

# ADDRESSING SECURITY CONCERNS IN ASYLUM PROCEDURE

- *supported by*
- Visegrad Fund
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**POLAND  
SLOVAKIA  
CZECH REPUBLIC  
HUNGARY**

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**A COMPARATIVE V4  
STUDY**



**HALINA NIEC LEGAL AID CENTER  
HUMAN RIGHTS LEAGUE  
ORGANIZATION FOR AID TO REFUGEES  
SUBJECTIVE VALUES FOUNDATION**

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POLAND – SLOVAKIA – CZECH REPUBLIC - HUNGARY



The goal of the project “Addressing security concerns in asylum procedure — a comparative study in the V4 countries”, financed from the Visegrad Fund, was to provide a comprehensive overview of current national laws and practices in the Visegrad Group countries as regards addressing security concerns within the broadly understood framework of refugee protection. The resulting 4 country reports include a description of the national laws and provide examples of best practices and crucial jurisprudence in this regard. As the reports also list recommendations concerning both law and practice, the authors hope that their publication would serve as a basis for developing even more effective mechanisms incorporating security procedures into protection procedures, while upholding the international human rights standards. The relation between asylum and security has not been subject to comparative research before and thus the project's innovative report is meant to form basis for discussing new policies with state governments and raise public

## HALINA NIEĆ LEGAL AID CENTER

The HNLAC's main goal is to protect human rights by providing free legal aid to asylum seekers and stateless persons, monitoring the adherence to standards of human rights and undertaking advocacy activities.

## HUMAN RIGHTS LEAGUE

HRL is the leading Slovak organization working in the field of immigration and asylum law.

## ORGANIZATION FOR AID TO REFUGEES

OPU provides free legal aid and social counseling to applicants for international protection and to foreigners in the Czech Republic, organizes training programmes for both professionals and the general public and other activities aimed at promoting integration of foreigners.

## SUBJECTIVE VALUES FOUNDATION

SVF aims to support an ongoing dialogue between cultures, to create a sustainable society and to promote the European ideals in Hungary.



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POLAND - SLOVAKIA - CZECH REPUBLIC - HUNGARY

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# INTRODUCTION

The new challenging reality of the refugee crisis brought about significant political and ideological divisions within the EU and in many ways reshaped the states' approach towards protection for refugees. Threats of terrorist attacks, in common view often associated with the unprecedented inflow of refugees to the EU, are the reason why governments now more closely than ever are concerned about addressing security risks within international protection procedures. Establishing effective security screening mechanisms for asylum seekers are a prerequisite to upholding the integrity of the international system of protection for those escaping persecution. Ensuring high security level while not infringing human rights standards is also key to mitigating fears and anti-refugee sentiments of the general public.

The project's research was centered around the theme of state responses to the refugee crisis and therefore a broader, regional approach was applied as the most adequate method in analyzing this cross-border phenomenon. The legal solutions introduced by the V4 countries in reaction to the refugee crisis and the increase of terrorist threats are to some extent similar, as are these states' publicly proclaimed prevailing negative positions vis-à-vis the current refugee situation in Europe. The public perception of refugees and fear of the migration flows are also to some extent shared by all V4 populations. Taking into consideration these important changes shaping the new reality for protection proceedings, the partner organizations in the present project decided to carry out a comparative study on a regional scale with a focus on the impact of refugee crisis and changed security situation on asylum. The study allowed to formulate a set of recommendations for ways of improving existing standards in all the four countries and introducing mechanisms tailored to the specific context of the V4 states.

At the outset of this analysis it should be underlined that the main premise of the project is that security and protection are not mutually exclusive. The main objective of the research was to analyze the interface between refugee protection procedures and security risks prevention mechanisms in the national context of V4 states against a broader, regional background and comparing this legal framework with the overarching principles of international human rights and refugee law.

It has been widely acknowledged that the right to seek asylum (which implies also the right to reach another state's territory with a view of exercising this right) is a fundamental human right that together with the *ius cogens* principle of non-refoulement is the cornerstone of the system of international refugee protection. These rights cannot be compromised even in case of increased risks to security and the states need to ensure that all newly established security measures are not infringing these rights.

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees are the two universal instruments in international refugee law, applicable in the context of the present study. With regard to terrorism and security measures taken to counter it, these international instruments incorporate a sound system of checks and balances that takes full account of the security interests of states and host communities while protecting the rights of persons who, unlike other categories of foreigners, no longer enjoy the protection of their country of origin.<sup>1</sup>

Even though these conventions have been concluded long before the terrorist threat in Europe was seen as one of the top priorities that should be tackled collectively by the states, their safeguards related to excluding terrorists as well as common criminals from the scope of refugee protection, are still valid today. It is their full and effective implementation that should become the priority of refugee-hosting states, before resorting to imposing additional legal procedures and new restrictive laws.

On the international level, under the Charter of the United Nations, it is the Security Council that holds primary responsibility for the maintenance of international peace and security, including measures to address terrorism as a threat to international peace and security. Pursuant to Security Council resolution 1373 (2001), states are

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<sup>1</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, available at: <http://www.refworld.org/docid/48733ebc2.html>

required to prevent “the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents”.

It is apparent that the reasoning of this resolution was based in the increasingly emphasized linkage between the movement of people across borders, especially related with asylum seeking and the fear of security breach. The applied security measures often have a direct impact on the human rights of migrants and refugees. It is thus important to recall that while states have a sovereign right to determine conditions of entry and stay in their territories, they also have an obligation to respect and protect the human rights of all individuals under their jurisdiction, regardless of their nationality, origin or immigration status. International borders are not zones of exclusion or exception with respect to human rights obligations, and the jurisdiction of States at borders must, therefore, be exercised in a manner that is compatible with its human rights obligations towards all persons.<sup>2</sup>

The vividly discussed relationship between irregular migration and terrorism raises a number of acute dilemmas in terms of law and policy. Up to date there is little evidence, however, that terrorists take advantage of refugee flows to carry out acts of terrorism<sup>3</sup> or that refugees are somehow more prone to radicalization than others, and research shows that very few refugees have actually carried out acts of terrorism<sup>4</sup>. As noted by a representative of the Office of the United Nations High Commissioner for Refugees (UNHCR), “there is a clear perception in some quarters that asylum is misused to hide or provide safe haven for terrorists. Such perceptions are analytically and statistically unfounded, and must change”<sup>5</sup>. Moreover, in its 2016 European Union Terrorism Situation and Trend Report, Europol also noted that there was no evidence that terrorists were systematically using refugee flows to enter Europe<sup>6</sup>. In the overwhelming majority of cases, refugees and migrants do not pose a risk, but are in fact at risk, fleeing the regions where terrorist groups are the most active, being victims of terrorist attacks themselves.

The present report focused on the most pivotal aspects where international protection procedure and security measures may interfere.

The national researchers analyzed the security checks undertaken in relation to asylum seekers, looking at all steps of the asylum procedure. The report covers security considerations carried out during the submission of asylum claims, the process of identification and registration of applicants, the verification of authenticity of their documents, data collection and fingerprinting as well as any other additional measures taken at this point. The report looks at the scope of information collected at the very outset of asylum procedure and the methods applied, as well as any other additional screenings and sources of information employed in the pre-decision stage.

Further on, the analysis is focusing on the decision making process and the application of exclusion clauses, as spelled out in article 1F of the 1951 Refugee Convention. Related topics in this section include cancellation of refugee status due to security risks and breaches, procedural safeguards as well as available legal remedies in such cases.

The analysis also includes the practice of application of exceptions from the non non-refoulement principle (art. 33(2) of the 1951 Refugee Convention) and the interface between extradition process and pending asylum process.

Another area of research focused on the national anti-terrorist legislation and the interplay between the antiterrorist legislation and the asylum related procedures. The report also discusses the application of

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<sup>2</sup> See OHCHR, “Recommended principles and guidelines on human rights at international borders”, (Geneva, 2014).

<sup>3</sup> UNHCR, “UNHCR chief says it is ‘absolute nonsense’ to blame refugees for terror”, 17 November 2015; and Ishaan Tharoor, “Were Syrian refugees involved in the Paris attacks? What we know and don’t know”, *The Washington Post*, 17 November 2015.

<sup>4</sup> Kathleen Newland, “The United States record shows refugees are not a threat”, October 2015. Available from [www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat](http://www.migrationpolicy.org/news/us-record-shows-refugees-are-not-threat).

<sup>5</sup> Vincent Cochetel, “Terrorism as a global phenomenon”, UNHCR presentation to the joint seminar of the Strategic Committee on Immigration, Frontiers and Asylum and Committee on article 36, Ljubljana, 17 and 18 January 2008.

<sup>6</sup> UN General Assembly, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 13 September 2016, A/71/384, available at: <http://www.refworld.org/docid/57f63ef04.html>

detention in relation to asylum seekers deemed to pose security threats and the availability of free legal aid during these procedures.

Based on the findings of the research carried out in 4 Visegrad states, a set of national recommendations have been developed. Their comparison allows for formulation of common recommendations that are valid in relation to the whole Visegrad region:

- ✓ Access to information about the accusations – pending the asylum procedure, the applicant and/ or his/ her legal representative should be informed at least about the substance of the “accusations” against the applicant regarding alleged security threat in order to be able to defend his/ her rights in accordance with the international and EU fair trial and effective remedy standards,
- ✓ Access to classified information - access to classified information in asylum proceedings should be guaranteed in some form to legal representatives who have undergone a security check,
- ✓ Non refoulement – the principle of *non-refoulement* should be incorporated into the internal acts on protection/asylum,
- ✓ Detention - detention of asylum seekers should only be applied as a measure of last resort, only after alternative measures have been considered,
- ✓ Free legal aid - persons subjected to detention, administrative expulsion, criminal expulsion and extradition should always be appointed with a free legal counsel.

# POLAND

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## OVERVIEW OF THE NATIONAL ASYLUM PROCEDURE

Poland is party to the Geneva Convention on the Status of Refugees and the New York Protocol relating to refugees status, which established the international legal framework stipulating the material and legal basis for granting a refugee status and define the related rights. The rules of national asylum procedure (including other forms of protection) are regulated by the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland<sup>7</sup>, which has been harmonized with the EU Qualification Directive (2011/95/EU)<sup>8</sup> and the Procedures Directive (2013/32/EU)<sup>9</sup>. Additional applicable norms, pertaining primarily to the application of detention may be found in the Act of 12 December 2013 on foreigners Poland<sup>10</sup>.

According to the above mentioned set of principles, the refugee status in the Republic of Poland can be granted to foreigners, who fulfill the requirements for being acknowledged as a refugee under the 1951 Geneva Convention. The applicants are refused refugee status in the following situations:

- their fear of persecution is unfounded;
- they already benefit from protection or help provided by the UN authorities or agencies other than UNHCR, under the condition that the foreigner has legal and practical possibility of return to the territory where such protection or help are available, without a threat to their life, personal security or freedom;
- there are serious grounds to presume that:
  - they have committed a crime against peace, a war crime or a crime against humanity within the meaning of the international law,
  - they are guilty of actions contrary to aims and principles of the United Nations stated in the Preamble and articles 1 and 2 of the United Nations Charter,
  - they have committed a serious crime of a non-political character outside the territory of the Republic of Poland prior to submission of the application for granting the refugee status;
- they are regarded by the Polish authorities as a person who has the rights and obligations resulting from Polish citizenship.

The Polish asylum procedure can be initiated upon a personal request of a foreigner (the application may also include the spouse of the foreigner and their children). The only deviation of this rule concerns unaccompanied minors, in relation to whom the application is made either by a court appointed legal guardian, or by a representative of an international or non-governmental organization providing assistance to foreigners, if there are grounds to believe that the minor may be in need of international protection.

Asylum application is submitted to the Head of Office For Foreigners (the first-instance authority responsible for determining refugee status) through the Border Guard. In the majority of cases such applications are

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<sup>7</sup> Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland, Journal of Laws 2016, Item 1836.

<sup>8</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>9</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

<sup>10</sup> The Act of 12 December 2013 on Foreigners, Journal of Laws 2013, Item 1650.

submitted through the Border Guard in Terespol at the Eastern Polish border (Polish-Belarusian border point), less frequently at the airports or in the seat of the Office for Foreigners in Warsaw (in such cases also through the Border Guard).

Each application for granting the refugee status is simultaneously considered as an application for granting supplementary protection (second in the order). According to the Polish law, the first – instance decision should be issued no later than 6 months after the application is submitted, but this term can be prolonged if the case is complicated and in practice a large number of applicants have to wait much longer (up to 15 months). However, if the decision is not reached within 6 months, asylum seekers can legally work in Poland after obtaining a special document from the Office for Foreigners.

During this period they can actively participate in the proceedings: they are interviewed by the employees of the Office for Foreigners and they can also submit the evidence before the decision is issued. In the first instance proceedings the asylum seekers can be assisted by the lawyers from NGOs providing free of charge legal help. The proceedings for granting refugee status in Poland include two instances, which means, that if applicants are dissatisfied with the decision of the Head of the Office for Foreigners, they may within 14 days appeal to the Council for Refugees. This can be done with a help of the lawyer and the legal assistance at this stage may be financed by the State. The Council for Refugees, after considering the case (which takes 1 or 2 months), issues a final decision on granting the refugee status. Asylum seekers still have a right to complaint against this decision to the Voivodeship Administrative Court in Warsaw (within 30 days) which carries a judicial review of the proceedings.

According to the information provided by the Office for Foreigners, 12 325 persons filled their applications for international protection in 2015. Out of that number the majority were citizens of Russian Federation (65%) and Ukraine (19%). Significant number of applications were also submitted by citizens of Tajikistan (4%), Georgia (3%) and Syria (2%). 349 persons were granted refugee status - mostly citizens of Syria (203), 163 persons were granted subsidiary protection – mostly citizens of Russian Federation (100). Moreover 122 foreigners were granted a permit for tolerated stay (which is a type of national protection), they were mostly citizens of Russian Federation (91). It should be noted that Russian citizens are almost exclusively of Chechen origin.

Year 2016 was very similar to 2015 regarding the number of foreigners applying for the international protection – 12 305 persons applied for the international protection in 2016. Out of that number, 81% were first applications for international protection. The majority of applicants in 2016 were also citizens of Russian Federation (73%) Ukraine (10%) and Tajikistan (7%). 390 persons were granted international protection (in majority from Russian Federation – 129, Ukraine – 97, Syria - 43 and Iraq -18) and 177 foreigners received a permit for tolerated stay.

In comparison with 2015 the following changes in refugee applications were noticed in Poland:

- 20 % increase of number of applicants from Russia
- 44% decline of number of applicants from Ukraine
- nearly doubled number of applicants from Tajikistan
- nearly doubled number of applicants from Armenia
- 67% decline of number of applicants from Georgia
- 52% increase of number of applicants from Vietnam
- 84% decline of number of applicants from Syria.

Much less applications for international protection were submitted in Poland in 2017 - 5078 foreigners applied for the refugee status. The majority of the applicants were citizens of the Russian Federation (70%), Ukraine (13%) and Tajikistan (3%). Slightly more than a half of the applicants (57%) applied for the international protection in Poland for the first time. One application included averagely 2 persons (in case of Russian citizens – 3 persons). Nearly half of the foreigners applying for the refugee status in 2017 were children. 520 foreigners were granted international protection (in majority from Ukraine – 276, Russian Federation – 87 and Tajikistan – 35). Moreover 227 foreigners were granted a permit for tolerated stay.

In comparison with 2016 the following changes in refugee applications were noticed in Poland:

- 60% decline of number of applicants from Russia

- 48% decline of number of applicants from Ukraine
- 85% decline of number of applicants from Tajikistan
- 85% decline of number of applicants from Armenia
- 45% decline of number of applicants from Georgia
- 14% decline of number of applicants from Turkey
- 35% decline of number of applicants from Kyrgyzstan
- similar number of applications from Syria, Iraq and Belarus.

A careful analysis of the trends and statistics briefly described above allows for several conclusions. The statistics indicate that Poland has been virtually unaffected by the influx of refugees that peaked in Europe in 2015. The overwhelming majority of all asylum applications are made at the Polish-Belarus border crossing in Terespol by persons who are holding valid passports, only a small percentage of applicants are undocumented and/or have entered the country irregularly. Despite the changes of certain trends and the overall drop of the number of asylum seekers in Poland, the intake of applications at Terespol border crossing remains on the same level, irrespective of the number of persons attempting to enter and usually does not exceed 1 – 2 families per day. Some of the persons undertaking multiple, unsuccessful attempts at entering Poland are thus discouraged by the difficulties in making their application at the border and proceed to see alternative ways of entering Europe and submitting their applications. This practice of pushbacks contributes to a prolonged tension at the border.

Due to a still considerably high turnout of persons absconding the asylum procedure initiated in Poland, Terespol traditionally remains also the main gateway of all Chechen (and other North-Caucasus originating) asylum seekers on their way to other EU countries.

It is important to notice however that the percentage of persons absconding the refugee procedure (resulting in formal discontinuation of the administrative proceedings) is much smaller in 2017 (51%) than in 2016 (73%)<sup>11</sup> and 2015 (70%). Interestingly, the rate of absconding is also different in different nationality groups; 78% of decisions on discontinuation of proceedings due to the so called implied withdrawal of the application for granting international protection in 2017 concerned Russian citizens (1 437 persons) while only 8% Ukrainians, indicating that as a general rule, Ukrainian applicants are more likely to stay in Poland and wait until the completion of the protection procedure.

According to the annual reports on the procedure of granting protection to foreigners, published by the Office for Foreigners<sup>12</sup>, during the years: 2015, 2016 and 2017 there were no cases of application of the so-called exclusion clause, specified in Article 1F of the 1951 Refugee Convention. It should be mentioned that the circumstances resulting in exclusion from the possibility to use the benefits of the Convention have been directly indicated in the Act on granting protection to foreigners within the territory of the Republic of Poland (Act on Protection)<sup>13</sup>.

## SECURITY CHECKS UNDERTAKEN IN RELATION TO ASYLUM SEEKERS

Establishing the identity of the foreigner applying for protection is critical for the purposes of eliminating potential security threats during the protection/asylum process. Most applicants seeking protection in Poland are documented and enter the territory of the country legally, by presenting their application at the border (in most cases: Terespol border crossing between Poland and Belarus). In some cases, identify of the foreigner is disputable and thus certain steps need to be taken in order to establish it for the purposes of the procedure.

<sup>11</sup> Information of the Head of the Office for Foreigners (...) March 2016, available at:

<http://udsc.gov.pl/en/statystyki/raporty-okresowe/raport-roczny-ochrona-miedzynarodowa/2015-2/>

<sup>12</sup> Annual reports by the Office for Foreigners are published online: <https://udsc.gov.pl/en/statystyki/raporty-okresowe/raport-roczny-ochrona-miedzynarodowa/>

<sup>13</sup> See Article 19 sec 1 point 3, Act of 13 June 2003 on Granting Protection to Foreigners within the Territory of the Republic of Poland, Journal of Laws 2003, item 1176.

## The process of the identification and registration

The documents or copies of the documents issued by the country of origin of the foreigner are being taken into the consideration in the process of the identification of the foreigner. In case of the lack of any documented proof of the identity of the foreigner the border guard authority completes the data in the application based on the oral declaration of the foreigner. The identification of the foreigner on the first stages of procedure concerns the question of citizenship.

## The verification of authenticity of documents<sup>14</sup>

To define the identity and citizenship of the foreigner the Border Guard Authority may use the following methods: the contact with the diplomatic missions of the declared country of origin, contact with the Polish diplomatic representations in the declared country of origin, the verification in the databases (such as ZSE VI, Interpol, Eurodac, VIS database and in Pobył system). The prior identification includes also the language analysis (in case of using the new methods of identification). Hearing (interview) of the foreigner also represents one of the methods of the identification as well as questionnaires of the prior identification (applied for the cases of foreigners declaring to come from Syria, Iraq or Yemen). The participation of the foreigner in the identification process may be carried out by filling in the questionnaires with his identity documents information, submission of relevant statements, as well as contacting the family or relatives in the country of origin who can provide the foreigner with his identity documents. The foreigner may also take part in the interviews with consular representatives or experts. The foreigner is being informed only about the result of the identification procedure, but at the request of the foreigner the information about the type of the actions undertaken in the process of identification may be provided. The foreigner may question the findings of the border guard orally or in a written form.

The identity of the foreigner may be recognized as undefined due to the reasons dependent on the foreigner (for example lack of cooperation) or due to the independent reasons such as, for instance, lack of response from the embassy). It should be emphasized that Poland has not yet established a procedure for identification of statelessness and difficulties in establishing the foreigner's nationality are assessed on a case-by-case basis, without any uniform guidance. There are also no statutory deadlines for awaiting reply from the diplomatic missions, past which a foreigner should be determined to be stateless.

## Data collection and fingerprinting

During the submission of the application for protection the applicant is being a subject to the compulsory procedures such as photographing and taking the fingerprints of the applicant. The applicant may also become a subject to a detailed body check by the same sex representative of the border guard authority. This measure is applied in the cases justified by safety reasons and involves the examination of the body and checking the clothing, underwear and footwear, as well as items owned by that person<sup>15</sup>. Moreover, the border guard authority may initiate the medical examination and sanitary treatment of the applicant. The individual conversation with a foreigner may be carried out according to the EU Regulation No 604/2013.

## The application for the international protection in Poland

The application for the international protection in Poland consists of five parts. The first part includes questions concerning the identity of the applicant: name, surname, nationality, race (ethnicity), religion, personal description, country of origin and last places of residence, education, military service, work, spoken languages, marital status, family and other personal information. The second part is dedicated to the information concerning the departure from the country of origin: when, where and how did the applicant leave the country

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<sup>14</sup> The information above is based on the responses to the survey provided by the Halina Niec Legal Aid Center concerning the determination of the identity of the foreigner by the border guard services. The response was received on January 10<sup>th</sup> 2017.

<sup>15</sup> Art. 30 par. 4. Act on granting protection to foreigners on the territory of the Republic of Poland.

of origin and which documents did he/she use to cross the border. The third part of the application contains questions concerning health condition and violence suffered by the applicant and the persons on behalf of whom the applicant is acting. Among other questions the applicant has to describe his/her experience of physical violence and (or) psychological, including acts of sexual violence, violence caused by gender, sexual orientation or gender identity as well as has to describe the circumstances of the life or health - threatening event that has occurred to the applicant or the person on behalf of whom the applicant is acting. The fourth section is set to gather the reasons for applying for international protection by the applicant and the persons on behalf of whom the applicant is acting. The questions in this section concerns also the membership in the political or other organisations, the information about the detention and arrest of the applicant or applicant's family members in any country other than Republic of Poland. Finally, the last (fifth) section of the application asks for "other" information such as information about detention or arrest of the applicant or applicant's family members on the territory of Poland.

## Registration of the application and data storage

After the application is signed it is being registered in the register of cases of granting or withdrawing the international protection and of assistance provided to foreigners applying for international protection<sup>16</sup>. The access to the register is open to the Border Guard, to the Head of the Office for Foreigners and to the Refugee Council (an appeal body that reviews the decisions of the Head of the Office for Foreigners) to the extent of their competencies. The register gathers the following information: the information about lodged applications, issued decisions, administrative decisions and court judgments, identity certificates, residence cards and travel documents foreseen in the 1951 Refugee Convention, information whether the foreigner is an unaccompanied minor and biometric data on foreigners subject to the international protection proceedings as well as their personal data described in the art. 8 of the Act on Protection. Data and fingerprints of foreigners who lodged the application for the international protection are stored separately from the registers of data and fingerprints collected for other purposes. The Chief Commander of the Police provides the data processed in registers concerning the foreigners who applied for the international protection to the Border Guard authorities, police authorities; the prosecutor, the Head of the Internal Security Agency, the Head of the Office for Foreigners, to the Polish Refugee Council. The fingerprints data of the foreigner who applied for the international protection is also registered in the Eurodac system according to the EU Regulation No 603/2013.

## THE SECURITY CHECKS ON THE PRE-DECISION STAGE

During the 48 hour period the application for protection is being forwarded to the Head of the Office of Foreigners for further steps in a procedure of granting of the international protection on the territory of Poland. According to the art. 45 of the Act on Protection the security checks of the foreigner are also being carried out at the stage of the decision-making process about whether to grant the international protection to the foreigner. Before the decision about the international protection is issued, the body which is conducting the procedure (Office for Foreigners in the 1<sup>st</sup> instance and Refugee Council in the second instance) addresses the commander of the Border Guard, Head of the Internal Security Agency, and if necessary - also other agencies asking to provide information on the applicant. The requested information is aimed to find out if the applicant may constitute a threat to the security of the state or society. The request concerns also the circumstances under which the applicant may be denied the international protection on the territory of Poland (exclusion clauses). These circumstances include: the initiation or taking part in the commitment of crimes or acts against peace, war crimes, crimes against humanity, in acts contrary to the principles of the United Nations set in the art. 1 or 2 of the Preamble of the United Nations Charter, other crimes committed on the territory of Poland or on the territory of other countries or the circumstances allowing to prove that the application was lodged only to avoid the punishment for the crime committed in another country<sup>17</sup>.

