to him/her by the agent of persecution.[613]

In its Concluding Observations[614] for the RS in March 2019, the Committee on the Elimination of Discrimination against Women (CEDAW) welcomed the adoption of the above LATP provisions. The CEDAW underlined the progress achieved in relation to the prior RS reports it considered.[615]

6.1.1. Asylum Office Decisions

In 2019, the Asylum Office granted asylum to three Russian women,[616] who based their asylum claims on their fear of persecution on the grounds of their membership to the LGBTI community. When it was reviewing the admissibility of their applications, the Asylum Office examined the status of LGBTI population in Russia, as well as in the transit country, and concluded that they would be unable to receive adequate protection in any of those countries.[617] In addition, the Asylum Office granted asylum to Iranian national A.J.[618] on the same grounds of persecution, as he was able to demonstrate that, because of his sexual orientation, he was unable to avail himself of the protection of his country of origin, which is why he did not wish to return there.

611 Article 26, para. 2 of the LATP.

612 Article 26, para. 5 of the LATP.

613 Article 26, para. 3 of the LATP.

614 *Concluding Observations on the Fourth Periodic Report of Serbia*, CEDAW, UN Doc. CEDAW/C/SRB/CO/4 (14 March 2019), pp. 1–2, para. 4.

615 Namely, its predecessor did not define in detail acts of persecution on grounds of sex and gender, although the relevant asylum authorities did recognise gender-based violence as one of the grounds for granting refugee status or subsidiary protection in several cases. Specifically, the Asylum Office recognised sex or gender as membership of a particular social group. However, this authority's practice is inconsistent, particularly considering their application of the safe third country concept in most cases, including the gender-related asylum claims. See further: *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, pp. 63–65.

616 Asylum Office Decisions No. 26–1216/18, 26–1217/18 and 26–1218/18 of 12 February 2019.

617 In this case, the Asylum Office consulted reports by relevant international bodies and organisations concerning the situation of LGBTI population in the country of origin and the country of transit, as well as the European Court of Human Rights case law.

618 Asylum Office Decision No. 26–1605/18 of 15 March 2019.

It has to be noted that these cases were initiated in accordance with the provisions of the LATP, according to which the acting authority is required in each case to examine individual and general circumstances not only in the country of origin, but also in the third, i.e., transit countries.[619] Consequently, the competent authorities can no longer apply automatically the safe third country concept in the asylum procedure.[620] The LATP provisions[621] are more favourable to asylum seekers.

The cases of the Russian women and the Iranian national prove that the Asylum Office has significantly improved its practice by applying the provisions of the LATP,[622] as it properly took into account the gender components in their claims and particular vulnerability of the asylum seekers. However, the BCHR lawyers noted that this authority's practice in terms of reviewing gender-based asylum claims is not yet fully consistent.

Thus, in the case of Iranian woman F.S., a member of the LGBTI population,[623] the Asylum Office issued a decision[624] rejecting her asylum claim on the grounds that she failed to demonstrate a well-founded fear of persecution. The Asylum Office adopted a negative decision despite the fact that F.S. made allegations of multiple traumas she had experienced, as well as sexual and gender-based violence in the country of origin. She substantiated her allegations with evidence. Despite the reports submitted on the situation of LGBTI population, specifically transsexual persons in Iran, the Asylum Office stated in its rationale that "there are no sources indicating that transsexual persons in Iran are systematically threatened, persecuted and socially discriminated".[625] Howev-

619 Article 45, para. 2 of the LATP.

620 The Asylum Office in several cases decided to dismiss the applications because the asylum seekers had passed through safe third countries just before they arrived in the RS, without taking into account the individual circumstances of each case, the general circumstances in the transit countries or the existence of a real possibility that they could avail themselves of protection in those countries. See further: *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, p. 64.

621 In relation to the LA, the LATP further specifies the principle of gender equality and sensitivity (Article 16), as well as the principle of providing special procedural and reception guarantees to children and single mothers with underage children (Article 17), and the aforementioned improved legal provision on the implementation of the safe third country concept (Article 45 of the LATP).

622 For instance, in 2018, the Asylum Office dismissed the asylum applications made by two Iranian women who had been victims of sexual and gender-based violence in their country of origin, wrongly concluding that they did not want to access the asylum procedure in Turkey, which is on the RS Government list of safe third countries. Asylum Office Decisions No. 26–2432/17 and 26–2433/17 of 14 March 2018.

623 This is a transsexual person who underwent a sex change procedure in the country of origin.

624 Asylum Office Decision 26–1592/18 of 20 November 2019.

625 In the course of this procedure, the BCHR lawyers, in order to prove F.S's allegations, which she made during the official actions, made a comprehensive submission on the situation in her country of origin, referring to numerous relevant international reports on the treatment

er, the Asylum Office did not provide a sufficiently clear explanation as to why it rejected F.S's asylum application, despite all of the above.

In 2019, the BCHR lawyers represented several other foreigners in whose asylum applications included predominantly the gender component. Among them, five belonged to the LGBTI population, and 10 were victims of sexual, gender-based or domestic violence, including one person with disabilities. At the time of writing this Report, all the cases were still pending. The authors hope that the Asylum Office will continue with their good practice and take particular account of this asylum-seeker population's vulnerable situation and sensitivity when deciding on their claims.

6.1.2. Conclusion and Recommendations

Women asylum seekers and refugees are in a particularly vulnerable situation considering that they had to leave their country of origin due to a well-founded fear for their own lives, due to gender-based persecution, or due to the different gender roles attributed to them in the societies they come from. They are very frequently a target of discrimination, and the violence that is perpetrated against them is often justified by the culture or customs that are based on the notion of women's inferiority to men.

In principle, the LATP provisions recognise acts of sexual and gender-based violence as persecution. It is essential to continue strengthening the asylum system and provide additional training for Asylum Office officers on gender-related claims. It is necessary to continuously improve the quality of their work and that the procedure itself is carried out with full respect of the LATP provisions. In this regard, the Asylum Office officers need to inform themselves regularly and properly of the state of human rights and the status of victims of sexual and gender-based violence in the countries of origin, in order to adopt proper and lawful decisions. For example, some forms of violence against women that are criminalised by the international regulations and the RS Criminal Code are widespread in many asylum seekers' countries of origin.[626]

6.2. Gender Equality and Sensitivity in the Asylum Procedure

The LATP enshrines the principle of gender equality and sensitivity.[627] That entails the obligation of the competent asylum authorities to respect gender

of LGBTI persons in Iran. Parts of that submission are almost identical to a part of the reasoning of the Asylum Office's Decision No. 26–1605/18 of 15 March 2019 granting asylum to the aforementioned Iranian national A.J., who is also a member of the LGBTI population.

626 For example, female genital mutilation (FGM) that many women from the African continent, such as Somalis or Nigerians, are subjected to.

627 Article16 of the LATP.

equality and interpret the LATP in a gender-sensitive manner. Gender equality means accepting and equally recognising the differences between women and men and their different roles in society.[628] This means that, in the asylum procedure, particular account needs to be taken of the differences between women and men regarding their membership of a particular social group, political opinion, religion, ethnicity, race or sexual orientation.

In addition, under the LATP, female asylum seekers accompanied by men should be interviewed separately from their male companions, i.e., husbands.[629] Although the wording of the provision indicates that this guarantee is provided only to women, in practice, that principle applies to all individuals, and in the asylum procedure, official actions should be conducted separately for men and for women.[630] This possibility is extremely important given that persons who have been subjected to some form of SGBV may be afraid and ashamed to speak about it in the presence of their partners or compatriots. In addition, if the Asylum Office officer interviews asylum seekers separately, he/she can obtain information on the existence of domestic violence, if the victim of the violence gathers the courage to speak up about it.[631]

Therefore, it is important that the Asylum Office officers during interviews comply with the established standards and measures[632] that are specially tailored to survivors of gender-based violence. It is important that they are neutral, compassionate and objective and that they avoid any body language or gesticulation that could be perceived as intimidating, culturally insensitive or inappropriate.[633] In addition, interviewers need to understand that cultural differences and trauma play an important and complex role in the applicant's behaviour. In

628 *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices,* Council of Europe (Strasbourg, May 1998).

629 Article 16, para. 4 of the LATP.

630 However, this guarantee is not provided to all family members, e.g. children, who are always interviewed in the presence of their parents or guardians.

631 In the period 2015–2016, an Afghan woman, X.Y., was staying at the Tutin Asylum Centre with her husband and his family members, all of whom had abused her in their country of origin. X.Y. applied for asylum in the presence of her husband, and on that occasion, she was not able to speak openly about the real reasons for her persecution. After the official application submission action, the gender-based violence continued at the Asylum Centre. After she reported it, following a successful intervention by the CRM and the NGO Atina, the asylum seeker was separated from her husband, placed in a safe house, and subsequently, through the UNHCR procedure, and with the BCHR support, she was relocated to a third country.

632 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR (Geneva, 2019), p. 90. (hereinafter: UNHCR Handbook).

633 While conducting an official application submission action, one of the Asylum Office female officers made some inappropriate comments about asylum seeker from Burundi A.A., who had been raped in her country of origin several years before.

some cases, mostly those of women, they may not be aware of the reasons for their abuse.[634]

6.2.1. One Particular Aspect of the Gender Sensitivity Principle

The principle of gender sensitivity also entails the asylum seekers' right to request to be interviewed during an official action by police officers of the same sex, or to be assisted by translators or interpreters of the same sex.[635] Practice has shown that this legal possibility given to asylum seekers is of great importance considering the sensitivity of gender-related asylum applications. Namely, women, and particularly men, have great difficulty speaking openly during the procedure about the traumatic experiences they experienced in their country of origin or *en route*.[636] This also contributes to the credibility of the testimony in the asylum procedure, as in a conducive climate, they can more easily "open up" and are more willing to relate in more detail the circumstances that are the reasons for their persecution. This principle is generally respected in practice, with regard to female asylum seekers, considering that the Asylum Office, in most cases, engages female officers to conduct official actions.[637] However, the BCHR has noted a case when this principle was not applied.[638] In addition, the Asylum Office has been endeavouring to engage interpreters of the same sex as the asylum seeker in the respective case.

The LATP provides that this rule may be waived in cases where the provision of an officer or an interpreter of the same sex is not possible or is associated with disproportionate difficulties for the asylum authority. However, the question is raised as to what could constitute such disproportionate difficulties in practice.

634 UNHCR Handbook, p. 91.

635 Article 16, para. 2 of the LATP.

636 An asylum seeker from Iran, who was politically active in the country of origin, did not want to speak about the sexual abuse he had been exposed to during his official actions because he felt ashamed and embarrassed. His traumatic experience was established based on the medical and psychological reports submitted to the Asylum Office by his legal representatives.

637 Particularly as most of the Asylum Office officers are female.

638 For example, in November 2019, female asylum seeker A.A. from Nigeria independently applied for asylum before a male official of the Asylum Office who was permanently present at the Banja Koviljača Asylum Centre. The translation from English into Serbian was done by a male translator who provided translation services to the Asylum Office on that day at the Centre and translated for other asylum seekers as well. During the subsequent interview with A.A. from Nigeria, the BCHR lawyers found out that she had not had access to free legal assistance by that point, and had not been previously informed of her rights as an asylum seeker in the RS and that the Asylum Office official would interview her on that particular day. Given that AA came to and stayed in the RS alone, the Asylum Office could assume that she was a particularly vulnerable person and allow her to make her asylum application in the presence of a legal representative, as well as a female interpreter and a female Asylum Office officer. The claim relates to a serious and multiple forms of gender-based violence that A.A. was exposed to in her country of origin.

However, in the case of a Somali woman, despite her legal representatives' request that the procedure should be gender-sensitive, the first-instance authority failed to ensure an English interpreter of the same sex at the time she was making her asylum application. The Asylum Office explained the above omission with the lack of female interpreters.[639] The Somali woman had been waiting for her official application submission action for more than a month after she had given power of attorney to the BCHR lawyers to represent her in the procedure. That is why she herself asked for her official action not to be rescheduled and consented to a male interpreter. However, for the purpose of the official interview, the Asylum Office obliged her request, and a female interpreter was hired for both the languages she spoke – Arabic and English. During the interview, she was more secure, free and more open to cooperation and providing relevant information relating to the reasons for her persecution. This confirms how important it is to ensure adequate conditions for conducting quality interviews in the asylum procedure, especially in predominantly gender-related cases.

In the case of a Burundi woman, the Asylum Office provided a male English interpreter for her interview.[640] Specifically, in the absence of interpreters for her native language, a male English interpreter was hired. Considering the abundance of both male and female English interpreters in the RS, it is unclear why the Asylum Office failed to respect the principle of gender sensitivity in this case.

The LATP implies that an asylum seeker may only require to be interviewed by a person of the same "sex", which is not an appropriate legal solution for some asylum seekers, such as transsexual persons.[641] Instead, they should be allowed to declare, depending on their personal circumstances, whether they are more comfortable being interviewed or assisted by an interpreter in the asylum procedure by persons of the same or opposite sex. The BCHR lawyers made several requests to the Asylum Office to ensure that an official application submission action for the transsexual man from Bosnia and Herzegovina, who was staying outside of Belgrade at the time, is conducted in the presence of a female official. Despite the logistical and organisational difficulties, the Asylum Office ensured

639 The BCHR requested that the Office of Asylum should provide a female English interpreter for the official application submission action. The Asylum Office uses interpretation services provided by the interpreters on the UNHCR list of interpreters, and at that point, there were more than 10 female English interpreters on that list.

640 One of the languages used by Burundi nationals is French, which was not the case of the respective asylum seeker. When applying for asylum, she stated that she spoke Swahili, but agreed that the following official action (interview) would be conducted in English, in case no Swahili interpreters could be found.

641 Article 16 defines the principle of gender equality and sensitivity in the asylum procedure. Specifically, the asylum seeker is entitled, at his/her personal request, to have his/her proceedings conducted by an Asylum Office officer of the same sex, with the assistance of an interpreter/translator of the same sex. In addition, female individuals accompanied by men have a right to make their asylum application and to be interviewed separately from their male companions.

that the BCHR client was able to exercise his right guaranteed by the LATP, which alleviated to a great extent his feeling of discomfort and insecurity.[642]

Practice has shown that, in many cases of gender-related claims, the presence of officers and interpreters of the same sex as the asylum seeker is conducive to building a climate of trust during the procedure, wherefore they are more willing to open up when making asylum applications and during interviews. That is essential to ensure more accurate descriptions of the events that have caused trauma to the asylum seekers, which are most frequently the grounds for the recognition of the right to asylum.[643] Consequently, asylum seekers need be as comfortable as possible during their interviews.

6.2.2. Conclusion and Recommendations

To ensure proper review of gender-related asylum claims, the competent asylum authorities need to develop a climate of trust and safety during the implementation of the asylum procedure. Furthermore, the Asylum Office officers, as well as the staff in other competent authorities, must assure SGBV survivors during the initial contact that everything they say will be treated with the strictest confidence and will not be disclosed to their families or countries of origin. Every asylum procedure with a gender component must be conducted in a climate tailored to the sensitivity of the asylum seeker, who must be allowed to choose the sex of the officers and interpreters taking part in all the official actions throughout the procedure.

It is important that the Asylum Office in each individual case informs asylum seekers of the principle of gender equality and sensitivity in a timely manner and present them all the protection forms that are available to them. In addition, SGBV victims need to be referred by the Asylum Office officers to appropriate organisations or institutions that can support them. That would further empower SGBV survivors and strengthen their personal integrity, which could help them relate accurately all the facts relevant to the asylum procedure.

6.3. Special Procedural and Reception Guarantees

The LATP lays down the principle of ensuring special procedural and reception guarantees to specific vulnerable asylum seeker populations.[644] The populations recognised as vulnerable under the LATP include, *inter alia*, pregnant

642 The asylum seeker from B&H was born as a man, but ever since his early adolescence he has felt like a woman, which exposed him to multiple forms of discrimination in his country of origin and virtually prevented him from living a dignified life.

643 Opinion obtained during the year from at least 5 BCHR clients who had been victims of some form of gender-based violence.

644 Article 17 of the LATP.

women, single mothers with their underage children, and victims of human trafficking. Those include also survivors of grave forms of psychological, physical and sexual violence, such as women victims of female genital mutilation.

Specifically, through special procedural and reception guarantees, appropriate protection is extended to asylum seekers who, on account of their personal circumstances, are unable to exercise their rights and obligations under this law without such assistance. However, it is unclear what type of assistance is provided, primarily because the LATP does not specify it explicitly. During its activities to date, the BCHR still has not ascertained how this principle is applied to individuals who had experienced SGBV or are at risk of SGBV. Until now, those persons have been assisted mostly by civil society organisations operating in the field.[645]

To the best of the BCHR's knowledge, the NGO Atina is the only non-governmental organisation in the RS providing support and accommodation in a safe house to members of the refugee population who are at risk of SGBV.[646] In addition, as part of their activities, the NGO Atina has a well-developed *peer support programme*, which is important for empowering women SGBV survivors.[647]

The assistance provided by the NGO Atina is essential, primarily considering that it provides special accommodation conditions for vulnerable persons and support throughout their asylum procedure. However, the problem is that Atina, apart from being the only provider[648] of this type of protection, is funded through projects. That means that such assistance is not systemic and long-term assistance. In addition, the resources of an NGO are certainly not sufficient to meet the vast needs of persons at risk of SGBV.

6.3.1. Vulnerability Identification

Timely identification of vulnerable asylum seekers is crucial for the application of the special procedural and reception guarantees within the meaning of the LATP. The procedure for identification of the asylum seekers' personal circumstances should be carried out on a continuous basis, by the competent authorities, and at the earliest reasonable time after the initiation of the asylum procedure.[649]

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645 NGO Atina is the only organisation that provides assistance to these persons through accommodation in a safe house, as well as through various support and empowerment programmes.

646 For example, psychosocial support is provided by the International Aid Network (IAN), Psychosocial Innovation Network (PIN), *Medecins Sans Frontieres* (MSF), and other organisations.

647 A peer support programme is one of the mutual support and assistance mechanisms for women SGBV survivors that additionally promotes their recovery.

648 In exceptional cases, UNHCR may finance accommodation in the state facilities for particularly vulnerable women.

649 Article 17, paras. 2 and 3 of the LATP.

In principle, as soon as they issue women their registration certificate, the MI police officers refer them to an AC or RTC.[650] In the cases where there are indications that the women are victims of some form of violence already during the registration of the expressed intention to seek asylum, the Asylum Office allows their immediate placement in safe houses. Therefore, the Asylum Office has in some cases recognised the special needs and vulnerabilities of women SVGB survivors.

Although in some cases they act pre-emptively,[651] the MI and the CRM, as the competent institutions in the asylum system, generally do not have the mechanisms in place to identify early on particular vulnerable populations and ensure them special reception conditions.[652] The competent authorities are frequently assisted in the vulnerability identification by non-governmental organisations.

In case vulnerability to SGBV or SGBV incidents are identified at an Asylum Centre or a Reception Centre,[653] the CRM officers alert the organisations providing protection to these persons. In most cases, the CRM then refers the victim to a safe house, notifying the Asylum Office about the referral. As stated in the NGO Atina example, safe houses for refugees and migrant women SGBV survivors have limited capacities and are funded solely by the organisation itself.

The women migrants staying at the NGO Atina safe house include also victims of human trafficking, who were previously identified by the Centre for the Protection of Victims of Trafficking in Human Beings (Centre). In 2019, the Centre identified four members of the refugee population who were victims of human trafficking, and the NGO Atina worked on empowering them and providing them additional protection.[654] According to the NGO Astra 2019 Report on Trafficking in Persons,[655] there are still no official mechanisms in place to identify victims. The NGO Astra proposes that the RS should make additional efforts in identifying victims, especially in the migrant, refugee and asylum seeker populations.[656]

650 The asylum seeker is obliged to report to the Asylum Centre within 72 hours of the date of issue of the registration certificate.

651 And, for example, in case of reasonable suspicion of violence, the person is immediately referred to a safe house or other Asylum Centre where he/she would be ensured a higher level of security.

652 This view is based on the information obtained by the BCHR in the field and on the experience in representing parties in the asylum procedure. For example, the Asylum Office is usually informed that a particular person has suffered violence or has been raped and that special attention needs to be paid to that case only by the legal representative in the asylum procedure or an organisation providing protection to victims of violence.

653 Violence is usually identified by competent NGO staff, the CRM staff, or, in rare cases, the victim herself/himself reports it.

654 Information provided by an NGO Atina representative.

655 *Report on Trafficking in Persons: Serbia 2019, letter to US State Department,* Astra (20 June 2019), available in Serbian at: https://drive.google.com/file/d/15rvXQ7ym01KNZ1zkbMW92xCa0SovzQGt/view.

656 *Ibid.*

It is of particular importance to establish systematic and effective protection for persons who have suffered or are at risk of SGBV, by developing mechanisms for their early identification and by increasing the number of safe houses and ensuring that they are funded from the RS budget on a continuous basis. It is essential that the state authorities take a more active role in supporting SGBV victims, especially in light of the CEDAW recommendations addressed to the RS. Specifically, according to the CEDAW observations, the RS must provide effective protection from SGBV, including access to legal assistance extended by experienced professionals. Furthermore, women need to be extended greater protection in the asylum procedure, through the recognition of their vulnerabilities at the very start of the procedure and through adequate support throughout the procedure.[657]

6.3.2. Special Accommodation Conditions

The LATP further lays down that, when deciding on the accommodation of asylum seekers, due attention shall be given, in particular, to their gender and age, status of a person requiring special procedural and/or reception guarantees, and family unity.[658] This provision applies particularly to women travelling alone, single mothers and women SGBV survivors. However, there are still many challenges in the practice of the competent authorities.

In 2019, women travelling alone, single mothers and women SGBV survivors, after they have been issued the registration certificated, were referred by the MI to the ACs that could afford them greater privacy and security. In most cases, they were accommodated in the ACs in Banja Koviljača or Bogovađa, which are designated mostly for the accommodation of families and have limited capacities.[659] However, in a number of cases, the MI initially referred women travelling alone to other centres.

A young female asylum seeker from Tunisia was ordered, according to the certificate issued by the Directorate for Foreigners at the Belgrade Police Station, to go to the Reception Centre in Pirot. After 24 hours, amid allegations of sexual harassment[660] by a Pakistani man, she left the Centre on her own initiative and returned to Belgrade. After she had received information by the organisations operating in the field, the asylum seeker, with the approval of the CRM representative, was referred to the Bogovađa AC.

657 *Concluding Observations on the Fourth Periodic Report of Serbia*, CEDAW, UN Doc. CEDAW/C/SRB/CO/4 (14 March 2019), para. 24(d).

658 Article 50, para. 3 of the LATP.

659 The Bogovađa and Banja Koviljača ACs are used primarily to accommodate families. That was informally agreed several years ago by the CRM and the Asylum Office.

660 Information on sexual harassment was obtained from the asylum seeker herself, as well as from a representative of another organisation making field visits to the centre.

In addition, a woman asylum seeker from Congo, who had travelled alone to the RS, was referred to the Tutin Asylum Centre after she was issued the certificate. The Congo national could speak only French, and given that there were no French-speaking asylum seekers at the Tutin AC, she had virtually no one to speak to for months. However, thanks to an initiative launched by representatives of the Tutin AC management, the asylum seeker was transferred to the Bogovađa AC, where at that time there were many French-speaking individuals from the francophone African countries. [661]

After issuing the registration certificate to Iranian national B.B., a disabled person, a paraplegic and a victim of SGBV in the country of origin, the MI referred her to the Reception Centre in Bosilegrad. The RTC female management staff took care of her, and allowed her to stay alone in a room that was equipped for her needs. Due to her intention to apply for asylum in the RS, in agreement with the CRM and the Asylum Office, B.B was relocated to the Tutin AC, which is the only centre adapted for persons with disabilities. Despite the fact that the conditions at the centre in Tutin were adequate, the BCHR lawyers considered it a bad decision. Firstly, the centre is located approximately 3 – 4 kilometres from the Tutin town centre, which makes the use of public transportation for people with disabilities difficult, effectively limiting B.B.'s activities to the AC grounds. Furthermore, due to her being accommodated at the Tutin AC, the B.B's prospects for integration into society were limited, considering that the town of Tutin is underdeveloped and that she was not able to get in touch with the institutions or organisations assisting people with disabilities.[662]

In terms of respecting the principle of family unity when deciding on accommodation, in October 2019, after having issued the registration certificates to a Cuban woman and her daughter, the Asylum Office allowed them immediately to reside in private accommodation, instead of at the Asylum Centre, where they had previously stayed.[663] The BCHR lawyers requested such approval because the husband, i.e., father of the Cuban family had been staying in private accommodation in Belgrade for three years already.

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661 This refers to a Congolese asylum seeker represented by the BCHR lawyers in the asylum procedure.

662 Due to all that, the BCHR lawyers have tried to consider alternative forms of accommodation for the asylum seeker B.B. With the support of UNHCR, the eligibility assessment procedure has been initiated to relocate the asylum seeker B.B. to one of the institutions for the accommodation of persons with disabilities in Belgrade, bearing in mind that the other Asylum Centres are not adapted to her needs. The eligibility assessment procedure for her relocation is ongoing.

663 A few years ago, the Asylum Office established the practice of compulsory placement in Asylum Centres or Reception/Transit Centres within 72 hours of the date of issuance of the certificate. Only after the official application submission action is completed, asylum seekers may apply to the Asylum Office for a permission to reside in private accommodation.

Bearing in mind all the above, it appears that the competent state institutions (CRM, MI) do not have sufficiently developed practices and good coordination when it comes to accommodating particularly vulnerable asylum seeker populations. The state institution representatives should set clear rules of procedure in this regard.

6.3.3. Conclusion and Recommendations

As noted, the LATP does not specify explicitly what special procedural and reception guarantees mean. Bearing in mind the current practice of the competent authorities, clearly there is a lack of timely identification of the persons covered by these guarantees. Additionally, accommodation in safe houses is not provided by the state institutions but by non-governmental organisations, which is not a systemic and sustainable solution.

It is imperative that all actors involved in working with particularly vulnerable asylum seeker and refugee populations, including SBGV victims, improve their practice. In particular, the MI and the CRM, in cooperation with other relevant line ministries, need to establish the rules for timely identification of all SGBV survivors, while ensuring the minimum conditions for their protection. The resources of these state institutions need to be increased as soon as possible to facilitate the efficient resolution of the SGBV problem.[664]

The RS should provide safe accommodation facilities for the refugees SGBV victims. Increasing the number of sustainable safe houses where they could be accommodated is a prerequisite for SGBV prevention and protection. Those facilities should also be adapted to ensure that all persons accommodated there have access to various services and are able to recover quickly and successfully. In that respect, the CRM may wish to designate one of the ACs or RTCs solely for accommodating SGBV survivors or persons at risk of SGBV.

6.4. Competent Authorities' Response to Sexual and Gender-based Violence

In accordance with Article 3 of the ECHR, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In the ECtHR case law, SGBV is subject to this provision, which is why each state party to the ECHR has an obligation to protect SGBV victims and prevent SGBV in the future.[665]

664 Information obtained at the meeting of the Working Group for the Protection of Refugees and Migrants from SGBV in February 2019.

665 See, for example, *M.C. v, Bulgaria*, ECtHR, Application No. 39272/98 (2003) and *Maslova and Nalbandov v. Russia,* ECtHR, Application No. 839/02 (2018).

The Council of Europe Convention on the Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)[666] is the first legally binding document in the field of prevention of violence against women in Europe that has been ratified by the RS.[667] The Istanbul Convention sets clear standards for protection from SGBV committed against women migrants, asylum seekers, and refugees.[668]

The Law on Prevention of Domestic Violence[669] governs the prevention of domestic violence and the actions of the state authorities in this regard, as well as the provision of protection and support to the victims. In addition, this law also applies to the cooperation of the competent authorities in preventing domestic violence in criminal proceedings for specific criminal acts.[670] The aim of the law is to effectively prevent domestic violence, ensuring immediate, timely and effective protection and support to the victims.[671]

Given that they are under the jurisdiction of the RS, the provisions of the above regulations apply to all migrant population equally as to the RS nationals. However, perpetrators of SGBV against migrants often stay unsanctioned.[672] The representatives of the competent institutions justify that with the fact that migrants stay in the RS "for a short period of time only",[673] as the wish to contin-

666 *Official Gazette of the RS – International Treaties*, No. 12/13.

667 The Istanbul Convention is the first international treaty that includes the definition of gender as a "socially constructed category", defining "women" and "men" in relation to their socially defined roles, behaviour, activities and attributes. The Convention also establishes a strong link between ensuring gender equality and the eradication of violence against women. Based on this premise, it recognises the structural nature of violence against women, as a manifestation of historically unequal power relations between men and women.

668 Thus, Article 59 governs residence status of migrant women in the event of the dissolution of the marriage or the relationship, in the event of particularly difficult circumstances, and for victims of for forced marriage. Furthermore, Article 60 of the Istanbul Convention stipulates that the asylum procedures and accompanying procedures need to be gender-sensitive, and that states are required to develop gender-sensitive reception procedures and support services for asylum-seekers, as well as gender guidelines and gender-sensitive asylum procedures. In addition, Article 61 stipulates the principle of *non-refoulement*.

669 *Official Gazette of the RS*, No. 94/16.

670 Article 4 of the Law on Prevention of Domestic Violence.

671 To ensure efficient and effective protection against domestic violence, the Law stipulates mandatory cooperation between state authorities, institutions and facilities in risk assessments, emergency response measures to stop violence, and provision of long-term protection and support to victims through protection measure monitoring and planning.

672 This conclusion is drawn on the basis of the field visits and discussions with the representatives of non-governmental organisations providing assistance to victims of violence.

673 Information obtained by the BCHR at meetings with representatives of the non-governmental sector, and the same was concluded during the implementation of the outreach activities.

ue their journey and settle in one of the EU countries, and that there is no point in initiating proceedings in SGBV cases.[674]

In 2019, CEDAW expressed concern because refugee women in the RS continued to experience multiple and intersecting forms of discrimination and inadequate protection from SGBV.[675] CEDAW recommended that the RS should intensify its efforts to raise awareness among women, including disadvantaged groups of women and refugee women, of their rights and the existence of laws protecting them.

Based on the information the BCHR obtained from its clients, government institutions and other non-governmental organisations, CEDAW's concerns are justified. The following part of the Report will briefly describe the challenges in terms of ensuring SGBV prevention and protection from SGBV committed against migrants.

6.4.1. Acts of Violence and Challenges Related to Reporting Violence

In the experience of the BCHR lawyers, survivors of violence are most often women from Iran, Afghanistan, Somalia, Burundi, and Nigeria. They are particularly vulnerable if they are travelling with their husband or other male companion, as they depend on his actions and decisions about their common future.[676] Consequently, the fact that they are travelling with someone does not necessarily mean that they are protected from violence or that they are less vulnerable – they could be even more exposed to violence. On the other hand, some women who travel with their family members speak more openly about violence than women travelling alone because the presence of their family makes them feel more secure.[677] However, many women who are just passing through the RS choose not to talk about violence. They usually report violence only after they arrive in the country of destination, when they manage to get away from the abuser.[678] In most cases, the perpetrators of violence are male family members and smugglers.[679]

In addition to domestic violence, which is most often targeted at women, sexual violence and discrimination against members of the LGBTI community

674 It appears that the authorities do not take these cases of violence seriously enough, primarily from a cultural point of view.

675 *Concluding Observations on the Fourth Periodic Report of Serbia*, CEDAW, UN Doc. CEDAW/C/SRB/CO/4 (14 March 2019), p. 14, para. 43.

676 Information obtained during an interview with an Afghan woman who was a victim of domestic violence but did not want to be separated from her husband because of their planned trip to the EU. Similar information was obtained from an Indian woman.

677 Information provided by NGO Atina, obtained during interviews with women migrants and asylum seekers.

678 *Ibid.*

679 *Ibid.*

are also common among the migrant population. In many cases, violence is continuous. That means that it occurs not only in the country of origin, but also in the RS, at the hands of other members of the migrant population.

Thus, an asylum seeker from Iran, who is a member of the LGBTI community, had been hiding his sexual orientation from other foreigners at the Asylum Centre where he was staying for almost two years. According to him, the reason for that was the fear and a strong sense of shame, caused by of years of trying to "stifle" his own identity in the country of origin where homosexuality is incriminated.[680] Similarly, while staying at the Asylum Centre, a transsexual person from Bosnia and Herzegovina was exposed to almost daily discrimination by a large number of asylum seekers, mostly from Afghanistan, Pakistan and African countries.[681] She stated:

> They would laugh at me and throw in inappropriate comments. They turn away from me as if I were contagious. When I enter the dining room and sit down at the table, they would get up and leave me sitting there alone.[682]
>
> ...
>
> One girl told me to "shoo". I wanted to reach out to her father, and then another campmate intervened and verbally attacked me. I started screaming. Since then, no one at the first floor is talking to me.[683]

The vast majority of migrants staying in the RS are aware that violence is prohibited by law.[684] However, the mere fact that they aware of that does not mean that they will seek help and report violence, and that largely depends on the individual circumstances in each case. Those who know that they can report violence would usually contact the police, non-governmental organisations, the CRM, UNHCR or other actors in the field.[685]

Even though they are aware that they have that possibility,[686] in practice, victims rarely decide to report the perpetrators of violence. The fact that, in ad-

680 Information obtained during interviews with an asylum seeker represented by the BCHR lawyers in the asylum procedure.

681 Information obtained during interviews with an asylum seeker represented by the BCHR lawyers in the asylum procedure.

682 Information obtained during an interview in September 2019.

683 Information obtained during an interview held on 19 August 2019, during a field visit to an Asylum Centre.

684 According to a pilot survey of 162 women and girls conducted by the NGO Atina, 80 percent of the respondents were aware that violence was prohibited.

685 *Ibid.*

686 In the Asylum Centres, brochures prepared by international organisations are available on what constitutes gender-based violence, who the victims should turn to if they are victims of violence or are at risk of becoming victims of violence, and what rights they have in Serbia in that regard. In addition, women and girls are informed about the concept of SGBV through various workshops and lectures organised from time to time by the competent non-govern-

dition to their economic dependence, they might not even be aware they were subjected to violence or do not speak about it out of shame or guilt, quite often because of the cultural and traditional norms of the societies they are coming from, is a particular reason for concern.[687]

While operating procedures for identifying and reporting violence are in place, in principle,[688] clearly they do not provide sufficient protection to the victims or effective coordination of the competent authorities' efforts. In Asylum Centres and Reception/Transit Centres, any person who wishes to report violence needs to notify[689] the police, the competent Social Work Centre and the CRM manager, who is responsible to provide an interpreter and, if necessary, medical assistance at the Centre.[690] In some cases, the CRM removes the abuser from the facility or relocates him to another AC or RTC as a way of "punishment". However, in such cases, victims are often condemned by their compatriots because they had "caused" the abuse they suffered at the hands of their partners or other male family members.[691] In addition, if the CRM only relocates the perpetrator to another Centre, there is always a risk that he would return to the first Centre to persecute the victim, which is why it is imperative that such conduct is sanctioned.[692] In addition, the perpetrator of violence remains unpunished and poses a risk to others in his environment.

mental organisations. In 2018, the BCHR held several such workshops at the Bogovađa Asylum Centre, as well as the Adaševci and Principovac Reception Centres.

687 There were indications that a national of India, with whom a BCHR lawyer spoke, was a victim of domestic violence in the Centre she was staying in. However, although she was provided all the relevant information about her rights and the available protection, she denied that she had experienced any SGBV, strongly defending her husband and claiming that his erratic behaviour was caused by anxiety.

688 The operating procedures regarding the provision of assistance in SGBV cases violence in Asylum and Reception Centres are specified under the national Standard Operating Procedures (SOP) for SGBV prevention and protection of refugees from SBGV. The SOP have been developed in cooperation with the Ministry of Labor, the MI, the Ministry of Health, the Ministry of Justice, the Gender Equality Coordination Body, the CRM, the Serbian Institute for Social Protection, the Dr. Milan Jovanović-Batut Institute for Public Health, independent national regulatory human rights authorities, the UN Population Fund in Serbia, UNHCR, UNICEF, and civil society organisations present at the centres.

689 Violence is reported by the victim, if she wants to report it, and may also be reported by the other residents of the Centre who witnessed it or by representatives of civil society organisations present at the Centre, in accordance with Article 13, para. 1 of the Law on Prevention of Domestic Violence.

690 For more details, see: *Right to Asylum in the Republic of Serbia, Periodic Report for January-June 2019*, Belgrade Centre for Human Rights, pp. 70–71.

691 Information provided by the NGO Atina, obtained during their outreach activities and interviews victims of violence.

692 After domestic violence was identified at the Asylum Centre X, the perpetrator was relocated to another centre, but often returned to persecute the victim. Information obtained at a civil society organisations meeting.

6.4.2. Impunity

Despite the efforts by the authorities to identify violence and ensure protection to victims, their response is inadequate. There is a lack of complete exchange of information and coordination between different state authorities. The exchange of information comes down to the MI receiving notifications of suspected violence cases without providing any feedback from the police about the follow-up measures.[693] The CRM and AC representatives do not participate in the Public Prosecutor's Office and the Ministry of the Interior's coordination and cooperation meetings, despite the fact that the Law on Prevention of Domestic Violence allows for them to be present at such meetings.[694]

In some cases, judicial authorities usually respond by issuing restraining orders. According to information obtained by the BCHR lawyers, in 2019, the Kikinda Basic Court issued immediate measure of temporary removal of the perpetrator from the apartment in one case and immediate measure of prohibiting all contact and restraining orders in two cases of perpetrators from the migrant population.[695] In addition, during that same year, five criminal charges[696]

693 According to information obtained by the BCHR lawyers in the field, in some cases, the CRM representatives notify the police about violence cases without receiving a specific response. In addition, another common problem is that several organisations working in the field are aware of the violence committed, and are circulating the information about the event among them for no purpose. That inadvertently harms the victim herself, by exposing her to the risk of revictimisation.

694 In addition to representatives of the guardianship authority, coordination and cooperation group meetings are open also for other experts and representatives of other systems. See the Ombudsman's opinion of 11 July 2019, available in Serbian at: https://www.ombudsman.rs/index.php/2011–12–11–11–34–45/6184-z-sh-i-ni-gr-d-n-upu-i-ishlj-nj-n-dl-zni-z-un-pr-d-nj-r-d-u-z-sh-i-i-d-n-silj-u-c-n-ru-z-zil-rnj-c.

695 Information obtained following a request for access to information of public importance. The first case concerns an Afghan national, staying in private accommodation in Kikinda, who abused his wife, a Serbian national. The Kikinda Police Department ordered immediate measure of temporary removal of the perpetrator from the apartment and temporary restriction orders, which the competent court subsequently extended at the proposal of the Basic Public Prosecutor's Office in Kikinda. Kikinda Basic Court, Letter 3 NP. 96/19 of 7 April 2019. The second case concerns spouses from Afghanistan, staying at the Kikinda Reception Centre. The competent Kikinda Police Department ordered immediate measure to prohibit the perpetrator from approaching and contacting the victim, which was subsequently extended by the decision of the Kikinda Basic Court as the Kikinda Basic Public Prosecutor's Office estimated that there was still an imminent threat of domestic violence. Letter No. 2 NP. 157/19 of 20 June 2019.