<sup>16</sup> art. 119 para 1 of the Act on Protection.

<sup>17</sup> Art. 19 para. 1 point 3. , Art. 19 para 2, art. 20 para 1 point 2, 3 of the Act on Protection.

State bodies which have received such request have 30 days to respond and may prolong this term up to 3 months in the special cases. In case of the lack of such response during the aforementioned time period it is presumed that the requirement to obtain the information have been met.

It should be noted also that if there were grounds to believe that the foreigner constitutes a threat to national security or public order, or for this reason he was expelled in the past from the territory of Poland an application for international protection may be examined in accelerated manner. This means that the decision about the international protection shall be issued within 30 days and there are only 7 days to appeal the negative decision<sup>18</sup>.

## THE SECURITY CHECKS DURING THE RELOCATION, RESETTLEMENT AND RETURN PROCEDURES

The verification of the identity of the foreigner is also carried out under the art. 86f of the Act on Protection. The procedure described in the article concerns the foreigners who are the subject to relocation to Poland. The identity of the foreigners is being checked in the context of security matters and are aimed to confirm whether their entry or stay will pose a threat to the defence, security or public safety and order of the state.

The security checks are being carried out by the relevant departments of the Border Guard, Police, Internal Security Agency or other state bodies on the request of the Office for Foreigners. According to the art. 86f of the Act on Protection these agencies have 45 days to respond (with the possibility of prolongation for another 14 days). The information received is taken into consideration in the process of decision-making whether the foreigner shall be accepted or denied the relocation or resettlement on the territory of Republic of Poland.

According to the amendment of the Act on Protection (20<sup>th</sup> of May 2016) the Head of Office for Foreigners is obliged to take into consideration the concerns of every state agency, competent to carry out the security checks concerning foreigners in Poland<sup>19</sup>. In case at least one state agency informs the Office for Foreigners that the foreigner may constitute the danger to the national defence and security or to the public order, the Office for Foreigners issues a decision according to which the foreigner is not qualified for the relocation or resettlement on the territory of Poland.

In the situation of the negative decision the Head of the Office for Foreigners informs about the decision the competent authority of the state from which the relocation or resettlement of the foreigner was to be performed. Therefore, it should be noted, that the possibility of relocation or resettlement is only possible after the positive opinions of all state bodies listed in the art. 86f, otherwise it will not be possible to obtain the international protection on the territory of Poland.

Due to the fact that Poland does not have a practice of publishing asylum-related decisions, and only selected court decisions are published in publicly accessible online databases, researching relevant jurisprudence is extremely challenging. Another difficulty in collecting reliable data and comparing court practice is the scarcity of decisions explicitly quoting security reasons in their justification.

What is more, article 5 of the Act on Protection allows for refraining from justifying of a decision issued in asylum proceedings, due to reasons of state security or defence or justified by the public security or public order. As a consequence, decisions denying international protection as falling within the scope of article 1F of the Refugee Convention would often also be encompassed by the operation of this waiver. It should of course be noted that this is not an automatic correlation – there may be cases where there are grounds for applying the exclusion clause, but where no additional security risks allowing for refraining from justification are valid.

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<sup>18</sup> Art. 39 para 5).

<sup>19</sup> Jakub Skiba, Odpowiedź na zapytanie nr 499 w sprawie dyrektywy unijnej 2004/83/WE z dnia 29 kwietnia 2004 r., dyrektywy Rady 2005/85/WE z dnia 1 grudnia 2005 r. i wyroku Trybunału Sprawiedliwości UE z dnia 2 grudnia 2014 r. w sprawach połączonych od C 148/13 do C 150/13, A (C 148/13), B (C 149/13), C (C 150/13). Warszawa, 08/08/2016. Available at: <http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=18BC39A1> (20.07.2018).

It should be also mentioned that refraining from justifying the decision is allowed under the general principles of administrative procedure in Poland. Articles 9, 10 and 73 of the Code of Administrative Procedure establish respectively the principles of the rule of law and public proceedings, and the right of a party to proceedings to have access to a case file. Article 74 of that Code sets out an exception to the rule regarding the right of a party to proceedings to have access to a case file by providing that a decision shall be issued to restrict the access of a party to a case file containing secret or top secret information. Such a decision is open to an interlocutory appeal. The Code of Administrative Procedure applies to procedure on granting international protection to foreigners in Poland, as a *lex generalis*, while the Act on Granting Protection regulates the protection procedure in detail, as *lex specialis*.

The lack of a written justification is one of the most problematic aspects of implementing security measures into the asylum process. The right to a fair trial and the right to legal remedy are under threat where the asylum applicant cannot learn the reasoning of the decision denying him protection. Issuing a decision based on classified information provided for example by the Internal Security Agency, renders the related case file classified as well, which results in a practical impossibility of formulating a well founded appeal and benefiting from the statutory right to a two-instance administrative procedure as well as the possibility of further judicial revision.

One of the best-known cases of denying asylum due to security concerns in Poland was the case of an Iraqi national, excluded from refugee protection.

31-year old Ameer Alkhawlany, a Jagiellonian University PhD student, has been apprehended by the Border Guard in October 2016. During that time he was staying legally in Poland, due to his studies. Following an application of the ABW (Internal Security Agency), hinting that he poses a danger to Polish state security, he has been immediately placed in detention (a guarded center for foreigners in Przemysl). While in detention, having consulted with his lawyer as well as Helsinki Foundation for Human Rights and the Halina Niec Legal Aid Center, Ameer filed an application for asylum but it was rejected both by the first instance authority and later by the appeal body (Refugee Council), quoting exclusion clauses as the reasons for such a decision. Both decisions were grounded on classified information provided by the Internal Security Agency and thus were issued without a written justification.

After 6 months of detention the court in Przemysl decided the grounds to keep Ameer in detention are no longer valid but he was never released as the Border Guard organized a swift deportation process, following his final negative decision in the refugee procedure. Throughout the process Ameer contested the charges of posing a threat to the state security and held that his deportation was in fact a way of punishing him for disagreeing to cooperate with Polish Internal Security Agency. Polish authorities have consistently maintained that Ameer has been excluded from protection due to the application of article 1F(c) (has been guilty of acts contrary to the purposes and principles of the United Nations) and posing a threat to the state security and society while media reports covering this case indicated that Ameer may have concealed his contacts with radicalized friends living in the western Europe.

During the judicial review of the asylum process, the administrative court dismissed motions made by the Helsinki Foundation and the Polish Ombudsman who requested submitting a question to the European Court of Justice. These motions were asking for a preliminary ruling concerning the conformity of Polish legal order with the relevant EU laws regarding the access of the applicant to classified information based on which his decision was made. The Polish administrative court decided that national legislation fulfills the EU standard in relation to legal remedies within asylum procedure and thus there are no grounds for requesting a preliminary ruling from the ECJ.

The case of Ameer is indicative of the Polish practice. Wherever reasons of state security arise, the applicant is in fact stripped off his right to an effective remedy during the adherent asylum and/or return proceedings, the justification not provided and case-files classified.

Several ECtHR decisions, including *Lupsa v. Romania*<sup>20</sup>, *C.G. and others v. Bulgaria*<sup>21</sup> provide useful guidance on the standard of court proceedings where the decision concerning a foreigners is quoting the reasons for state security and refrains from a detailed justification. These judgments indicate that the foreigner should have access to his case file in order to prepare his appeal and benefit from the right to effective remedy and the right to fair trial. Some form of adversarial proceeding should be also involved in the decision making process to allow the applicant to challenge the allegations. According to the ECtHR, this goal may be reached for example by establishing a legal plenipotentiary who would have access to the classified case file. The same rationale of the need to secure the procedural rights of the applicant is behind the formulation of article 23 of the EU Asylum Procedures Directive which determines the scope of legal assistance and representation.

The article stipulates that a legal adviser who assists or represents the applicant during the asylum procedure, shall enjoy access to the information in the applicant's file. Member States may however make an exception where:

*“disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised”*

In such cases, the file should nevertheless be made accessible to the relevant decision making and appeal bodies but the Directive also imposes an explicit obligation on the authorities to establish national procedures guaranteeing that the applicant's rights of defence are respected, and goes on to explain that member states may, in particular, grant access to such classified information which is relevant in the asylum process to a legal adviser or counsellor who has undergone a security check.

In the relevant caselaw of the Polish administrative courts, which are competent for the judicial review of both the administrative protection procedure and the return procedure, the adopted reasoning is similar to that of the *Alkhwalyani* case.

When the fact that the foreigner is posing a threat to state security is established, the court goes on to accept that applicable procedural guarantees, as prescribed by Polish law have been provided, as there are no special formal requirements for the submission of an appeal (pending the administrative procedure) or the judicial review court complaint (when the administrative procedure is completed). According to the Law on proceedings before administrative courts<sup>22</sup> the court is not bound by the scope of the submitted claim and thus can freely examine the entirety of the case file, which in itself fulfills the requirement of adequate fair trial safeguards. Therefore, even if the foreigner files a request for judicial review without a detailed reasoning referring to the findings concerning the alleged security threat, the case will still be examined by the court in its entirety, including the parts which were rendered classified.

In the case of a PHD student from Iraq<sup>23</sup>, already quoted above, the lawyers representing Mr Ameer, relied additionally on article 23 sec. 1 of the EU Procedural Directive, which explicitly spells out the obligation of Member States to establish national procedures guaranteeing that the applicant's rights of defence, in particular by granting access to classified files to legal advisors with a security clearance.

During the hearing before the Regional Administrative Court, the Court stated that within the framework of Polish law, such a role is fulfilled by Ombudsman who holds the right of access to the court files, thus exhausting the standard of the Directive. The Ombudsman representatives, participating in the hearing did not

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<sup>20</sup> *Lupsa v. Romania*, 10337/04, Council of Europe: European Court of Human Rights, 8 June 2006, available at: <http://www.refworld.org/cases,ECHR,468cbca00.html>

<sup>21</sup> *C.G. and Others v. Bulgaria*, Appl. no. 1365/07, Council of Europe: European Court of Human Rights, 24 April 2008, available at: <http://www.refworld.org/cases,ECHR,48215e422.html>

<sup>22</sup> Act of 30 August 2002 – the Act on proceedings before administrative courts, Journal of Laws 153, item 1270

<sup>23</sup> Case call: IV SA/Wa 1612/17, the court decision is unpublished but it was reported on the Helsinki Foundation for Human Rights website: <http://www.hfhr.pl/wsa-oddalil-skarge-ameera-alkhwalynyego-ktoremu-odmowiono-ochrony-miedzynarodowej-w-polsce/>



## SECURITY CONSIDERATIONS DURING THE ASYLUM DECISION MAKING PROCESS

Assessing security considerations during the procedure on granting international protection in Poland is determined by the wording of article 1F of the Convention relating to the status of refugees (exclusion clauses), the relevant articles stipulated in the EU Qualification Directive and the corresponding articles of the Polish Act on granting protection.

The basic exclusion rule (article 19 sec 1 point 3 of the Act on Protection), enumerates three categories of applicants who cannot be granted refugee protection. Exclusion applies when there are serious reasons for considering that the applicant has committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside the country of refuge or has been guilty of acts contrary to the purposes and principles of the United Nations.

There is a certain discrepancy between the scope of exclusion as phrased by the Polish law and the EU legislation. While the Qualification Directive mentions serious non-political crimes committed outside the country of refuge prior to the applicant's admission as a refugee, understood as the time issuing a residence permit based on the granting of refugee status; the Act on Protection talks of such crimes, committed prior to applicant's arrival on that territory (which sets an earlier time limit). The indicated timeline is thus different. The wording adopted by the Polish act is in fact closer to the original standard set out by the 1951 Refugee Convention.<sup>28</sup>

Similar grounds are applied to exclude applicants from benefiting from subsidiary protection (article 20 sec 1 point 2 of the Act on Protection). A foreigner will not be eligible for such protection in case he has committed a crime against peace, a war crime, a crime against humanity or has been guilty of acts contrary to the purposes and principles of the United Nations, which repeats the wording of exclusion in relation to asylum seekers. In addition to these two clauses, subsidiary protection will not be granted in two situations not mentioned in the refugee clause:

- 1) to persons who have committed a crime on the Polish territory or a deed outside this territory, that is qualified as a crime under Polish law (there is no additional reference to the political or non-political character of the crime and no time limitation)
- 2) when the foreigner poses a threat to the state security or to the community of the state

These additional grounds are in line with the provision of article 17 of the EU Qualification Directive and are especially important for maintaining a high security threshold within the framework of protection. It should be emphasized however that these grounds may never be applied to exclude asylum seekers, who qualify for refugee status.

The revocation of granted protection refers to the same grounds as in the case of exclusion during the protection procedure. The grounds for exclusion from subsidiary status are applicable accordingly as grounds for revocation of subsidiary protection<sup>29</sup>. In the case of refugee status however, the clause on serious non-political crime is omitted, as its operation it is limited by the clause's wording (crime committed prior to applicant's arrival on that territory).<sup>30</sup>

Interestingly, Polish provisions are more favourable in this respect than the corresponding article 14 of the EU Qualification Directive which allows for the revocation of refugee status also in case the foreigner is regarded as a danger to the security of state or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the state.

The article goes on to stipulate that in such situations, the state may decide not to grant status to a refugee, if a decision in this regard is still pending, thus creating an additional exclusion clause, contrary to the standard established by the 1951 Refugee Convention.

<sup>28</sup> Article 1F of the 1951 Refugee Convention uses the phrase: „prior to his admission to that country as a refugee”.

<sup>29</sup> Article 22 sec 1 point of the Act on Protection.

<sup>30</sup> Article 21 sec 1 point 7 and 8 of the Act on Protection.

A statistical analysis has shown that the application of exclusion clauses in Poland in the timeframe under study has been extremely rare. Annual reports of the Office for Foreigners indicate that there were no such cases recorded in 2015 and 2016.

In contrary to previous years, in 2017 the application of a 1F exclusion clause was recorded in relation to 1 national of Libya. The decision of the first instance authority was repealed by the Refugee Council, returned for motion and is currently pending.<sup>31</sup> As there is no practice of publishing administrative decisions in Poland, the detailed reasoning and arguments invoked in this case are unknown.

The exclusion clause (due to safety of state or society) was applied also in 1 case of subsidiary protection – of the national of the Russian Federation. Upon examining the appeal, the Refugee Council repealed the decision of the first instance authority and granted the refugee status to the foreigner. The reasoning of these decisions have not been published.

The annual reports of the Office for Foreigners do not include cases where security grounds have been invoked after the protection (asylum or subsidiary protection) procedure has been completed.

## THE APPLICATION OF EXCEPTIONS FROM THE NON-REFOULEMENT PRINCIPLE (ART. 33(2) OF THE 1951 REFUGEE CONVENTION)

Polish law has not explicitly adopted the non-refoulement principle as spelled out in the article 33 of the 1951 Convention, into its national legislation. Even though the Act on Protection echoes the wording of article 1 of the Convention defining the term “refugee”, including also passages from the EU Qualification Directive, the non-refoulement principle has not been translated into domestic legislation. Without a doubt, article 33 is still binding in Poland by virtue of direct applicability of international treaties, as spelled out in the Polish Constitution. Nevertheless the silence of the Act on granting protection on the scope and procedural application of the non-refoulement may seem puzzling.

The only indication of the security risks valid in relation to persons qualifying for protection is included in article 109 which pertains to temporary protection. This article reads that the Head of Office for Foreigners may refuse to grant such protection to a foreigners in relation to whom there are reasonable grounds to believe that he has committed a crime against peace, a war crime, a crime against humanity, serious non-political crime, prior to entry into Poland, has committed acts contrary to aims and principles of the United Nations. This part of the article thus follows the list from article 1F and the exclusion clauses, but then goes on to add another two conditions which reflect the sense of the second paragraph of article 33 of the Convention (exceptions from the non-refoulement principle). Temporary protection may be denied to a foreigner whose stay in Poland could pose a threat to the state security or who, having been convicted by a final judgment for a crime which character indicates that his further stay in Poland could become a threat to the citizens.

## EXTRADITION

The Act on granting protection which lays down the rules of asylum procedure as well as the conditions for affording subsidiary protection in Poland does not make any reference to extradition of foreigners pending the procedure. No such references are included in the Act on Foreigners, either. The legal framework concerning extradition is grounded in the relevant articles of the Polish Constitution, Polish Code of Criminal Procedure

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<sup>31</sup> Information of the Head of the Office for Foreigners on implementation of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland (uniform text in Journal of Law of 2016, item 1836) in the scope of performing the obligations of the Republic of Poland under the Geneva Convention Relating to the Status of Refugees and the New York Protocol Relating to the Status of Refugees in 2017, Warsaw, March 2018.

and the text of bilateral agreements on legal assistance and cooperation in criminal matters concluded between Poland and various states.

Polish Constitution<sup>32</sup> spells out the general guarantees concerning extradition in article 55 according to which the extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens. This provision thus also applies to foreigners, including asylum seekers. According to the constitutional standard, the admissibility of extradition is to be decided by a competent court.

According to article 604 of the Polish Code of Criminal Procedure, extradition is inadmissible, inter alia in the following cases:

- 1) the person to whom such a motion refers has been granted the right of asylum in the Republic of Poland
- 2) there is a well-founded fear that that person may be sentenced to death or that death penalty may be executed in the requesting state
- 3) there is a well-founded fear that that person's rights and freedoms may be infringed upon extradition to that state
- 4) the extradition request concerns a person persecuted for a political crime, committed without the use of force
- 5) the extradition would contravene Polish law

Bilateral agreements laying down the rules of legal assistance and legal relations in criminal matters concluded between Poland and other states, usually include a reservation stating inadmissibility of extradition if it would be in breach of Polish law. This is a general term which however has a broad application, operating as an exemption used mostly in relation to instances concerning extradition of persons accused of political or military crimes. This reservation also implies that other legal obligations of Poland may limit the possibility of carrying out the extradition procedure, especially when a risk to human rights is involved.

In an important judgment issued in relation to this limitation<sup>33</sup>, the Polish Appeal Court in Wrocław ruled that article 33(1) of the Geneva Convention regarding the institutions of deportation and expulsion also applies to the institution of extradition. The Court reiterated that article 33(1) prohibits the expulsion of a foreigner who has been granted refugee status unless he is deprived of that status. The Court observed that the principle of non-refoulement stemming from this article as well as the entirety of the 1951 Refugee Convention is part of the Polish law, due to the scope of article 87 sec 1 and article 91 of the Polish Constitution which list ratified international agreements among the sources of universally binding law of Poland and state that such agreements/conventions constitute part of the domestic legal order and are to be applied directly.

An important outcome of this judgment is the confirmation of direct applicability of the non-refoulement principle within the framework of Polish law, and reiteration of its impact on extradition proceedings. Consequently, the Court decided that extradition of refugees to their country of origin is legally inadmissible.

Although the relevant articles of the Criminal Procedure Code do not explicitly mention granting refugee status as a legal obstacle to extradition and only refer to persons granted the right of asylum (understood as the Polish national form of protection – the so called political asylum, not to be confused with international protection afforded in the form of refugee status), it can be concluded that extradition is in principle impossible in relation to asylum seekers and recognized refugees if it would be equivalent to exposing them to a threat to the right to life or other rights and freedoms in the requesting country.

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<sup>32</sup> The Constitution of the Republic of Poland, 2<sup>nd</sup> April 1997, Journal of Laws No. 78, item 483.

<sup>33</sup> Case call: II Akz 508/04

## NATIONAL ANTI-TERRORIST LEGISLATION

In 2016, shortly before hosting two high profile international events: the NATO summit and the World Youth Day with a visit of the Pope Francis, Polish Parliament adopted anti-terrorist legislation.

The Act of 10 June 2016 on anti-terrorist activities introduced important changes into a wide range of acts, including the Act on Foreigners. Notably, the new law gave the state security service the right to conduct surveillance of foreign citizens for up to three months without prior court approval and allowed for suspects to be held for 14 days without charges but with court approval, expanding the current period of 48 hours a suspect can be held without charges. The regulation also established a faster track of deportation of foreigners considered as a threat to state security and introduced an obligation to register the pre-paid phone cards. According to the new rules, the request to issue a return order<sup>34</sup> may be also filed by the Head of the Army Counter-Intelligence Service, Head of the Army Intelligence<sup>35</sup>. The new law thus broadened the existing scope of agencies entitled to file such a request while maintaining the competence of the Border Guard regarding the issuance of decision.

Even before this new act was adopted, the act on foreigners specified that a return order should be issued if it was justified by national security or defence, the protection of public order and safety or the interests of the Republic of Poland<sup>36</sup>, (Article 302 sec 1 point 9). The anti-terrorist amendment to the Foreigner's Act added a new ground for ordering return, article 329a, which states, that the Minister competent for internal affairs, upon an application from the Commander in Chief of the Police, Head of the Internal Security Agency or Head of the Army Counter-Intelligence Service, issues a decision obliging a foreigner to return with respect to a foreigner who is feared to be involved in terrorist or espionage activities, or who is suspected of committing one of these offences.

Importantly, a return decision made on the basis of this provision is subject to immediate execution. It should be emphasized that the antiterrorist legislation has not amended the Act on granting protection to Poland, and the asylum procedure takes precedence to any procedures related to migration control. Pending the first asylum procedure, the foreigner is protected from deportation by virtue of the non-refoulement principle and in case a return order has been issued prior to filing the application for granting international protection, its execution is suspended for the duration of the protection proceedings.

If any security concerns arise in relation to a foreigner seeking protection in Poland, they are considered exclusively in relation to the application of the exclusion clauses. It should be reiterated that Poland adopts the so called uniform procedure, meaning that an application for protection is assessed in relation to grounds for granting refugee status (first) and grounds for subsidiary protection (when conditions for refugee status are not fulfilled). Although a threat to security is not a basis for excluding refugee status, if this status is not afforded, a security threat may lead to exclusion from subsidiary protection.

## THE USE OF DETENTION

As a rule, asylum seekers are not placed in detention, unless explicitly enumerated circumstances arise. Even so, the alternatives to detention should always be considered<sup>37</sup>. The reasons for applying detention in asylum proceedings include the following<sup>38</sup>:

- 1) if there is a need to establish the identity of the applicant
- 2) if there is a considerable risk of absconding and there is a need to ensure the collecting of information upon which the asylum application is based, and which could not otherwise be collected

<sup>34</sup> The return order is issued by the competent Border Guard unit.

<sup>35</sup> Article 310 of the Act on Foreigners.

<sup>36</sup> Article 302 sec 1 point 9) of the Act on Foreigners.

<sup>37</sup> Article 88 of the Act on Protection.

<sup>38</sup> Article 87 of the Act on Protection.

- 3) in order to issue or carry out a return order, provided that the applicant had a chance to apply for asylum before and there are reasonable grounds to suspect that his application has only been made to frustrate the return process
- 4) in case where there are grounds to presume that they may constitute a threat to the security of the state or safety and public order
- 5) pending a Dublin procedure, if immediate transfer to the responsible Member State is impossible and there is a considerable risk of absconding

A foreigner may be placed in detention only upon a competent court order, following a relevant request made by the Border Guard. If such an order is issued, the foreigner will be placed in one of six guarded centers which serve as administrative detention facilities. If, however, the foreigner does not follow the rules of the center, he may be relocated to the so called arrest for foreigners, with a much stricter, prison-like regime. In such detention facilities both asylum seekers and irregular migrants can be placed. The latter can also apply for the refugee status while in detention – through the Border Guard in the detention facility.

Security reasons may be used to justify detention of asylum seekers. If there are certain grounds to believe that the foreigner seeking protection in Poland, may constitute a threat to the state security or to the safety and public order, the competent court may place such an applicant in detention. The length and the rules of detention applied on the basis of this provision are the same as in case of other enumerated situations. Practice shows that this ground is almost never used in the court reasoning of detention orders, it is impossible however to provide any meaningful statistics, as court decisions in this respect are not published.

## LEGAL AID

A 2015 amendment to the Act on granting protection established a state sponsored legal aid system directed to asylum seekers. This system is formally operational since January 2016 but in practice it is still not full-fledged and it remains to be seen whether it can effectively ensure assistance to all those in need.