696 The first criminal charges for domestic violence against a Libyan national was filed with the First Basic Public Prosecutor's Office in Belgrade. He was also issued a temporary restraining order prohibiting him from contacting and approaching the victim (Letter from the First Basic Public Prosecutor's Office No. 68/19 of 21 November 2019). The second criminal charges was filed with the Second Basic Public Prosecutor's Office in Belgrade against an Algerian

and one police report[697] were filed for acts of domestic violence committed by men from the migrant population in the RS. To the best of knowledge of the BCHR lawyers, none of these individuals were convicted for the crime of domestic violence. In some cases, there is a lack of coordination between the competent authorities and a lack of adequate protection of victims.

Thus, at an Asylum Centre, after an Iranian woman had reported her husband for domestic violence, he was issued a restraining order.[698] However, based on the information provided by a representative of one of the non-governmental organisations, the officer of the competent Social Welfare Centre did not conduct the necessary interview with their child, nor did the Centre want to initiate the procedure to separate the child from the father. Subsequently, after the Iranian woman and her son changed their place of residence, this case was transferred to another Social Work Centre.[699]

In another case, a migrant woman staying at a Reception Centre was sexually harassed by a member of the staff at the Centre, i.e., a CRM officer. She had reported the violence, but did not receive any protection. She also stated that, upon leaving the Centre, she was not returned the registration certificates for her and for her child, and was told by the Centre staff that she was not allowed to leave the facility "without permission", after which they left without their documents.[700]

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national. In this case, the prosecution proposed an extension of the immediate measure, and it was also considered by the Coordination and Cooperation Group (Letter from the Second Basic Public Prosecutor's Office No. 55/19 of 8 November 2019). Two criminal charges for sexual harassment against Y.M. from Pakistan and for domestic violence against M.H. from Iran were filed with the Basic Public Prosecutor's Office in Vranje (Letter from the Basic Public Prosecutor's Office in Vranje PI. No. 63/19 of 12 November 2019). In addition, two criminal charges for domestic violence were received by the Basic Public Prosecutor's Office in Sombor against two Iraqi nationals who were issued immediate measures by the Sombor Police Department prohibiting them to contact and approach the victim (Letter from the Basic Public Prosecutor's Office Sombor No. PI 23/19).

697 The City of Belgrade Police Department, Rakovica Police Station, has submitted a report to the Second Basic Public Prosecutor's Office for acts of violence under the Law on Prevention of Domestic Violence against an Iraqi national. Letter from the Second Basic Public Prosecutor's Office 55/19 of 8 November 2019.

698 Response following a request for access to information of public importance.

699 Information provided by a representative of the NGO involved in the case. The same information was obtained by the BCHR lawyers in response to a request for access to information of public importance.

700 A civic association providing protection to victims of violence approached the Ombudsman concerning this case, after which the procedure for the review of the legality and regularity of the CRM and the Reception Centre was initiated, and the recommendations and opinion were issued. For the Ombudsman's opinion of 29 October 2019, see (in Serbian): https://www.ombudsman.rs/index.php/2012–02–07–14–03–33/6320-irs-d-pr-v-ri-p-s-up-nj-svih-c-n-r-s-licni-ispr-v-risni-i-njih-vi-p-vrd-z-h-vu-z-zil.

The above information indicates that the RS authorities do not sanction SGBV adequately in all cases, that they do not have the will to prevent it, and that cross-sectoral cooperation is inadequate. An obstacle for SGBV prevention of and protection from SGBV is the fact that the refugee population is still largely perceived as persons temporarily staying in the RS. It appears that the competent authorities still do not feel responsible for ensuring a timely response.[701]

In that respect, CEDAW sharply criticised the RS for the lack of effective prosecution of SGBV cases, in addition to inadequate risk assessments to prevent SGBV against women and girls. CEDAW noted the disparity between the number of criminal charges and the number of convictions, with a majority of cases resulting in suspended sentences, and the low number of rape cases reported.[702] According to CEDAW, due to all that, women migrants are in a particularly vulnerable situation. In addition, all cases and all forms of violence need to be properly investigated, perpetrators need to be punished with sanctions proportionate to the gravity of their crime, and victims need to be protected against revictimisation. All the above requires adequate institutional mechanisms for prompt identification of persons at risk of SGBV to be developed.[703]

In 2019, the Ombudsman issued also an opinion[704] to the CRM, the Ministry of Labour, the Ministry of the Interior, and the Ministry of Finance concerning the situation of particularly vulnerable migrant and asylum seeker populations. The Ombudsman believes that migrants, considering their vulnerable situation, are at higher risk of domestic and partner violence and that the RS authorities have a duty to protect them. The Ombudsman considers that the CRM, the MI, judicial authorities, Social Work Centres and other organisations need to develop information exchange procedures and standards to ensure timely prevention of and response to violence.[705]

Victims cannot effectively protect their fundamental human rights unless there are institutional measures in place to prevent and punish SGBV. Failure to conduct effective investigations, prosecute and punish the perpetrators, results in the SGBV cases being virtually ignored.

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701 Information provided by an NGO Atina representative.

702 *Concluding Observations on the Fourth Periodic Report of Serbia,* CEDAW, UN Doc. CEDAW/C/SRB/CO/4 (14 March 2019), para. 23(g,d).

703 *Ibid.*

704 The Ombudsman's Opinion No. 201542 of 11 July 2019, addressed to the CRM, the Ministry of Labour, Employment, Veteran and Social Affairs, the Ministry of the Interior, and the Ministry of Finance. Available in Serbian at: https://www.ombudsman.rs/index.php/2011–12–11–11–34–45/6184-z-sh-i-ni-gr-d-n-upu-i-ishlj-nj-n-dl-zni-z-un-pr-d-nj-r-d-u-z-sh-i-i-d-n-silj-u-c-n-ru-z-zil-rnj-c.

705 *Ibid.*

6.4.3. Conclusion and Recommendations

The RS is under the obligation to extend effective protection from SGBV not only to own nationals, but also to all other individuals under its jurisdiction, irrespective of their legal status. In this way, instead of creating a system in which the established rules do not apply to everyone, the RS should prevent and adequately respond to violence committed by any individual in society.

The competent asylum authorities and civil society organisations should invest additional efforts to empower SVGB victims to report violence, and to ensure that they get continued support and protection. In this regard, it is important for civil society organisations and competent state institutions to raise awareness about SGBV among women and girls, but also among men, in a way that is appropriate to their age, culture and gender. Various workshops and joint activities, organised by the competent organisations, have proven extremely effective, especially in ACs where women rarely leave their rooms and lack opportunity to separate from the men in whose company they arrived in the RS.[706]

Intercultural dialogue can be one of the mechanisms for SGBV prevention, with the aim of eradicating the established social patterns in which women are subordinate to men. Therefore, all actors involved in the frontline work with migrants should be informed about the asylum seekers' culture manifestations, considering that an understanding of the cultural difference contributes to a better understanding of the person and the problem he/she is facing. The CRM officers who are the first line of assistance available to the migrant population should be sensitive to SGBV and qualified to deal with it properly, and to refer victims to the competent institutions for their protection. In this regard, it would be desirable for the CRM to increase security in the accommodation facilities for asylum seekers and migrants, which would allow them to more easily identify and reduce the potential SGBV risks.

The CRM, the MI and the judicial authorities must act in a timely and coordinated manner in the cases of identified or reported SGBV committed against migrants. The prosecutor's offices need to conduct effective investigations, and the courts need to impose adequate sentences on the abusers.

706 *A Room for Women and Girls: Voices of Women Refugees and Migrants in Serbia,* ADRA Serbia (Beograd 2019), p. 16, available in Serbian at: file:///D:/Gender%20contribution%20BCHR/RoomFoorWomen_ENG_final.pdf.

7. INTEGRATION

Within the meaning of the LATP, integration entails inclusion of persons granted asylum in Serbia's social, cultural and economic life, and their naturalisation.[707] The LATP stipulates that the RS is to ensure the conditions for integration, commensurately with its capacities.

Under the LATP, all foreigners who have been granted asylum are guaranteed: the right to residence, accommodation, freedom of movement, property, health care, education, access to the labour market, legal and social assistance, freedom of religion, family reunification, and assistance during integration. These persons enjoy equal rights as the RS nationals in terms of access to the education system, intellectual property rights, and free access to justice and legal aid. They are also equal to the RS nationals in terms of exemptions from payment of administrative fees and other costs before the state authorities. Access to the labour market, health care and the right to movable and immovable property for persons granted asylum in the RS is subject to the regulations governing the status of foreigners in these areas.[708]

In terms of secondary regulations, the area of integration is governed to an extent by the Decree on the Integration of Foreigners Granted Asylum in the Social, Cultural and Economic Life of the Republic of Serbia (Integration Decree).[709] Another regulation relevant for integration is the Decree on Criteria for Temporary Accommodation of Persons Granted Asylum or Subsidiary Protection and Conditions for Use of Temporary Housing (Accommodation Decree).[710]

The RS legislation is specific in that, in addition to the LATP, the rights of refugees are governed by the 1992 Law on Refugees,[711] which refers to the refugees from former SFR Yugoslavia. From the aspect of integration, this is a particular challenge considering that a whole range of secondary regulations defining the rights to certain benefits for refugees is based on the provisions of the 1992 Law on Refugees, and consequently does not recognise the persons who

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707 Article 71 of the LATP.

708 Law on Employment of Foreigners (*Official Gazette of the RS*, No. 128/14, 113/17, 50/18 and 31/19), Law on Health Care (*Official Gazette of the RS*, No. 25/19), and the Law on Basis of Ownership and Proprietary Relations (*Official Gazette of the SFRY,* No. 6/80 and 36/90, *Official Gazette of the FRY*, No. 29/96 and *Official Gazette of the RS*, No. 115/05 – separate law)

709 *Official Gazette of the RS*, No. 101/16 and 56/18.

710 *Official Gazette of the RS*, No. 63/15 and 56/18

711 *Official Gazette of the RS*, No. 18/92

have been granted asylum under the LATP.[712] Thus, for instance, in order to get a free Belgrade public transport card, refugees must show a Refugee ID Card issued in accordance with the Law on Refugees. This requirement is set out in the Rulebook on Fares in Public Line Transport of Passengers in the Territory of the City of Belgrade.[713] The documents provided to persons granted asylum under the LATP do not guarantee the foreigners such benefits.

Despite the integration legal framework in place, according to the BCHR's records, at least 18 persons granted asylum left the RS in the last two years because of difficulties they had experienced in terms of long-term integration.[714] Nearly all of them stated that the main reason why they left the RS and moved to the EU was their inability to naturalise and to obtain travel documents. Economic reasons were not the decisive factors. Some persons granted asylum lacking refugee travel documents returned to their countries of origin in order to exercise their right to family life. The main obstacles to integration include inconsistent legislation, the fact that the current laws do not envisage the basic ways to achieve long-term integration, such as naturalisation, and the lack of systematic support during integration.

The CRM has the leading role in local integration.[715] In addition, the Ministry of Labour, performs the public administration tasks related to the exercise of the rights and integration of persons granted asylum.[716] The LATP stipulates that the Asylum Office is required to inform those persons of their rights and obligations as soon as possible after they have been granted asylum.[717] Specifically, the Asylum Office should instruct them orally or through informational materials to contact the CRM in order to exercise their rights and obligations specified by the Integration Decree.[718] Based on the current BCHR practice, the Asylum Office has yet to comply with that obligation.

In early 2019, the BCHR published short guides for persons granted asylum, which are available in English, Arabic and Farsi. The BCHR provides these guides to persons it represented in the asylum procedure, whose asylum claims

712 Article 14 of the Law on Refugees.

713 *Official Gazette of City of Belgrade*, No. 13/17 and 11/18.

714 The number of the BCHR clients who left the RS in the previous two years.

715 Article 10, para. 2 of the Law on Migration Management (*Official Gazette of the RS*, No. 107/12).

716 Article 16 of the Law on Ministries (*Official Gazette of the RS*, No. 44/, 14/15, 54/15, 96/15 – separate law, and 62/17)

717 Article 59, para. 6 of the LATP.

718 Under Article 2, para. 3 of the Integration Decree, integration into social, cultural and economic life of persons granted asylum is provided through: full and timely information of the rights, opportunities and obligations; Serbian language learning; learning about Serbian history, culture and constitutional order; assistance during integration into the education system; assistance in exercise of the right to health care and social protection, and assistance during inclusion into the labour market.

have been upheld, as a first step in informing them of their rights and obligations. In 2019, with the support of UNHCR, the BCHR continued to provide direct support and legal assistance to foreigners during integration.

In addition, during 2019, the BCHR implemented the programme "Introduction to Serbian Culture, History and Constitutional Order for Persons Granted Asylum" in accordance with the Integration Decree and with the financial support of the CRM. The training programme included 30 school hours and covered geography, history, culture, human rights, and constitutional order, including translation/interpretation services and organised visits to cultural and social institutions. The main challenges in terms of successful implementation of the programme were the lack of translators/interpreters for all languages and the applicant's lack of motivation. In addition, the number of persons granted asylum in the RS is still small and it is difficult to draw an accurate conclusion on whether and how this programme could be improved.

Although, under the current RS regulations, persons granted asylum are entitled to the rights that are relevant for their integration, the BCHR believes that it is important that some of those rights are granted also to asylum seekers, to ensure that their integration process begins as soon as possible. In this respect, this chapter will discuss the integration of persons granted asylum, but also ways in which asylum seekers can enjoy certain rights that are important for their integration into Serbian society (e.g. right to work, health care, education). We will also draw attention to a number of integration challenges resulting from the legal gaps and inconsistent legislation, but also from the underdeveloped practice of the competent authorities. We will use the term "refugee" to mean persons who have been granted asylum in the RS, except in several places in the text where it is important to indicate the exact term used for a specific foreigner's status in accordance with the applicable regulations.

7.1. Right to Accommodation

Under the LATP, the CRM is responsible to ensure the material reception conditions for asylum-seekers and temporary accommodation for persons who have been granted asylum.[719] The right to temporary accommodation for persons who have been granted asylum is specified under the Accommodation Decree.[720] The Decree stipulates that all persons who have been granted asylum under a final and enforceable decision, who do not have sufficient means, may apply for accommodation with the CRM. The CRM may provide them housing for temporary use or financial assistance for temporary accommodation.[721]

719 Article 33 of the LATP.

720 *Official Gazette of the RS*, No. 63/15 and 56/18.

721 Article 2, para. 1 of the Integration Decree.

Persons with special needs and unaccompanied and separated children can be provided accommodation in social protection institutions, with other accommodation service providers, or in a family.[722]

The right to temporary accommodation is effective only up to one year from the date of the final decision granting asylum.[723] During the previous year, some of the challenges raised by the BCHR in the past were addressed, while other issues remain.

7.1.1. Challenges Identified in Practice

In practice, due to a lack of adequate housing capacities, the CRM ensures the right to temporary accommodation in the form of financial assistance for accommodation.[724] In the first ten months of 2019, the CRM adopted 19 decisions granting financial assistance for accommodation. The number of positive decisions is significantly higher than in 2018, when the CRM adopted eight decisions granting financial assistance for accommodation.[725]

The first challenge refers to the method of determining the level of financial assistance for accommodation. If a refugee has no income or if his/her income does not exceed 20% of the minimum RS wage for the previous month, the level of financial assistance is equal to the established RS minimum wage per employee for the previous month. The Accommodation Decree does not provide for progressive assistance levels depending on the number of family members, and the monthly level of assistance would thus be the same for an unemployed single person and for a five-member family not earning income.[726]

The second issue, which was raised by the BCHR in the past and which still needs to be addressed, refers to the huge burden put on the refugees in terms of the documentation that needs to be submitted with the application for financial assistance in accordance with the Accommodation Regulation. Specifically, a refugee needs to submit a certified statement of no income and register as unemployed with the National Employment Service (NES). This implies considerable costs for the reasons described in the section on the right to work and other issues relating to integration.

Thirdly, financial assistance for accommodation is conditioned by law by attendance of language classes. The LATP stipulates that if a refugee fails to report to the CRM to attend Serbian language classes within 15 days from the final decision granting asylum or if he/she stops attending Serbian classes without a

722 Article 2, para. 4 of the Integration Decree.

723 Article 9, para. 1 of the Integration Decree.

724 In practice, two persons granted asylum have been provided accommodation at the Banja Koviljača AC, but not in accordance with the Accommodation Decree.

725 Letter by the CRM of 13 November 2019.

726 Article 10 of the Integration Decree.

justified reason, he/she would lose the right to temporary accommodation assistance.[727] However, the Accommodation Decree and the LATP are not harmonised where they refer to this issue. The Decree only mentions that a person who fails to report to the CRM without a justification within 15 days of the final decision to attend Serbian classes loses the right to one-time assistance, but not the accommodation assistance.[728] As knowledge of the language is a precondition for successful integration, the provisions relating to the right of accommodation need to be clearly formulated so that they provide additional incentives for refugees to learn Serbian.

The amendment to the Accommodation Decree, stipulating that refugees can start using temporary accommodation for which financial assistance is intended, only one month after the CRM's decision granting financial assistance becomes final is a positive step.[729] In the meantime, they may stay at the Asylum Centre. Previously, considering that such exact timeline was not specified, applicants for financial assistance had to move out of Asylum Centres before the assistance could be granted.

7.1.2. Conclusion and Recommendations

In most cases, refugees belong to the socially disadvantaged population. That is why the support that they are provided in terms of accommodation may be essential. The right to accomodation is generally well regulated, although there are some challenges in terms of accessing this right. In practice, the RS has adopted a good solution for refugees to exercise this right through financial assistance. The solution adopted in some other countries, which is foreseen also in the Accommodation Degree and which implies the provision of housing units is connected with more serious challenges. Namely, the construction of special housing capacities for refugees would not lead to their inclusion, but rather to their isolation. That is why it is necessary to keep the existing solution, supplementing it to an extent with new solutions that have proven successful in practice.

The RS government needs to revise the Accommodation Decree to ensure that refugees enjoy the right to financial assistance depending on the number of family members. The RS Government needs to revise the Accommodation Decree to simplify the procedure and reduce the cost of applying for assistance, as well as to extend the period for which the assistance is granted for one additional year for vulnerable refugee populations. In addition, the RS Government needs to revise the Decree on Accommodation to ensure that participation in the Serbian society inclusion programmes is stipulated as a mandatory condition for enjoying the right to accommodation.

727 Article 59, para. 4 of the LATP.

728 Article 4, para. 10 of the Integration Decree.

729 Article 14, para. 1, Item 14a of the Integration Decree.

7.2. Personal Documents and the Right to Freedom of Movement

The LATP provides that the MI may issue four types of identity cards, as well as travel documents for refugees.[730] The identity card contents and design are governed by the Rulebook on Contents and Design of the Asylum Applications and Documents Issued to Asylum Seekers and Persons Granted Asylum or Temporary Protection.[731] The Minister of the Interior did not adopt the refugee travel document design within the timeline set by the LATP,[732] and the ID cards for persons granted asylum do not contain all the necessary elements.

Refugees and asylum seekers may also hold a driving license issued by the MI, which they can obtain by passing a driving test or by replacing a valid foreign driving license. The procedure is prescribed under the Road Traffic Safety Law[733] (RTSL) and the accompanying Rulebook on Driving Licenses.[734] However, these regulations are not harmonised with the LATP. Specifically, the RTSL does not contain any special provisions regarding refugees and asylum seekers, which is especially important when it comes to the replacement of foreign driving licenses for a Serbian driving license.

7.2.1. Inability to Obtain Travel Documents

The Convention Relating to the Status of Refugees requires states to issue travel documents to refugees. [735] In accordance with this international treaty, that obligation can be restricted only when it is necessary to protect national security or public order. A refugee travel document template is provided in the attachment of the Convention Relating to the Status of Refugees.

The BCHR has for a long time now been alerting to the fact that the MI's failure to prescribe the design of the refugee travel document has impinged on the refugees' integration. Both the LATP[736] and its predecessor, the LA,[737] lay down that the Minister of the Interior is required to enact a regulation on the contents and design of the refugee travel document within 60 days from the date of the law entering into force. Although more than 10 years have passed since

730 Article 87 of the LATP stipulates the issuance of identity cards for asylum seekers, identity cards for persons granted asylum, identity cards for persons granted subsidiary protection, identity cards for persons granted temporary protection, and travel documents for refugees.

731 *Official Gazette of the RS*, No. 42/18.

732 Article 101 of the LATP.

733 *Official Gazette of the RS*, No. 41/09, 53/10, 101/11, 32/13 – Constitutional Court Decision, 55/14, 96/15 – separate law, 9/16 – Constitutional Court Decision, 24/18, 41/18, 41/18 – separate law, 87/18 and 23/19.

734 *Official Gazette of the RS*, No. 73/10, 20/19 and 43/19.

735 Article 28 of the Convention Relating to the Status of Refugees.

736 Article 101 of the LATP.

737 Article 67 of the LA.

the LA came into force, and one year since the LATP has been applied, the Minister of the Interior has yet to adopt the regulation on the contents and design of the refugee travel document. Since states usually issue passports valid between five and ten years, the passports of the increasing number of foreigners who have been granted asylum, who are represented by the BCHR have expired or are about to expire. In the absence of documents allowing them to travel abroad, their freedom of movement is effectively restricted to the RS territory, giving rise to their general dissatisfaction and disappointment in the RS asylum system. The inability to leave the country often results in violations of the right to family life, as well as the right to work. Namely, the refugees may need to travel abroad to maintain contacts with their families or on business.

In October and November 2019, the BCHR made requests to the Asylum Office for the travel documents to be issued in two cases. The first case is that of an Iranian national who has been granted asylum, while the second case concerns a Syrian national who has been granted subsidiary protection. In responding to those requests, the MI avoided responding in the form prescribed by the LGAP, and responded to the requests in the form that did not contain the mandatory legal remedy provision.[738]

In a letter from 21 October,[739] the Border Police Directorate did not grant the request made by the refugee from Iran, stating that the RS had taken all the necessary steps regarding the adoption of the Rulebook on Travel Documents in line with the UNHCR's recommendations on the issuance of biometric documents for refugees. From the above, it is unclear based on what reasons the MI believes that all the steps have been taken, considering that the necessary regulations have not been adopted for more than 10 years. In a subsequent request dated 8 November 2019, the BCHR requested the Asylum Office to issue the same person a travel document provided for in the Attachment to the Convention Relating to the Status of Refugees and published also in the Official Gazette of the SFRY upon ratification. The BCHR also pointed out to the MI that the UNHCR's recommendations were not legally binding and that, although it would be desirable for travel documents to be biometric documents, issuing technically obsolete documents would be a better solution than unlawfully refusing to issue any travel documents. The Border Police Directorate also failed to grant that request,[740] stating that "in accordance with the new 2015 International Civil Aviation Organization (ICAO) standards, all travel documents for refugees and stateless persons must have a machine readable zone". In their response to this request, the MI also noted that 63 countries issue these documents in accordance with the UNHCR standards and recommendations. In their response,

738 Article 141 of the LGAP.

739 Border Police Directorate Decision No. 26–430/17 of 25 October 2019.

740 Border Police Directorate Decision No. 26–430/17 of 15 November 2019.

the MI confirms that the recommendations are not legally binding, but that they "call for action to be taken in a specific way, for the sake of more efficient action and progress itself". In the explanation of their response, the MI also points out that RS is a candidate for EU membership and is required to harmonise its legislation with EU legislation. In conclusion, the MI points out that in the future, all eligible refugees will be issued a travel document.

This view contains a number of illogicalities. The MI has failed to explain why it considers that it is bound to act in accordance with the ICAO and UNHCR recommendations if it does not consider them to be legally binding. It is also unclear why these recommendations are given priority over the national legislation and the ratified international conventions. In addition, the MI is unfoundedly referring to the EU *acquis* as Greece and Italy are known to issue identity cards valid for intra-EU travel and Cyprus issues travel documents for refugees that do not meet the ICAO requirements in terms of either a machine-readable zone or biometric information.[741]

It also remains unclear why the MI refuses to issue travel documents in accordance with the provisions of the Convention Relating to the Status of Refugees in order to at least reduce the suffering of refugees. All this does not mean that the BCHR does not agree that refugees should be issued documents that are in line with the latest standards, but that refugees should not suffer because the RS has failed to adopt the relevant regulations. Issuing documents that do not comply with the latest standards is a less bad solution than not issuing travel documents at all.

With respect to the request dated 11 October 2011 for the issuance of a travel document to a person from Syria who has been granted subsidiary protection, the MI requested that the request should be amended to clarify that the document should be issued for humanitarian reasons.[742] The MI responded to the amended request in the same manner as in the above mentioned case, i.e. it neither upheld this request.[743]

Deprivation of the right to freedom of movement through failure to issue travel documents to persons who have been granted asylum is a subject of the complaint against the RS made before the ECtHR. The communication was made by the BCHR asserting a breach of Article 2 of Protocol No. 4 to the ECHR, which provides that everyone is free to leave any country. In relation to the exercise of this right, states cannot impose any restrictions other than those

741 *Design of identity cards issued to nationals of Greece and Italy and travel documents for refugees issued by Cyprus*. Available at: https://www.consilium.europa.eu/prado/en/GRC-BO-01004/index.html; https://www.consilium.europa.eu/prado/en/ITA-BO-03001/index.html and https://www.consilium.europa.eu/prado/en/CYP-JO-01001/index.html

742 Border Police Directorate Letter No. 26–3638/15 of 22 October 2019. The letter requested a justification in accordance with Article 91 (3) of the LATP, which stipulates that refugee travel documents may also be issued to persons who are granted subsidiary protection, but only in exceptional cases for humanitarian reasons.

743 Border Police Directorate Decision No. 26-3638/15 of 2 December 2019.

that are specified by law and are necessary in a democratic society for the purpose of protecting enumerated interests. A failure to adopt the regulation on the contents and design of the travel document for asylum seekers in the RS is not a permissible ground for restricting movement within the meaning of the ECHR. The complaint is currently in the decision-making stage.[744]

7.2.2. Identity Cards not Containing All Necessary Elements

Under the current legal provision, MI issues identity cards for refugees without any protective elements apart from the seal, and the information in the identity cards is handwritten by the Asylum Office staff.[745] In addition to being easy to forge, in practice, refugee identity cards as handwritten documents have met with mistrust among third persons and caused unpleasant situations for persons who have been granted asylum. Furthermore, in the BCHR's experience, most identity cards are damaged after a few months of use due to substandard lamination.

In addition, the identity cards do not include the Foreigner Registration Number (FRN) field, which in practice means that, to be able to access numerous rights, persons granted asylum and asylum seekers, in addition to the identity card, must also have a valid FRN certificate with them.[746] The certificates are issued by the Asylum Office for a specific purpose and cannot be used for other purposes. The issuance of the certificate is subject to a fee in the amount of RSD 320, plus the banking costs, except in the exempted cases stipulated by the Law on Republic Administrative Fees.[747]

7.2.3. Difficulties Related to Issuance of Driving Licenses

Under the RTSL, foreigners temporarily residing in the RS are entitled to operate vehicles with a valid foreign driving licence, i.e., international driving licence.[748] During their stay in the RS, foreigners are also required to have docu-

744 *Seraj Eddin v. Serbia*, ECtHR, Application No. 61365/16 of 19 October 2016, communicated on 23 February 2018.

745 The Rulebook on Contents and Design of the Asylum Applications and Documents Issued to Asylum Seekers and Persons Granted Asylum or Temporary Protection (*Official Gazette of the RS*, No. 47/18).

746 This includes all the situations in which Serbian nationals are also required to have a Personal Identity Number (JMBG) to perform any transaction in banks, to register on the unemployment records, for employees to register with the Pension Fund, etc.

747 Article 19 of the Law on Republic Administrative Fees (*Official Gazette of the RS*, No. 43/03, 51/03 – correction, 61/05, 101/05 – separate law, 5/09, 54/09, 50/11, 70/11 – adjusted RSD amount, 55/12 – adjusted RSD amount, 93/12, 47/13 – adjusted RSD amount, 65/13 – separate law, 57/14 – adjusted RSD amount, 45/15 – adjusted RSD amount, 83/15, 112/15, 50/16 – adjusted RSD amount, 61/17 – adjusted RSD amount, 113/17, 3/18 – correction, 50/18 – adjusted RSD amount, 95/18 and 38/19 – adjusted RSD amount).

748 Article 178, para. 2 of the RTSL.

mentary evidence of continuous residence. The RTSL also lays down that foreign and international driving licences cease to be valid 12 months after the date of issuance of the foreigner's RS habitual residence permit or a temporary residence permit valid for more than six months in continuity.[749]

The above provisions clearly show that that applies to foreigners whose status is governed by the FL and that they are not directly applicable to refugees and asylum seekers. Namely, considering the way they had to leave their country of origin, refugees usually do not have all the requisite documents with them. On the other hand, those who are in possession of such documents are at risk that their identity would be disclosed to their country of origin, which will be discussed further in the section on the risk of confidentiality principle violations.

7.2.4. Conclusion and Recommendations

Only when full enjoyment of all guaranteed rights is ensured we can speak of successful integration. Unfortunately, even more than ten years after the adoption of the national asylum legislation, the Minister of the Interior still has not adopted the regulation specifying the design of travel documents for refugees. Only when this issue is resolved will it be possible to conclude that the RS has granted the right to freedom of movement to asylum seekers. In addition, identity cards that the MI issues to persons granted asylum are not of the same quality as those issued to the RS nationals. Furthermore, the road traffic safety regulations are not adapted to the needs of persons who have been granted asylum.

The Minister of the Interior should adopt the requisite regulation governing the design and contents of the travel document for refugees of without delay. In the transitional period, the MI could issue refugee travel documents in the template provided in the Attachment to the 1951 Convention Relating to the Status of Refugees.

The MI should prescribe a new template for identity card issued to persons granted asylum. It should be of the same quality and offer the same level of protection as the biometric identity cards issued to Serbian nationals. It should also include the Foreigner Registration Number that is equivalent to a Personal Identity Number (JMBG) issued to Serbian nationals. Given that, at the time of writing this Report, only 164 persons have been granted asylum, the costs of issuing such biometric documents would not have a significant effect on RS budget.

There is a need that the RS Government, at the initiative of the Ministry of the Interior, propose to Serbian Parliament to harmonise the RTSL with the provisions of the LATP. Refugees would thus be recognised in the driving license issuance procedure as a separate category, different from foreigners whose status issues are governed by the FL.

749 Article 178, para. 3 of the RTSL.

7.3. Access to the Labour Market

The Convention Relating to the Status of Refugees stipulates that states are required to adopt measures that aim to equate the rights of all refugees as regards the right to engage in wage-earning employment with the rights of their nationals.[750] The most important international instrument guaranteeing the right to work ratified by the RS is the International Covenant on Economic, Social and Cultural Rights (ICESCR).[751] Although the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families entered into force in 2003, the RS still has not ratified this international treaty due to the RS Government's view that the national legislation provides an adequate legal frame for protection of the rights of migrant workers.[752]

The right to work is also guaranteed under the RS Constitution.[753] The LATP guarantees the right of access to the labour market to persons who have been granted asylum.[754] Access to the labour market is granted also to asylum seekers under specific conditions.[755] This area is governed closely by the Law on Employment of Foreigners Employment of Foreigners (LEF).[756]

The LEF currently recognises two broad categories of asylum seekers. The first category is *refugees* and, in accordance with the LEF, it includes foreigners who have been granted asylum under the LATP. The second category is *members of special category of foreigners,* including asylum seekers and persons granted subsidiary or temporary protection. This group includes also victims of human trafficking,[757] but not persons granted temporary residence permit for humanitarian reasons.[758]

Both the foreigner categories are entitled to a personal work permit issued by the National Employment Service (NES). In the course of 2019, as of 30 October, NES issued 14 personal work permits to persons from the refugee category, and 115 to persons from the special category of foreigners. In the same period of 2018, 6 personal work permits were issued to persons from the refugee category, and 71 to persons from the special category of foreigners.[759]

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750 Article 17 of the Convention Relating to the Status of Refugees.

751 *Official Gazette of the SFRY*, No. 7/71.

752 *Responses to Recommendations under the Third Cycle of the Universal Periodic Review, paragraph 7.1.,* Government of the Republic of Serbia (April 2018), available in Serbian at: https://bit.ly/2KLXb4l.

753 Article 60 of the RS Constitution (*Official Gazette of the RS*, No. 98/06).

754 Article 65 of the LATP.

755 Article 57 of the LATP.

756 *Official Gazette of the RS*, No. 128/14, 113/17, 50/18 and 31/19.

757 Article 62 of the FL.

758 Article 61 of the FL.

759 Response by the NES following a request for information of public importance of 8 November 2019.

A personal work permit is one of the two types of work permits. Unlike an ordinary work permit, which is tied to a specific employer, a personal work permit allows free employment, self-employment and the right to unemployment insurance.[760] That allows foreigners who have been granted asylum to access the labour market without any restrictions. Its validity corresponds to the validity of the identity card held by persons granted asylum.

The requirement for asylum seekers to enjoy the right to work is that more than nine months has passed after their asylum application and that the decision on their asylum application has not been passed through no fault of their own. In that case, a work permit is issued for a period of six months with the possibility of extension for the duration of the asylum-seeker status.[761] That provision is problematic considering that asylum seekers wait for a long period of time to submit their asylum application. Specifically, from the registration of asylum seekers at a police station until the submission of an asylum application (which is the date from which the timeline for obtaining a work permit runs), it takes 130 days, on average. For persons residing in the RTC, this process takes even longer, given that they usually make the asylum application only after they have been relocated to one of the ACs.

7.3.1. High Costs of Complicated Work Permitting Procedure

During a survey conducted by the BCHR from May until August 2019, the refugee and migrant respondents found the right to work in the RS to be very complex and difficult to exercise for most of them. The survey identified numerous cases of illegal work, without a work permit and, consequently, without the possibility of exercising the right to the minimum wage and other employment rights.[762] This section will illustrate some of the challenges related to obtaining work permits.

The Rulebook on Work Permits[763] specifies closer the procedures for issuing, i.e., extending work permits and the terms for demonstrating eligibility for work permits. In order to be issued a personal work permit, in addition to a completed application, a person granted asylum in the RS needs to submit proof of payment of the administrative fee, a certified copy of the identity card and a certified copy of the decision granting asylum. Instead of the decision granting asylum, asylum seekers submit proof of the asylum application made. In that respect, a number of issues indicates that the procedure is not cost-effective.

760 Article 12 of the LEF.

761 Article 13 of the LEF.

762 Slavica Milojević, *Migrants' Access to the Right to Work in the Republic of Serbia*, Belgrade Centre for Human Rights (Belgrade, 2019), available in Serbian at: http://azil.rs/azil_novi/wp-content/uploads/19/10/Pristup-migranata-pravu-na-rad-u-RS.pdf.

763 *Official Gazette of the RS*, No. 63/18, 56/19.

Specifically, with regard to the principle of procedural efficiency and cost-effectiveness, the LGAP emphasises that the procedure must be conducted without delay and at the least possible cost to the party. The competent authority is required to inspect, *ex officio*, in accordance with the law, the information related to the facts necessary for taking a decision available in the official records. It may request from the party such information as is necessary for its identification and documents confirming facts only if they are not available in the official records.[764]

An identity card issued by the MI is sufficient evidence of the status of persons who have been granted asylum. That is why it is unclear why the Rulebook on Work Permits also requires the submission of a certified copy of the decision granting asylum or a certificate of status. In addition, the requirement to provide a certified copy of a personal document to NES also does not have a clear basis in the law if the application is made personally. The LGAP stipulates that documents may be provided as simple transcripts, and that the authorised official may always require the original document to be provided for viewing, and if the transcript is true to the original, make an official note verifying it.[765] Considering that the issuance of an identity card or a decision in the asylum procedure must be recorded in the MI official records, if it is clearly indicated which official records contain the appropriate information, the NES is required to obtain it *ex officio*.

The cost of the work permitting procedure is a major issue. Specifically, according to the current republic administrative fee schedule, the fee charged for the issuance of a work permit is RSD 13,890,[766] with additional RSD 320 for the application fee.[767] In addition to being a prerequisite for foreigners to engage in employment in the RS, a work permit is also a prerequisite for the registration on the NES unemployment register. This issue is relevant also for refugees wishing to exercise their right to accommodation in accordance with the law, as one of the requirements for accessing that right is evidence of registered unemployment. That is why such high levies are a major impediment for this vulnerable population.

The LGAP stipulates exemptions from payment of the costs of procedure[768] if the party cannot afford to bear the costs without endangering his/her subsistence or the subsistence of his/her family or if provided for in a ratified international treaty. In practice, this is possible only for persons staying in one of the ACs or RTCs. For persons staying in private accommodation, demonstrating the inability to afford the costs of procedure would require obtaining the opinion of a Social Work Centre and would cause additional delays in their access to the right to work or other related rights.

764 Article 9 of the LGAP.

765 Article 121 of the LGAP.

766 Fee Schedule No. 205 of the Law on Republic Administrative Fees.

767 Fee Schedule No. 1 of the Law on Republic Administrative Fees.

768 Article 89 of the LGAP.

Although reducing the administrative fee for obtaining a work permit would deprive the state budget of a certain amount, broader legal employment of refugees would likely have greater economic benefits and prevent potential labour exploitation.[769] It is crucial that the employment of refugees and asylum seekers is regulated in such a way as to discourage employers from hiring persons who do not have a work permit.

7.3.2. Additional Challenges

An additional problem is that many of the accommodation facilities for asylum seekers and refugees are located in economically devastated municipalities or in isolated areas. There are no real job opportunities.[770]

In terms of the actual access to the labour market, from the experience of the BCHR, the employment opportunities for refugees are closely linked to their degree of integration, knowledge of the language and competences they have. In 2019, the BCHR assisted refugees in developing their CVs and applying for jobs.

One way for refugees to use their skills to find employment is to work in telephone support centres. This type of employment is most often available for speakers of the European area languages such as Spanish, French, English or Russian. However, the majority of the refugees in the RS speak Farsi or Arabic as their native language, and this type of employment is not so relevant for them.

The BCHR was contacted on several occasions by employers in search of workers who could not to find workers even among the RS nationals. Those were usually minimum-wage unskilled jobs, and the response of the BCHR's refugee clients was low. In 2019, the most popular jobs for refugees were the hospitality industry jobs. Those were most often preceded by training, such as that organised by German Society for International Cooperation, whose programmes included training for cooks and other hospitality workers. After successfully completing the training, refugees had the opportunity to find employment in social enterprises such as the pizzeria opened by the Balkan Centre for Migrations with the assistance of the US Embassy in downtown Belgrade in November 2019. At the global level, some of the multinational companies present in the RS also have refugee employment programmes, but these programmes have yet to be implemented.