According to these new provisions asylum seekers are entitled to legal assistance and advice at the administrative level from NGO legal counsels and from lawyers hired by state. At the judiciary level the courts usually accept requests for free legal assistance and *ex officio* lawyers are appointed by the Bar Associations.

As this system is limited to the appeal stage specialized Polish legal-providing NGOs are of the opinion that their services are still necessary. In practice a prevailing majority of asylum seekers prefers to turn to NGO lawyers rather than corporate lawyers who usually lack any training in the field of refugee law.

Simultaneously to these developments the accessibility of free legal assistance in Poland has noticeably decreased in the course of recent years. The overall number of NGO-based lawyers rendering free legal assistance to asylum seekers has dropped, as has the number of visits to detention centers. These limitations are the direct effect of the suspension of distribution of the AMIF fund and dire financial situation of many refugee-assisting NGOs in Poland. The last call for AMIF projects directed to asylum seekers and refugees has been announced in May 2016. The planned projects were supposed to start their implementation in September 2016. After months of waiting and postponing the announcement of the call results it has been unofficially communicated that the AMIF funds for refugee aid, including legal assistance, will not be further distributed, causing many NGOs to scale down their operations.

## CONCLUSIONS AND RECOMMENDATIONS

- ✓ The applicant seeking protection in Poland and/ or his/ her legal representative should be informed at least about the substance of the “accusations” against the applicant regarding alleged security threat in order to be able to defend his/ her rights in accordance with the fair trial and effective remedy standards
- ✓ Article 23 of the EU Asylum Procedures Directive should be carefully transposed into Polish Act on Protection, including the safeguards concerning access to classified information which is relevant in the asylum process to a legal adviser or counsellor who has undergone a security check.

- ✓ The principle of *non-refoulement* should be incorporated into the Act on Protection
- ✓ Detention of asylum seekers should only be applied as a measure of last resort, only after alternative measures have been considered.
- ✓ All court decisions should be published online in order to provide a better transparency and understanding of the court jurisprudence
- ✓ Identification procedure of asylum seekers should adopt rules and deadlines concerning the determination of nationality and include clear guidance on assessment of statelessness
- ✓ Article 604 of the Polish Code of Criminal Procedure determining the inadmissibility of extradition should be amended so as to include asylum seekers, refugees and persons granted subsidiary protection.

# SLOVAKIA

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## OVERVIEW OF THE NATIONAL ASYLUM PROCEDURE

Asylum procedure in Slovakia is regulated by an Asylum Act<sup>39</sup>. As the vast majority of asylum seekers arrive to Slovakia without a visa or residence permit necessary for an official entry into the territory, for the initial proceedings with such foreigners (prior to submitting asylum application)<sup>40</sup> the provisions of other legal acts are applied, especially Foreigners Act<sup>41</sup> and Act on the Police Force<sup>42</sup>. Asylum procedure is an administrative procedure, therefore an Administrative Procedure Code<sup>43</sup> applies as *lex generalis*, and an appellate judicial procedure is regulated by an Act on Administrative Judicial Procedure<sup>44</sup>.

Asylum procedure starts with a foreigner's submission of asylum application (so-called "statement") done at the competent police department. Foreigner can lodge his/her asylum application at the specialized police department ("Asylum Department of Police Force") in Humenné, in the transit area of the international airport (Bratislava, Košice or Poprad) and in other specified places, e. g. in case of detained foreigners in the detention centre for foreigners (Medveďov or Sečovce)<sup>45</sup>. There is no time limitation set in Asylum Act for lodging an application<sup>46</sup>. First two - three weeks after lodging an asylum application a foreigner is placed in the Reception Centre in Humenné in order to undergo obligatory entrance medical examination<sup>47</sup>. Here also an asylum interview with an officer of the Migration Office of the Ministry of Interior is usually conducted (hereinafter "Migration Office"). Once this "quarantine" is completed, asylum seeker is moved to one of the two opened accommodation centers – in Rohovce (men) or in Opatovská Nová Ves (women, families with children, or other

<sup>39</sup> Act. No. 480/2002 Coll. on Asylum and on the Changes and Amendments of Some Legal Acts - regulates asylum procedure and the procedure for granting temporary shelter, stipulates the powers of public authorities in the area of asylum, provides for the rights and obligations of asylum seekers and regulates the integration of persons granted asylum and subsidiary protection.

<sup>40</sup> Such as providing explanation on the illegal crossing of the border or for an illegal stay, finger printing, verifying of the identity, age assessment, etc. for these purposes a foreigner may be brought to the responsible police department of the border and foreign police.

<sup>41</sup> Act No. 404/2011 Coll. on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners (third country nationals and EU citizens), provides for their rights and obligations as well sanctions for their violations, and stipulates procedures on administrative deportation and detention.

<sup>42</sup> Act No. 171/1993 Coll. on the Police Force regulates the obligations, powers and operational instruments of the police officer and the police force, including an authority of the police officer to demand explanation from a person that is likely to assist in clarification of facts important for the detection of a criminal act or offence and its perpetrator (e.g. in case of third country nationals e.g. an offence of illegal entry or illegal stay on the territory), to demand proof of identity, as well as an authority to detain.

<sup>43</sup> Act No. 71/1967 Coll. on the Administrative Procedure.

<sup>44</sup> Act No. 162/2015 Coll.

<sup>45</sup> In accordance with § 3 of the Asylum Act competent entity to receive asylum application is also police department according to the location of the health care facility in case of a foreigner being provided with institutional health care, police department according to the location of the prison or custody facility in case of a foreigner being imprisoned or in custody, and police department according to the location of the facility for social and legal protection of minors in case of unaccompanied minors.

<sup>46</sup> According to § 12 (2) a) of the Asylum Act "The Ministry rejects asylum application as manifestly unfounded, if an asylum seeker entered the territory of Slovakia illegally and without a serious reason did not submit its asylum application immediately after its entry".

<sup>47</sup> Based on § 23 (3) b) and c) an asylum seeker is obliged to undergo medical examination in the Reception Centre, which takes place without delay after the placement in this centre, and he/ she is obliged to remain in the centre until the result of such examination is known.

vulnerable groups), where he/she stays for the rest of the asylum procedure<sup>48</sup>. Migration Office is responsible for examining the asylum application within 6 months from the date of lodging the application<sup>49</sup>. Possible outcomes of the asylum procedure are the following: 1) decision on granting asylum<sup>50</sup>, 2) decision on granting subsidiary protection<sup>51</sup>, 3) decision on rejecting both asylum and subsidiary protection, 4) decision rejecting application as inadmissible<sup>52</sup>, 5) decision rejecting application as manifestly unfounded<sup>53</sup>, 6) decision on the cessation of procedure<sup>54</sup>.

If the decision of the Migration Office is negative, asylum seeker has an option to submit a legal remedy in the form of an administrative complaint to the Regional Court (in Bratislava or in Košice)<sup>55</sup>. The remedy in general has a suspensive effect; however there are decisions when the remedy does not have an automatic suspensive effect (only if granted by the judge upon request)<sup>56</sup>. The Regional Court has 90 days to decide on a remedy. In case the Regional Court confirms the decision of the Migration Office, the applicant can appeal the decision of the Regional Court to the Supreme Court of the Slovak Republic, which has 60 days to issue a decision (in general without an oral hearing). The Supreme Court's decision is final. In case of positive judicial decision both Regional and Supreme courts can only return the case back to Migration Office for further procedure. Based on the Slovak law courts cannot grant protection to asylum seekers themselves<sup>57</sup>.

Numbers of asylum seekers have constant decreasing tendency in Slovakia. With an absolute maximum of asylum applications per year in 2004 when Slovakia entered the EU (11395 applications), dropping down rapidly in 2005 (to 3549) and since then gradually going down (despite the increased numbers of asylum seekers across the Europe). The statistics of Migration Office<sup>58</sup> say that in 2015 there were 330 asylum applications filed (59 of them were repeated), in 2016 there were 146 applications filed (47 of them were repeated) and in 2017 there were 166 applications (13 of them were repeated). The most represented nationalities in the past three years were from Iraq, Afghanistan, Ukraine, Pakistan, Syria and Vietnam.

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<sup>48</sup> If the asylum seeker has sufficient resources, or if a state citizen of Slovakia provides him/her with accommodation, he/she can seek long-term permission to reside outside the asylum centre for the duration of the asylum procedure.

<sup>49</sup> In accordance with § 20 (1) of the Asylum Act, this period can be prolonged, also repeatedly, for another 9 months in case this is necessary for examining complicated factual or legal questions, or if a high number of asylum seekers submits asylum application at the same time (the law does not specify what is "high number") or if an asylum seeker is not cooperative or otherwise hinders the asylum procedure.

<sup>50</sup> Asylum in Slovakia can be granted for the reasons as stated in the 1951 Convention, for the exercise of political rights and freedoms (Constitutional asylum), for the reasons of family reunification, and on humanitarian grounds (however these grounds are not specified in the Asylum Act, and it is up to the discretionary power of the Migration Office to consider concrete case as humanitarian).

<sup>51</sup> In case Migration Office concludes the conditions for asylum have not been completed, they are obliged to examine whether the conditions for granting subsidiary protection are fulfilled. Asylum is granted for unlimited period of time (permanent residence with the possibility to apply for Slovak citizenship in 4 years). Subsidiary protection is granted for 1 year and can be extended (based on the request) repeatedly (always for 2 years) – foreigner with subsidiary protection is granted temporary residence permit with a possibility to apply for long-term residence in 5 years time.

<sup>52</sup> According to § 11 of the Asylum Act this applies e.g. in case another state is responsible (so-called "Dublin cases"), in case a foreigner was granted asylum by another country, he/she comes from safe third country.

<sup>53</sup> According to § 12 this applies e.g. to cases when foreigner claims asylum for reasons other than asylum reasons, but also in cases when he/she constitutes a danger for the safety of the Slovak Republic or a danger for the society.

<sup>54</sup> According to § 19 this applies e.g. in case of *res iudicata* (when a final decision has already been issued in the previous asylum procedure and the facts of the case did not substantially change); it also applies in case the asylum seeker leaves the territory of Slovakia or does not appear in or return to the asylum facility (without a permission) in the time period prescribed by Asylum Act.

<sup>55</sup> In cases when the procedure is ceased, the applicant may challenge this kind of decision by lodging a complaint (so-called "remonstrance") to the Minister of Interior.

<sup>56</sup> This could be, for example, the decision on the inadmissibility of the asylum application because another Member State is responsible for examining the asylum application (Dublin procedure) which does not have an automatic suspensive effect.

<sup>57</sup> This sometimes leads to cyclic delays, when in the same case there are several positive court decisions, but the Migration Office keeps issuing negative decisions. In recent asylum case concerning an asylum seeker from Iran (who applied for asylum in 2010 and his case is currently at the Supreme Court for the 4th time) Supreme Court, based on his attorney's request, submitted a preliminary ruling question to the Court of Justice of the European Union asking whether article 46 (3) of the Procedural Directive (No. 2013/32/EU) should be understood in a way that national court should have a right to grant international protection (response of the CJEU is pending).

<sup>58</sup> Available on the Migration office website: <https://www.minv.sk/?statistiky-20>

Recognition rate remains low<sup>59</sup>, and most asylum procedures are ceased because the asylum seekers left asylum facility without a permission, which confirms the status of Slovakia as a transit country. People coming from war-torn countries usually receive subsidiary protection.

Migration Office does not officially publish statistical data that would provide information about negative decisions based on security reasons. We have requested such statistics for the purpose of this research and Migration Office provided us with available data from 2010 till 2018. It says that the exclusion clause in relation to asylum protection was used the last time in 2010. In 2011 and 2012 there were four decisions on non-granting subsidiary protection because the applicant represented a danger to the security of the Slovak Republic. In 2016 there were two decisions on non-granting subsidiary protection because the applicant represented a danger to society. In 2010 and 2011 together seven beneficiaries of subsidiary protection got their protection cancelled due to the security reasons. According to the data provided by the Migration Office, out of these decisions, only 4 did not include any reasoning.

## SECURITY CHECKS UNDERTAKEN IN RELATION TO ASYLUM SEEKERS

### SECURITY CONSIDERATIONS CARRIED OUT DURING THE SUBMISSION OF ASYLUM CLAIMS:

Asylum procedure starts with a foreigner's submission of asylum application done at the competent police department. This police department should carry out a short interview with asylum seeker which focuses on personal information, possession of identity documents, route of travel to Slovakia, disposal of financial means, brief description of asylum reasons.<sup>60</sup> When asylum seeker has identity documents, those are retained until the end of the asylum procedure. During this time the process of verification of their authenticity is carried out by the Police department of analysis of travel documents in Bratislava. After this evaluation, the retained documents are placed in the deposit of the Detention Centre for Foreigners in Medveďov, where they can be reclaimed after the asylum procedure is completed. After the asylum seeker provides so-called "statement" on asylum claim, he/she is fingerprinted and photographed. The fingerprints obtained during the submission of asylum claim are registered within the information systems run by the Ministry of Interior<sup>61</sup>, and they are inserted in the EURODAC system. The "statement" on asylum claim should be sent by the police department without delay together with supporting documentation to Migration Office.

Based on our inquiry, the Bureau of Foreign and Border Police (hereinafter referred to as "BFBP") stated that the police department does not take any security measures in order to assess the national security risk during the submission of asylum claim.

### SECURITY CONSIDERATIONS WITHIN THE ASYLUM PROCESS (PRE-DECISION STAGE):

Asylum seekers are usually placed, after the submission of their asylum claim, in the Reception Centre in Humenné where they undergo obligatory health screening. In-depth asylum interview is conducted by the officer of the Migration office usually in this centre.<sup>62</sup> Afterwards the statements of the asylum seeker are

<sup>59</sup> 29 asylums granted out of 166 applications in 2017, by May 2018 one asylum granted out of 62 applications.

<sup>60</sup> Before such interview takes place, a personal check is made by the police officer of the same sex as the asylum seeker and also check of his/her belongings in order to make sure that the asylum seeker does not have any items at disposal that could endanger people around him/her.

<sup>61</sup> Fingerprints of asylum seekers are inserted to IS MIGRA (the Migration and International Protection Information System) from where they are further entered into the national database AFIS (national database of automated dactyloscopic identification of persons).

<sup>62</sup> There can be another, complementary, interview if it is found as necessary by the responsible decision-maker of Migration Office, e.g. in order to clarify statements of the applicant or the evidence submitted to the Migration office.

evaluated by the decision-maker. In case there is any suspicion that the applicant could represent a threat to national security or public order, the decision-maker can initiate the process of verification of these concerns by sending inquiries to various national state authorities (e.g. National Unit for Combating Illegal Migration, various departments of Police Force, Ministry of Justice, Ministry of Defense, Public prosecution or national courts, etc.).

During the asylum procedure the Migration Office also collects information on country of origin of the asylum seeker through their Department of Documentation and International Cooperation (hereinafter referred to as "ODZS"). Both the Migration Office and the authority dealing with the inquiry to provide information on the applicant should protect the applicant's personal data, as well the information that could potentially identify the applicant by the agent of persecution. In the process of collecting information the agent of persecution cannot be contacted. In case the requested information cannot be obtained from publicly available sources, Migration office cooperates with other EU Member States (in particular through networks of COI experts in EASO), in some cases also with Slovak embassies abroad.

In the sense of the previous legislation, Migration Office used to request a statement of the Slovak Information Service (hereinafter "SIS") for the purpose of examination of the asylum claim. If the information provided by the SIS was designated as information subject to confidentiality<sup>63</sup>, such document was not part of the administrative case file available to asylum seeker for inspection, but was stored in special evidence of classified information at the Migration Office. All documents that didn't have this designation were made available to the asylum seeker or his/her legal representative. According to the responses given to us by the Migration office *"the probative force of the security risk assessment of an asylum seeker provided by SIS was individual and it was evaluated based on its content and the severity of such information"*. Decision-makers of the Migration office stated<sup>64</sup> that in case the information provided by SIS was too general, they requested additional, more specific information in order to be able to assess its severity<sup>65</sup>. In accordance with the last (July 2018) amendment to the Asylum Act<sup>66</sup> Migration Office has the obligation not only to ask SIS for the provision of the statement on security risk of every asylum seeker, but also to inquire the statement of the Slovak Military Intelligence. New change also includes the right of SIS and Military Intelligence to give a consent or disagreement with granting asylum as part of the statement provided, which might *de facto* in practice shift the decision-making competence from Migration Office to SIS and/or Military Intelligence, though technically Migration Office is the one issuing decision in accordance with the Asylum Act<sup>67</sup>.

If asylum seeker refuses to be fingerprinted or submits false information or documents, Migration Office has the legal possibility to reject his asylum claim as manifestly unfounded pursuant to § 12 (2) b) and c) of the Asylum Act. The possession of identity documents is not the legal prerequisite for applying for asylum in Slovakia, though asylum seeker might be detained for the purpose of ascertaining or verifying his/her identity or nationality pursuant to § 88a (1) a) of the Foreigners Act.

## SECURITY CONSIDERATIONS DURING THE ASYLUM DECISION MAKING PROCESS

Asylum Act includes the exclusion clauses of article 1F of Geneva Convention in § 13 (2) a), b) and c) in regard of asylum and in regard of subsidiary protection in § 13c (2) a), b) and c). In cases of exclusion from subsidiary protection a slight modification of the article 1F(b) is in § 13c (2) b) where it solely states "committed a particularly serious crime" with reference to Slovak Criminal Code.

<sup>63</sup> Act no. 215/2004 Coll. on the Protection of Classified Information and on the Changes and Amendments of Some Legal Acts.

<sup>64</sup> During the interview, which we conducted with them for the purpose of this study on 18<sup>th</sup> April 2018.

<sup>65</sup> Approximately one third of the decision-makers of the Migration office has a security clearance, which enables them to get familiar also with the confidential information provided by SIS; these decision-makers decide cases of asylum seekers, in which confidential information must be evaluated.

<sup>66</sup> § 19a (9) of the Asylum Act.

<sup>67</sup> Decision-makers of Migration office stated in the interview from 18th April 2018 that this new law might change their decision-making power in practice, because they will be obliged to respect the consent or disagreement of SIS or of Slovak Military Intelligence. It is possible that the jurisprudence and opinion of the courts in this matter will be necessary.

Asylum shall not be granted pursuant to § 13 (5) a) and b) of the Asylum Act if the applicant may reasonably be considered dangerous to the security of the Slovak Republic or the applicant has been convicted for committing a particularly serious crime and constitutes a danger to society. In the sense of the last amendment to the Asylum Act, disagreement of SIS or Military Intelligence constitutes another reason for not granting asylum. Other reasons for rejecting the application as manifestly unfounded are included in § 12 (2) h) (poses a danger to the security of the Slovak Republic) and i) (poses a danger to society) of the Asylum Act. The same reasons are incorporated in § 13c (2) d) and e) in regard of non-granting subsidiary protection.

The refugee status can be withheld pursuant to § 15 (3) a) of the Asylum Act if the refugee may reasonably be considered dangerous to the security of the Slovak Republic or pursuant to § 15 (3) b) if the refugee was convicted for particularly serious crime and constitutes danger to society. Subsidiary protection can be withheld or not prolonged pursuant to § 15b (1) b) or § 20 (3) of the Asylum Act if the holder of subsidiary protection represents a danger to security of the Slovak Republic or to society, or if the statement of SIS or Military Intelligence includes disagreement with provision of subsidiary protection.

If the decision is based on classified information, the classified information is never part of the case file or described in the written decision. Neither the asylum seeker/protection holder, nor his/her legal representative has the access to such information. Such access is also denied to the Ombudsman. The classified information can be made available to the attorney of the asylum seeker/protection holder upon the written request and upon the consent of the SIS pursuant to § 35 (3) of Act no. 215/2004 Coll. on the Protection of classified information. HRL has no information of a case when classified information would have been made available to the attorney. On the other hand, according to the knowledge of HRL, there have been several cases, in which attorney submitted such a request, but it was rejected by SIS.

Pursuant to § 52 (2) if Migration office issues a negative decision<sup>68</sup> for the reason that the asylum seeker/protection holder represents a danger to the security of the Slovak republic, the reasoning of such decision states only the fact that it is a security interest of the Slovak Republic. There is no more explanation or specification of this risk provided in the reasoning of the decision.

Non-granting of the asylum or subsidiary protection for the reasons stated in exclusion clauses can be challenged within 30 days by lodging an administrative action to the Regional Court. This action has suspensive effect. Non-granting, withholding or non-extending of the asylum or subsidiary protection based on the security reasons<sup>69</sup> can be challenged within 30 days by lodging an administrative action to the Regional Court. This action does not have suspensive effect pursuant to § 21 (1) of the Asylum Act, unless the court grants it upon written request. Rejection of an asylum application as manifestly unfounded for reasons pursuant to § 12 (2) h) and i) of the Asylum Act may be challenged within 20 days by lodging an administrative action to the Regional Court. This action has no suspensive effect under § 21 (2), unless the court decides to grant it upon written request.

If any of the above-mentioned actions are rejected by the Regional Court, the applicant has the possibility to lodge a cassation complaint to the Supreme Court of the Slovak Republic within 30 days. Such a complaint does not have a suspensive effect, unless the court grants it upon the written request.

As stated above, § 52 (2) of Asylum Act enables Migration Office not to state any reasoning within the negative decision, if the asylum seeker is considered to be dangerous to the security of the Slovak republic<sup>70</sup>. Migration

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<sup>68</sup>Decision on non-granting of asylum pursuant to § 13 (5) a), non-granting of subsidiary protection under § 13c (2) d), withholding the asylum pursuant to § 15 (3) a), withholding of subsidiary protection pursuant to § 15b (1) b) on grounds of § 13c (2) d), non-extension of subsidiary protection pursuant to § 20 (3) for the reason of § 13c (2) d) and the withholding of the temporary shelter pursuant to § 33 c).

<sup>69</sup>§ 13 (5), § 15 (3), § 15b (1) b) on grounds of § 13c (2) d) or e), § 20 (3) on the grounds of § 13c (2) d) or e) of the Asylum Act.

<sup>70</sup>Similarly to asylum decisions also decisions in accordance with § 120 (2) of the Foreigners Act on the rejection/ withdrawal of residence permits and on administrative expulsion in case the foreigner represents a threat to the security of the state, are reasoned only by stating that it is in the "security interest of the Slovak Republic" to issue such a decision; based on § 125 (6) of the same Act in the procedure to grant temporary or permanent residence permit the foreign police department requests a statement from the SIS as well as from the Military Intelligence.

Office has the right only to make a reference to this provision. In order to come to the conclusion that the asylum seeker poses a danger to the security, Migration Office must have certain information at disposal, usually originating from the SIS or other security units/ specialized agencies of the Slovak Republic. Classified information provided to the Migration Office is not made available to the asylum seeker and his/ her legal representative and the asylum seeker has his/ her asylum application rejected without even having knowledge of the substance of the “accusations” against him/ her. Asylum seekers and their legal representatives objected at the courts that such decisions violate basic rights of the applicants, especially their right to a fair trial, right to a judicial protection, right to effective remedy, right to comment on all the evidence used in the procedure, equality of arms principle, etc.

Case-law of the Slovak courts has been varied, but as can be seen from the judgments described below, in some way evolving in favour of alleviating the disadvantaged position of an asylum seeker.

The Supreme Court of the Slovak Republic (hereinafter “Supreme Court”) ruled in 2011<sup>71</sup> that Migration Office when applying § 52 (2) of Asylum Act is not allowed to give more detailed reasoning, which led him to the application of this provision than merely stating that it is a security interest of the Slovak Republic. *“The reason for such a wording is obvious - it is an attempt to prevent a disclosure of sources from which the knowledge that a particular person poses a danger to the security of the Slovak Republic is obtained. If the reasoning contained a description of the established factual situation, it would reveal the source of knowledge, the actual mass of knowledge and the way in which it was obtained, and that would in particular case jeopardize the actions of the competent state authorities, and in general also disclose the procedures used to detect the actions threatening the constitutional establishment, territorial integrity, sovereignty and security of the Slovak Republic, which lead to the activity of foreign intelligence services, to the organization of criminal activity and terrorism, respectively may seriously endanger or damage the interests of the Slovak Republic.”*

Later, the Regional Court in Bratislava ruled that Migration Office cannot come to a conclusion on the danger to national security without the existence of a document, on basis of which they reached such a conclusion, within the administrative case file<sup>72</sup>. The Supreme Court<sup>73</sup> added that despite the fact that the negative decision in accordance with § 52 (2) of Asylum Act does not need to contain a justification, this does not preclude the court from being able to get to know the reasons and evidence on the basis of which the Migration Office concludes that the applicant poses a danger to the security of the Slovak Republic. The cited provision of Asylum Act does not exclude the court's right to review the decision of the administrative body as well as its procedure on the basis of the submitted case file containing the necessary evidence, to judge whether the administrative discretion of the administrative body used in assessing the danger of the applicant for the security of the Slovak Republic did not deviate from the limits set forth by relevant laws. In order to carry out this precise review, the Migration Office must submit a complete case file to the court.

In regard of security reasons given in asylum procedure the Constitutional Court of the Slovak Republic<sup>74</sup> (hereinafter “Constitutional Court”) emphasized that within the judicial review the judge is a qualified person having a special position to get acquainted with the classified information. After requesting the complete case file, including the classified information, the competent judge can assess and evaluate the procedure of the Migration Office in applying its proper consideration, whether it actually deviated from the limits laid down by law. If the case file contains confidential information, automatic inspection of the case file by the applicant and his legal representative would be excluded in compliance with the Act on the Protection of Classified Information. Based on § 35 (3) of the Act on the Protection of Classified Information only the attorney of the applicant could become acquainted with the confidential information on the basis of the consent of the director to whose competence this confidential information falls into. It would be a one-time inspection of those facts and to the extent necessary for the procedure, after signing the relevant instruction and statements of confidentiality. It is for the competent authorities to determine, in view of the nature of the classified information, the scope of the one-time inspection of the classified information in order to ensure the necessary

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<sup>71</sup> The Supreme Court of the Slovak Republic, decision no. 10Sža/10/2010 dated 12.02.2011, this legal opinion is also mirrored in several decisions of the Regional Court in Bratislava, no. 9Saz/78/2010 dated 31.08.2011, no. 9Saz/7/2011 dated 20.04.2011 etc.

<sup>72</sup> The Regional Court in Bratislava, no. 9Saz/78/2010 dated 31.08.2011

<sup>73</sup> The Supreme Court of the Slovak Republic, decision no. 10Sža/2/2011 dated 16.02.2011

<sup>74</sup> The Constitutional Court of the Slovak Republic, case no. IV. ÚS 308/2011-90 dated 25.01.2012

scope for the proceedings but also to protect other interests which have led to the confidentiality of the information in question (fight against terrorism, detection of criminal offenses, fight against organized crime, protection of confidential witnesses, agents, etc.). The Constitutional Court at the end added that it must be clear from the case file which facts have been taken into account by the deciding authority and attributed the legal relevance, in particular in the view of the legal consequences of the negative decision on international protection. Since those were not clear from the case file in the contested procedure, the right of the applicant to comment on all the evidence produced was breached.

Based on the above-mentioned legal opinion of the Constitutional Court, the Regional Court in Bratislava extended this legal argument ruling that if the Migration Office has at its disposal knowledge that is in favour of a conclusion on a threat to national security of the Slovak Republic, it shall, in compliance with the applicable law (e.g. Act No 215/2004 Coll.), be added to the asylum case file. In case such information is of a classified nature, it is sufficient to base a record on its existence in the case file indicating the place where it can be found<sup>75</sup>. The scope of the information available to the Migration Office for decision-making must be sufficient to conclude that the applicant is dangerous to the security of the Slovak Republic. It is the duty of the Migration Office to require from these state authorities (e.g. the SIS) that their statements provide sufficient mass of information for Migration Office to assess the potential danger to national security because, in cases governed by the Asylum Act, the only acting and deciding authority is the Migration Office and no other state authority<sup>76</sup>. The national courts used to quash the negative decisions of Migration Office based on security reasons due to the lack of information provided by the SIS (or other agency) for the evaluation of potential danger to the national security.<sup>77</sup>

Because in some cases this negative practice related to the application of § 52 (2) of Asylum Act and non-disclosure of the substance of alleged danger to national security continued, the Ombudsman of the Slovak Republic (hereinafter "Ombudsman") filed a proposal for a declaration of non-compliance of this provision with the Constitution to the Constitutional Court. The proposal was rejected in March 2014 arguing that the Ombudsman was not an authorized person to initiate infringement proceedings because he did not act based on the complaint of a particular natural person or legal entity but on its own initiative. Cases of this nature though continued to appear at the national courts, which led at the end the Supreme Court to initiate such proceeding at the Constitutional Court. On 11<sup>th</sup> October 2017 the Constitutional Court issued a resolution no. ÚS 15/2017-15 accepting the proposal of the Supreme Court for the initiation of infringement proceedings. The proposal suggested that § 52 (2) of Asylum Act prevents Migration Office from providing a proper reasoning within the negative decision on asylum claim. The fact that the statement of the SIS remains unknown for the applicant and the lack of reasoning of the negative decision of the Migration Office exclude the applicant from the possibility to know the basis and reasons for such decision. The Supreme Court in its proposal therefore suggested to the Constitutional Court to decide that § 52 (2) of Asylum Act violates the following rights of the applicant: right for a fair trial, the principle of equality of the parties to the proceedings which is the eminent part of every rule of law state and which is supported by the prohibition of discrimination and the principle of equality before the law, the right to effective remedy, the right for a judicial protection and the right to comment on all the evidence made within the procedure<sup>78</sup>.

Similarly, to the case-law related to asylum claims rejected based on security concerns, also the case-law in relation to the rejection/ withdrawal of residence permits deals mainly with the question of whether the "confidential information" provided by the SIS should be accessible to the applicant at least partly in order to guarantee him/ her an access to a fair procedure in front of the administrative authorities as well as in front of the courts. The most important judgments are mentioned below.

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<sup>75</sup>The Regional Court in Bratislava, case no. 9Saz/37/2012 dated 03.10.2012

<sup>76</sup>The Regional Court in Bratislava, case no. 9Saz/37/2012 dated 03.10.2012 and no. 9Saz/8/2012 dated 08.08.2012

<sup>77</sup>Decision-makers of the Migration office during the interview on 18<sup>th</sup> April 2018 stated that Migration Office had to request provision of more detailed information and claimed that the requested authorities always cooperated and provided the needed additional information.

<sup>78</sup> "The provision of § 52 (2) of Asylum Act is in contrary with Art. 1 par. 1, Art.12 par. 1, par. 2 and Art.13 par. 4 in conjunction with Art.46 par. 1, par. 2, Art.47 par. 3 and Art.48 par. 2 of the Constitution of the Slovak Republic, Art.6 par. 1, with Art.13 in conjunction with Art.8 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Art.47 of the Charter of Fundamental Rights of the European Union."

In case from July 2010<sup>79</sup> the Supreme Court agreed with an opinion of the Regional Court that “in the present case it is not possible to accept the universality and general validity of a statement of the SIS in general terms. Knowing concrete facts based on which the SIS concluded that the applicants represent a threat to state security is crucial for the decision of an administrative authority in considering the application for the renewal of the temporary residence permits of the applicants. Without this knowledge it is not possible to review the decision of the administrative authority by the court.” However, the Supreme Court also said that “in case the administrative authorities find out that the applicants threaten the state security, in the reasoning of the decision they just state the fact that it is in the security interest of the Slovak Republic. That is why the Supreme Court does not agree with the opinion of the Regional Court that, taking into account the conflict between individual and public interest, the administrative authority in its decision must provide a proper reasoning why it gave a preference to the public interest.”<sup>80</sup>

On 12 February 2015 the Constitutional Court of the Slovak Republic issued a Ruling No. II.ÚS 480/2014 in relation to non-granting of the permanent residence permit for unlimited time period based on the statement of the SIS and declared that the rights of the applicant were not violated. The applicant (from Pakistan) had a clean criminal record, resided in Slovakia for several years based on the tolerated stay, was married to a Slovak citizen and they had a minor child together; the information provided by the SIS to the procedure was confidential and none of it was made available to the applicant. Constitutional Court reasoned that “it is indubitable that a sovereign regulating the foreigners’ regime, especially the conditions for granting long-term residence permits, does possess a broad discretion. Legal regulation of this matter is based on the reliance on the intelligence knowledge of the SIS and from the constitutional and institutional point of view one must rely on its political control. The protection given by the administrative courts in this field is considerably limited and that is why it can provoke in foreigners the sense of insufficient protection of their rights. It must be however accepted that the field of security protection does concern the political questions, in which the judicial discretion is limited. Legal regulation can seem to lack a logic because the one that until now did have a residence permit and tries to make it stronger and stabilize it by applying for a permanent residence, and suddenly he has to face the risk of his expulsion. This is a paradox, which however does contain rationality in itself, because in cases of applications for tolerated stay the questions of security are not examined obligatorily, contrary to application for permanent residence. That one is already a very stable foreigner’s regime and therefore if security concerns arise, total illegality of the stay is not illogical as a consequence, better than returning to the provisional form of a stay.” The Constitutional Court continues in its reasoning as follows: “Anyway, the Supreme Court as well as the Constitutional Court did find a legal space for a broader protection of the position of foreigners. This space of intersection is the provision of an Act on Classified Information, which allows the judges to become familiar with classified information, as well as to the attorneys based on the agreement of the director of the SIS and under the duty of confidentiality. For example, in the decision no. 1Sža 39/2010 the regional court did become familiar with the classified information and did cancel the decision of the police department because this one relied only upon too general information about the foreigner provided by the SIS.”<sup>81</sup>

Based on the provisions of an Act No. 40/1993 Coll. on the State Citizenship of the Slovak Republic “ministry, in the procedure on the application for granting the citizenship of the Slovak Republic, takes into consideration a public interest, particularly an aspect of security, as well as the statements of the Police Force, the SIS and other relevant state authorities<sup>82</sup>. Contrary to the decisions in asylum, residence or expulsion procedures, the decision on non-granting citizenship because of security concerns cannot be reasoned only by stating that it is in the security interest of the Slovak Republic<sup>83</sup>. There is a very interesting judgment of the Supreme Court of the Slovak Republic<sup>84</sup> in case of the rejection of an application for state citizenship. The case concerned an applicant from Lebanon, who has lived in Slovakia for several years, studied at university and subsequently became a pilot; one of the reasons for rejection of his application for citizenship was the negative statement provided to the procedure by an Office for Combating Organised Crime (Slovak abb. ÚBOK), this statement was based on the classified information, which was not made available to the applicant. The Supreme Court in its

<sup>79</sup> Case No. 1Sža/39/2010 from 13 July 2010

<sup>80</sup> Similar judgment in relation to deciding on the application for permanent residence permit: Judgment of the Regional Court in Bratislava No. 6S/141/2013 from 19 September 2014 .

<sup>81</sup> The same in the judgment of the Supreme Court No. 1Sža/51/2014 from 19 January 2016

<sup>82</sup> § 8a (3) of a Citizenship Act

<sup>83</sup> There is not a provision in a Citizenship Act that would allow this.

<sup>84</sup> Judgment No. 5Sžo/70/2015 from 30 May 2017

judgment decided on “the lawlessness of the procedure of the administrative authority, because in the administrative procedure as well as in the procedure at the court of first instance there was no equality of arms guaranteed to the applicant, as he was not aware of the content of the negative statement of ÚBOK”. In the view of the Supreme Court “by this procedure the principle of rule of law was violated (...), the decision is arbitrary and not sufficiently reasoned (...), and there has been other violation of basic rights, mainly the right for a judicial protection as stated in Art. 46 (1) of the Constitution of the Slovak Republic, the equality of the parties to the procedure stipulated in Art.47 (3) of the Constitution, and also the right to comment on all the evidence made within the procedure (...) and right to a fair trial.” In the conclusion of the decision the Supreme Court does emphasize that, taking into account future decision of the Constitutional Court in the case no. ÚS 8/2016<sup>85</sup>, in the next procedure the administrative authority will have an obligation to make sure that the “applicant will be aware of the content of the statement of ÚBOK in an appropriate manner, so that the right to a fair procedure is secured and that the applicant can effectively defend himself. Considering the classified nature of the information the administrative authorities do not have to inform the applicant about how this information was obtained, however the content of the statement must be accessible to the applicant in such an extent that he can react to the findings, whilst the source of classified information is protected. “

The application of exceptions from the non-refoulement principle (art. 33(2) of the 1951 Refugee Convention) The current Asylum Act does not include neither the transcript of the art.33 (1), nor of the art.33 (2) of Geneva Convention. The former national asylum legislation applicable until 31.12.2006 included both of these provisions within the § 47 (1) and (2) of the Asylum Act. At that time the subsidiary protection was not yet incorporated into Slovak national legislation and Migration Office had the obligation in cases of negative decisions to evaluate and include within the verdict of such a decision whether a foreigner is subject to the prohibition of expulsion<sup>86</sup> or not.<sup>87</sup>

After the incorporation of the institute of subsidiary protection into Slovak Asylum Act<sup>88</sup>, Migration Office stopped evaluating the obstacles for expulsion within their negative decisions and this obligation was also removed from the Asylum Act. Migration Office holds the opinion that this obligation was transferred to Foreign Police within the § 81 of the Foreigners Act (described below), although they do admit that the *non-refoulement* principle is partly reflected in the institute of subsidiary protection<sup>89</sup>.

The Supreme Court of the Slovak Republic in regard of such practice of Migration Office in a recent case no. 15žak/11/2017, dated 22.08.2017, where security reasons were applied for non-granting protection, held different opinion. The Supreme Court of the Slovak stated that it was not possible to accept the argument that the obligation under art. (3) of the Convention is not subject to review in this international protection proceedings but is to be brought before other authorities responsible for deciding on the expulsion of the complainant, especially when the complainant was already imposed with a final sentence of expulsion within the criminal proceedings and its enforcement was also ordered by decision of the local court and therefore cannot reasonably be expected that the complainant will be party to another proceedings where obstacles for his expulsion would be subject of an assessment. Therefore, the complainant would face a real risk of violation of art. 3 of the Convention, if this question was not assessed within the international protection proceedings in contrary with the international obligations of the Slovak republic

This change of legislation and the following practice had negative impact on the decision making of Foreign Police in procedures on administrative expulsion of failed asylum seekers.

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<sup>85</sup> At the moment at the Constitutional Court is pending the decision whether § 120 (2) of the Foreigners Act is in accordance with the relevant provisions of the Constitution, of the European Convention on Human Rights and of the EU Charter of Fundamental Rights, it means whether it is constitutionally correct that the administrative authorities can reason their decisions just by stating that it is in the security interest of the Slovak Republic and without providing further explanation.

<sup>86</sup> § 20 (3) – Asylum Act in force until 31.12.2006.

<sup>87</sup> In case Migration office declared that the expulsion of the failed asylum seeker was prohibited, Foreign Police could not expel such foreigner. This incorporation of the prohibition of expulsion in the decision of Migration Office also enabled the failed asylum seeker to apply for tolerated stay due to the existing obstacle for his/her expulsion.

<sup>88</sup> Since 01.01.2007

<sup>89</sup> This was confirmed by decision-makers of the Migration office during the interview on 18<sup>th</sup> April 2018.

Pursuant to § 82 (2) a), b) and c) of the Foreigners Act the police department may administratively expel a third-country national if s/he poses a serious threat to state security or public order, if s/he threatens state security, public order or public health or if s/he has been legally convicted of an intentional offense and has not been subject to a sentence of expulsion. The use of wording “may” give a rise to broad discretion within the decision-making process carried out by Foreign Police.

The non-*refoulement* principle as defined within the art. 33 (1) and also the art. 33 (2) of Geneva Convention is transposed within the art. 81 (1) and (2) of the Foreigners Act<sup>90</sup>. Additionally, to that, the § 81 (4) states that a stateless person can be expelled only if he/she threatens the security of the state or public order.

From the wording of the § 81 (2) can be concluded that the exclusion from the *non-refoulement* principle can be applied only in cases when the personal freedom of the foreigner is at stake. In cases when the foreigner's life is under threat, or when s/he would be subjected to torture, cruel, inhuman or degrading treatment or punishment, the exclusion clauses from *non-refoulement* principle cannot be applied.

During our research, we approached the BFBP with a request for provision of their own interpretation of exclusion clause from *non-refoulement* principle in practice of Foreign Police. The answer of BFBP stated, that that the exclusion clause given in § 81 (2) applies as well to cases regulated in (1). If this answer was applied in practice by the Foreign Police as said, it would constitute a breach of legally given obligation within the § 81 (1) Foreigners Act, as well as breach of the art. 3 of the Convention, which includes irrevocable rights.

Despite the above-mentioned legal framework, HRL has identified certain shortcomings in the administrative proceedings carried out by the Foreign Police, when it comes to applying the principle of *non-refoulement* in practice and the exclusion clauses. The main problem is that the Foreign Police in practice often mistakenly concludes that there is no need for evaluating obstacles for administrative expulsion in expulsion proceedings of failed asylum seekers because Migration Office has not identified them while considering the granting of subsidiary protection. This approach of the Foreign Police is though in contrary with the § 81 (1) and (2) of the Foreigners Act, which clearly imposes the obligation to evaluate the possible obstacles for administrative expulsion within the expulsion proceedings to the Foreign Police at the time of writing this report (April 2018).

The amendment to the Foreigners Act applicable since 01.05.2018 adds to the § 81 paragraph (5) which states that the police department shall not consider obstacles to administrative expulsion under paragraphs 1 to 4 in the administrative expulsion proceedings if the reasons under paragraphs 1 to 4 have been lawfully ruled by another state authority in a different proceeding and there has been no change in the individual situation of the foreigner concerned. This raises several questions regarding the future compliance of a practice based on this provision with the prohibition of *non-refoulement* principle which has been already found problematic in the practice of Foreign Police in relation to consistency in the examination of obstacles for expulsion.

The inclusion of *non-refoulement* principle and its exclusion clause can be also found within the criminal law in § 65 (2) e) and f)<sup>91</sup> of the Penal Code. The principle of *non-refoulement* goes not only in Foreigners Act, but also here further when it includes in f) provision also art. 3 of ECHR, imposed death penalty and even a possible

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<sup>90</sup>“(1) A foreigner cannot be administratively expelled into the state in which his/her life would be threatened for the reasons of his/her race, nationality, religion, membership in a particular social group or for his/her political conviction, or in which s/he would be threatened by torture, cruel, inhuman or degrading treatment or punishment. Similarly, a foreigner cannot be administratively expelled into the state in which s/he was imposed the death penalty or it can be assumed that s/he can be imposed such a penalty in the ongoing criminal proceedings.

(2) A foreigner cannot be administratively expelled into the state in which his/her freedom would be threatened for the reasons of his/her race, nationality, religion, membership in a particular social group or for his/her political conviction; this shall not apply, if a foreigner threatens the state safety by his/her actions or if s/he was sentenced for crime and represents a threat for the Slovak Republic.”

<sup>91</sup> “e) A sentence of expulsion cannot be imposed on perpetrators if they are to be expelled to a state where their personal freedom is threatened on account of their race, nationality, religion, belonging to a particular social group or political opinion; this does not apply to those reasonably considered to be dangerous to the security of the Slovak Republic or to those who have been convicted of a particularly serious crime and pose a danger to the Slovak Republic or

f) A sentence of expulsion cannot be imposed on perpetrators if they are to be expelled to a state where their life is threatened on account of their race, nationality, religion, belonging to a particular social group or political opinion, or threatened with torture, cruel, inhumane or degrading treatment or punishment, or in which he has been subjected to the death penalty, or is it presumed that such punishment may be imposed in the ongoing criminal proceedings.”

imposition of death penalty in the ongoing criminal proceedings. The exclusion clause is again mentioned only in relation to the risks to personal freedom of the foreigner, but not in relation to the risk of life. The application of principle of *non-refoulement* within the decision-making practice of criminal courts is questionable. HRL observed that the courts try to avoid the responsibility for applying *non-refoulement* principle by not stating to which country the foreigner should be expelled in the decision. It means that they decide on the sentence of expulsion but do leave to Foreign Police the power to decide to which country the foreigner should be expelled, which creates many concerns and problems in practice. It might be caused by the lack of court's capacity to examine the situation in the foreigner's country of origin/country of last residence.

## EXTRADITION

Extradition from Slovakia to another country is regulated in Criminal Procedure Code No. 301/2005 Coll. in § 498 and the following. The requests by foreign authorities for extradition of a person from the Slovak Republic shall be submitted to the Ministry of Justice<sup>92</sup>. Extradition shall be admissible if the act for which extradition is requested is a criminal offence under the law of the Slovak Republic and is punishable under the same law by a maximum prison sentence of at least one year.

Inadmissibility of extradition is stipulated in § 501. In accordance with § 501 (b) extradition shall be inadmissible if "it concerns a person who applied in the Slovak Republic for asylum or who was granted such asylum or provided subsidiary protection to the extent of the protection provided to such persons by a separate act or by an international treaty; this does not apply in relation to the person who applied for asylum in the Slovak Republic repeatedly and his/her asylum application had already been lawfully decided". In practice the interpretation of this provision is problematic. Criminal Procedure Code does not specify what is meant, for the purpose of extradition, by a "repeated asylum application".

In accordance with § 22 (1) of the Asylum Act "the applicant is permitted to reside on the territory of Slovakia until the final decision on his/ her asylum application, if this act or special regulation<sup>93</sup> does not provide otherwise. The applicant is not permitted to reside on the territory of Slovakia in case of a repeated asylum application if the ministry already rejected this application in the past in accordance with § 11 (1) f)<sup>94</sup> or § 12 (2) g)<sup>95</sup> .

Preliminary investigation shall be conducted by the prosecutor of a regional prosecution office, to whom the ministry of justice forwarded the request by a foreign authority for extradition abroad, or in whose district the person to be extradited to the requesting State was arrested or lives. The goal of a preliminary investigation is to determine whether conditions for the admissibility of extradition are met. During the extradition proceedings the person whose extradition is sought shall be represented by a defense counsel.<sup>96</sup> If it is necessary to prevent the escape of the person whose extradition is sought, the presiding judge of a panel of the Regional Court shall place him in custody, based on the request of the prosecutor conducting preliminary investigation.<sup>97</sup> After the conclusion of the preliminary investigation the court shall decide upon the motion of the prosecutor on the admissibility of extradition and shall subsequently submit the case to the Ministry of Justice after the decision become final. Person whose extradition is sought can submit a complaint to the

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<sup>92</sup>The request shall be submitted in writing and shall be supported by a) the original or an authenticated copy of the sentence, warrant of arrest or another order having equal effect, b) a description of the criminal offences for which extradition is requested, including the date and place of their commission and their legal qualification, c) the wording of the applicable legal provisions of the requesting State.

<sup>93</sup> Reference is made to the Criminal Procedure Code.

<sup>94</sup>"Ministry rejects the application as inadmissible if it is a repeated asylum application, in the past it was decided that the application is rejected as manifestly unfounded, or it was decided on non-granting asylum, withholding asylum, non-prolongation or withholding of subsidiary protection, and since the validity of such decision there has not been a substantial change in the facts of the case; the ministry can decide whether the asylum application has been submitted exclusively with an intention to avoid imminent expulsion from Slovakia"

<sup>95</sup> Ministry rejects the asylum application as manifestly unfounded also in cases when the applicant does not meet the condition for granting asylum or subsidiary protection and it is his/ her repeated asylum application and it is not possible to reject his/ her application in accordance with § 11 (1) f) because there has been a substantial change in the facts of the case.

<sup>96</sup> § 502 of the Criminal Procedure Act

<sup>97</sup> § 506 of the Criminal Procedure Code

Supreme Court of the Slovak Republic against the decision on admissibility of his/ her extradition based on the ground of inadmissibility as stipulated in § 501; this complaint does have a suspensive effect. Supreme Court acting as an appellate court can decide by a resolution on whether the extradition is admissible or not.<sup>98</sup>

Based on § 510 of the Criminal Procedure Act the minister of justice gives a consent with the extradition; the consent cannot be given if the Regional or Supreme Court decided that the extradition is inadmissible. Even if the court declared by a decision the extradition in a concrete case admissible, minister of justice can refuse to give a consent to the extradition based on the specific reasons stipulated in § 510 (2)<sup>99</sup>. If the minister of justice does not allow the extradition to proceed, the ministry of justice shall submit the matter to the General Prosecution Office in order to commence criminal prosecution in compliance with the legal order of the Slovak Republic.

For the purpose of this report we have asked the Ministry of Justice how they interpret in practice that part of § 501 (b) of the Criminal Procedure Act, which says that asylum seeker can be subjected to extradition abroad in case of a repeated asylum application, and whether they consider “repeated asylum application” also such application in which the Migration Office does not reject the application as a repeated one, but evaluates it in the merits. However, in their response they just referred to above cited provisions of the Criminal Procedure Act stating that the admissibility of the extradition is evaluated by the court, and the minister for the purpose of giving a consent with the extradition considers only the conditions stipulated in § 510 (2). From the statements of the decision makers of the Migration office, who dealt with the cases of asylum seekers subject to extradition, and which we interviewed for the purpose of this report, it can be concluded that nothing prevents asylum procedure and extradition procedure to run in parallel and that every second asylum application, if the first one was lawfully decided on merits, is considered as “repeated” application for the purpose of extradition irrespective of whether Migration office rejects it as repeated or not. The same can be concluded from the recent case of Mr. Aslan Yandiev, asylum seeker in the repeated asylum procedure, whose extradition was sought by Russia, declared admissible by the courts and given consent by the minister, despite of the fact that his second asylum application has not been lawfully decided yet and the Migration Office has not rejected it and is considering it in the merits due to the substantive change in the facts of the case.