The state institutions still do not provide organised assistance to refugees for inclusion into the labour market. The Integration Decree provides that persons who have been granted asylum are entitled to assistance for their integration into the labour market.[771] The CRM, as the implementing agency for the activities un-

769 Slavica Milojević, *Migrants' Access to the Right to Work in the Republic of Serbia*, Belgrade Centre for Human Rights (Belgrade, 2019), available in Serbian at: http://azil.rs/azil_novi/wp-content/uploads/19/10/Pristup-migranata-pravu-na-rad-u-RS.pdf.

770 *Ibid*.

771 Article 7 of the Integration Decree envisages assistance in obtaining the necessary documents required to register with the NES, in initiating the procedure of official recognition of foreign

der the Integration Decree, and the NES, as the implementing partner for the integration into the labour market, have not implemented the envisaged activities to date. Assistance for the integration into the labour market in the RS is provided exclusively by non-governmental organisations through their project activities.

7.3.3. Conclusion and Recommendations

The issue of refugees' access to the labour market depends on the legal regulations and the actual labour market opportunities. In terms of the labour regulations, there are still many unresolved issues regarding the costs and timelines for exercising the right to work, and it is only through exercising that right that these persons could find employment in the current market conditions. The comparative practice of EU Member States in a similar economic situation as the RS shows that refugees are generally exempted from the requirement to obtain a work permit.[772] Adopting such a solution in the RS would certainly resolve a number of issues raised in this Report. That would allow the existing resources of the institutions and non-governmental organisations to be redirected to the actual realisation of this right through qualification and retraining programmes, as well as to a more active cooperation with potential employers.

At the proposal of the RS Government, Serbian Parliament should revise the LATP and the LEF so that persons who have been granted asylum are automatically granted the right to work without the requirement to obtain a work permit. Serbian Parliament needs to revise the LEF to adopt a more liberal model than the current one, which requires nine months to pass from the asylum application before the asylum seeker can exercise his/her right to work. That timeline should run from the moment the intention to seek asylum is expressed.

Until such time a decision exempting refugees from the requirement to obtain a work permit is adopted, the NES should ensure the cost-effective work permitting procedure. The NES should not request the proof of the status of a person whose asylum application has been granted if that person has an identity card to prove that same status. In addition, the NES should not request applicants to obtain documentation that can be obtained through official channels. Finally, the NES should not require parties to provide certified copies of documents if the originals can be presented for viewed or can be obtained from the official records maintained by the competent authority. Serbian Parliament should revise the Law on Republic Administrative Fees[773] to exempt refugees

school certificates, enrolling in additional education and training in line with the needs of the labour market, participating in active labour market policies, and retraining and additional training programmes implemented by certified training service providers.

772 Article 73 of the Croatian Law on Foreigners, available in Croatian at: https://www.zakon.hr/z/142/Zakon-o-strancima.

773 *Official Gazette of the RS*, No. 43/03 and the latest adjustment of RSD amounts *Official Gazette of the RS*, No. 38/19

and the special category of foreigners referred to in the LEF from the payment of fees for employment of foreigners.

In cooperation with the CRM, the NES needs to start implementing the activities foreseen in the Integration Decree by organising assistance in obtaining the documents required for registration with the NES. In addition, in cooperation with the CRM, the NES needs to organise the inclusion of refugees in additional education and training, and develop active labour market policies for refugees.

The NES needs to organise an information campaign for refugees and asylum seekers in the languages they can understand to ensure that they are aware of their rights and obligations regarding the right to work. This campaign should also target potential employers to ensure that they have a better understanding of the legal status of refugees and asylum seekers in the labour market.

7.4. Education

The right to education is guaranteed by the numerous international instruments ratified by the RS.[774] The RS Constitution stipulates that everyone has the right to education.[775] This means that all persons in the RS have equal right to education, including refugees. The education system is further regulated by a set of laws: the Law on Foundations of Education System,[776] the Law on Primary Education,[777] the Law on Secondary Education,[778] and the Law on Higher Education.[779]

The UN recommends that states should provide inclusive and equitable education for migrant children and facilitate their access to learning.[780] That is achieved through strengthening the education system capacity and ensuring that migrant children have access to formal and non-formal education without discrimination.[781] The UN Committee on the Elimination of Racial Discrimination (CERD) in its 2018 Concluding Observations points to the need for all children, including migrants, to be included in primary education. The CERD

774 Thus, the Universal Declaration of Human Rights in Article 26 proclaims that everyone has the right to education; the International Covenant on Economic, Social and Cultural Rights regulates this issue in Articles 13 and 14 (*Official Gazette of the SFRY – International Treaties*, No. 7/71); the CRC in Article 28; the Convention on the Elimination of All Forms of Discrimination against Women in Article 10 (*Official Gazette of the SFRY – International Treaties*, No. 11/81), etc.

775 Article 71 of the RS Constitution.

776 *Official Gazette of the RS*, No. 88/17, 27/18 – separate law, 10/19 and 27/18 – separate law.

777 *Official Gazette of the RS*, No. 55/13, 11/17, 10/19 and 27/18 – separate law.

778 *Official Gazette of the RS*, No. 55/13 and 101/17.

779 *Official Gazette of the RS*, No. 88/17, 27/18 – separate law, 73/18 and 67/19.

780 *The Global Compact for Safe, Orderly and Regular Migration*, UN General Assembly, A/RES/73/195, (11 January 2019), Goal 15, (f) p. 44, available in Serbian at: http://azil.rs/globalni-kompakt-o-sigurnim-uredjenim-i-regularnim-migracijama/.

781 *Ibid*.

recommends that the RS should implement appropriate inclusion programmes ensuring the language and other support for migrants.[782]

The Law on Foundations of Education System guarantees non-discrimination.[783] Everyone, regardless of his/her personal characteristics, is entitled to pre-school, primary, secondary and higher education on equal terms.[784] The LATP provisions stipulate that asylum seekers are entitled to free primary and secondary education.[785] Furthermore, the LATP guarantees the right to pre-school, primary, secondary and higher education to persons granted asylum in the RS, under equal conditions as those applying to the RS nationals.[786]

The integration of refugees into the education system and ways to support their inclusion in the RS education system are further regulated under the Professional Instruction on the Inclusion of Refugee/Asylum Seeker Students in the Education System.[787] If the refugee children have proof of prior education, the enrolment is made according to their age and level of education completed.[788] However, if they do not have any proof of prior education, the enrolment is based on a prior knowledge test.[789] For each student, the school is required to develop a Support Plan that should include the adaptation and stress management programme, the intensive Serbian language programme, individualised teaching activities programme, and the extracurricular activities programme.[790] The challenges related to the refugees' exercise of the right to education vary depending on the level of education.

7.4.1. Pre-school Education

Despite the guaranteed right of refugees to pre-school education under equal conditions as those applying to the RS nationals, the BCHR team has identified a number of difficulties in practice. This section will describe a case illustrating such difficulties.

An RS-born girl was granted asylum along with her single mother from Cameroon. They reside in Belgrade and, they faced a number of challenges when the girl was to be enrolled in kindergarten. The child does not have RS citizen-

782 *Concluding Observations on the Combined Second, Third, Fourth and Fifth Periodic Reports of Serbia*, CERD, UN Doc. CERD/C/Srb/Co/2–5 (3 January 2018), Recommendation 27, para. (c).

783 Article 23 of the Law on Foundations of Education System.

784 Article 19 of the Non-Discrimination Law (*Official Gazette of the RS*, No. 22/09).

785 Article 55 of the LATP.

786 Article 64 of the LATP.

787 Ministry of Education, Science and Technological Development Instruction No. 601-00–00042/17–2018 of May 2017.

788 *Ibid*. pp. 1 and 2.

789 *Ibid*. p. 2.

790 *Ibid*., p. 3.

ship, and *de facto* does not have Cameroon citizenship. The fact that the child did not have Serbian citizenship prevented her from exercising the right to subsidies provided by the City of Belgrade. In 2019, the city subsidy amounted to 80% the cost of kindergarten services, or RSD 22,361, with the full cost being RSD 27,952.[791] The efforts by the BCHR team to enrol the child in pre-school education had started in 2018, and the enrolment with the right to subsidy was finally achieved in July 2019, with the assistance of the Zemun Social Work Centre.

What is new relative to 2018 is the mandatory implementation of the preparatory pre-school programme for migrant children staying in Reception Centres.[792] This practice has had a positive impact on achieving inclusive education.[793]

7.4.2. Primary and Secondary Education

In accordance with the LATP provision, asylum seekers and persons granted asylum are entitled to free primary and secondary education in the RS.[794] While primary education is free and compulsory,[795] secondary education is free, but not compulsory. Furthermore, it is stipulated that underage asylum seekers are to be ensured access to education immediately, and no later than three months from the date of asylum application in the RS.[796]

The Integration Decree stipulates that the integration of refugees is to be achieved through, *inter alia*, assistance during the integration into the education system.[797] The Integration Decree envisions assistance[798] through the provision of textbooks and school supplies. Refugees are also entitled to assistance with learning and the competent authorities should finance the inclusion of refugees in extracurricular activities.[799]

It is precisely in the area of primary education that the greatest progress has been made, ensuring a proactive approach to the enrolment of children in

791 "Kindergarten RSD 5,590 per month", *Večernje Novosti* (24 December 2018), available in Serbian at: http://www.novosti.rs/vesti/beograd.74.html:767817-Za-vrtic-mesecno-5590-dinara.

792 *From this Year, Migrant Children Attend Pre-school Education Programme*, Social Inclusion and Poverty Reduction Unit (7 September 2018), available in Serbian at: http://socijalnoukljucivanje.gov.rs/rs/deca-migranata-od-ove-godine-u-predskolskom-programu-obrazovanja/.

793 *Refugee Education 2030 – A Strategy for Refugee Inclusion,* UNHCR (September 2019), p.6, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/71213.pdf.

794 Article 55, para. 1, and Article 64 of the LATP.

795 Articles 4 and 5 of the Law on Foundations of Education System.

796 Article 55, para. 2 of the LATP.

797 Article 2, para. 1, Item 4 (*Official Gazette of the RS*, No. 101/16, 56/18).

798 The Commissariat for Refugees and Migration provides assistance for inclusion in the social, cultural and economic life for persons granted asylum in the RS, Article 2, para. 2 of the Integration Decree.

799 Article 6 of the Integration Decree.

schools. During the 2018/2019 school year, 383 migrant children, including 82 unaccompanied children,[800] were enrolled in 40 primary schools, 10 secondary schools, and 10 pre-school institutions. However, the inclusion of these children in the primary education system has not been without difficulties.

For example, the Government Decision[801] specifies the categories of children entitled to textbooks financed from the RS budget. These include students from materially disadvantaged families, students with development disabilities, physical disabilities, etc., but not persons seeking or granted asylum in the RS.[802] Furthermore, parents need to apply for assistance, but it is the teachers who need to instruct parents to apply for free textbooks if they feel they meet the requirements.[803] Due to the incompatibility of the Integration Decree with the above RS Government Decision, refugee children are not able to apply for and receive free textbooks financed from the RS budget.

When enrolling a girl from Cuba (who had been granted asylum together with her family) in the third grade of "Mile Dubljić" Primary school in Lajkovac, the BCHR team became aware that the girl had not previously applied for free textbooks. When she had attended classes in the Bogovađa AC, the girl used her friend's textbooks. Later, the "Mile Dubljić" School recognised the need to help the child, and the school staff made an effort to provide free used textbooks.[804]

One of the main problems is the children's lack of motivation to attend school. A study conducted by the BCHR found that most migrant children did not attend classes regularly. Only 14% of migrant children, by their own admission, regularly attended school. Interviews with education professionals revealed that the main problem was the language barrier, especially when dealing with multiple-traumatised children. One of the factors that undermine the effective delivery of teaching is the frequent fluctuation of migrant children, i.e., the fact that some of them stay in the RS only temporary. The competent authorities should be put in more efforts to motivate and inform migrant children and their parents, about regular school attendance, as well as to motivate education professionals to encourage regular school attendance.[805]

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800 *EU Support to Serbia in Managing Migrations – MADAD 2*, available in Serbian at: https://remis.rs/.

801 Decision on Financing Procurement of Textbooks from the Budget of the Republic of Serbia for School Year 2019/2020, No. 451–2660/19, RS Government (Belgrade, 21 March 2019), *Official Gazette of the RS*, 22/19.

802 *Ibid*.

803 For more details (in Serbian), see: http://edukacija.rs/obrazovanje/u-toku-je-prijavljivanje-za-besplatne-udzbenike.

804 Information obtained during the BCHR team members' interview with the school staff in charge of administering free textbooks.

805 Slavica Milojević, *Migrants' Access to the Right to Work in the Republic of Serbia*, Belgrade Centre for Human Rights (Belgrade, 2019).

7.4.3. Higher Education

The LATP recognises the right to higher education to persons granted asylum in the RS under equal conditions as for the RS nationals.[806] Thus, enrolment is subject to equal requirements and equal tuition fees for the RS nationals and for refugees. However, this right is rarely exercised in practice due to numerous challenges.

Under the Integration Decree, the CRM is required to assist refugees in initiating the procedure for the official recognition of foreign school certificates.[807] However, such support is still not available.[808] Consequently, the refugees themselves have to initiate and pay for the official recognition procedure. High fees for the official recognition of foreign school certificates are a major challenge.[809] Refugees often cannot have their school certificates officially recognised if they have been destroyed in the war. In such cases, the only solution would be to establish a system for the recognition of previously acquired higher education levels. This procedure, which would include an assessment of the available documentation and a structured interview, should be organised in accordance with the *qualifications passport for refugees* process conducted by UNESCO and the Council of Europe.[810]

The objective problem that arises here is the insufficient knowledge of the Serbian language, which is one of the preconditions for passing the higher education entrance examination. The BCHR team is not aware of any English language higher education programmes funded from the RS budget. Universities can help overcome this obstacle by organising preparatory year courses for prospective students during which they can master Serbian sufficiently to be able to follow the study programmes.

7.4.4. Conclusion and Recommendations

The most significant progress in terms of the refugees' access to the right to education to has been made in the area of primary education. This may be related to primary education being compulsory. In terms of the access to pre-school education, there is a number of challenges resulting from the inconsistent regulations and the lack of services to assist refugees in exercising this right. Although

806 Article 64 of the LATP.

807 Article 6 and Article 7, para. 2, of the Integration Decree.

808 This conclusion was drawn on the basis of the BCRH team's working experience.

809 The administrative republic fee payable to the RS budget for official recognition of foreign primary school certificates is RSD 2,780, while the fee for official recognition of foreign secondary school certificates is RSD 5,540.

810 *UNESCO qualifications passport for refugees and vulnerable migrants*, UNESCO, available at: https://en.unesco.org/themes/education-emergencies/qualifications-passport. *European Qualifications Passport for Refugees*, Council of Europe, available at: https://www.coe.int/en/web/education/recognition-of-refugees-qualifications

enrolment in secondary schools is also possible, the students' motivation to attend classes is low. That problem applies also to the children attending primary schools. The most common cause is their inability to speak the language and participate actively and meaningfully in the teaching programmes. The lack of preparatory programmes applies also to enrolment to higher education institutions.

The City Assembly of Belgrade should revise all relevant regulations on enrolment in pre-school institutions to ensure that refugees and asylum seekers are recognised as vulnerable categories eligible for subsidies. The City of Belgrade, but also other cities and municipalities in the RS, may wish to consider providing free kindergarten services for migrant children in the RS, irrespective of their legal status.

The Ministry of Education, Science and Technological Development (Ministry of Education) should revise the Decision on Financing Procurement of Textbooks from the RS Budget. The revised decision should ensure that children asylum seekers and children who have been granted asylum have the right to free textbooks. The Ministry of Education needs to establish a system for the official recognition of previously acquired higher education levels through a procedure that would include an assessment of the available documentation and a structured interview, in accordance with the *qualifications passport for refugees* process conducted by UNESCO and the Council of Europe. In addition, the CRM needs to establish a system of assistance with the initiation of the procedure for the official recognition of foreign school certificates. All universities in the RS should develop preparatory programmes and active measures for the inclusion of refugees in higher education.

7.5. Right to Social Assistance

The Universal Declaration of Human Rights stipulates that all persons are entitled to a standard of living that ensures health their and well-being.[811] The ICESCR requires all Contracting States to recognise that everyone has the right to an adequate standard of living.[812] By ratifying the ICESCR, Serbia has committed to providing social safety net for all persons in its territory.[813] Furthermore, the Convention on the Elimination of All Forms of Racial Discrimination provides that states have an obligation to abolish all forms of discrimination and guarantee equality as regards the enjoyment of the right to social security and the use of social services.[814]

811 Article 25, Universal Declarations of Human Rights, adopted by a Resolution of the United Nations General Assembly, Number 217 (III), of 10 December 1948.

812 Article 11, para. 1 ICESCR.

813 Article 9 of the ICESCR.

814 Article 5, *Official Gazette of the SFRY – International Treaties*, No. 31/67.

Considering the RS is a state that promotes social justice,[815] all citizens who need assistance to ensure the minimum living standard are entitled to social protection.[816] Social protection is more closely regulated under the Law on Social Protection (LSP),[817] which specifies the objective of social protection, i.e., providing assistance to and empowering individuals and families for a productive life and preventing social exclusion.[818]

In accordance with the LSP provisions, the right to social protection is granted to all individuals and families in need of support and assistance in overcoming the social difficulties they face and ensuring the minimum living standard.[819] The LSP guarantees the right to social protection to all RS nationals, foreign nationals and stateless persons.[820]

This right is exercised through the provision of social protection services and material support.[821] Thus, social protection services are defined as activities to support an individual or family to improve their quality of life and to achieve an independent life in society.[822] Material support is provided in order to ensure the minimum livelihood security and support social inclusion in society.

One of the rights of asylum seekers and persons who have been granted asylum in the RS is the right to social assistance.[823] The provision of social assistance benefits is specified further under the Rulebook on Social Assistance for Asylum Seekers or Persons Granted Asylum (Rulebook on Social Assistance).[824] To be eligible to receive the monthly cash benefits, individuals or families must not be accommodated in an Asylum Centre and they must have no income or earn income that is lower than the threshold specified in the Rulebook.[825] The Social Work Centre in the municipality where the refugee resides is responsible to review the applications for monthly cash benefits.[826] Appeals against the decision of the Social Work Centre are reviewed by the minister responsible for social affairs.[827]

815 Article 1 of the RS Constitution.
816 Article 69 of the RS Constitution.
817 *Official Gazette of the RS*, No. 24/11.
818 Article 2 of the LSP.
819 Article 4, para. 1 of the LSP.
820 Article 6 of the LSP
821 Article 4, para. 2 of the LSP.
822 Article 5, para. 1 of the LSP.
823 Article 52 and Article 67 of the LATP.
824 *Official Gazette of the RS*, No. 44/08.
825 *Ibid*., Article 3.
826 *Ibid*., Article 8.
827 *Ibid*., Article 9.