Mr. Aslan Yandiev was an asylum seeker in Slovakia. He submitted his first asylum application in 2008, but not under his real identity. He was not granted asylum neither subsidiary protection; this decision became final in November 2010. He submitted his second asylum application in December 2010, this time under his real identity and stating new facts. Migration Office did not reject his new application as repeated, but has considered it in the merits; this procedure is still ongoing. During his second asylum procedure, the Russian Federation sent a request for extradition of Mr. Yandiev to Russia for the purpose of criminal prosecution there. Based on the documents sent to the Ministry of Justice Mr. Yandiev has been accused of serious crimes, including terrorism, membership in organized group, banditry, several attacks, etc. Applicant was put in custody, where he was deprived of liberty for more than seven years. In his case, the asylum and extradition proceedings were running in parallel. By now, there have been several decisions of the Migration Office on non-granting asylum neither subsidiary protection, and several judgments of the courts cancelling the decisions of Migration Office and returning the case back to Migration Office for further investigation. Asylum procedure has not been lawfully finished so far. Courts decided also on the admissibility of his expulsion. In June 2013 ECtHR issued an interim measure against the extradition of Mr. Yandiev to the Russian Federation for reason that his extradition would expose him to the risk of torture, this obstacle was removed on 1<sup>st</sup> March 2016 when

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<sup>98</sup> § 509 of the Criminal Procedure Code.

<sup>99</sup> If a) there is reasonable ground to believe that the criminal proceedings in the requesting State did not or would not comply with the principles of articles 3 and 6 of the European Convention on Human Rights or that the prison sentence imposed or anticipated in the requesting State would not be executed in accordance with the requirements of article 3 of the said Convention, b) there is reasonable ground to believe that the person whose extradition is sought would in the requesting State be subjected to persecution for reasons of his origin, race, religion, association with a particular national minority or class, his nationality or political opinions or that due to these factors his status in the criminal proceedings or in the enforcement of the sentence would be prejudiced, c) taking into account the age and personal circumstances of the person whose extradition is sought, he would most likely be inadequately severely punished by extradition in proportion to the level of gravity of the criminal offence he allegedly committed, d) in the case of the criminal offence, for which the extradition is requested, the capital punishment may be imposed in the requesting State, unless the requesting State gives a guarantee to the effect that the capital punishment will not be imposed, or e) requesting State requests the extradition in order to execute capital punishment.

the ECtHR rejected the application of Mr. Yandiev<sup>100</sup>. ECtHR came to the conclusion that there were no grounds to assume that the applicant would be exposed to ill-treatment in case of his extradition to the RF. ECtHR also noted that the guarantees offered by the RF in this case are similar to those provided in other Slovak cases<sup>101</sup>. On 7 February 2018 Minister of Justice gave consent to the extradition of Mr. Yandiev to Russia. On 8 February 2018 request for interim measure submitted to ECtHR by legal representative of Mr. Yandiev was rejected. In its position regarding the extradition of Mr. Yandiev to Russia, the Ministry of Justice states that “the Office of the Prosecutor General of the Russian Federation offered diplomatic guarantees according to Article 3 of the European Convention on Human Rights<sup>102</sup>”. Ministry in its position also emphasizes that “Mr. Yandiev repeatedly applied for asylum in the Slovak Republic. His first application was finally refused in November 2010. The ongoing (repeated) asylum procedure therefore did not constitute a legal obstacle to the extradition pursuant to section 501 letter b) of the Code of the Criminal Procedure.” On 21 March 2018 The Constitutional Court of the Slovak Republic decided by its resolution No. III. ÚS 129/2018, based on the proposal of the legal representative of Mr. Yandiev, to accept the complaint concerning violation of the fundamental rights and freedoms for further proceedings. Simultaneously, the Constitutional Court suspended the enforceability of the decision of the Minister of Justice by which the consent with the extradition of Mr. Yandiev was given, until the final decision is taken regarding the constitutional complaint. On 2<sup>nd</sup> May 2018 the Constitutional Court rejected the complaint of Mr. Yandiev. Mr. Yandiev’s attorney repeatedly applied for an interim measure to the ECtHR, however on 29 May 2018 the ECtHR decided not to issue the requested interim measure. On 21<sup>st</sup> June 2018 UN Committee on Human Rights issued an interim measure, based on the request of Mr. Yandiev’s attorney. Not respecting this interim measure, on 17 July 2018 Slovak Republic did extradite Mr. Yandiev to Russia.

## NATIONAL ANTI-TERRORIST LEGISLATION

Slovakia has adopted in late 2015 the so called “anti-terrorist pack” as a response to the terrorist attacks that took place in Paris. These amendments brought many new restrictions and competences for various authorities, as well harsher punishments for people convicted of crimes on terrorism. For example, usually if a person was apprehended, he/she should be handed over to the court by the police or prosecutor within 48 hours or otherwise released. In case of a person apprehended over suspicion on terrorist crimes this period was extended to 96 hours<sup>103</sup>. The court is now able to take into custody a person who is accused of a terrorist crime, without having to fulfill the conditions for taking into custody requested by law for other cases<sup>104</sup>. Under suspicion of terrorism such a person can be kept in judicial custody in justified cases for up to five years<sup>105</sup>. The agenda of the Special Criminal Court was extended to deal with crimes of terrorism. The crime of setting up, forming and supporting a terrorist group has been classified as a particularly serious crime and the penalty rate for it starts with at least 10 years of imprisonment, instead of the previous 8 years<sup>106</sup>. In the case of crime of terrorism and certain forms of participation on terrorism, the penalty ranges from the imprisonment for 20 to 25 years up to a life sentence<sup>107</sup>. The protection of the witness has been strengthened by using video conference calls in order to avoid confrontation with the accused person<sup>108</sup>. The police might carry out searches (previously only insight into) of personal cars and public transportation vehicles and its

<sup>100</sup> A.Y. against Slovak Republic, No. 37146/12.

<sup>101</sup> Referring to cases of Mr. Chentiev and Mr. Ibragimov, who were subjected to extradition to Russian Federation after unsuccessful asylum applications in Slovakia and after their complaints against extradition were rejected also by ECtHR (Chentiev v Slovakia, No. 21022/08, Ibragimov v Slovakia, No. 51946/08).

<sup>102</sup> By which as regards Mr. Yandiev it guaranteed him the right to a fair trial under international law, guaranteed that he will be prosecuted only for the acts for which he was extradited and he will not be extradited to another state without the consent of the Slovak Republic, he will not be subject to torture and inhuman treatment and after serving his sentence he will be allowed to leave the Russian Federation (RF). On request of the Slovak Republic, these guarantees were supplemented by the possibility to monitor Mr Yandiev by the extraditing party after his extradition to the RF.

<sup>103</sup> § 85 (4), Act no. 301/2005 Coll. Code of Criminal Procedure

<sup>104</sup> § 71 (2), Act no. 301/2005 Coll. Code of Criminal Procedure

<sup>105</sup> § 76a, Act no. 301/2005 Coll. Code of Criminal Procedure

<sup>106</sup> § 297, Act no. 300/2005 Coll. Criminal Code

<sup>107</sup> § 419, Act no. 300/2005 Coll. Criminal Code

<sup>108</sup> § 134 (3), Act no. 301/2005 Coll. Code of Criminal Procedure

contents under the pretext of a suspicion on terrorist threat<sup>109</sup>. Website operators or domain providers are obliged, on the basis of a court order issued upon the request of SIS, to prevent the use of their site or access to the domain menu for the dissemination of ideas supporting or promoting terrorism, political or religious extremism, violent extremism or harmful sectarian groups<sup>110</sup>.

The crimes of terrorism are punishable, as stated above, by long lasting sentence of imprisonment. The Criminal Code allows when a security of persons or property or other public interest requires so for issuing a sentence of expulsion jointly with imprisonment, when the expulsion would take place after serving the time of imprisonment. The court cannot impose a sentence of expulsion from the territory of the Slovak Republic to a person who has been granted asylum or subsidiary protection<sup>111</sup>. Usually in those cases a granted protection would be first withheld by Migration Office (*see below*) and the court would have an obligation to take into consideration the *non-refoulement* principle and its exclusion clause<sup>112</sup> when deciding about the imposition of the sentence of expulsion.

The asylum procedure is taking place in case of every foreigner who applies for international protection in the territory of the Slovak Republic, including in cases where such foreigner is serving his/her sentence of imprisonment, is in criminal or administrative detention or prosecuted without deprivation of his/her liberty. Those proceedings are parallel and no authority is waiting for the outcome of the other procedure. A reasonable suspicion of terrorist crimes is considered and evaluated in asylum procedure and affects the outcome of asylum procedure, which might result in the application of the exclusion clause or withholding of refugee/subsidiary protection status<sup>113</sup>.

In the case *Labsi vs Slovakia*<sup>114</sup> the European Court of Human Rights (hereinafter “ECtHR”) held that the expulsion of an Algerian national from Slovakia to Algeria, despite an interim measure issued by the ECtHR, was in violation of Articles 3, 13 and 34 of the Convention. The applicant was found guilty of involvement in terrorist acts in France, was convicted to a five-year sentence and was expelled from the territory of France. Following his release, in 2006 he travelled to Slovakia where he applied three times for asylum, without success. His appeals arguing the risk of ill-treatment or of a death sentence upon return as well his family ties in Slovakia were rejected. Moreover, the applicant was found to represent a security risk to the Slovak Republic and to the society. The Supreme Court upheld that decision. Slovak immigration authorities ordered his expulsion and banned him from re-entering the country for ten years. Following this decision, the Algerian authorities requested his extradition to Algeria where in 2005 he had been sentenced in his absence to life imprisonment for membership of a terrorist organisation and forgery. The Bratislava Regional Court gave its consent to the applicant’s extradition to Algeria. In 2008 the Slovak Supreme Court ruled that the applicant could not be extradited to Algeria owing to the risk that he would be subjected to torture and the ECtHR issued an interim measure requiring the Slovak authorities not to extradite him. In March 2010 the Supreme Court upheld the immigration authorities’ original decision to expel the applicant after finding that he represented a safety risk in Slovakia on account of his involvement in terrorism<sup>115</sup>. The ECtHR specifically informed the Slovak Government that the interim measure remained in force pending a possible constitutional complaint by the applicant. The applicant was nevertheless expelled to Algeria three days later.

Since then Migration Office has not dealt with any asylum seeker that would be suspected of, prosecuted for or convicted of one of the crimes on terrorism<sup>116</sup>. Neither HRL dealt with such cases in practice.

<sup>109</sup> § 23 and § 24 of Act No. 171/1993 Coll. on the Police Force.

<sup>110</sup> § 16a (1 - 6), Act no. 46/1993 Coll. On the Slovak Information Service.

<sup>111</sup> § 61 (1), Act no. 300/2005 Coll. Criminal Code.

<sup>112</sup> § 61 (2) e) and f), Act no. 300/2005 Coll. Criminal Code.

<sup>113</sup> e.g. § 12 (2) h) and i), § 13 (2), § 13 (5), § 13c (2), § 15 (2) g), § 15 (3) and § 15b (1) b) of the Asylum Act.

<sup>114</sup> Application no. 33809/08, 24 September 2012.

<sup>115</sup> In the Supreme Court’s view, the applicant’s conviction in France, on 7 April 2006, of involvement in a terrorist organisation and his admission that he had been trained in Afghanistan in handling weapons and explosives, as well as other information gathered by the Office for the Fight Against Organised Crime, justified the conclusion that the applicant could provide assistance to persons suspected of involvement in terrorist groups operating worldwide.

<sup>116</sup> As confirmed by decision-makers of the Migration office during interview on 18<sup>th</sup> April 2018 .

## THE USE OF DETENTION

Foreigners Act regulates the administrative detention of asylum seekers in Slovakia in § 88a (1) and the following. Paragraph one of the provision 88a includes five reasons for the permissible detention of asylum seekers<sup>117</sup>. Specifically, § 88a (1) d) provides the foreign police with the possibility to detain asylum seeker if it is necessary due to the danger to the security of the state or public order. Though detention can still be used only if any other less coercive measures cannot help to achieve the same objective.

Asylum seeker may be detained for the time necessary if the grounds under paragraph 1 are in force. The total detention time of the asylum seeker under paragraph 1 shall not exceed six months.

Applying for asylum in detention does not constitute a reason for release from detention. Foreigner who applied for asylum in detention might be re-detained pursuant one of the legal grounds stated in § 88a (1) of Foreigners Act. Sometimes the delay for such re-detention might take up to 60 days<sup>118</sup>. Those days are usually not counted by the Foreign Police within the maximum period of six months for detention of asylum seeker. Until a foreigner is re-detained as asylum seeker based on § 88a of the Foreigners Act, he/ she remains in the detention center based on § 88 of the same Act (as third country national detained for the purpose of deportation or Dublin return).

When it comes to the detention of asylum seeker due to the danger to the security of the state or public order, the maximum detention time differs and can be repeatedly prolonged even up to 18 months<sup>119</sup>. Asylum seeker detained based on security reasons might face limited access to family members and people that are providing him with legal aid. This access though cannot be significantly restricted or denied<sup>120</sup>.

Though detention of asylum seekers in Slovakia is quite wide spread<sup>121</sup>, HRL has not come across a case of asylum seeker detained pursuant to § 88a (1) d) of Foreigners Act yet. Therefore, for the purpose of this report, we requested provision of such information from BFBP. Their answer was that they do not process statistical data regarding the specific reasons for the detention of asylum seekers. So for the purpose of this study we were not able to collect the exact numbers of asylum seekers detained based on the security reasons in the past years.

Though BFBP further stated that for the purpose of assessing the reasons for detention of asylum seeker pursuant to § 88a (1) d) of Foreigners Act, it is relevant whether the factual basis have been fulfilled in accordance with the definition given in § 2 (1) l) (threat to state security<sup>122</sup>) or m) (threat to public order<sup>123</sup>) of Foreigners Act, irrespective of the source of this information. The relevant background for the police department is therefore information on activities directed against the security of the Slovak Republic.

Where the base for conclusion about the security threat consists of classified information in accordance with the Act on the Protection of Classified Information, such information is not available to the party to proceedings as well to his/her legal representative. Other supporting documents for the decision shall be made

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<sup>117</sup>Based on the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection .

<sup>118</sup>Based on § 12 (3) of Asylum Act the application for asylum can be rejected as manifestly unfounded within 60 days after the submission of asylum application. In practice the police usually waits those 60 days and only if the Migration Office does not reject the application of detained foreigner as manifestly unfounded they re-detain him/ her as an asylum seeker. This practice was though overruled by the Supreme Court of the Slovak Republic. However, it still persists.

<sup>119</sup>Foreigners Act, § 88a (2)

<sup>120</sup>Foreigners Act, § 98 (4)

<sup>121</sup>In 2017 46 asylum seekers were detained out of 166 lodged asylum applications.

<sup>122</sup>Threat to state security constitutes an act of the person, which endangers the democratic order, sovereignty, territorial integrity or inviolability of the state borders, or the act of the person, which violates the fundamental rights and freedoms that protects the life and health of persons, property and the environment.

<sup>123</sup>Threat to public order constitutes a violation or endangering of the interest protected by the law regarding the fundamental rights and freedoms, the protection of minors and other vulnerable persons or repeated violations of lawful interests protected by the law regarding the good performance of the public administration, the environment, public order or civil cohabitation.

available to the party to the proceedings or to his/her legal representative in accordance with the provisions of the Administrative Procedure Code.

## LEGAL AID

The Legal Aid Centre (hereinafter referred to as “CPP”), which is a state budget organisation founded by the Ministry of Justice of the Slovak Republic<sup>124</sup>, provides based on the law free legal representation to asylum seekers on the territory of Slovak Republic in the appellate asylum procedure, but not in first instance asylum procedure. Based on this law, every asylum seeker has the legal entitlement, whether in the open asylum facility or in the detention facility, in case of negative decision on his asylum application to ask CPP for free legal representation at the courts.

Free legal aid for asylum seekers is otherwise usually provided by NGOs operating in Slovakia on project subsidized base. Currently Human Rights League is running a 3 – year long AMIF project based on which it provides free legal aid to asylum seekers in the first instance asylum procedure, as well in the appellate asylum procedure. National AMIF project explicitly excludes detained asylum seekers from being provided legal aid within the framework of the project, which discriminates them in comparison to the asylum seekers who are not detained. HRL has had very limited resources to cover this gap, which raises a serious concern with regards to the access of detained asylum seekers to the legal help in first instance asylum procedure.

Apart from this, asylum seekers are free to choose any other legal representative in the first instance asylum procedure based on their own expenses. In the appellate asylum procedure such a legal representative, if not CPP or lawyer of NGO, must be an attorney registered in the Slovak Bar Association.

## CONCLUSIONS AND RECOMMENDATIONS

Both Asylum Act as well as a Foreigners Act contain quite significant securitization elements<sup>125</sup> and allow the administrative authorities deciding on asylum, residence permit or expulsion to issue a negative decision without a reasoning, just stating that it is in the security interest of the Slovak Republic; the statement of the SIS (or Military Intelligence or other agency) if containing classified information is not made available to the applicant neither his/her legal representative<sup>126</sup>. In asylum procedure as well as other procedures with foreigners, including procedure for granting citizenship<sup>127</sup>, there is an obvious priority given to the public interest and to the security of the state, which often contradicts the individual rights of the applicant<sup>128</sup>. Based on the case law most judges deciding in asylum cases find it sufficient for the judicial review of the administrative decision and for the protection of the rights of the applicant in the procedure if the classified information provided by the SIS (or other agency) is sufficiently concrete in nature and if a judge has access to this information. However, there have been also few judgments in cases concerning negative decisions based on Foreigners Act and in one citizenship case, in which the courts found a violation of the rights of the applicant if he/ she was not informed at least about the substance of the "accusations" against him/ her. Despite such judgments, on the level of the administrative procedures, as far as HRL is aware, until now there has not been a

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<sup>124</sup> Pursuant to Act no. 327/2005 Coll. on the provision of legal aid to persons in material need .

<sup>125</sup> In order to apply for a residence permit a foreigner must submit clean criminal record from the country of origin as well as any other country in which he/ she resided for more than 90 days in the last 3 years, there is zero tolerance in committing any deliberate crime; Migration office and foreign police authorities do have a duty to request a statement from the SIS and from the Military Intelligence; etc.

<sup>126</sup> Attorney can request an access to such information from the directory of the SIS, but in practice they do not allow access in general; we are not aware of any case, in which they would allow it.

<sup>127</sup> According to an Act on State Citizenship, § 8a (4): “Ministry requests an information whether there is any criminal procedure, extradition procedure, European arrest warrant procedure, expulsion procedure or asylum withdrawal procedure going on in case of the applicant for citizenship; in case such a procedure is going on the procedure on granting a citizenship should be interrupted.”

<sup>128</sup> Right to a fair trial, right to a judicial protection, right to effective remedy, right to family and private life, right to comment on all the evidence used in the procedure, equality of arms principle, etc.

practice on providing access to the applicant at least to such "substance" of the information against him/her<sup>129</sup>. Pending ruling of the Constitutional Court on joint cases ÚS 15/2017 and ÚS 8/2016<sup>130</sup> will be crucial in this respect. Furthermore, in accordance with a new amendment to Asylum Act, Migration office needs to request the statement not just of SIS but also of the Military intelligence in every asylum case and part of these statements is now also the consent or disagreement with granting of protection<sup>131</sup>. This does raise serious concerns, because it might shift the deciding powers from the Migration Office to the SIS or Military Intelligence in cases of existing classified information against the applicant.

Based on the findings of our research we would like to propose here some recommendations:

- ✓ Provisions of an Asylum Act and of a Foreigners Act<sup>132</sup>, which allow the relevant administrative authorities to issue a decision without a reasoning should be found unconstitutional and violating basic procedural rights of the applicant and should be withdrawn from both legal acts
- ✓ The applicant and/ or his/ her legal representative should be informed at least about the substance of the "accusations" against the applicant in order to be able to defend his/ her rights in the procedure
- ✓ There should be more harmonization on the level of the EU on concrete (minimum) conditions under which an asylum seeker can be considered as representing a security threat for a state, including the definitions of relevant terms<sup>133</sup>
- ✓ The principle of *non-refoulement* should be incorporated back to the Asylum Act or at least this act should explicitly give an obligation back to the Migration Office to evaluate the obstacles for expulsion of failed asylum seekers based on the available country of origin information
- ✓ The deciding powers of the Migration Office should be maintained in all asylum cases, including those where the SIS does provide a negative statement; the SIS should not have a right to give a consent or a disagreement with granting of international protection
- ✓ In cases of asylum seekers detention should be applied always as a measure of last resort, families with minor children should not be detained and foreign police authorities should not wait 60 days after a detained foreigner submits asylum application, but should re-examine the need for continuation of the detention of an asylum seeker immediately after he submits asylum application in detention
- ✓ Detained asylum seekers should not be discriminated against in their access to the legal aid and legal representation in the asylum procedure at first instance and should have equal access to it (based on the AMIF national projects) as asylum seekers that are not in detention
- ✓ There should be a reasonable legal time limit imposed on the extradition custody
- ✓ For the purposes of extradition "repeated asylum application" should be considered only the one, in which the Migration Office does reject the application based on the *res iudicata* principle and does not examine it in the merits in a regular asylum procedure
- ✓ Criminal courts deciding on the sentence of expulsion should always decide to which concrete country a foreigner should be expelled examining properly the *non-refoulement* principle

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<sup>129</sup> Zuzana Številová, *Právo versus kontrola (Law versus control)* presented at the seminar of the Czech ombudsman 28 March 2013, published in „Status of foreigners – selected legal problems“

<sup>130</sup> On whether § 52 (2) of an Asylum Act and § 120 (2) of a Foreigners Act are compatible with the Constitution and with the European Convention on Human Rights

<sup>131</sup> § 19a (9) of the Asylum Act

<sup>132</sup> § 52 (2) of Asylum Act and § 120 (2) of Foreigners Act

<sup>133</sup> This is the recommendation suggested by the decision-makers of the Migration Office during our interview

# CZECH REPUBLIC

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## OVERVIEW OF THE NATIONAL ASYLUM PROCEDURE

The asylum procedure in the Czech Republic is covered in Asylum Act<sup>134</sup>. The authority responsible for asylum claims is the Ministry of Interior, Department of Asylum and Migration Policy<sup>135</sup>. The asylum claim initiates a procedure on international protection (§2/1a Asylum Act), which can result into following outcomes: 1. decision on granting asylum, 2. decision on granting subsidiary protection, 3. decision on rejecting the international protection. In exceptional cases, the outcome can be stopping of the procedure, typically if the application is a repeated application without any new facts provided.

An applicant can apply for international protection at the border crossing, at any foreigners police station, at OAMP reception centers (currently two: Zastávka, Airport Prague) or detention centers (currently three : BěláJezová, Balková, VyšníLhoty), and in exceptional situations in hospitals, prisons or special facilities for children<sup>136</sup>.

There are two reception centers in the Czech Republic. One of the two reception centers is located at the border - Airport Prague reception center, while the other reception center is located in the Czech territory - Zastávka reception center. While the law indeed enables persons to file asylum claims at any alien police station, in practice the police offices refer the applicants to the Zastávka center to actually initiate the procedure.

The asylum seekers are obliged to remain in one of the closed facilities initially depending on where they filed the asylum application (be it one of the two reception centers, or a detention center). Subsequently, for the duration of the asylum procedure, asylum seekers have the possibility to move to one of the open accommodation centers for asylum seekers (located in Kostelec and Havířov).

When applying for asylum at Zastávka reception center or one of the detention centers, there is no waiting period between applying for asylum and the procedure commencement. When applying at the airport, though, there can be delays as well as obstacles to file the application. Since 2015, OPU has been monitoring complaints regarding access to procedure in the airport transit zone. These complaints typically describe that the airport police doesn't identify applicant's wish to seek asylum, and in some cases ignores explicit asylum requests. Some of these cases were described in the report Pushed Back at The Door (2017<sup>137</sup>).

In general, there is no deadline for filing the application, unless it is filed from a detention center in which case a 7 days deadline since detaining applies<sup>138</sup>. Such a very strict time limit for filing an asylum application can pose an obstacle to do so.