7.5.1. Inadequate Legal Solution

Although they have been recognised by the legislature as a population that may be in need of social assistance, asylum seekers and refugees have been rejected other types of social protection services. Thus, in accordance with the current regulations, they can only receive monthly financial assistance, but sometimes they might need other types of social protection services such as counselling-therapeutic and social-educational services.[828]

In addition, the fact that only foreigners not accommodated in Asylum Centres are entitled to the monthly cash benefits indicates the shortcomings of the Rulebook on Social Assistance. Specifically, foreigners who reside in private accommodation often have own financial resources and therefore opt not to live in an Asylum Centre. On the other hand, persons staying in Asylum Centres often face financial difficulties and, in most cases, cannot afford to go to a nearby town to participate in social life.[829]

7.5.2. Overly Long Social Assistance Granting Procedure

In practice, asylum seekers and refugees have to wait for a long time for Social Work Centres to adopt decisions, despite the fact that they are in urgent need of assistance. The BCHR has applied for monthly cash benefits[830] on behalf of an asylum seeker from Afghanistan. He was staying in private accommodation at the time of the application and was not employed, and thus he did not have the financial means to ensure the minimum living standard. No response had been received in respect of the application made by the BCHR to the City Social Work Centre in Belgrade on May 15, 2019, until 25 September 2019, i.e., the time when the applicant lost the grounds for receiving this type of assistance. After the Asylum Office dismissed his asylum application, the asylum seeker from Afghanistan was no longer eligible to receive cash benefits. However, the City Social Work Centre in Belgrade only verbally informed the BCHR of the discontinuation of the procedure. In this case, the Social Work Centre failed to make a timely decision on cash benefits, considering that the asylum seeker had been waiting for it for approximately 4 months.[831]

The overly long procedures before the Social Work Centre cannot be justified by a large number of applications they receive. In addition to the above case of the Afghan national, in the period from 1 January until 31 October 2019, Social Work Centres received only two applications for monthly cash benefits made

828 For more detail, see Article 40 of the LSP, which specifies in detail the groups of social protection services.

829 Information obtained based on the experience of the BCHR team working with clients.

830 The BCHR request for assistance in the form of cash benefits of 15 May 2019.

831 Under the LGAP (Article 145), the general time limit for deciding on an application in administrative proceedings is 60 days.

by refugees and asylum seekers.[832] Both the applications were made to the City Social Work Centre in Belgrade, and only one person was granted the monthly cash benefit.[833] In November 2019, the BCHR applied for social assistance for an Iranian citizen and for a Cuban family who had been granted asylum in the RS. Until the time of writing this Report, the BCHR had not received the decisions upon those applications.

7.5.3. Conclusion and Recommendations

Asylum seekers and persons granted asylum are undoubtedly a socially disadvantaged population. Consequently, they must be recognised as such in the relevant regulations and in the competent authorities' practice. The LATP and the Rulebook on Social Assistance are not adapted to the actual financial status of asylum seekers, and persons granted asylum. In terms of refugee protection, it is important to ensure that the existing social protection services are available to them on equal terms as to the RS nationals.

The Ministry of Labour needs to revise the Rulebook on Social Assistance to ensure the asylum seekers accommodated in Asylum Centres who not have sufficient means of livelihood are also eligible to receive social assistance. At the initiative of the same ministry, the RS Government needs to propose amendments to the LSP to Serbian Parliament to ensure that refugees are guaranteed access to other social protection services, in addition to monthly financial assistance.

Social Work Centres need to decide on applications for social assistance made by refugees and asylum seekers within a very short period of time, as they are one of the most vulnerable populations in urgent need of assistance. In cooperation with the CRM, Social Work Centres need to ensure that asylum seekers and refugees are adequately and timely informed of all social protection services and measures available in the local community. That is a precondition for improving the social protection of migrants and ensuring their social inclusion.

7.6. Health Care

The right to health, as one of the fundamental human rights, is guaranteed by the numerous international instruments ratified by the RS.[834] The LATP pro-

832 This conclusion was drawn on the basis of the responses to requests for access to information of public importance. The responses were received from the Social Work Centres in Bujanovac, Dimitrovgrad, Kikinda, Lajkovac, Niš, Novi Pazar, Pirot, Preševo, Vranje and the City Social Work Centre in Belgrade.

833 Response by the City Social Work Centre in Belgrade following a request for access to information of public importance, No. 550–414, of 18 November 2019.

834 Article 25 of the Universal Declaration of Human Rights, adopted by United Nations General Assembly Resolution 217 (III) of 10 December 1948; According to Article 12 of the ICESCR, Member States recognise the right to the highest achieved psychological and mental health

vides that asylum seekers are entitled to health care in the RS in accordance with the regulations governing foreigners' health care.[835] Furthermore, the LATP stipulates that this right is enjoyed by persons granted asylum, and that the cost of health care is borne by the state budget.[836] In addition, foreigners' health care is regulated further by the Law on Health Care,[837] the Law on Health Insurance,[838] and the Rulebook on the Terms and Procedure for Exercising the Right to Compulsory Health Insurance.[839] Discrimination on the grounds of any personal characteristic when providing healthcare services is prohibited.[840]

The Committee on the Elimination of Racial Discrimination urges the RS to continue making efforts to ensure that asylum seekers have access to adequate health insurance.[841] The Council of Europe recommends that Member States should, to the extent possible, ensure the right of migrants to use health services and simplify the procedures for using health services.[842] The numerous challenges in this regard in the RS will be described in more detail below.

7.6.1. Inconsistent Regulations

In accordance with the provisions of the Law on Health Care, refugees and asylum seekers are entitled to health care under equal terms as the RS nationals.[843] However, the Law on Health Insurance and the Rulebook on the Terms and Procedure for Exercising the Right to Compulsory Health Insurance do not specify further the rights of refugees other than those from former Yugoslavian republics. Thus, the Law on Health Insurance does not recognise the refugees and asylum seekers referred to in the LATP as a separate category of insured

standard; According to Article 24 of the CRC, the Contracting Parties recognise the right of the child to enjoy the highest standard of health and to the treatment and health rehabilitation facilities; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination provides that Member States undertake to ensure equal access to the right to health of all through the prohibition of racial discrimination.

835 Article 54 of the LATP.

836 Article 63 of the LATP.

837 *Official Gazette of the RS*, No. 25/19.

838 *Official Gazette of the RS*, No. 107/25, 109/05 – correction, 57/11, 110/12 – Constitutional Court Decision, 119/12, 99/14, 123/14, and 126/14 – Constitutional Court Decision.

839 *Official Gazette of the RS*, No. 10/10, 18/10 – correction, 46/10, 52/10 – correction, 80/10, 60/11 – Constitutional Court Decision, and 1/13.

840 Article 21. of the Law on Health Care.

841 *Concluding Observations on the Combined Second, Third, Fourth and Fifth Periodic Reports of Serbia*, CERD, UN. Doc. CERD/C/Srb/Co/2–5 (3 January 2018), Recommendation 27, para. (a).

842 *Recommendation on mobility, migration and access to health care* (Committee of Ministers of the Council of Europe, CR/Rec(2011)13, 16 November 2011), Recommendation 7, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cbd6d.

843 Article 236, para. 1, and Article 239 of the Law on Health Care.

persons.[844] They can be insured if they have employment.[845] However, it needs to be underlined that that excludes a large number of refugees and asylum seekers who are unemployed.

Serbian Health Insurance Fund also does not recognise refugees other than those from former SFRY republics as a separate category.[846] Consequently, the asylum seekers and refugees within the meaning of the LATP are not entitled to compulsory health insurance and issuance of health insurance cards.[847]

Despite the BCHR team's efforts to assist an asylum seeker from Iran in June 2019 in attempting to obtain a health insurance card based on the unemployment status, that was not possible in the Čukarica Branch Office of the Serbian Health Insurance Fund (SHIF). The Čukarica Branch Office stated that it was not authorised to issue health insurance cards to asylum seekers.[848]

This case illustrates that, in practice, refugees and asylum seekers remain deprived of the health insurance card that continues to ensure them free health care. That is why they often have to rely on private healthcare services, which most of them cannot afford.[849] That puts them in a disadvantaged situation and exposes them to other risks, such as the risk of poverty, further causing feelings of insecurity and uncertainty for themselves and their family.

It has to be noted that, when exercising the right to health, persons granted refugee status in the RS and asylum seekers often depend on the assistance provided by the civil sector. For instance, if they have not mastered the Serbian language, they cannot go to a doctor by themselves. In addition, before they can be referred to a health centre, it is often necessary for civil society organisations to inform the health centre about the arrival of refugees and their right to free medical assistance. Despite such advance notices, health centres refuse to provide them health services.[850] As a reason for refusal, they state that they require a permission to treat foreigners in the RS if they are chronic or acute patients and that with a certificate of registration of foreigner who has expressed intention to apply for asylum only emergency cases can be admitted.[851] Thus, if the health

844 Article 11 lists the categories of insured persons under the Law on Health Insurance.

845 Article 11, Item 10 of the Law on Health Insurance.

846 Exercising the Right to Compulsory Health Insurance, Serbian Health Insurance Fund, Belgrade, May 2015, available in Serbian at: https://rfzo.rs/download/brosure/Brosura%20za%20osiguranike.pdf.

847 Insurance document, Article 25 of the Law on Health Insurance.

848 The BCHR team accompanied the beneficiary to the designated health care institution with the aim of assisting him and gathering information on the SHIF practice when treating this category of foreigners.

849 Information obtained based on the experience of the BCHR team.

850 Information obtained based on the experience of the BCHR team working with clients.

851 Information obtained based on the BCHR team's discussion with the lawyers at the "Simo Milošević" Heath Centre, Čukarica, in Belgrade.

centre staff consider that they are not emergency cases, they refuse to provide health services to asylum seekers and persons granted asylum.

However, asylum seekers are subject to a medical examination upon admission to the Asylum Centre or another accommodation facility.[852] The Rulebook on Medical Examinations of Asylum Seekers upon Admission to Asylum Centres or other Asylum Seeker Accommodation Facilities prescribes closer the medical examination procedure.[853] Asylum seekers have free access to healthcare services in the ACs where there is a GP is available on a daily basis. Furthermore, if there is need for emergency medical treatment or specialist examinations, the CRM staff at these ACs would take them, or refer them, to local health facilities. In practice, healthcare facilities provide emergency medical care to all. However, a problem arises when asylum seekers residing in ACs are not employed and therefore cannot have health insurance on that basis, and wish to be treated at local health centres. This is where they most often encounter misunderstandings and rejections by the nurses because they do not have a health insurance card or otherwise regulated health insurance.[854]

In June 2019, the BCHR requested a meeting with the Ministry of Health to understand better how the exercise of the right to health care is regulated in practice. It is particularly important to establish how asylum seekers and persons granted asylum could obtain a health insurance card. In addition, the main issue is what is the most effective way for them the get the health care services they need.[855] However, until the date the writing this Report, the BCHR had not received a response from the Ministry of Health.

Achieving the highest standard of health in line with the principle of non-discrimination must be the goal the RS should strive to in order to ensure the conditions for a dignified life for all the persons under its jurisdiction. The RS should respect and ensure the implementation of its laws guaranteeing refugees and asylum seekers health care financed from the RS budget.

7.6.2. Conclusion and Recommendations

The current status analysis appears to indicate that health care is the area with the largest number of remaining concerns. Although no serious consequences have been reported due to the inability to exercise the right to health

852 Article 54, para. 1 of the LATP.

853 The examination includes health history, objective examination, and other diagnostic examinations. Article 3 of the Rulebook on the Medical Examinations of Asylum Seekers upon Admission to Asylum Centres or other Asylum Seeker Accommodation Facilities (*Official Gazette of the RS*, No. 57/18).

854 Information obtained based on the experience of the BCHR team working with clients.

855 Letter addressed to the RS Ministry of Health, No. 58/19 of 24 July 2019.

care, many situations have generally been addressed in an informal manner, through personal involvement of medical professionals. Although this area is legally regulated, there is lack of a consistent health care institutions' practice and equal application of the existing rules by the SHIF to asylum seekers and persons granted asylum in the RS.

Considering the inconsistent practice of health centres and other healthcare institutions in terms of providing health services to refugees and asylum seekers, the Ministry of Health needs to coordinate the activities of all healthcare institutions in the RS. The Ministry of Health and the SHIF need to issue asylum seekers and refugees health insurance cards for unemployed persons. In this regard, the RS Government, at the initiative of the line ministry, needs to propose to Serbian Parliament an amendment to the Law on Health Insurance to ensure that refugees and asylum seekers are able to exercise their right to health care.

7.7. Naturalisation

Naturalisation is an issue that is particularly relevant for long-term integration. In accordance with the Convention Relating to the Status of Refugees, states have clearly committed to facilitating the naturalisation of refugees and to accelerating such procedures at minimum cost.[856]

The RS has committed to gradually ensuring the rights recognised by the ICESCR.[857] In November 2019, the Committee on Economic, Social and Cultural Rights requested the RS authorities to explain what measures had been taken regarding the naturalisation procedures for refugees, asylum seekers, migrants, returnees and internally displaced persons.[858] Until the time of writing this Report, no progress had been made on facilitating naturalisation, whereby the RS was defying the international commitments and the provisions of its own laws. Due to the inconsistent regulations governing the status of foreigners, admission to citizenship and the rights of asylum seekers in the RS, naturalisation of refugees has been *de jure* impossible.

7.7.1. Legal Gaps

Specifically, under the LATP, the RS is required to ensure naturalisation of refugees, and the terms and conditions, procedure and other issues of relevance to their naturalisation are to be specified by the RS Government, at the proposal

856 Article 34 of the Convention Relating to the Status of Refugees.

857 Article 2 of the ICESCR.

858 *List of issues in relation to the third periodic report of Serbia* (CESCR, 12 November 2019). Available at: https://bit.ly/2tVfHBt.

of the CRM.[859] To the best knowledge of the BCHR, the CRM has still to forward such a proposal to the RS Government.

In addition, the Law on Citizenship of the Republic of Serbia[860] (LCRS) entitles permanently residing foreigners to acquire citizenship by admission.[861] The right to settlement, i.e. permanent residence, is granted to foreigners with temporary residence who fulfil additional requirements and the timeline specified under the FL.[862] The FL, however, does not explicitly recognise foreigners granted asylum as permanently residing foreigners, nor does the LCRS contain a specific provision on the naturalisation requirements for foreigners granted asylum under the LATP. This is why persons granted asylum under the LATP cannot acquire Serbian citizenship considering that they do not fulfil the requirements laid down in the FL and the LCRS.

7.7.2. Conclusion and Recommendations

It is through the acquisition of citizenship that refugees achieve social inclusion and become equal members of that country. Unfortunately, this issue in the RS has not been resolved due to the inconsistencies of the FL and the LCRS with the LATP. This issue can only be resolved by amending the relevant legislation and establishing clear rules for the naturalisation of foreigners who have been granted asylum.

The RS Government, at the initiative of the Ministry of the Interior, needs to propose to Serbian Parliament amendments to the LCRS to ensure that the status categories of foreigners referred to in the LATP can acquire Serbian citizenship. The LCRS should also enable these persons, considering their particular vulnerability, to acquire citizenship under more favourable terms than those applying to permanently residing foreigners in accordance with the FL, which is the solution that is adopted by many EU Member States.[863]

Although the LATP came into force in April 2018 and has been applied since June 2018, the CRM has yet to forward to the RS Government a proposal for specifying the terms and procedure for naturalisation of refugees. Regardless of the MI being responsible to review the submitted applications for RS citizenship, the CRM needs to formally submit to the RS Government a proposal to revise the LCRS as soon as possible.

859 Article 71 of the LATP.

860 *Official Gazette of the RS*, No. 135/04, 90/07 and 24/18.

861 Article 14 of the CL.

862 Articles 67 and 68.

863 For example, the required duration of residence for the naturalisation of persons who have been granted asylum in Sweden has been reduced from the standard five years to four years. More information available at: https://bit.ly/2MSRvGD.

7.8. Other Issues Relevant for Integration

7.8.1. Lack of Timely Serbian Language Courses

In addition to accommodation assistance, social inclusion, and access to the labour market discussed earlier, the Integration Decree also provides for assistance with the Serbian language learning. Not speaking the Serbian language is a barrier to successful integration. Consequently, refugees who do not speak the language are at the highest risk of social exclusion.

The LATP provides for an obligation for all persons granted asylum to attend Serbian language classes.[864] The procedure for inclusion in the Serbian language learning programmes is further specified in the Integration Decree. The Decree stipulates the duty of persons who have been granted asylum in the RS to apply to the CRM for attending language classes within 15 days from the date of the final decision granting refugee status.[865] The CRM is required in turn to organise that they attend the classes no later than two months after the final decision granting asylum or subsidiary protection.[866] The period of two months may be extended if the period from the final decision until the beginning of the summer or winter semester in regular or foreign language schools exceeds two months.[867]

The timeline specified for the CRM to organise and refer persons to attend the Serbian language classes is not always respected in practice.[868] Thus, for example, a refugee family from Cuba, who had been granted refugee status on 13 March 2019, began attending Serbian language classes in November 2019, i.e., eight months after the final decision granting asylum. Similarly, refugees from Afghanistan who had been granted asylum on 29 May 2019, had the Serbian language classes organised only in November 2019, which also indicates a long period of waiting for the language courses to be implemented.

7.8.2. Risk of Confidentiality Principle Violations

Under the confidentiality principle, only officers authorised by law may have access to the refugees' and asylum seekers' information.[869] The LATP does not specify the circle of the authorised officers. Individuals being identified as refugees or asylum seekers by persons not authorised by law to access their information may lead to the intentional or unintentional disclosure of specific information to

864 Article 59, para. 3 of the LATP.

865 Article 14 of the Integration Decree.

866 Article 4, para. 7 of the Integration Decree.

867 Article 4, para. 8 of the Integration Decree.

868 This conclusion was drawn on the basis of the BCHR integration team's work with the clients who have been granted asylum in the RS.

869 Article 19 of the LATP.

their countries of origin. That might jeopardise their safety. The importance of confidentiality is reflected also in the approach of UNHCR, which when it publishes the statistics on the countries of origin at the global level does not include any information where the number of refugees from a specific country is lower than five in order to additionally safeguard their anonymity.[870] In practice, the confidentiality principle could be violated in many situations. The following Section analysis the notarial certification and the traffic police procedures.

Notaries public invoke the Law on Verification of Signatures, Manuscripts and Transcripts[871] and insist that they cannot partially verify transcripts of decisions granting asylum, notably the introduction, operational part, signature and seal of the decisions. They believe that they can only certify the transcript of the entire document, including the reasoning. The reasoning of decisions granting asylum includes extremely sensitive information, and the disclosure of such information might jeopardise the lives and safety of the refugees in specific situations. The Serbian Chamber of Notaries Public is of the view that, considering that the law does not specify the persons authorised to access data on individuals granted asylum (in terms of respect for the confidentiality principle), they are unable to address this issue. It opined that the issue should be addressed by "the institutions charged with supervising the implementation of the laws" on asylum and employment of foreigners.[872]

In addition, the confidentiality of asylum seeker information may be compromised when issuing driving licenses. The driving license replacement procedure is specified under the Rulebook on Driving Licenses.[873] This regulation stipulates that a foreign driving license, upon replacement, is to be returned to the authorities of the states that had issued them via their diplomatic and consular missions in the RS.[874] The enforcement of this provision in case of refugees and asylum seekers would result in the violation of the confidentiality principle enshrined in the LATP, which prohibits the disclosure of their information to the country of origin.

7.8.3. High Notarial Fees and Lack of Court-sworn Interpreters

Another major problem faced by refugees and asylum seekers availing themselves of notarial services is high notarial fees laid down in the Notary Public Fee Schedule.[875] Specifically, notaries public charge fees for their work, including reimbursement of any costs incurred in relation to performing their duties, and their fees

870 *Population Statistics Database* (UNHCR). Available at: http://popstats.unhcr.org/en/overview.

871 *Official Gazette of the RS*, No. 93/14, 22/15 and 87/18.

872 Response by the Serbian Chamber of Notaries Public to the Belgrade Centre for Human Rights of 29 July 2019.

873 *Official Gazette of the RS*, No. 73/10, 20/19 and 43/19.

874 Article 17 of the Rulebook on Driving Licenses.

875 *Official Gazette of the RS*, No. 91/14, 103/14, 138/14, 12/16, 17/17, 67/17, 98/17, 14/19 and 49/19.

are much higher if the notarial documents are issued in the presence of interpreters.[876] Therefore, in addition to the high fees of court-sworn interpreters/translators, refugees and asylum seekers, who have to produce specific certified statements or documents,[877] must also pay the inexplicably higher notarial fees because of the mandatory presence of court-sworn interpreters during the certification procedure.