<sup>134</sup> Asylum Act (Zákon o azylu), Law Nr. 325/1999 Coll.

<sup>135</sup> Ministry of Interior, Department of Asylum and Migration Policy (Ministerstvo vnitra, Odbor azylové a migrační politiky, OAMP), [www.mvcr.cz/clanek/odbor-azylove-a-migracni-politiky.aspx](http://www.mvcr.cz/clanek/odbor-azylove-a-migracni-politiky.aspx)

<sup>136</sup> Asylum Act (Zákon o azylu), Law Nr. 325/1999 Coll., §3a.

<sup>137</sup> Hungarian Helsinki Committee (HHC). Pushed Back At the Door, 2017, p.8-11, available at <https://www.opu.cz/wp-content/uploads/2017/01/Pushed-Back-Report-Central-Europe-and-Bulgaria.pdf>

<sup>138</sup> The deadline is connected to the moment in which the police informs the detainee on the possibility to apply for asylum. In practice, this typically happens the first day of the detention. See Asylum Act (Zákon o azylu), Law Nr.325/1999 Coll., §3b.

The decision should be issued within 6 months (§27/1 Asylum Act) which, in exceptional cases, can be extended up to 18 months in total. In practice, the applicants face long delays even if no exceptional grounds for deadline extension apply, with the duration often exceeding 2 years or more. The asylum is granted for an unlimited time period, while the subsidiary protection is granted for a period of 1 year at the minimum (§53a Asylum Act) and can be extended periodically.

In case of a rejection by OAMP, the applicants can file a judicial appeal to regional courts (§32 Asylum Act) within 15 days since the negative decision. There are no special courts solely for asylum or migration agenda. As asylum and migration law belongs in the field of administrative law, the judicial appeal cases are handled by administrative law judges.

The appeal typically has a suspensive effect, with the exception of appeals against a decision claiming the application inadmissible such as a repeated claim or a Dublin decision (§32 Asylum Act). The regional courts have no power to directly grant international protection as the Czech Republic failed to timely implement art. 45 of the Procedural Directive<sup>139</sup>. The positive court decision can only return the procedure back to OAMP. This can result to continuously repeated delays, as even a successful judicial decision only leads to a repetition of the OAMP procedure which can repeatedly result in a negative decision in spite of the successful judicial decision. While such asylum seeker continues to maintain their asylum seeker status (including the possibility to be housed in state accommodation centers), such cyclic delays feed asylum seekers' insecurity. If the court rejects the appeal, the asylum seeker can file another remedy, a cessation complaint to the Supreme Administrative Court which too has a suspensive effect typically<sup>140</sup>.

The international protection in the form of asylum cannot be granted if one of the Art.1F of the 1951 Refugee Convention (exclusion clause) reasons arise. The content of Art.1F sub a) is word by word encompassed in §15/1 Asylum Act sub a). The content of Art.1F sub b) is encompassed in §15/1 Asylum Act sub b) while the § 15/1 sub b) references the Czech asylum procedure specifically, and also contains an additional exclusion ground – committing of a particularly cruel act:

- b) committed before the decision of the ministry in the international protection matter a serious non-political crime or a particularly cruel act, even if this was allegedly committed with a political goal out of the territory

The content of Art.1F sub c) is encompassed in §15/a Asylum Act sub c) with a modification : while the Convention requires the person to be found *guilty of* acts contrary to the purposes and principles of the United Nations, the §15/1 sub c) only requires that the person

- c) *committed* acts contrary to the purposes and principles of the United Nations.

The exclusion grounds in the contexts of subsidiary protection are broader. In the contexts of the subsidiary protection, Art.1F sub a) of the 1951 Refugee Convention is word by word encompassed in §15a/1 sub a) Asylum Act. Art. 1F/1 sub c) is encompassed in §15a/1 sub c) with the same modification as above in the contexts of asylum – the person has to have *committed* relevant acts rather than *be guilty of* them. Art.1F sub b) is significantly broadened in the context of subsidiary protection as stated in §15a/1 sub b) and applies to a person who

- b) committed a serious crime

Ultimately, the subsidiary protection can also be rejected if the person, as stated in §15a/1 sub d):

- d) poses a threat for state security

The Asylum Act also contains a possibility to subsequently withhold a previously granted international protection. The reasons to withhold the protection in the form of asylum are listed in §17 Asylum Act. Reasons in §17/1 sub a) – g) relate to the change of circumstances and are mostly approximately corresponding to the cessation clause of the 1951 Refugee Convention Art.1/C:

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<sup>139</sup> Directive 2013/32/EU of the European Parliament and of the Council ,Procedural Directive, Art.46/3, in contrast with Judicial Procedural Order (SoudníŘádSprávní), Law Nr.150/2002 Coll., §78.

<sup>140</sup> The exceptional case in which the cessation appeal has no automatic suspensive effect is when the preceding judicial appeal to the regional court had no automatic suspensive effect, Asylum Act (zákon o azylu), Law Nr.325/1999 Coll., §32.

- a) before its granting, the asylum holder provided untrue data or kept important facts secret that are relevant to establish grounds for issuing the decision,
- b) the asylum holder has voluntarily re-availed himself of the protection of the country of his nationality or last residence,
- c) the asylum holder has voluntarily reacquired the citizenship of the country which he has left for the reasons of the well founded fear of persecution,
- d) the asylum holder has acquired a new nationality, and has therefore a possibility to enjoy the protection of this country,
- e) the asylum holder voluntarily stays in the country which he left owing to reasons listed in §12<sup>141</sup>,
- f) the asylum holder can enjoy the protection of the state of his citizenship because the reasons to grant asylum have ceased to exist,
- g) the asylum holder is without a citizenship and can return to the state of last residence because the reasons to grant asylum have ceased to exist.

Additional reasons to withhold international protection in the form of asylum are listed in §17/1 sub h) – j) and contain references to state safety and security:

- h) the asylum holder should have been or is excluded from the possibility to grant asylum according to §15 Asylum Act,
- i) there are justified reasons to consider the asylum holder to be a threat to state security, or
- j) the asylum holder was enforceably condemned for a particularly serious crime and so poses a threat to state security.

The subsidiary protection can be withheld according to §17a Asylum Act, if:

- a) the circumstances that led to granting subsidiary protection ceased to exist or changed to such extent that the subsidiary protection is no longer needed
- b) the subsidiary protection holder should have been or is excluded from the possibility to grant asylum according to §15 Asylum Act
- c) untrue providing or omitting of certain facts, including usage of forged or modified documents, was decisive for granting of subsidiary protection, or
- d) the person enjoying the subsidiary protection committed a particularly serious crime.

The numbers of asylum seekers in the last years have been low, including the 2015 in so called refugee crisis. According to official statistics<sup>142</sup>, in 2017, there were 1450 asylum applications filed, out of which 308 were repeated applications. In 2016, there were 1 478 asylum applications, out of which 263 were repeated ones. In 2015, there were 1 525 asylum applications, out of which 285 were repeated ones. The Ministry does not list the number of exclusion clause proceedings. In 2017, out of 1508 decisions issued<sup>143</sup>, asylum was granted in 29 cases and subsidiary protection was granted in 118 cases, in 635 cases the ministry rejected the application and in 726 cases it stopped the procedure. The highest numbers of applications in 2017 were from Ukraine with the clearly prevailing number of 435 applications, followed by Armenia and Georgia each with 129 applications and Azerbaijan with 127 applications, followed by Vietnam with 82 applications, Syria with 76 applications, Cuba with 68 applications, Russian federation 57 applications, Iraq 52 applications, Kazakhstan 38 applications and Turkey with 32 applications. Other nationalities were represented with less than 20 applications<sup>144</sup>.

## SECURITY CHECKS UNDERTAKEN IN RELATION TO ASYLUM SEEKERS

Upon filing the asylum application, each person has to undergo a police safety check, has to present their ID documents and has to provide their biometric data including finger prints by police and a medical check done at the reception centers. Before these, the asylum seeker is not allowed to leave the reception center (§45 and

<sup>141</sup>Note : §12 Asylum Act lists reasons for granting international protection in the form of asylum.

<sup>142</sup>Statistics issued by the Czech Ministry of Interior available at <http://www.mvcr.cz/migrace/docDetail.aspx?docid=22116049&doctype=ART>

<sup>143</sup>Note: The decisions were issued in cases that were not necessarily initiated in the same year, hence the higher number of decisions than the number of new applications filed in 2017.

<sup>144</sup>Statistics issued by the Czech Ministry of Interior available at <http://www.mvcr.cz/migrace/docDetail.aspx?docid=22116049&doctype=ART>

§46 Asylum Act). OPU has monitored multiple complaints on how the police check up is conducted at the airport transit zone. These complaints typically focus on obstacles to access the asylum procedure – for example they often mention police’s unwillingness to accept asylum declarations, however they also mention police’s verbal violence and threats, including threats of deportation. Some of these cases were described in the report *Pushed Back at The Door* (2017<sup>145</sup>). In one case initiated by OPU, an asylum seeker complained to the European Court of Human Rights about the physical violence committed by police at the airport. The complainant, a Kurdish citizen of Turkey, was transferred to the Czech Republic in 2013 based on the Dublin regulation. After arrival, he claims he was injured by the airport police during his security check. He claims that, after being hit to his stomach by a baton, and hit to his mouth by one policeman, other policemen proceeded to hit him by batons and kick him. He claims that because of subsequent violence, he lost consciousness and only woke up in hospital. After emergency treatment, he was placed in a detention center. He was in bad psychological condition in the detention and attempted a suicide. The case is currently pending as *B.Ü v. Czech Republic*<sup>146</sup>.

A failure to present a proper ID/entry documents can lead to obstacles to access the asylum procedure at airport transit zone : in some monitored cases, the police did “not hear” the asylum requests and instead initiated a criminal procedure for the crime of presenting a forged document, which lead to the criminal punishment of expulsion<sup>147</sup>, as described in the report *Pushed Back at The Door* (2017<sup>148</sup>).The criminal expulsion is ordered by a criminal court in a procedure where there is no obligation - solely a possibility - to postpone the expulsion if an asylum application is pending<sup>149</sup>.

Alarmingly, though, the push backs were monitored even in cases where persons arrived with valid ID as the Police can cancel entry visas resulting in an immediate deportation, in procedure where there is no legal aid or interpretation required (§9 of law nr.326/1999, Foreigners Act). This procedure on territory access denial is encompassed in §9 Foreigners Act<sup>150</sup>, according to which the police can deny access to territory to a broad scale of persons including a person who cannot prove sufficient financial means to live in the Czech Republic. According to this procedure, the police can deny access to territory to a person who:

- a) does not have a valid travel document
- b) presents a forged or modified travel document, visa or residence permit
- c) does not present a visa, if a visa obligation exists, or (does not present) a residentship permission
- d) does not present documents indicating the purpose and securing of conditions of residentship at the territory
- e) does not have a sufficient amount of means to stay at the territory and to leave the territory
- f) is an unwanted person (§154<sup>151</sup>) je nežádoucí osobou (§ 154),
- g) is listed in the informational system created by the states which are bound by international treaties on removing common border controls (further only contract states), for the purposes to get an overview about aliens who cannot be allowed territory entrance to the territory of contract states (further only „informational system of contract states“), this is not valid if the alien is granted a visa allowing solely to reside at the territory
- h) there is a well founded danger that the alien could during his residence threaten the state security, seriously disrupt public order or threaten international obligations of the Czech Republic,
- i) there is a well founded danger that the alien could during his residence in the territory of another contract state threaten its state security, or seriously disrupt public order there or threaten international relations of contract states, or

<sup>145</sup>Hungarian Helsinki Committee (HHC). *Pushed Back At the Door*, 2017, p.8-11, available at <https://www.opu.cz/wp-content/uploads/2017/01/Pushed-Back-Report-Central-Europe-and-Bulgaria.pdf>

<sup>146</sup> European Court for Human Rights, *B. Ü. v. the Czech Republic*, Complaint Nr. 9264/15, pending

<sup>147</sup> The punishment of expulsion is a result of a criminal procedure and is ordered by a court. This is to be distinguished from the administrative expulsion issued by police in an administrative procedure.

<sup>148</sup>Hungarian Helsinki Committee (HHC). *Pushed Back At the Door*, 2017, p.8-11, available at <https://www.opu.cz/wp-content/uploads/2017/01/Pushed-Back-Report-Central-Europe-and-Bulgaria.pdf>

<sup>149</sup> See more below under Exception from non-refoulement principle

<sup>150</sup> Foreigners Act (Zákon o pobytu), Act Nr. 326/1999 Coll.

<sup>151</sup> Foreigners Act (Zákon o pobytu), Law Nr.326/1999 Coll, §154 : (1) *An unwanted person is a foreigner who cannot be allowed territory entrance for the reason that this foreigner could, if residing at territory, threaten the security of the state, seriously disrupt public order, threaten public health or protection of rights and freedoms of others or a similar interest protected by an obligation resulting from an international treaty.*

j) does not fulfill the conditions stated by the measure of the Ministry of health to prevent intrusion of a contagious disease from abroad, in line with the law on protection public health (further only „measure to prevent intrusion of a contagious disease“)

Considering there is no legal assistance provided and there is no interpreter available, the police is able to proceed according to one of the conditions above without any supervision mechanism, while the foreigners don't necessarily understand the reasons of the access denial, and have no efficient way to answer to the police.

In addition to the grounds to be denied access to territory, presence without ID or entrance/residence documents can result into Police's issuing a decision on administrative expulsion at the airport transit zone, including issuing such decisions for persons who wish to file an asylum claim, contrary to Art.31 1951 Refugee Convention. While the administrative expulsion decisions are not immediately executed for those persons who apply for international protection, it is not always easy to apply for international protection at the transit zone, considering the monitored obstacles which describe the common practice of the Foreigners' Police to "not hear" the asylum requests<sup>152</sup>.

All these systemic issues met in the case of a Kurdish family from Iraq who arrived to the Prague airport transit zone with valid ID and visas, planning to apply for asylum. However, their valid visas were annulled by the police in a procedure that the family did not understand, without an interpreter or a lawyer. After their visas were annulled and their access to territory denied, the family understood from the basic police gestures that the police wanted to deport them immediately. The family tried to apply for asylum at the Prague airport transit zone, but the police ignored their requests.

The family, terrified of deportation, decided to destroy their passports to prevent the deportation. As a result, the Police immediately began to regard them as persons without valid I.D., and on this ground issued an administrative expulsion to all the family members over 15 years of age, claiming lack of ID constitutes a breach of Foreigners Act. The police, still ignoring the family's asylum requests, was ready to execute the administrative expulsion. But, in the administrative expulsion procedure, the police is obliged to always ask the Ministry of Interior whether there are *obstacles to return*<sup>153</sup>. Interestingly enough, in this case, the Ministry indeed issued a speedy statement that there are *obstacles to return* considering the political situation in Iraq. Positive statement *on obstacles to return* can often indicate that in future, the asylum application would be successful at least in the form of subsidiary protection. Absurdly, it was only the desperate act of destroying passports which prevented the family's deportation, because without the penalizing procedure for lack of passports, no authority would be obliged to examine the obstacles to return.

In this case, the family ultimately managed to gain access to asylum procedure, and the three family members who were above the age of 15 (mother, father, the eldest son) also appealed their administrative expulsion decisions to court. In the Supreme Administrative Court decisions 10 Azs 212/2017, 10 Azs 213/2017, and 9 Azs 2017/2017, the court stated the expulsion decision for this family was contrary to Art.31 1951 Refugee Convention which prohibits penalizing refugees for an unlawful entry under certain circumstances including applying for asylum without delays. The Czech police argued this was not applicable as the family did not apply for asylum without delays. In the decision of the mother of the family (which is then similarly used in the other three family members' decisions), the Supreme administrative court pointed out that an asylum application filed immediately after their access to territory was denied still meets the criteria of an application without delays. According to the court, the family clearly arrived with valid visas and therefore planned to file their asylum application on the Czech territory, therefore it is understandable that the family did not originally plan to file their applications at the airport as they had no way to be prepared for a nullification of their visas. The court also points out that it is necessary to consider the language and cultural obstacles that the applicant faced - it is clear she only spoke Kurdish and cannot read and write, there was no interpreter in the procedure on denying access to territory, and she could not understand the information in the decision on denying access to territory. The Supreme Administrative Court decisions were later repeated in the subsequent Municipal

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<sup>152</sup> Hungarian Helsinki Committee (HHC). Pushed Back At the Door, 2017, p.8-11, available at <https://www.opu.cz/wp-content/uploads/2017/01/Pushed-Back-Report-Central-Europe-and-Bulgaria.pdf>

<sup>153</sup> Foreigners Act (Zákon o pobytu), Law Nr. 326/1999 Coll., §179, see more below under Exceptions from the non-refoulement protection.

Court decisions 4 A 32/2017, 4 A 33/2017, 4 A 34/2017 after which the administrative expulsion decisions were cancelled. The Municipal court added that the family had a clear severe reasons for an irregular entry - fear of their life.

After filing for asylum, the lack of an ID or an indication that the person will pose a threat to public order can result in detention in the reception center up to 120 days (§46a and §73 Asylum Act), as described more below in the chapter on Detention. ). The assessment of the threat to public order is completely up to the particular officer of the ministry of interior and typically contain only vague references. For example typically, in case of the airport reception center, the detention is reasoned by threat to public order based on the person's modification in travel document, previous residence in another EU member state or future wish to travel to another EU member state.

During the procedure in merits, the Ministry conducts one or more individual interviews with the applicants and compares the statements with country of origin information gathered from multiple sources. As part of this, the Ministry routinely asks the Czech diplomatic missions abroad to provide their statements on the human rights situation in the respective country. The Ministry is bound by confidentiality and should never reveal applicant's identity. Recently, a media report pointed out to the method of the ministry of the interior regarding a group of asylum seekers from China. According to this media report, the ministry conducted a thorough individual safety/security assessment in the country of origin - the method of this assessment was not specified<sup>154</sup>.

## SECURITY CONSIDERATIONS DURING THE ASYLUM DECISION MAKING PROCESS:

§15/1 of the Asylum Act lists reasons for which international protection in form of asylum cannot be granted, while §15a/1 lists such reasons when the subsidiary protection cannot be granted. An expansion of the 1F Article occurs in §15/1 sub b) where the 1F article specifically states that a serious non-political crime is a reason for exclusion from asylum or a particularly cruel act, even if this was allegedly committed with a political goal. In cases of exclusion from subsidiary protection in §15a/1 sub b), this same provision solely states "committed serious crime".

These reasons are also some of the reasons to withhold the previously granted international protection, §17 and 17a Asylum Act. Other reasons to withhold the protection in §17 and §17a include under letter a) : when the asylum holder withheld certain facts relevant for their case, under i): there are well founded reasons to consider the asylum holder a threat to state security, or under j): the asylum holder was condemned for a particularly serious crime and so poses a threat to state security.

The decisions on exclusion or withholding refugee or subsidiary protection status are always presented in writing in Czech language, without a written translation provided – however the same is valid for standard international protection decisions as well, as in those there is also no written translation provided. The oral interpretation is provided only regarding the actual outcome (example: the phrase "international protection is not granted"). The interpreter also has to translate the instruction on available legal remedies.

If the decision is based on classified information, the classified information is never described in the written decision, and the asylum seeker/asylum holder has no access to the information<sup>155</sup>.

<sup>154</sup>Vaculík, Radim. Právo, Novinky.cz. 22.2.2018. Available at <https://www.novinky.cz/domaci/464126-osm-cinskyh-krestanu-dostalo-azyl-v-cesku-70-jich-odmitli.html>: „The second reason of the procedure delay, which the minister refused to comment on Wednesday, but was according to Právo findings also essential. It concerned investigating whether there are secret service agents among the applicants, or of other foreign offices. „The Interior used all its resources to verify these persons, if the don't play some games with the Czech Republic. It verified also through Czech secret services“, a resource familiar with the ministry investigations outcomes told the publisher.“

<sup>155</sup>Law on protection of classified information and on security capability (Zákon o ochraně utajovaných informací a o bezpečnostní způsobilosti), Law Nr.412/2005 Coll.

The remedy available for those who were issued a rejecting decision based on §15 or §15a<sup>156</sup> as well as to those whose status was withheld based on §17 or §17a<sup>157</sup> is a judicial appeal to a regional court, with suspensive effect, §32 Asylum Act. The appeal has to be filed within 15 days. If the result of the appeal is negative, applicants can appeal to the Supreme Administrative Court with suspensive effect, the appeal has to be filed within 2 weeks.

As mentioned above, the Ministry does not list the number of exclusion clause proceedings. Adequately, OPU does not monitor such cases very often. Among the cases monitored, there are as follows:

- a man who was a subsidiary protection holder in the past, was subsequently convicted to a 5 years imprisonment penalty for unlawful production of narcotic drugs and stealing. The man initially neglected to extend his subsidiary protection. Subsequently he asked for international protection again. The international protection was examined in merits in spite of being a repeated one, however the protection was not granted to him for the reasons of committing a particularly serious crime.
- a woman who had permanent residence in the past was subsequently sentenced to an 8 years imprisonment penalty for unlawful production of narcotic drugs as a member of an organized group. Her permanent residence was withheld from her on the grounds of having committed a particularly serious crime based on §75 par.1 letter e) of the Foreigners Act<sup>158</sup>. After being released from prison, she asked for international protection. The international protection was not granted to him for the reasons of committing a particularly serious crime.
- a man who was a subsidiary protection holder, was sentenced to 28 months imprisonment and a criminal expulsion for an unlimited time period for the crime of attempted crime. His subsidiary protection was subsequently not extended based on having committed a particularly serious crime. However, in the time immediately preceding the issuing of the decision on non-extending the subsidiary protection, the Supreme Court<sup>159</sup> cancelled the preceding criminal sentence. The man appealed the decision on non-extending the subsidiary protection which was successful and the subsidiary protection was extended.

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<sup>156</sup> Reasons corresponding to Art. 1/F of the 1951 Convention with some modification and expansions, see Chapter 1

<sup>157</sup> Reasons corresponding to Art. 1/C of the 1951 Convention with some modification and expansions, see Chapter 1.

Additional reasons to withhold international protection in the form of asylum are listed in §17/1 sub h) – j) and contain references to state safety and security:

- h) the asylum holder should have been or is excluded from the possibility to grant asylum according to §15 Asylum Act
- i) there are justified reasons to consider the asylum holder to be a threat to state security, or
- j) the asylum holder was enforceably condemned for a particularly serious crime and so poses a threat to state security.

The subsidiary protection can be withheld according to §17a Asylum Act, if

- a) the circumstances that led to granting subsidiary protection ceased to exist or changed to such extent that the subsidiary protection is no longer needed
- b) the subsidiary protection holder should have been or is excluded from the possibility to grant asylum according to §15 Asylum Act
- c) untrue providing or omitting of certain facts, including usage of forged or modified documents, was decisive for granting of subsidiary protection, or
- d) the person enjoying the subsidiary protection committed a particularly serious crime.

<sup>158</sup> Foreigners Act (Zákon o pobytu), Law Nr.326/1999 Coll. : §75 par.1 sub e) „*The foreigner threatened the state security or in a serious manner threatened public order or there is a well founded threat that the foreigner could threaten state security or in a serious manner threatened public order or, sub f) The foreigner threatened the state security of another EU member state or in a serious manner threatened its public order, upon the condition that this decision will be proportionate considering its impact to foreigner’s private or family life.*“

<sup>159</sup> Supreme Court (Nejvyšší soud) which was deciding in the criminal matter, to be distinguished from the Supreme Administrative Court (Supreme administrative court) which is in charge of administrative law agenda. Law on Courts and Judges (Zákon o soudech a soudcích), Law Nr. 6/2002 Coll.

## THE APPLICATION OF EXCEPTIONS FROM THE NON-REFOULEMENT PRINCIPLE (ART. 33(2) OF THE 1951 REFUGEE CONVENTION)

In the Czech Republic, the protection from the non-refoulement principle is reflected in §12 of Asylum Act<sup>160</sup> according to which the asylum is granted if the foreigner

- a) is persecuted for exercising political rights and freedoms or
- b) has a well founded fear of persecution on grounds of race, gender, religion, nationality, belonging to certain social group or for maintaining certain political opinions in the state of citizenship, or in case of a stateless person, in state of the last permanent residence.

This provision does not apply in cases of the exclusion clause of §15 Asylum Act (see above).

During the asylum procedure pending, the asylum seeker has a right to remain at the territory, unless it is a further subsequent asylum application<sup>161</sup>.

The principle of non-refoulement is also reflected in the Foreigners' Act §179 on *obstacles to return*<sup>162</sup>. Should a person be present at the Czech territory without valid visa or ID, and should the police therefore initiate an administrative expulsion procedure, in every administrative expulsion procedure the police is obliged to always ask the Ministry of Interior whether there are *obstacles to return*. According to §179 Foreigners Act, the *obstacle to return* exists if there is a well founded fear of, upon return,

- a) imposing or executing death penalty
- b) torture or cruel or in humane treatment or punishment
- c) serious danger for life or human dignity for reasons of indiscriminate violence in situations of international or internal armed conflict
- d) if the expulsion was contrary to international obligations of the Czech Republic

If the *obstacles to return* apply, the administrative expulsion can still be issued, however cannot be executed.

The provision above on *obstacles to return* does not apply according to the same legal provision for persons who

- a) committed a crime against peace, war crime or a crime against humanity in the sense of international documents containing provisions on these crimes,
- b) committed a particularly serious crime,
- c) committed crimes that are contrary to the values and goals of the United Nations, or
- d) poses a threat to state security.

Another exception from the non-refoulement principle can apply for foreigners serving a criminal sentence of criminal expulsion. Such foreigners are subjected to the Criminal Order<sup>163</sup>. According to §350b of the Criminal Order<sup>164</sup>, if the applicant files an international protection application and the application is not manifestly unfounded, the court postpones<sup>165</sup> the expulsion. The postponing decision has to be issued in writing. Unlike in the asylum procedure before the Ministry (OAMP) which at least in theory should be equipped to decide asylum cases with certain degree of background knowledge, there are no specific obligations, methods or resources set for the courts in the criminal expulsion procedure as of how to evaluate whether the application is not manifestly unfounded. This means that the criminal court has no obligation to postpone the expulsion, if it assesses - without much resources or information - that the asylum application is manifestly unfounded.

<sup>160</sup> §12 Asylum Act Law Nr.325/1999 Coll.

<sup>161</sup> §11a Asylum Act Law Nr.325/1999 Coll.

<sup>162</sup> §179 Foreigners Act, Law Nr. 326/1999 Coll.

<sup>163</sup> Criminal Order (TrestníŘád), Law Nr. 141/1961 Coll.

<sup>164</sup> Criminal Order (TrestníŘád), Law Nr. 141/1961 Coll, §350b paragraph 4: *If the convicted to the punishment of expulsion applied for international protection according to a special legal provision, and it is not a manifestly unfounded application, the head of the (judicial) senate upon the convicted's request or even without such request postpones the punishment of expulsion. About the postponing of punishment of expulsion for this reason, the head of the (judicial) senate informs the authority responsible for the procedure on international protection according to a special legal provision and also requests that immediately after terminating the procedure, it be informed in what way was the application decided.*

<sup>165</sup> The text of law specifically says that the court postpones the expulsion, not suspends.

A difficult situation can arise for those foreigners serving their criminal sentence of criminal expulsion in prisons. Serving a criminal expulsion sentence in prisons is not uncommon, as the sentence of criminal expulsion can and often is combined together with a sentence of incarceration. Further, even foreigners whose sentence of criminal expulsion is not combined with another sentence, are placed in prisons in a special regime of expulsion incarceration for the purposes of executing the criminal expulsion. Serving any criminal sentence occurs in regular prisons, not in immigration detention centers<sup>166</sup>. Access to legal aid in regular prisons is severely limited, even more so for persons with a language barrier and no social network in the Czech Republic. At criminal proceedings, there is no compulsory legal aid guaranteed at the initial stages of the procedure. Further, for those who did manage to get access to legal aid, the legal counselors in the criminal proceedings have no obligation to inform the person on immigration consequences of the proceedings - such as that the criminal expulsion punishment will be enforceable immediately. Neither the legal counselors (if present at all) nor the judges have any obligation to inform the person subjected to criminal expulsion on the possibility to apply for asylum. The courts have no obligation and no power to process an asylum request, should such request be raised at the court procedure. Moreover, the court does not have any obligation to pass the asylum request to the responsible authorities (Ministry of Interior) nor to interact with the Ministry of Interior to assess the asylum claim. All this lowers the chances of a to-be-expelled asylum seeker to be perceived as a well founded asylum applicant. At the same time, the OAMP routinely processes asylum application in prisons in an immensely speedy time and in a low quality assessment as for example in the case before ECHR *Budrevich v. Czech Republic*<sup>167</sup>, or in a recent case pending before UNHCHR-CEDAW<sup>168</sup>:

In October 2017, OPU represented a case of a woman from Ghana, a severely traumatized domestic violence victim, who tried to apply for asylum at the Prague Vaclav Havel international airport transit zone. The Police ignored her request and since she arrived without valid ID and documents, a criminal expulsion procedure was initiated at the airport. She was put to prison and underwent a criminal procedure in which she had no legal aid available. Even though she continued to repeated her asylum requests and was visibly traumatized, the court ignored her request - partially also because the criminal court is not responsible for processing asylum request. The court issued a criminal expulsion decision and the woman was awaiting her expulsion to take place immediately, even though later she managed to contact OPU from the prison, and file an asylum application from the prison. Her asylum application did not lead the court to postpone her expulsion. OPU filed a complaint to the UN High Commissioner of Human Rights, Committee on Elimination of Discrimination Against Women, which issued an interim measure<sup>169</sup> within the next work day (the interim measure request was filed on Friday, while the interim measure was declared the following Monday), which ultimately suspended the woman's expulsion. The case, reported on in Czech public media<sup>170</sup>, is still pending.

In 2013, the Czech Republic was criticized on failing to provide legal remedy in a criminal expulsion proceedings of an asylum seeker, in a ECHR Case *Budrevich v. Czech Republic*<sup>171</sup>. As this case partially covers extradition, it will be described below.

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<sup>166</sup> Although bearing a myriad of visual similarities to regular prisons such as barbed wired fence and windows behind bars, immigration detention centers in the Czech Republic typically serve for detaining migrants for execution of administrative expulsion or for the purposes of transferring migrants to another EU member state based on the Dublin regulation or a readmission agreement, §124 et al. Foreigners Act, Law 326/1999 Coll. - see more in charter 7.

<sup>167</sup> ECHR Judgement of 17. October 2013, *Budrevich v. Czech Republic*, Complaint Nr. 65303/10, Available at <http://hudoc.echr.coe.int/eng?i=001-126918>

<sup>168</sup> CEDAW X.v.Czech Republic, 121/2017, pending.

<sup>169</sup> CEDAW X.v.Czech Republic, 121/2017, pending.

<sup>170</sup> Biben, M. Aktuálně.cz. 8.11.2017. UN Committee stood for a refugee in Czechia. It urged the state to prevent the deportation of the woman back to Ghana. (Komisař OSN se zastal uprchlíka v Česku. Vyzval stát, ať zabráni deportaci ženy zpět do Ghany.). Available at [https://zpravy.aktualne.cz/domaci/urad-vysokeho-komisare-osn-se-poprve-zastal-uprchlika-v-cesku/r~2f8bfe5ec3f411e7b65a0025900fea04/?\\_ga=2.43371557.1460778020.1510304632-1724839074.1483257803&redirected=1534325553](https://zpravy.aktualne.cz/domaci/urad-vysokeho-komisare-osn-se-poprve-zastal-uprchlika-v-cesku/r~2f8bfe5ec3f411e7b65a0025900fea04/?_ga=2.43371557.1460778020.1510304632-1724839074.1483257803&redirected=1534325553)

<sup>171</sup> ECHR Judgement of 17. October 2013, *Budrevich v. Czech Republic*, Complaint Nr. 65303/10, Available at <http://hudoc.echr.coe.int/eng?i=001-126918>

## EXTRADITION

Extradition of persons in the Czech Republic is regulated by the law on International Judicial Collaboration<sup>172</sup>. According to sub b) of this law, extradition of a person with granted international protection is prohibited. According to §91/1 sub p) of this law, the expulsion is prohibited if there is a well founded fear that the person to be expelled would be exposed to persecution for reasons of her origin, race, religion, gender, particular nationality or other group, state nationality or for her political opinion or other similar reasons or that her position in criminal procedure or punishment would be worse<sup>173</sup>.

Czech Republic was criticized for an attempted criminal expulsion of an asylum seeker with an extradition request pending in a ECHR Case *Budrevich v. Czech Republic*<sup>174</sup>, stating Art.13+3 of ECHR were breached. The applicant, a Belarusian citizen, had no available judicial remedy to prevent his criminal expulsion to Belorussia during his asylum procedure pending, while Belorussia issued an extradition order against him. His asylum procedure was rejected in a speedy procedure within several days only, while the Ministry failed to consider important new developments in his case that were available. The decision on rejection of the asylum claim was delivered to the applicant without a prior notice to him or to his legal representative. While he still had time pending to file a judicial appeal against his negative asylum decision, the authorities initiated steps to conduct his immediate criminal expulsion. The ECHR concluded the applicant had no effective legal remedy available at the time of his attempted criminal expulsion.

## NATIONAL ANTI-TERRORIST LEGISLATION

The Czech Republic incorporated anti-terrorism measures into its Criminal Code in 2009<sup>175</sup>, including the crime of terrorist attack in §311 Criminal Code and terror in §312 Criminal Code. Later, in 2017, several other crimes were added into the same legal provision: taking part in a terrorist group §312a Criminal Code, financing, supporting and promoting terrorism §312d,e, and threat of a terrorist attack §313f.

As the anti-terrorism measures were directly incorporated into the Criminal Code, they can be applied at any given time. These crimes are punishable with imprisonment. The Criminal Code allows for issuing a criminal expulsion punishment jointly with imprisonment. In such cases, the criminal expulsion follows the time of imprisonment.

All the crimes above can be classified as particularly serious crimes which can lead to the application of the exclusion clause or withholding of refugee/subsidiary protection status. OPU did not monitor such cases in practice.

While there is no specific reference to a possibly pending asylum procedure in the section on anti-terrorism crimes, the general rule applies as described above already : according to §350b/4 of the Criminal Order (Trestní řád)<sup>176</sup>, if the person subject to criminal expulsion applies for asylum and the asylum application is not manifestly unfounded, the court postpones the expulsion. Unlike in the asylum procedure before the Ministry

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<sup>172</sup>Law on International Judicial Collaboration in Criminal Matters (*Zákon o mezinárodní justiční spolupráci ve věcech trestních*), Law Nr. 104/2013 Coll.

<sup>173</sup>Law on International Judicial Collaboration in Criminal Matters (*Zákon o mezinárodní justiční spolupráci ve věcech trestních*), Law Nr. 104/2013 Coll. , §91/1 sub p).

<sup>174</sup>ECHR Judgement of 17. October 2013, *Budrevich v. Czech Republic*, Complaint Nr. 65303/10, Available at <http://hudoc.echr.coe.int/eng?i=001-126918>

<sup>175</sup>Criminal Order (Trestní řád), Law Nr. 141/1961 Coll.

<sup>176</sup>Criminal Order (Trestní řád), Law Nr. 141/1961 Coll, §350b paragraph 4: *If the convicted to the punishment of expulsion applied for international protection according to a special legal provision, and it is not a manifestly unfounded application, the head of the (judicial) senate upon the convicted's request or even without such request postpones the punishment of expulsion. About the postponing of punishment of expulsion for this reason, the head of the (judicial) senate informs the authority responsible for the procedure on international protection according to a special legal provision and also requests that immediately after terminating the procedure, it be informed in what way was the application decided.*

(OAMP), there are no specific obligations, methods or resources set for the courts in the criminal expulsion procedure as of how to evaluate whether the application is not manifestly unfounded. The criminal expulsion can be appealed within 8 days, however if the person serves the sentence in a prison, access to legal aid is limited as described above.

## THE USE OF DETENTION

In the Czech Republic, an asylum seeker can typically be detained in one of the closed reception centers or in one of the detention centers (unless, in an exceptional case, serving a criminal sentence in a regular prison - see above).

### Detention in reception centers:

There are two closed reception centers in the Czech Republic. One at the airport transit zone, another one in Zastávka. The airport reception center is in a closed facility in the basement within the airport premises, with no outdoor space other than a small concrete yard for smokers surrounded by a tall concrete fence, and with no natural light nor regular size windows. The center is behind bars. The Zastávka center is a closed complex of several buildings. While the complex is closed and guarded too and persons cannot leave the complex, it is possible to move between buildings in the complex and there is a grass outdoor area between the buildings. There are no open reception centers in the Czech Republic<sup>177</sup>.

After filing the asylum application in a reception center, the person can be detained in the reception center up to 120 days according to §46a Asylum Act<sup>178</sup>:

- a) on grounds of reliable establishing or verifying one's identity
- b) the (asylum seeker) presents forged or modified identity document and the identity is not known otherwise
- c) it is well founded to assume the (asylum seeker) could present a threat for state security or public order
- d) will be transferred to a stay bound with a directly enforceable provision of the EU and there is a serious risk of absconding, especially if (he/she) already in the past attempted exercise of the transfer, or attempted to abscond or expressed an intent not to respect the enforceable provision of the EU or if such intent is obvious from (his or her) acts,
- e) the asylum seeker filed the asylum request in a detention facility and there are well founded reasons to assume that the application for international protection was filed only with the purpose to avoid expulsion decision, extradition or readmission according to the European warrant for criminal prosecution or to imprisonment sentence abroad, or delay such procedure, in spite of having been able to file for international protection earlier,
- f) through its actions causes difficulties in the procedure on international protection, especially by not offering necessary cooperation to the ministry, and because of this it is impossible to establish the state of facts without well founded doubts, and there is an existing risk of absconding or (he/she) already earlier left the territory unlawfully, if such procedure is not contrary to international obligations of the Czech Republic.

In case of the reception center in Zastávka, the detention is often if the applicant identity cannot be established. Other grounds are not as common.

In case of the reception center at the airport transit zone, persons are subjected to a special territory entrance procedure with the outcome of a decision allowing or denying access to territory. A decision denying access to territory is, in its content, a detention decision, as the consequence is an obligation to remain in the closed airport reception center. The detention in the airport reception center is applied often for the reason of an alleged threat to public order in all situations in which the person arrives without a valid document or visa. In some cases, the ministry reasons the threat for public order in the assumption or hypothesis that the person

<sup>177</sup>There are two open accommodation centers in the Czech Republic. All centers in the Czech Republic are administered by the Refugee Administration Facilities and can be found at [www.suz.cz](http://www.suz.cz).

<sup>178</sup>Asylum Act (Zákon o azylu), Law Nr.325/1999 Coll. §46a and §73.

will want to unlawfully enter another EU member state. There is a broad domestic jurisprudence criticizing such an ample interpretation of public order, such as Supreme Administrative Court 5 Azs 312/2016<sup>179</sup> in which the court points out that the asylum seeker from Cuba entered the Schengen space lawfully, and even if he hadn't entered lawfully, consideration would have to be given to art.31/1 of the 1951 Refugee Convention prohibiting punishment of refugees for an unlawful entrance upon certain condition. The court also pointed out the Procedural Directive prohibiting a detention of asylum seeker solely for applying for asylum. Further, the court pointed out that any assumption that the asylum seeker will want to continue his journey to another EU member state is a pure speculation which has no foundation in the case file. Ultimately, the court added that the ministry failed to thoroughly assess the applicant's vulnerability.

In case of the airport reception center, if the ministry does not decide the asylum application within 4 weeks, the applicant is allowed an entrance to the territory and can reside in one of the open accommodation centers, even if they were issued a decision previously.

The airport reception center procedure has one more specific compared to detention in other facilities: the detention cannot be imposed upon a vulnerable person with the exception of a physically disabled person whose disability doesn't prevent residence in the airport reception center. Vulnerable persons have to be allowed access to territory. This means that in cases of vulnerable asylum seekers, the detention should not be applied, but in practice this is not followed as the OAMP does not properly identify vulnerable applicants - as criticized in multiple court decisions such as Supreme Administrative Court 9 Azs 19/2016<sup>180</sup>, criticizing an absolute lack of identifying a female victim of torture. The court sharply criticized the practice of the administrative authority (ministry of interior) which did not even attempt to identify the applicant's vulnerability and so she was detained for an alleged threat to public order, without any clear reasoning and in spite of being a severely traumatized victim of torture in her home country including having suffered a severe head injury. Subsequently, the applicant was granted international protection in the form of asylum.

## Detention in detention centers:

There are three closed detention centers in the Czech Republic: BěláJezová, Balková, Vyšní Lhoty. The Bělá Jezová detention centers allows for detention of families, families with children and unaccompanied children above the age of 15. An unaccompanied child can be detained according to §124 par.6<sup>181</sup> if

*“there is a well founded risk that (he or she ) could threatened state security or in a serious manner disturb public order, and when it is in (the child’s) interests in line with the Convention on the Rights of a Child. In case of a well founded doubt that it is an unaccompanied minor, the police is allowed to detain the foreigner based on reasons in par.1 until the time of (his or her) legal age is established. The police initiates the steps to establish the age of the unaccompanied minor foreigner immediately after detention”*

Thus, the Czech Foreigners Act suggests there can be certain, unspecified, detention grounds that would be in the interest of an unaccompanied child. In this regard, recently, Czech Republic placed on the 9<sup>th</sup> worst place among 20 assessed countries regarding detention of children in the Global NextGen Index<sup>182</sup>. An unaccompanied minor or a family with children can be detained up to 90 days in a detention center.

Other foreigners can be detained in a detention center up to 180 days (§125/1 Foreigners Act<sup>183</sup>) with possible extensions : the detention can be extended and re-classified as a detention for a different purpose, if new facts arise during the detention period as specified in §125 Foreigners Act<sup>184</sup>. According to this provision, the detention can be extended specifically when the person a) hampered execution of the administrative expulsion or leaving the territory, b) provided incorrect data necessary to issue a travel document or refused to provide such data, c) there are delays in the procedure on obtaining necessary documents, all this for up to 545 days.

<sup>179</sup> Supreme Administrative Court decision Nr. 5 Azs 312/2016 of 9.3.2017, available at [http://www.nssoud.cz/files/SOUDNI\\_VYKON/2016/0312\\_5Azs\\_1600031\\_20170328094114\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2016/0312_5Azs_1600031_20170328094114_prevedeno.pdf)

<sup>180</sup> Supreme Administrative Court decision Nr. 9 Azs 19/2016 of 2.6.2016, available at [http://www.nssoud.cz/files/SOUDNI\\_VYKON/2016/0019\\_9Azs\\_1600050\\_20160602135550\\_prevedeno.pdf](http://www.nssoud.cz/files/SOUDNI_VYKON/2016/0019_9Azs_1600050_20160602135550_prevedeno.pdf)

<sup>181</sup> ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>182</sup> GlobalNextGen Index available at <http://next-gen-index.org/wp/en/>

<sup>183</sup> ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>184</sup> *ibid.*

The detention can also be extended up to another 120 days if the applicant applies for asylum in the detention facility (§46a Asylum Act<sup>185</sup>).

The persons who applied for asylum in another EU country and are detained for the purposes of Dublin transfer (§129 Foreigners Act<sup>186</sup>) can be detained if there is a risk of absconding, mirroring Art.28/2 of the Dublin regulation. This was a matter adjudicated by the CJEU in case of A.Ch<sup>187</sup>. In this decision, the CJEU ruled on a preliminary question raised by the Czech Supreme Administrative Court. CJEU stated that Art.2/n of the Dublin III regulation together with Art.28/2 of the Dublin Regulation has to be interpreted in such a way that the member states have the obligation to define the objective criteria of risk of absconding in their legal order. As such definition was not included in §129 at that time, the detention of the person in the procedure before the Supreme Administrative Court was declared as unlawful. Since then, the §129/4 was amended accordingly, supposedly providing a definition of the criteria of risk of absconding. However, the criteria are still formulated very broadly and so can be applied indiscriminately, especially those referring to the risk of absconding in future as being “obvious from his actions”:

*“As a serious risk of absconding is above all regarded if the foreigner resided at the territory unlawfully, avoided in the past transfer to the state bound by the directly enforceable EU law, or attempted to abscond or expressed an intention to disrespect a transfer decision to the state bound by the directly enforceable EU law or if such intent is obvious from his actions. As a serious risk of absconding is further regarded, if the foreigner who is to be transferred to a state bound by the directly enforceable EU law that is not directly neighboring with the Czech Republic, cannot independently travel to this state and cannot provide an address of residence at the territory.”<sup>188</sup>”*

A decision on detention can be appealed to court within 30 days. A detainee can also initiate a special procedure on releasing from the detention. In the recent law amendments to the Foreigners Act, the access to judicial remedy deteriorated, as it became more difficult for courts to declare unlawfulness of detention - according to the new amendment of 2017, a judicial procedure should be stopped if the foreigner is released while the procedure is pending<sup>189</sup>. This amendment was “glued” to the novelization of the Foreigners Act by a last minute suggestion of an individual member of parliament who however admitted that the material was in reality drafted by the ministry of interior<sup>190</sup>. This means that because the proposal skipped the regular law amendment procedure, it was impossible to invoke objections against the proposal and it was accepted without objections. Further amendments to Foreigners Act were suggested later, albeit as for now were not approved, to further deteriorate access to judicial remedy in detention, especially to shorten the appeal deadline and to cancel the possibility to request a release from the detention.

## LEGAL AID

The asylum seeker has a right to ask legal aid from an organization specialized in providing legal aid to refugees (see below) or from a lawyer in the Bar of Attorneys (see below).

In terms of legal aid provided by non-governmental organizations, the asylum seeker receives a list of NGOs in the reception centers and in detention centers which are typically the first entry points for asylum seekers to access the procedure.

<sup>185</sup> AsylumAct (Zákon o azylu), Law Nr.326/1999 Coll.

<sup>186</sup> ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>187</sup> A.Ch., decision of 15. 3. 2017, A.Ch. and others, C-528/15,. EU:C:2017:213

<sup>188</sup> ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>189</sup> Law 222/2017 amending the §172 par.6 ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>190</sup> “The members of parliament incorporated into the Foreigners Act amendment, in spite of critique of human rights defenders, most of additions, which were prepared by the member of parliament of the party CSSD Václav Klučka in collaboration with the Ministry of Interior.”. Czech Press Agency (ČTK), Aktuálně.cz, 7.4.2017, available at <https://zpravy.aktualne.cz/domaci/podminky-pro-pobyt-cizincu-v-cesku-se-zprisni-snemovna-schva/r~602b93201b8011e7b2a40025900fea04/>

In all reception centers, detention centers and accommodation centers, there should be regular free legal aid organized. The asylum seeker has a right to be in contact with a legal aid provider as stipulated by §21 of the Asylum Act while the ministry contributes to the legal aid provider toward the costs<sup>191</sup>. Currently, the legal aid is financed the European migration and integration fund (AMIF<sup>192</sup>). In 2017 and 2018, the legal aid has been implemented by OPU in all asylum facilities in the Czech Republic : 2 reception centers (Zastávka, airport), 3 detention centers (BěláJezová, Balková, VyšníLhoty) and 2 accommodation centers (Kostelec, Havířov<sup>193</sup>). In reception and accommodation centers, OPU legal aid is to continue until December 2019. In the detention centers, the legal aid by OPU is to continue till September 2018 with a momentarily unclear continuation.

Routinely, OPU did not monitor obstacles in accessing legal aid in the asylum facilities, unlike the time period of 2015-2016 when there were severe obstacles to access legal aid in detention facilities. However, the access to legal aid in detention centers can be delayed if an individual is placed in a so called strict regime according to §135 Foreigners Act<sup>194</sup>: if a) the person is aggressive or requires an increased supervision for other serious reason, b) repeatedly seriously disrupts the internal rules of the facility, c) repeatedly seriously disrupts obligations or a prohibition according to the Foreigners Act. Placement in the strict regime is ordered by the police upon a request raised by Refugee Facility Administration which is the administrative organizational unit of the Ministry of Interior in charge of administering all the accommodation facilities for asylum seekers and migrants. The foreigner can submit a complaint against being placed in the strict regime. If the strict regime lasts longer than 48 hours, the police issues a decision on placement in the strict regime, however there is no possibility to appeal or file a judicial claim against such decision. The period of strict regime cannot exceed 30 days<sup>195</sup>.

A more difficult access to legal aid is for those asylum seekers who are yet to enter the asylum procedure in the airport transit zone (see above), or those who are serving a criminal sentence in regular prisons (see above). Based on the amended Law on Attorney Practice<sup>196</sup>, which entered in force in July of 2018, asylum seekers are able to claim certain number of hours per year of free legal aid by the Czech Bar of Attorneys. There are several criteria to qualify for the legal aid including proving low financial income. This might be an obstacle for asylum seekers in detention who might have difficulties to even apply for such aid, or might have difficulties proving their financial situation as their finances are in deposit by the Ministry of Interior during the time of their detention. Moreover, nongovernmental organizations repeatedly expressed their doubts about such concept of state sponsored free legal aid - they suggested that the nongovernmental organizations should not be excluded from the system of state sponsored legal aid, since they are typically more experienced and more ready and competent to provide a thorough and complex legal aid to foreigners and asylum seekers, especially those placed in asylum facilities. As for now, the Czech Bar of Attorneys did not organize any systemic similar legal aid schemes.