As per notarial certification fees, the Notary Public Fee Schedule provides for charging specific vulnerable categories[878] lower fees, but refugees and asylum seekers are not listed among them. Refugees represented by BCHR include single mothers, families with a large number of children and unemployed persons; lack of income in the RS is a feature all of them have in common.

In addition, hiring court-sworn interpreters and translators is required for exercising a number of rights.[879] The appointment and dismissal of court-sworn interpreters and translators is governed by the Rulebook on Court-Sworn Interpreters and Translators.[880] The Rulebook lays down that the Minister of Justice, at the proposal of one or more court presidents, is required to publish a call for the appointment of court-sworn interpreters and translators in the *Official Gazette* and print media at least once a year.

Although currently most asylum seekers in Serbia hail from Afghanistan and Iran, there are no interpreters and translators for Farsi, which is the official language of these two countries, in the Ministry of Justice Register.[881] In the records of the Provincial Secretariat there is only one interpreter/translator for Farsi.[882] Neither of the two registers includes any court-sworn interpreters for Kurdish, Pashtu or Urdu, the languages commonly spoken by the refugees in the RS. According to information available to BCHR, presidents of at least one Higher Court filed an initiative to publish calls for the appointment of court-sworn interpreters and translators with the Ministry of Justice, at the initiative of Farsi interpreters registered by the UNHCR. However, the Minister of Justice has not published a call for the appointment of court-sworn Farsi interpreters yet.

876 Under Fee Schedule No. 18, the fee is increased by 10 points. Under Article 10 of the Fee Schedule, the value of one point equals RSD 150 not including VAT.

877 For instance, a statement of no-income and insufficient means must be submitted with the application for accommodation made to the CRM.

878 Under Fee Schedule No. 19, part of the fee is waived for persons with disabilities, unaccompanied and separated children and social assistance beneficiaries provided they submit the corroborating documents to the notaries public in advance.

879 For instance, giving a statement to a notary public.

880 *Official Gazette of the RS*, No. 35/10, 80/16 and 7/17.

881 *Electronic Register of Court-Sworn Interpreters and Translators* (Ministry of Justice of the Republic of Serbia), available in Serbian at: https://bit.ly/32TPDTJ.

882 *Register of Court-Sworn Interpreters in AP Vojvodina* (Provincial Secretariat for Education, Regulations, Administration and National Minorities and Communities of the AP Vojvodina). Available in Serbian at: https://bit.ly/36cExeI.

7.8.4. Conclusion and Recommendations

In practice, the opportunity to learn the Serbian language, as a precondition for successful integration, is not ensured in a timely manner. The CRM needs to ensure that persons who have been granted asylum are enrolled into the Serbian language courses and are able to attend such classes within the legally prescribed timeline. The problem of the enrolment of individuals residing in remote areas where the selected school has difficulty organising the classes can be overcome, for example, by issuing vouchers for private Serbian language lessons.

The confidentiality principle regarding the refugees and asylum seekers' personal information is not specified explicitly in the LATP. Consequently, the state authorities and the notaries public can act contrary to this principle in their work. The RS Government, at the initiative of the MI, should propose to Serbian Parliament amendments to the LATP to clearly specify the obligations of all authorities handling sensitive information on the identity of the refugee and asylum seeker.

The RS Government should propose to Serbian Parliament to amend the Law on the Verification of Signatures, Manuscripts and Transcripts to ensure it recognises the confidentiality principle referred to in the LATP. The amendments should provide for the partial certification of decisions granting asylum, accompanied by a note on the exclusion of the reasoning.

The RS Government, at the initiative of the MI, should propose to Serbian Parliament to harmonise the RTSL with the LATP to clearly define the rules of procedure for the replacement of the refugees' and asylum seekers' driving licences. Following that, the Minister of the Interior should amend the accompanying Rulebook on Driving Licenses as well. Analogous application of the provisions concerning foreigners temporarily residing in the RS to refugees and asylum seekers would be inadequate and might lead to violations of their rights in the event the RS authorities disclose their status in the RS to their country of origin.

Refugees incur high costs for certification of statements and documents with a notary public. They are not recognised as a vulnerable population in the Notary Public Fee Schedule. The Chamber of Notaries Public should review the possibility of abolishing the fees prejudicial to refugees because they have to pay additional fees when interpreters attend the certification of their documents.

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

SPECIAL SUPPLEMENT:
DECISION OF THE COMMITTEE AGAINST TORTURE

Decision adopted by the Committee under Article 22 of the Convention Conventions against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, **883884

Communication submitted by: Cevdet Ayaz (represented by counsels, Mr. Kovacevic and Ms. Trkulja, Belgrade Centre for Human Rights)

Alleged victim: The complainant

State party: Serbia

Date of complaint: 7 December 2017 (initial submission)

Document references: Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 11 December 2017 (not issued in document form)

Date of present decision: 2 August 2019

Subject matter: Risk of torture in the event of deportation to country of origin (non-refoulement); prevention of torture

Substantive issue: Deportation of the complainant from Serbia to Turkey

Procedural issues: None

Articles of the Convention: 3 and 15

1.1 The complainant is Cevdet Ayaz, a national of Turkey of Kurdish origin born in 1973. At the time of submission of the communication, the complainant was at risk of extradition to Turkey. He claimed that his extradition would amount to a violation, by Serbia, of article 3, in conjunction with article 15 of the Convention. Serbia made the declaration under article 22 of the Convention on 12 March 2001. The complainant is represented by counsel.

1.2 On 11 December 2017, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from expelling the complainant to Turkey while it considered his complaint. On

* Adopted by the Committee at its sixty-seventh session (22 July – 9 August 2019).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.

5 November 2018, the State party advised the Committee that the Committee's request for interim measures was not brought to the attention of the Ministry of Justice of Serbia in time to prevent the complainant's extradition, as the request was delivered on 18 December 2018, while the decision on extradition of the complainant was rendered on 15 December 2018.[1]

The facts as presented by the complainant

2.1 The complainant has been a Kurdish political activist since late 1980s. After he turned 18, he became a member of People's Labour Party (HEP). He became close with the president of the Diyarbakir branch of HEP, Mr. Vedet Aydin, who was killed by special Gendarmerie unit on 7 July 1991. Later that year, due to an increasing violence in southeastern Turkey and mass human rights violations committed against the Kurdish minority under the pretext of anti-terror operations, the complainant decided to move to Iraq. There, he remained in the city of Erbil and became a member of the Kurdish political party YEKBUN, which ceased to exist in 1994. He remained in Iraq until 1997, when the situation in Turkey slightly improved. The complainant claims to have never been involved in any military operation, nor ever using any kind of weapon or other violent means for achieving his political goals. He has never been a supporter of groups prone to violence (such as PKK) or a member of any political party that was declared as 'illegal' or 'terrorist' by the Turkish Government.

2.2 Upon his return to Turkey, the complainant led peaceful life in Diyarbakir where he opened a shop selling office supplies. He was not politically active, and in 2000, he went to Malatya for the mandatory military service in the Turkish army. On 6 April 2001, when the complainant was returning to his military base in Malatya from the granted leave, his bus was stopped by gendarmes and anti-terror forces, and the complainant was taken to the police station in Elazig where he was kept overnight. He was not informed about the reasons for his detention, was not given access to a lawyer or allowed to inform his family or anyone else about his whereabouts. The following day, he was taken to the Anti-Terror Department in Diyarbakir where he was held incommunicado until 18 April 2001.

2.3 The treatment to which the complainant was submitted during his incommunicado detention between 6 and 18 April 2001 included: being punched, slapped, kicked and beaten by police batons; being kept blindfolded most of the time during the detention; being subjected to 'Palestinian hanging';[2] being sub-

1 The State party does not say when exactly the complainant was extradited. According to the counsels, the complainant was extradited to Turkey on 25 December 2018.

2 *Palestinian suspension (strappado, reverse hanging, Corda, Scorpion Position, Akrab),* is a form of suspension where the arms or wrists are tied behind the back and then attached to a horizontal bar (https://dignity.dk/en/dignitys-work/health-team/torture-methods/suspension/).

jected to electric shocks applied through genitals and nipples while he was held on the ground; being hosed with high pressured cold water; being constantly threatened with execution or serious injury to him and his family; being verbally abused due to his Kurdish origin.

2.4 After days of torture, the complainant was forced to sign confession papers while blindfolded, which, as he later found out, said that he was a member and one of the leaders of the Revolutionary Party of Kurdistan ('PSK'). After signing the confession, the complainant was taken to a medical unit where he told the doctor that he had been tortured, however the doctor, in presence of the police officers who tortured him, told him that he was fine and told the officers to take him away. The complainant notes that such party does not exist and he has never heard about it. On 18 April 2001, the complainant was brought before the Diyarbakir court, where he was for the first time allowed to see an attorney. At the hearing, the complainant told the judge that he was tortured and forced to sign a confession. However, neither the judge nor the prosecutor asked him any questions about the torture, and the court ordered that he should be further kept in pre-trial detention. The complainant was released after 10 months in pre-trial detention, however, the criminal case against him and 36 other persons associated with his party continued.

2.5 In 2006, the European Court of Human Rights examined the complainant's case and found a violation of the right to liberty and security under article 5 (unlawful and arbitrary detention in Diyarbakir police headquarters, and lack of access to lawyer and judicial examination of his detention).[3]

2.6 On 27 November 2012, after 11 years of investigation, the Diyarbakir Court sentenced the complainant and five other co-defendants to 15 years of imprisonment for participation in an armed organization, namely the Revolutionary Party of Kurdistan (PSK), which, as stated in the court decision, aims to destroy the present system of the Republic of Turkey and to establish in its place an independent Kurdish State on the basis of socialist system, under the name Kurdistan, over the region of eastern and south-eastern Anatolia region. The trial consisted of only a few evidentiary hearings during which the complainant was absent as he was not summoned to appear. He was not present during the sentencing but was informed about the verdict by his lawyer.

2.7 The complainant submitted an appeal to the Supreme Court of Turkey stating all of the violations during the pre-trial investigation (torture, extortion of confession, deprivation of legal representation). On 6 April 2016, the Supreme Court rejected his appeal. After this decision, the complainant fled Turkey and travelled through several countries trying to reach Germany (Iran, Ukraine, Azerbaijan, Russia, Montenegro).

3 *Ayaz and others v. Turkey*, Application No. 11804/02.

2.8 The complainant was arrested on 30 November 2016 on the border crossing between Serbia and Bosnia and Herzegovina on the basis of an international arrest warrant issued in Turkey. On the same day, he was questioned by a judge at the Higher Court in Šabac in the presence of an *ex-officio* lawyer. However, since the complainant did not know Serbian, the court invited a local merchant who had business connections in Turkey to translate for the complainant. This person did not speak Turkish well, and during the court hearing had to consult over the phone with his associate in Turkey who in turn had to re-phrase judge's questions to the complainant. For the same reason, the *ex-officio* lawyer also was not able to provide confidential counseling for the complainant. The Higher Court in Šabac decided to keep the complainant in detention pending his extradition.

2.9 On 2 December 2016, the complainant appealed against his detention. On 6 December 2016, the Higher Court in Šabac rejected his appeal. On 7 December 2016, the Turkish authorities submitted a request to the Ministry of Justice of Serbia for the complainant's extradition. On 19 January 2017, the Higher Court in Šabac decided that all prerequisites for the complainant's removal to Turkey were met in line with articles 7 and 16 of the Law on Mutual Assistance in Criminal Matters. There was no rigorous scrutiny by the Higher Court in Šabac in examining the risks of treatment contrary to article 3 of the Convention. The decision was rendered based on documents received from Turkey and related to the complainant's case, which were not properly translated to Serbian and, as a result, were unreadable. The translation was done in the mixture of Serbian and Macedonian languages in Cyrillic and Latin alphabet. The same translated documents were used throughout the extradition procedure.

2.10 On 3 February 2017, the complainant appealed the decision to extradite him to the Appellate Court in Novi Sad. On 23 February 2017, the Appellate Court in Novi Sad quashed the decision of the Higher Court in Šabac on the grounds that it did not provide for adequate interpretation during the proceedings and did not establish for which criminal offence the complainant had been convicted in Turkey.

2.11 On 17 March 2017, the Higher Court in Šabac rendered an identical decision without proper questioning of the complainant, without properly translating the documents received from Turkey and without properly examining the risks of refoulement. The complainant again appealed this decision on 22 March 2017 to the Appellate Court in Novi Sad.

2.12 On 12 April 2017, the Appellate Court in Novi Sad again conducted a hearing during which the complainant stated that he was a victim of torture and the criminal case against him was of a political nature. On the same day, the Appellate Court in Novi Sad again ordered the Higher Court in Šabac to properly question the complainant and to provide a correct translation of the documents received from Turkey.

2.13 On 12 October 2017, for the third time, the Higher Court in Šabac decided there were no obstacles to the complainant's extradition to Turkey. The complainant again appealed this decision on 20 October 2017 to the Appellate Court in Novi Sad.

2.14 A hearing before the Appellate Court in Novi Sad was scheduled for 22 November 2017. However, on 9 November, the complainant's lawyer received a phone call from one of the judges of the Appellate Court in Novi Sad who informed her that the hearing was re-scheduled for the 15 November 2017. The judge also said that the change was requested by the Ministry of Justice who insisted that the case must be resolved before 30 November, because the extradition detention could not last longer than 1 year. This was necessary so that the Minister of Justice could render the final decision on the extradition in a timely manner.

2.15 On 15 November 2017, the Appellate Court in Novi Sad again quashed the decision of the Higher Court in Novi Sad and instructed it to hold a hearing in accordance with the Criminal Procedure Code, to translate the documentation received from Turkey on the basis of which it can be determined which specific criminal offence the complainant was accused of and sentenced for.

2.16 On 22 November 2017, the UN High Commissioner for Refugees intervened reminding the State party's authorities of the ongoing asylum proceedings and the importance of examining the complainant's claims of persecution on merits.

2.17 On 30 November 2017, the Higher Court in Šabac held a hearing where the complainant's lawyer reminded the court that the complainant had applied for an asylum in Serbia and due to expiry of maximum of pre-trial detention (1 year expired on that day) he should be released and referred to the asylum camp in Banja Koviljača. After the hearing, the complainant and his lawyers were notified that a decision repealing the detention would be delivered to the correctional institution in Šabac, where complainant was held in detention, by the end of the day, after which the complainant would be released.

2.18 However, later on the same day, while his lawyer waited outside of the prison gates for the complainant to be released, the police secretly transferred the complainant to the detention center for foreigners in Padinska Skela. After learning about this from the prison guards, the complainant's lawyer arrived at 00h30 on 1 December at the detention center for foreigners and asked for the decision on the complainant's detention. Her request was rejected. At 09h00 on 1 December 2017, the lawyer received the decision on extradition by the Higher Court in Šabac, rendered on the same day, stating that all prerequisites for the complainant's removal to Turkey were met in line with articles 7 and 16 of the Law on Mutual Assistance in Criminal Matters.

2.19 Later on 1 December 2017, the complainant's lawyer again went to the detention center to visit the complainant and to obtain the decision on his deten-

tion. However, she was only allowed to see the letter signed by the president of the Higher Court in Šabac, in which the court president informed the detention center for foreigners that the complainant's detention was repealed and replaced with another measure – prohibition of leaving his temporary place of residence in Banja Koviljača. In the same letter, the court president stated that, because all accommodation capacities in Banja Koviljača Asylum Centre were full, it was necessary to detain the complainant in Padinska Skela. The complainant's lawyer was not allowed to make a copy of the above-mentioned letter. The manager of the detention center informed the complainant's lawyer that the complainant was detained there on the basis of the above letter. According to the Law on Foreigners, the detention center for foreigners is an institution for accommodation of foreigners who are not allowed to enter the country or who are to be expelled from the country.

2.20 On 4 December 2017, the complainant submitted a request for interim measures to the European Court on Human Rights dated, which was rejected on 6 December 2017.[4]

The complaint

3. At the time of submission of communication the complainant claimed that his extradition to Turkey would constitute a violation of his rights under article 3 of the Convention since in Turkey he had been sentenced to 15 years in prison for a politically-motivated crime based on his confession extorted under torture. He claimed that the risk of torture and ill-treatment now is even higher in Turkey after the attempted military coup in July 2016, as those who are believed to be politically opposing the current regime have been subjected to torture and other ill-treatment, incommunicado detention, and held in inhumane conditions in Turkish overcrowded prisons.

Additional information from the complainant

4.1 On 19 June 2018, the complainant submitted additional information with regard to his legal proceedings in Serbia, his asylum procedure and extradition to Turkey. He provided translated copies of a number of procedural documents. The complainant also claimed that his extradition would violate article 3, in conjunction with article 15 of the Convention, because the Serbian authorities failed to take into consideration that his sentence in Turkey was based on a confession extorted by torture.

4 The complainant never submitted a full application to the European Court of human rights and no application appears to have been registered by the Court.

4.2 On 4 December 2018, the complainant appealed the 1 December decision of the High Court in Šabac to the Appellate Court in Novi Sad. In the appeal, the complainant reiterated that due to lack of appropriate translation, the first instance court could not establish the facts of the case against him properly and completely, that he was subjected to prosecution in Turkey on political grounds, that his asylum proceedings were still ongoing, and asked the appellate court to return his case for examination to the first instance court.

4.3 On 8 December 2018, the Appellate Public Prosecutor's Office in Novi Sad submitted its own motion to the Appellate Court in Novi Sad where it stated that even though the first instance court had secured an adequate interpreter for the last court hearing, however it had not acted in line with the instructions of the second instance court related to translation of the documents submitted by Turkey, and proposed to quash the first instance decision and to send the case back to the High Court in Šabac.

4.4 On 14 December 2017, the Appellate Court in Novi Sad held an appeal hearing during which the complainant's lawyer submitted the Committee's note verbal, along with its Serbian translation, requesting the State party to refrain from removing the complainant to Turkey. However, the appellate court upheld the decision of the High Court in Šabac to extradite the complainant. In its decision, the appellate court stated that despite the Committee's request to refrain from removing the complainant to Turkey, the extradition in this case is regulated by the provision of article 3(1) of the European Convention on Extradition as well as provisions of Art 3(1) of the Treaty between the Republic of Serbia and the Republic of Turkey on Extradition. The court held that an extradition would not be allowed if the person whose extradition is requested enjoys asylum on the territory of the requested state, and that in accordance with article 7(4) of the Law on Mutual Assistance in Criminal Matters, it is up to the Minister of Justice of Serbia and not the courts to decide if an extradition is requested for a political offence or not.

4.5 On 15 December 2017, the Minister of Justice rendered a decision stating that extradition of the complainant to Turkey was permitted under the Law on Mutual Assistance in Criminal Matters and that the courts had established that the offence for which the extradition was requested represented a criminal offence also in the Serbian legislation, namely a conspiracy for unconstitutional activity. The complainant notes that the Minister of Justice did not consider the issue whether the offence in question was a political crime and whether the complainant was at risk of torture, or was tortured and convicted on the basis of the statement tainted by torture.

4.6 By letter of 14 December 2017, the complainant's lawyer informed the Ministry of Interior, the Police Directorate and the Border Police administration

that on 11 December 2017 the Committee issued interim measures in the complainant's case, and that removing the complainant to Turkey would constitute a violation of the State party's international obligations. The same letter was submitted to Ministry of Justice on 18 December 2017. Despite this, the complainant was extradited to Turkey on the night of 25 December 2017.

4.7 With regard to his asylum proceedings, the complainant submits that on 26 January 2017, he expressed his intention to seek asylum in the State party. On 9 May 2017, he submitted his formal asylum request, and an asylum interview was conducted on 2 August 2017. During his interview, the complaint gave detailed account of his political activity prior to his arrest, his arrest and torture in 2011, his sentencing in Turkey, and his escape from Turkey. He also submitted copies of correctly translated documents from the Turkish case against him, and their legal analysis, which showed that the complainant's confession was the sole evidence used for his conviction. The complainant also submitted the decision by the European Court of Human Rights on his case, and reports by various international organizations between 1989 and 2017, which showed that torture has been widely used by the Turkish authorities during that period.

4.8 The complainant requested the Asylum Office to examine his application on the merits without automatic application of the 'safe third country' concept, so the authorities could examine the risk of torture in the country of origin. However, on 22 September 2017, the Asylum Office refused the complainant's asylum application stating that Montenegro should be responsible for his asylum. The Asylum Office held that since Montenegro, as a state that the asylum-seeker entered the Republic of Serbia from directly, is on the list of safe third countries based on a decision of the Government of the Republic of Serbia of 17 August 2009, and that it consequently represents a state which abides by the refugee protection principles contained in the 1951 Convention on Status of Refugees and the 1967 Protocol on Status of Refugees, there were valid grounds for dismissal of the asylum application based on article 33(1.6) of the Law on Asylum.[5]

4.9 On unknown date, the complainant appealed the decision of the Asylum Office to the Asylum Commission. On 22 November 2017, the Asylum Commission rejected the appeal on the grounds that Montenegro signed and ratified numerous treaties on human rights, and has been implementing them in practice achieving international standards, which meant that it was a safe third country for the complainant.

4.10 The complainant submits that he was extradited to Turkey before he was able to appeal the decision of the Asylum Commission to the Administrative court. The domestic law allows for an appeal to be submitted to administrative court with-

5 Article 33(1.6) of the Law on Asylum states that an asylum application would be dismissed without examination if established that the person seeking asylum has arrived from a safe third country unless proven that it is not safe.

in 30 days from the date of the receipt of the Commission's decision, however the complainant was extradited 14 days after the decision was delivered to his attorney.

4.11 The complainant claims that despite its reasoning, the Asylum Office knew that he would not be deported to Montenegro.[6] Therefore, the Asylum Office entrusted the extradition authorities to properly assess the risk of ill-treatment in Turkey before the complainant's extradition, while the courts and Ministry of Justice have not even carried out an adequate translation of the complainant's documents received from Turkey.

4.12 The complainant further argues that reports and findings by the Council of Europe, various UN Special Procedure mechanisms and Treaty Bodies show existence of consistent pattern of gross, flagrant or mass violations of human rights in Turkey during the last 30 years. The complainant submits that the country of origin information, combined with his personal circumstances, being his ethnicity, political views and past torture, should have been considered by both, the asylum and extradition authorities of the State party, as substantial grounds for believing that he would be exposed to foreseeable, personal, present and real risk of torture and ill-treatment if extradited to Turkey.

State party's observations on the merits

5.1 On 5 November 2018, the State party submitted its observations on the merits. The State party notes that on 5 December 2016, the Ministry of Justice of the Republic of Serbia informed the Republic of Turkey about the complainant's arrest based on the active international warrant of Interpol, and asked for an extradition request to be submitted along with the required documentation. On 29 December 2016, the Ministry of Justice received the request for extradition along with the required documents translated into Serbian language. The following day, these documents were forwarded to the High Court in Šabac (with supplements on 6 and 9 January 2017). On 9 May 2017, the High Court in Šabac returned the documents to the Ministry of Justice due to "incomprehensible translation". On 12 May 2017, the Ministry of Justice submitted the returned documents to a certified Turkish translator and the new translation was submitted to the High Court in Šabac on 21 July 2017. By a letter dated 15 August 2017, the High Court in Šabac requested clarifications regarding the complainant's criminal offence. The requested information was provided to the court by

6 In its decision the Asylum Office wrote: "Bearing in mind that the applicant Ayaz Cevdet, national of Turkey, is in extradition detention in the District Prison in Šabac and that his leaving the territory of the Republic of Serbia depends on the decision of another state authority, the Asylum Office in this legal matter has not invoked Art 57(1) of the Law on Asylum stipulating that a foreigner whose asylum application has been refused or rejected, or whose asylum procedure has been suspended, and who does not reside in the country on some other grounds, shall be obliged to leave the Republic of Serbia within the time limit specified in that decision".

the Ministry of Justice on 4 and 5 October 2017. On 27 November 2017, the UN High Commissioner for Refugees intervened and requested that the complainant should not be extradited before authorities make final decision on his asylum request. This intervention was forwarded to the High Court in Šabac on 6 December 2017. On 1 December 2017, the Ministry of Justice received the decision of the Asylum Commission rejecting the complainant's appeal. On 15 December 2017, the High Court in Šabac forwarded to the Ministry of Justice the final decision in the complainant's extradition case, confirmed by the Appellate Court in Novi Sad on 14 December 2017. On 15 December 2017, the Minister of Justice of the Republic of Serbia issued a decision allowing the extradition of the complainant to the Republic of Turkey. On 18 December 2017, the decision was served to the Interpol's Belgrade office. On the same day, the Ministry of Justice received, through the Permanent Mission of the Republic of Serbia in Geneva, the documents related to the complainant's individual communication.

5.2 The State party rejects the complainant's claim that there has been no adequate translation from Turkish to Serbian of the documents received from Turkey for over a year. It notes that based on the court's request for a revised translation of the provided documents, the Ministry of Justice engaged a local certified Turkish translator.

5.3 The State party further notes that in accordance with the European Convention on extradition or any other multilateral or bilateral extradition documents, there is no requirement to translate an entire case file to the language of the State party which is requested to extradite an individual. Only documents mentioned in article 12 of the European Convention on Extradition,[7] of which both Serbia and Turkey are Contracting Parties, must be attached to the request for extradition, as no other state is authorized to evaluate and examine legal proceedings conducted in another state.

5.4 The State party rejects the complainant's claim that it breached the principle of division of authority by telling the courts to complete the proceedings before one year term for detention of the complainant expires. It notes that in accordance with the Criminal Procedure Code of Serbia, there are other measures besides detention to secure presence of a person in extradition proceedings.

5.5 With regard to the Republic of Turkey and its violation of human rights, the State party submits that it included Turkey in the list of safe countries of

7 Article 12 of the European Convention on Extradition states that the request for extradition shall be supported by: a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party; b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

origin and safe third countries. It further notes that Croatia and Bulgaria also consider Turkey to be a safe country of origin, and it has been proposed to put Turkey in the joint list of the European Union of safe countries of origin. Moreover, the State party explicitly conditioned the extradition in its decision with the Turkey's obligation to respect all human rights and freedoms of the complainant, as provided by the appropriate international conventions.

5.6 The State party submits that the Ministry of Interior is the national authority in charge of extradition procedures, and the Ministry of Justice usually receives information about extraditions only after their completion.

5.7 The State party notes that with regard to the complainant's asylum proceedings, the decision of the Asylum Commission is not considered to be final and can be further appealed.

5.8 As to the complainant's claim that the State party has ignored the request for interim measures by the Committee, the State party notes that it has learned about the request on 18 December 2017 only, i.e. three days after the decision on extradition was already made. A copy of the Committee's letter was submitted along with a letter by representatives of the Belgrade Centre for Human Rights, who did not submit proof of being authorized to represent the complainant before the authorities of the State party.

Complainant's comments on the State party's observations on the merits

6.1 On 4 January 2019, the complainant submitted his comments on the State party's observations on the merits. He emphasizes that the State party has ignored invitations of the Committee to submit its observations on the admissibility and merits of the complaint for almost a year, which, according to the complainant, reflects Government's attitude towards its obligations arising from the Convention.

6.2 The complainant notes that the State party's submission contains only observations by the Ministry of Justice of Serbia, but does not contain information from other state authorities, what led to a violation of the principle of non-refoulement enshrined in article 3, in conjunction with article 15 of the Convention. He further notes that this shows that the State party does not have an established mechanism to properly communicate with the UN treaty bodies. The complainant requests that the Committee examines the lack of a State mechanism or body consisted of trained professionals who would be in charge of communicating with the UN Treaty bodies, because establishing such body would prevent unjustified postponements in individual procedures and problems in communication between different authorities in the State party.

6.3 The complainant reiterates his position that he was extradited without the courts properly translating the required documents received from Turkey. He notes that on 8 December 2018, the Appellate Public Prosecutor's Office in

Novi Sad submitted a motion to the Appellate Court in Novi Sad stating that even though the first instance court had secured an adequate interpreter for the last court hearing, it had not acted in line with the instructions of the second instance court related to translation of the documents submitted by Turkey, and proposed to annul the first instance decision and to send the case back to the first instance court. The complainant agrees that while it was not necessary to translate the entire case file of his Turkish case, the State party's authorities failed to provide adequate translation of any documents received from Turkey.

6.4 The complainant further reiterates that the Ministry of Justice has influenced the decision-making process of the appellate court by forcing it to reschedule the second instance hearing from 22 November 2017 to 15 November 2017, in order to resolve the entire case before the expiry of maximum length of the one-year extradition detention. The complainant does not consider this practice to be unusual since the independence of the judiciary in the State party has been a long-standing problem recognized in the latest findings of this and Human Rights Committees.

6.5 The complainant rejects the State party's argument that Turkey was included in the list of safe countries, and notes that State party's Decision on Safe Countries of Origin and the Safe Third Countries was annulled after the new Law on Asylum and Temporary Protection had come into force in June 2018. Articles 44 and 45 of the new law require that the determination of whether a particular country of origin or a third country is safe shall be done on a case by case basis. Thus, automatic reliance on the said list fully undermined the State party's obligation to assess the risk of refoulement with rigorous scrutiny.

6.6 Finally, the complainant notes that his case has also been brought to the attention of the UN Special Rapporteur on Torture who sent an urgent letter No. 3/2017 to the Serbian Minister of Foreign Affairs. It appears that the Special Rapporteur has never received a response to the said letter.

Issues and proceedings before the Committee

The State party's failure to cooperate and to respect the Committee's request for interim measures pursuant to rule 114 of its rules of procedure

7.1 The Committee notes that the adoption of interim measures pursuant to rule 114 of its rules of procedure, in accordance with article 22 of the Convention, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measure requested by the Committee, in particular by forcibly removing an alleged victim, undermines the protection of the rights enshrined in the Convention.[8]

8 See *Thirugnanasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 6.1 – 6.3; *Tursunov v. Kazakhstan* (CAT/ /C/54/D/538/2013), paras. 7.1 and 7.2.

7.2 The Committee notes the State party's argument that it has learned about the request on 18 December 2017 only, while the decision on extradition was rendered on 15 December 2017. The Committee also notes that the State party's submission does not indicate when exactly the complainant was extradited to Turkey. At the same time, the Committee notes the complainant's submission that his extradition took place on 25 December 2017.

7.3 The Committee observes that any State party that has made a declaration under article 22 (1) of the Convention recognizes the competence of the Committee to receive and consider complaints from individuals who claim to be victims of violations of the provisions of the Convention. By making such a declaration, States parties implicitly undertake to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. By failing to respect the request for interim measures transmitted to the State party on 11 December 2017, the State party violated its obligations under article 22 of the Convention because it impeded the comprehensive examination by the Committee of a complaint relating to a violation of the Convention, and prevented it from taking a decision which could effectively block the complainant's extradition to Turkey, should the Committee find a violation of article 3 of the Convention.

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee must decide whether the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not challenged the admissibility of the complaint.

8.3 Seeing no other obstacles to admissibility, the Committee finds that the complaint is admissible under article 22 of the Convention with respect to the alleged violation of article 3, and proceeds to consider it on the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22 (4) of the Convention.

9.2 In the present case, the issue before the Committee is whether the complainant's extradition to Turkey constituted a violation of the State party's obligation under article 3 (1) of the Convention not to extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee recalls, first and foremost, that the prohibition against torture is absolute and non-derogable and that no exceptional circumstances may be invoked by a State party to justify acts of torture.[9]

9.3 In assessing whether there are substantial grounds for believing that the alleged victim would be in danger of being subjected to torture, the Committee recalls that, under article 3 (2) of the Convention, States parties must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the requesting State. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture if he is extradited to Turkey. The existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on extradition to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.[10] Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.[11]

9.4 The Committee recalls its general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, according to which the non-refoulement obligation exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, either as an individual or a member of a group which may be at risk of being tortured in the State of destination. The Committee's practice in this context has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real".[12] Indications of personal risk may include, but they are not limited to: the complainant's ethnic background; political affiliation or political activities of the complainant and/or the complainant's family; previous torture; incommunicado detention or other form of arbitrary and illegal detention in the country of origin; and clandestine escape from the country of origin owing to threats of torture.[13] The Committee also recalls that it gives con-

9 See the Committee's general comment No. 2 (2007) on the implementation of article 2 by States parties, para. 5.

10 See *Ayden v. Morocco* (CAT/C/66/DR/846/2017), para. 8.3; *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), para. 8.3; and *Mugesera v. Canada* (CAT/C/63/D/488/2012), para. 11.3.

11 See *M.S. v. Denmark* (CAT/C/55/D/571/2013), para. 7.3.

12 See general comment No. 4 (2017), para. 11.

13 Ibid., para. 45.

siderable weight to findings of fact made by organs of the State party concerned. However, it is not bound by such findings and will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.[14]

9.5 In the present case, the Committee notes the complainant's claim that his extradition to Turkey would make him face a serious risk of persecution and torture in detention in Turkey owing to the perception that he is a member and one of the leaders of the Revolutionary Party of Kurdistan (PSK). In this regard, the Committee notes that the complainant has been sentenced in 2012 to 15 years in prison for his membership in PSK, while he denies being a member or even knowing about the existence of such an organization, and claims to have been tortured while being held incommunicado for 12 days and forced to sign a confession. The Committee also notes that in 2006, the European Court of Human Rights has already found that the complainant has been a victim, of a violation by Turkey of his rights under article 5(3) and (4) of the Convention as to his unlawful and arbitrary detention in Diyarbakir police headquarters in 2001, and lack of access to lawyer and judicial examination of his detention.

9.6 The Committee must take into account the current situation of human rights in Turkey, including the impact of the state of emergency (lifted in July 2018). The Committee notes that systematic extensions of the state of emergency in Turkey led to serious violations of human rights against hundreds of thousands of people, including arbitrary deprivation of the right to work and freedom of movement, torture and other ill-treatment, arbitrary detention and violations of the rights to freedom of association and expression.[15]

9.7 The Committee recalls its concluding observations on the fourth periodic report of Turkey, issued in 2016, in which it noted with concern that "despite the fact that the State party has amended its law to the effect that torture is no longer subject to a statute of limitations, ... [the Committee] has not received sufficient information on prosecutions for torture, including in the context of cases involving allegations of torture that have been the subject of decisions of the European Court of Human Rights. The Committee is also concerned that there is a significant disparity between the high number of allegations of torture reported by non-governmental organizations and the data provided by the State party in its periodic report, suggesting that not all allegations of torture have been investigated during the reporting period."[16] The Committee highlighted its concern about "recent amendments to the Code of Criminal Procedure, which

14 Ibid., para. 50.

15 See *Ayden v. Morocco*, para. 8.6; also, OHCHR, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017", March 2018.

16 Concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), para. 9.

give the police greater powers to detain individuals without judicial oversight during police custody".[17] The Committee also regretted the "lack of complete information on suicides and other sudden deaths in detention facilities during the period under review (arts. 2, 11 and 16)".[18] The Committee takes note of the fact that the concluding observations in question were issued prior to the declaration of the state of emergency. However, the Committee notes that reports published since the declaration of the state of emergency on the situation of human rights and the prevention of torture in Turkey indicate that the concerns raised by the Committee remain relevant.[19]

9.8 In the present case, the Committee notes that the complainant's asylum application was refused in Serbia on the grounds that Montenegro should be responsible for his asylum application. Thus, there was an assumption that the complainant would be removed to Montenegro where the local authorities would examine his asylum claims on the merits, or in case of his extradition, the State party's courts would assess the risk of torture that such an extradition would entail for the complainant in view of the general human rights situation in Turkey and the complainant's personal circumstances. As a result, the Committee observes that neither the Asylum Office nor the courts have carried an assessment of the risk of torture that the complainant would be exposed to following an extradition to Turkey. The documents before the Committee show that the Minister of Justice of Serbia also did not carry out an assessment if the charges against the complainant were of a political nature, as it was required by the decision of the Appellate Court in Novi Sad and the Law on International Legal Assistance in Criminal Matters, before signing the decision to extradite the complainant. The Committee therefore concludes that the State party's authorities have failed in their duty to carry out an individualized risk assessment before returning the complainant to Turkey.

9.9 The Committee further notes the complainant's claim that the State party failed to take into consideration that his prison sentence in Turkey was based on a confession extorted by torture due to the absence of adequately translated documents related to the complainant's conviction in Turkey. The Committee also notes that based on the court's request for a revised translation of the provided documents, the Ministry of Justice engaged a local certified Turkish translator to translate the documents. However, the Committee observes that the

17 Ibid., para. 19.

18 Ibid., para. 33.

19 See *Ayden v. Morocco*, para. 8.7; *Erdogan v. Morocco* (CAT/C/66/DR/827/2017), para. 9.7; *Onder v. Morocco* (CAT/C/66/DR/845/2017), para. 7.7; also, OHCHR, "Report on the human rights situation in South-East Turkey: July 2015 to December 2016", February 2017; and OHCHR, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017", March 2018. See also the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey (A/HRC/37/50/Add.1).

appeal submitted by the complainant to the Appellate court in Novi Sad on 4 December 2017 and the motion submitted by the Appellate Public Prosecutor's Office in Novi Sad to the same court on 8 December 2017, indicate that at the time of the complainant's extradition, the State party still hasn't adequately translated the documents related to his conviction in Turkey. Thus, the Committee is of the view that the State party's authorities failed to establish whether the complainant's conviction was based on his own confession extorted by torture.

9.10 Taking into consideration the foregoing, the Committee concludes that, in this case, the State party's removal of the complainant to Turkey constituted a violation of article 3 of the Convention. In light of this conclusion, the Committee will not consider any other complainant's claims.

10. The Committee, acting under article 22 (7) of the Convention, therefore concludes that the complainant's extradition to Turkey constituted a violation of article 3 of the Convention. Regarding the State party's lack of compliance with the Committee's request of 11 December 2017 for interim measures for the complainant not to be extradited, and his forcible removal to Turkey on 25 December 2017, the Committee, acting under article 22 (7) of the Convention, decides that the facts before it constitute a violation by the State party of article 22 of the Convention due to a lack of cooperation with the Committee in good faith, which prevented the Committee from considering the present communication effectively.[20] The Committee also notes that the State party failed to provide any sufficiently specific details as to whether it has engaged in any form of post-expulsion monitoring of the complainant, and whether it has taken any steps to ensure that the monitoring is objective, impartial and reliable.

11. The Committee considers that the State party has an obligation to provide redress for the complainant, including adequate compensation of non-pecuniary damage resulting from the physical and mental harm caused. It should explore ways and means of monitoring the conditions under which the complainant is in detention in Turkey in order to ensure that he is not subjected to treatment contrary to article 3 of the Convention, and inform the Committee as to the results of such monitoring.

12. The Committee urges the State party, in accordance with rule 118 (5) of its rules of procedure, to inform it, within 90 days of the date of transmittal of this decision, of the steps taken in response to this decision. The Committee urges the State party to take steps to prevent similar violations of article 22 in the future and to ensure that, in cases where the Committee has requested interim measures, the complainants are not removed from the State party's jurisdiction until the Committee has made a decision on a prospective application.

20 See *Thirugnanasampanthar v. Australia*, para. 9.

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