## CONCLUSIONS AND RECOMMENDATIONS

The overlaps between the asylum procedure and administrative/criminal expulsion procedure call for strong procedural guarantees available to the asylum seeker, including to persons who wish to access the asylum procedure. These procedural guarantees aren't as strong in the Czech Republic. Further, certain provisions of Criminal Order<sup>197</sup> allow for a broad discretion of courts in assessing whether an asylum application is manifestly unfounded without having adequate data and resources to draw such conclusion. Accordingly, we recommend following steps to be taken to remedy the situation:

- ✓ Upon arrival to the Prague international airport transit zone, Police should identify asylum seekers properly in line with Art.8 of the Procedural Directive, and should not issue administrative expulsion to those who apply for asylum

<sup>191</sup>AsylumAct (zákon o azylu), LawNr. 325/1999 Coll.

<sup>192</sup>European Asylum, Migration and Integration Fund, AMIF, available at [https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en)

<sup>193</sup>Allasylum facilities are administered by theRefugee Facilities Administration and can be found at [www.suz.cz](http://www.suz.cz)

<sup>194</sup>ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Coll.

<sup>195</sup>ForeignersAct (Zákon o pobytu), Law Nr.326/1999 Col..

<sup>196</sup>Law on AttorneyPractice (Zákon o advokacii). Lawnr. 86/1999 Coll, §18a et al.

<sup>197</sup>CriminalOrder (Trestní Řád), Law Nr. 141/1961 Coll.

- ✓ The police procedure on annulling valid visa at the Prague Airport transit zone should be supervised by a special independent body, preferably by the office of the Czech Ombudsman
- ✓ Asylum seekers who arrive with forged documents or without documents should never be penalized with criminal expulsion in line with Art.31 of the Refugee Convention
- ✓ For asylum seekers serving the criminal sentence of criminal expulsion, the criminal court should always be obliged to suspend the criminal expulsion proceedings for the entire duration of the asylum procedure including judicial remedies in the asylum procedure.
- ✓ Access to classified information in asylum proceedings should be guaranteed in some form - at least for the legal representative at courts deciding on the appeal.
- ✓ Persons subjected to detention, administrative expulsion, criminal expulsion and extradition should always be appointed with a free legal counsel.
- ✓ Legal counsels appointed to represent persons subjected to detention, administrative expulsion, criminal expulsion and extradition should be obliged to inform their clients on immigration consequences of their situation, including the possibility to apply for asylum.
- ✓ All foreigners, including asylum seekers, subjected to detention should have access to regular Legal Aid provided by NGOs to cover the broad scope of their legal needs.

# HUNGARY

Author: Marcell Lőrincz. Subjective Values Foundation

## OVERVIEW OF THE NATIONAL ASYLUM PROCEDURE

Hungary acceded to the 1951 Convention in 1989 and was elected as a Member of UNHCR's Executive Committee in 1992 in the midst of an influx of tens of thousands of refugees from neighbouring Yugoslavia. Hungary has acceded to almost all relevant human rights conventions, as well as the 1954 UN Convention relating to the Status of Stateless Persons (henceforth the 1954 Convention) in 2001 and to the 1961 UN Convention on the Reduction of Statelessness in 2009.<sup>198</sup>

The adoption of an act on asylum by the Hungarian Parliament took place only in 1997. The Act CXXXIX of 1997 on Asylum entered into force on 1 March 1998, lifting the geographical limitation with respect to asylum seekers arriving from non-European countries. Government Decrees that implemented the act on asylum were also adopted. The scope of various legal norms was extended to recognized refugees and other categories of persons in need of international protection. The act on asylum has since been amended several times.<sup>199</sup>

The asylum procedure in Hungary is a single procedure where all claims for international protection are considered jointly. The procedure consists of two instances. The first instance is an administrative procedure carried out by the IAO, which is a government agency under the Ministry of Interior in charge of the asylum procedure through its Directorate of Refugee Affairs (asylum authority). The IAO is also in charge of operating the transit zones, open reception centres and closed asylum detention facilities for asylum seekers. The second instance is a judicial review procedure carried out by regional Administrative and Labour Courts.

The asylum procedure is initiated upon submission of an application, in person, at the asylum authority. However, only those lawfully staying can apply for asylum in the country. The asylum procedure starts with assessing whether the applicant falls under Dublin regulation. If Hungary is the member state responsible for the asylum case, the IAO continues with the procedure and goes on to examine the admissibility of the application. The admissibility decision is made within 15 days. If the application is not inadmissible and it will not be decided in accelerated procedure, the IAO has to make a decision on the merits within 60 days.

Since 15 September 2015 Hungarian asylum system operates under special rules, due to the ordering of a "state of crisis due to mass migration". As a result of this order, currently the Hungarian Defence Forces is tasked with the armed protection of the border and with the assistance of the police forces in handling issues related to migration.<sup>200</sup>

### Asylum procedure

The objective of the asylum procedure in Hungary is to establish whether the asylum-seeker is eligible for refugee status or subsidiary protection, and whether the principle of non-refoulement applies, and if not,

<sup>198</sup> Hungary as a country of asylum - <http://www.refworld.org/pdfid/4f9167db2.pdf>

<sup>199</sup> Gyöngyvér Demény Integration of refugees In Hungary - [http://epa.oszk.hu/02300/02334/00034/pdf/EPA02334\\_Fundamentum\\_2008\\_05\\_116-122.pdf](http://epa.oszk.hu/02300/02334/00034/pdf/EPA02334_Fundamentum_2008_05_116-122.pdf)

<sup>200</sup> AIDA: Asylum Information Database, Hungary: country report, (Hungarian Helsinki Committee) 2017 Update – February 2018, available at: <https://www.asylumineurope.org/reports/country/hungary>

should the asylum-seeker be expelled, extradited, or transferred to another EU Member State in accordance with the Dublin III regulation.

## Refugee status

Refugee status may be granted to a person whose life and liberty are threatened in his/her country of origin on account of race, religion, nationality, membership of a particular social group or political opinion, or whose fear of being subject to persecution is well founded, and who currently resides in the territory of Hungary and submits an application for asylum.

In order to maintain the unity of the family, unless there is a reason for exclusion, upon request, the refugee's family members (spouse, if the family relationship has been established prior to entering Hungary, minor child, or the minor child's parent where applicable) and the refugee's children born in Hungary may also be recognised as refugee.

Refugee status remains in force until the refugee receives Hungarian citizenship, or until the refugee status is withdrawn. The refugee authority is required by law to ex officio review each refugee status every three years.

## Persons granted subsidiary protection

A person may be admitted for subsidiary protection if he/she does not qualify as a refugee but in respect of whom there are reasons to believe that the person concerned, if returned to his/her country of origin would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

In order to maintain family unity, unless there is a reason for exclusion, upon request, the family member of the person admitted for subsidiary protection will be granted subsidiary protection as well, if they have jointly applied for protection or if the family member has submitted an application for subsidiary protection upon the consent of the person admitted for subsidiary protection, before the resolution for granting subsidiary protection status is adopted.

Furthermore, if a foreign national who has been granted subsidiary protection status has a child born in the territory of Hungary, the child shall also be granted subsidiary protection status upon request. The refugee authority is required by law to ex officio review each subsidiary protection status every three years.

## Persons enjoying temporary protection

Temporarily protected status, i.e. temporary protection, may be granted to groups leaving their home country in masses, on the basis of the decision of the Council of the European Union or the Government. Parliament grants temporary protection to foreign nationals arriving to Hungary in masses on account of being forced to flee their country due to an armed conflict, civil war, ethnic conflict or the general, systematic and gross violation of human rights, in particular torture, or cruel, inhuman or degrading treatment. Refugee status and status of temporary protection differ in time, meaning that while temporary protection is granted for a specific period of time determined by Parliament (one year that can be extended), refugee status ends when the refugee receives Hungarian citizenship, or until the status is withdrawn.<sup>201</sup>

Upon submission of an asylum application, Hungarian authorities will determine if the asylum-seeker applies for refugee status, subsidiary protection, or if the non-refoulement principle applies. If the asylum seeker is found not to fulfill the conditions for granting these statuses, he will be expelled or transferred to another EU

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<sup>201</sup> Hungarian Immigration and Asylum Office – Introducing the asylum procedure  
[http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=521&Itemid=728&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=521&Itemid=728&lang=en)

Member State under the Dublin process. In practice Hungary has considered Serbia as a safe third country and does not accept applications from migrants travelling through that state.

The asylum procedure begins once the application for refugee status has been submitted to the refugee authority. The asylum-seeker must declare their intention to request international protection as soon as they enter Hungary; this request must be submitted in person in the transit zone unless the person seeking recognition is subject to a measure restricting personal freedom or a measure or a punishment, is subject to refugee detention ordered by the refugee authority, or the applicant is lawfully residing in Hungary and does not request placement at an accommodation center.

According to the law, the asylum procedure, including the asylum-seeker's personal interview, should be completed within sixty days. Procedural steps including determining the authenticity of documents and translating submitted materials are not included in the sixty days of procedural time. Therefore, there is a possibility that the asylum procedure could last much longer. The Immigration and Asylum Office will conduct the asylum procedure for free if it is the asylum seeker's first time applying for asylum. An interpreter is provided to the asylum-seeker during their personal interview and the Immigration and Asylum Office covers the costs of interpretation. In the interview the asylum-seeker is asked questions regarding the reasons for the asylum request, how they came to reach Hungary, and if they possess any other evidence that can be used to aid their asylum application. During the asylum procedure, the refugee authority is obliged to inform the asylum-seeker of their rights and obligations. Applicants can additionally seek assistance from non-governmental organizations that offer free legal aid, or the United Nations High Commissioner for Refugees. All applicants are responsible for their cost of stay in community accommodations, reception centers, and transit zones unless they are granted a residence permit on humanitarian grounds or granted international or subsidiary protection by refugee authorities or the court. A health screening is mandatory for asylum-seekers to determine if they carry any infectious diseases. Treatment will be given if needed.

Once the asylum request has been processed the following decisions can be granted to the asylum-seeker: a decision granting refugee status, subsidiary protection, temporary protection, a decision on refusal of application, or termination of asylum procedure. In case of rejection or if the asylum seeker doesn't agree with the type of protection it's possible to appeal to the Immigration Office (within 15 days following the decision). If the person seeking recognition as a refugee is an unaccompanied minor under the age of 14 the refugee authority shall without delay arrange temporary accommodation for the child and will request the guardianship authority to appoint a child protection guardian to represent the minor. The child protection guardian shall be appointed within 8 days from the receipt of the request from the refugee authority. The unaccompanied minor and the refugee authority shall be notified by the appointing authority without delay of the identity of the appointed child guardian. Minors under 14 years of age are immediately placed in the Károlyi István Children's Center, the child protection facility appointed to provide accommodation and care for unaccompanied minor asylum-seekers and protected individuals, in Fót, just outside Budapest. Minors above 14 years of age are detained in the transit zones for the duration of the status determination procedure and are transferred to the Children's Center only following a positive decision.

The so called refugee crisis and an unprecedented inflow of asylum seekers into Hungary led to major changes in the law and practice concerning granting protection to foreigners. One of the crucial impacts on the system was the construction of the barbed-wire fence along the 175km long border section with Serbia (completed on 15 September 2015) and with Croatia (completed on 16 October 2015). So-called "transit zones" have been established as parts of the fence. After the construction of the fences, the number of asylum seekers arriving in Hungary dropped significantly. Despite all of the measures taken with the explicit aim of diverting refugee and migrant flows from the Serbian border, this border section continues to be the fourth biggest entry point to Europe.<sup>202</sup>

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<sup>202</sup> AIDA: Asylum Information Database, Hungary: Access to the territory and pushbacks (Hungarian Helsinki Committee), available at: <http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/access-procedure-and-registration/access-territory-and-push>

On 28 March 2017, the law XX of 2017 on the amendment of certain acts to tighten the procedures conducted on the border entered into force. This law has been heavily criticized by human rights NGOs, UNHCR, UNICEF, the Council of Europe's Human Rights Commissioner and Lanzarote Committee. According to information published by the Hungarian Helsinki Committee<sup>203</sup>, this law prescribes police to push-back unlawfully staying migrants who wish to seek asylum in Hungary across the border fence from anywhere in the country, without any legal procedure or opportunity to challenge this measure. All asylum-seekers are required to submit their application in the transit zones at the border, where they will be detained for the entire asylum procedure. Along with depriving potential asylum-seekers of their right to challenge removal from the territory of Hungary and/or file an asylum claim, these measures seriously undermine their rights to have access to territory and being heard.

Notably, on 14 March 2017, the European Court of Human Rights (ECtHR) in the case of Ilias and Ahmed v Hungary<sup>204</sup>, found in its unanimous judgment that placement of foreigners in the transit zones without a legal framework constitutes unlawful detention. The court expressed the view that keeping asylum seekers in the closed transit zones amounts to an arbitrary restriction of freedom.

The Hungarian Government further tightened the operating regime of the transit zones by restricting the number of asylum-seekers admitted to one person a day, and only on workdays. Additionally, members of a family are counted individually for the purpose of executing the operational rules, so a five-member family depletes a week's quota.

As the result of the tightened measures, the number of unaccompanied minor asylum-seekers placed in the Children's Center is down to a one-digit number, as opposed to the average of 30-35 children accommodated at any given point in time before the Summer of 2018.

## Reception centers and community accommodation

Reception centers provide for accommodation, health and social services for protected adults and families for 30 days following the receipt of the positive decision. This time is also used by authorities to prepare the identity and other documents for protected persons. No additional benefits and provisions are available to protected individuals and families on top of those available to Hungarian nationals after the 30 days have elapsed. Beneficiaries are released from the facilities and left to their own devices. Majority of them leave Hungary for a Western European destination country.

In 2015, there were 177,135 applicants requesting asylum in Hungary, which resulted in 505 positive decisions. In 2016, there was a drastic decrease in the number of applicants following the creation of the border wall with 29,430 applicants, which resulted in 430 positive decisions. In 2017, there were 1,291 persons accepted, the most since 2007.

## SECURITY CHECKS UNDERTAKEN IN RELATION TO ASYLUM SEEKERS

Immigration authorities take the fingerprints and photos of all asylum-seekers who are fourteen years and older. The fingerprints are uploaded to the European Union fingerprint database, EURODAC, to discover if the applicant has either previously applied for asylum or has resided in a different EU Member State. The primary purpose of EURODAC is to implement Regulation No. 604/20133 (the Dublin Regulation). The fingerprints also

<sup>203</sup> HHC: Law on automatic detention of all asylum seekers in border transit zones enters into force, despite breaching human rights and EU law, Information update by the Hungarian Helsinki Committee (HHC), 28 March 2017, available at: <https://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-rule39.pdf>

<sup>204</sup> ECtHR - Ilias and Ahmed v. Hungary, Application No. 47287/15, 14 March 2017, available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-ilias-and-ahmed-v-hungary-application-no-4728715-14-march-2017>

allow authorities to detect if the fingerprints match with any criminal investigations, serious crimes, or terrorism<sup>205</sup>. The fingerprints are stored in a database for ten years; if the asylum-seeker is granted citizenship in the EU then the fingerprint data is deleted. Asylum-seekers who do not permit their fingerprint and photo to be taken will be made to leave the country due to non-cooperation<sup>206</sup>. Another point to mention is that fingerprinting is mandatory for all asylum seekers over the age of 14 in all EU countries. The non-EU member states Norway, Iceland and Switzerland also take part in the EURODAC fingerprinting scheme. If the asylum seeker does not comply to get his or her fingerprint, they might be detained.

The Agency for Constitutional Protections and the Counter-Terrorism Centre (TEK) decides if the asylum-seeker's admittance to Hungary would pose a threat to national security. The Counter Terrorism Centre was set up on 1 of September 2010. TEK performs personal protection tasks; it protects the President of the Republic and the Prime Minister. It detects and counteracts terrorism, captures armed persons suspicious of having committed a crime, counteracts violent crimes against people, and captures persons that pose a danger for themselves and the public. The Counter-Terrorism Centre (TEK) is under the Ministry of Interior.

The refugee authority terminates the procedure if the person seeking protection withdraws their application in writing, refuses to make a statement and thereby obstructs the assessment of the application, prevents or frustrates having their fingerprints or photograph taken, or leaves the transit zone. No court review is permitted against a decision terminating the procedure on these bases<sup>207</sup>. To verify the status of recognition as refugee, beneficiary of subsidiary or temporary protection the following evidence may be used: facts and circumstances relating to the nature of fleeing their country and documents supporting their claim; travel documents or any other document presented by the person to determine his/her identity and/or nationality; all relevant up-to-date information relating to the country of origin of the person seeking recognition.

During the interview the asylum seeker has to give personal data (name, age...) to the officer of the Immigration Office and explain the reasons of his/her request. Minors failing to prove their age go through an age assessment process. The refugee status might be refused if: the refugee went through what they call "safe countries", if the asylum seeker has already the refugee status in another country in Europe or if he/ she asked again for the status without new information. In these cases it's possible to appeal within 3 days following the negative decision. The Immigration Office forwards the appeal to the competent Court (The Szeged Regional Court of Appeal).<sup>208</sup>

## SECURITY CONSIDERATIONS DURING THE ASYLUM DECISION MAKING PROCESS

A crisis situation caused by mass immigration can be ordered when a migration situation occurs that directly endangers the protection of the border of Hungary as set out in Article 2(2) of the Schengen Borders Code which includes situations that directly endanger public security, public order or public health in a 60m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark or in any settlement in Hungary. In particular the outbreak of unrest or the occurrence of violent acts in the reception center or another facility used for accommodating

<sup>205</sup> European Commission, Migration and Home Affairs: Identification of applicants (EURODAC) [https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en)

<sup>206</sup> Patrick Wintour: Hungary to detain all asylum seekers in container camps <https://www.theguardian.com/world/2017/mar/07/-hungary-to-detain-all-asylum-seekers-in-container-camps>

<sup>207</sup> On the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area - Rapporteur: Dr. Sándor Pintér Minister of Interior (2017) [https://www.helsinki.hu/wp-content/uploads/Bill\\_No-13976\\_20-February-2017.pdf](https://www.helsinki.hu/wp-content/uploads/Bill_No-13976_20-February-2017.pdf)

<sup>208</sup> On the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area - Rapporteur: Dr. Sándor Pintér Minister of Interior (2017) [https://www.helsinki.hu/wp-content/uploads/Bill\\_No-13976\\_20-February-2017.pdf](https://www.helsinki.hu/wp-content/uploads/Bill_No-13976_20-February-2017.pdf)

foreigners located within or in the outskirts of the settlement concerned. Any asylum seeker is able to see his request rejected if he is affected by an exclusion procedure.

## THE APPLICATION OF EXCEPTIONS FROM THE NON-REFOULEMENT PRINCIPLE (ART. 33(2) OF THE 1951 REFUGEE CONVENTION)

The prohibition of refoulement applies if the person seeking recognition was exposed to persecution due to race, religion, ethnicity, membership of a social group or political opinion, or if there is no safe third country, which would receive him/her. In the case of an unaccompanied minor, the prohibition of refoulement prevails if the unification of the family or any state or other institutional care is not possible either in his/her country of origin or in another state accepting him/her. In this case the Hungarian Court decides, based on the EU laws, the refugees can ask for legal help from NGOs. In its decision relating to the refusal of an application for protection or the revocation of protection status, the refugee authority establishes whether the prohibition of refoulement prevails or not. If the foreigner has no right to stay in the territory of Hungary, they will be faced with expulsion and deportation based on Act II of 2007 on the entry and stay of third country nationals. In the case of a decision of the revocation of recognition as a refugee, the refugee authority shall withdraw the foreigner's travel document issued by Hungary, identity card, their official document verifying his/her personal identity and residential address or any other document verifying their identity and – if the foreigner has no right to stay in the territory of Hungary on other grounds, shall order their expulsion and deportation and determine the period of prohibition of entry and residence.

## EXTRADITION

Persons found guilty of a crime who are not of Hungarian citizenship and whose presence in Hungary is deemed as undesirable are expelled. Once expelled, they may not return for the duration of their term of expulsion. Persons who are granted asylum are exempt from expulsion. Persons with the right of residence in Hungary, permanent residents or recognized refugees, can only be expelled if they have been convicted of a criminal offence punishable by imprisonment for five or more years<sup>209</sup>. Decisions concerning extradition of an asylum-seeker must comply with Article 33(1) of the 1951 Convention which states that an asylum-seeker cannot be extradited to a country where they would be threatened on account of race, religion, nationality, or any other political/social factor.

The immigration police authorities will not expel an illegally staying third country national, who submitted an asylum application in accordance with Section 71/A(1)(b) or Chapter IX/A<sup>210</sup>.

Between September 15, 2015 and July 10, 2016 there were 2,888 people charged with illegally crossing the border fence at the Szeged criminal court. Over 98% of those charged were found guilty and were expelled from Hungary. Between July 10, 2016 and December 31, 2016 there were 7 cases that were tried for illegally crossing the border fence<sup>211</sup>. Hungary began a policy of push-backs at the border fence; migrants who came into Hungary through the border fence were immediately pushed back to the Serbian side of the fence. Many of these push-backs used excessive force. Up until March 2017 any migrant apprehended within 8km of the

<sup>209</sup> Act C of 2012 on the Criminal Code <http://www.parliament.am/library/Qreakan/Hungary.pdf>

<sup>210</sup> On the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area - Rapporteur: Dr. Sándor Pintér Minister of Interior (2017) [https://www.helsinki.hu/wp-content/uploads/Bill\\_No-13976\\_20-February-2017.pdf](https://www.helsinki.hu/wp-content/uploads/Bill_No-13976_20-February-2017.pdf)

<sup>211</sup> TWO YEARS AFTER: What's Left of Refugee protection in Hungary? Information Note by the Hungarian Helsinki Committee (September 2017) [https://www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](https://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf)

Serbian or Croatian border were automatically pushed back to the Serbian side of the border fence without possibility of filing an asylum claim or appeal against the measure.

## NATIONAL ANTI-TERRORIST LEGISLATION

According to the Act LXXX of 2007 on Asylum, chapter 3 paragraph 8 no temporary protection shall be granted to a foreigner in whose case there is good reason to assume that they have committed a crime against peace, a war crime or a crime against humanity as defined in international instruments; if they have committed a serious, non-political criminal act outside the territory of Hungary prior to the submission of the application for recognition as a beneficiary of temporary protection; if they have committed a crime contrary to the purposes and principles of the United Nations; whose stay in the territory of Hungary violates the interest of national security; in whose case a final and absolute court judgment established that the foreigner had committed a crime which is punishable by a term of five or more years imprisonment under the relevant Hungarian rules of law<sup>212</sup>.

Under a state of terrorism threat, the government may rule by decree to suspend certain laws at its discretion and may adopt extraordinary measures such as curfews, tightened border controls, evacuations, the prohibition of public events, and heightened surveillance of the post and internet are some of the other measures authorized by the amendment<sup>213</sup>.

## THE USE OF DETENTION

At the time of a crisis situation caused by mass immigration, the police can halt foreigners illegally staying in the territory of Hungary and escort them to the nearest gate of the facility unless the suspicion of a crime arises<sup>214</sup>. The refugee authority can, in order to conduct the asylum procedure and to secure the Dublin transfer, take the person seeking recognition into asylum detention if his/her entitlement to stay is exclusively based on the submission of an application for recognition where the identity or citizenship of the person seeking recognition is unclear. In order to establish them, a procedure is ongoing for the expulsion of a person seeking recognition and it can be proven on the basis of objective criteria (inclusive of the fact that the applicant has had the opportunity beforehand to submit application of asylum) or there is a well-founded reason to presume that the person seeking recognition is applying for asylum exclusively to delay or frustrate the performance of the expulsion, facts and circumstances on which the application is based need to be established. If these facts or circumstances cannot be established in the absence of detention, in particular when there is a risk of escape by the applicant, the detention of the person seeking protection is necessary for the protection of national security or public order, the application was submitted in an airport procedure, or it is necessary to guarantee Dublin transfer procedures and there is a serious risk of escape. To carry out the Dublin transfer, the refugee authority may take into asylum detention a foreigner who failed to apply for asylum in Hungary and the Dublin handover can take place in his/her case.

Asylum detention is ordered by a decision and is executed at the time it is communicated. Asylum detention can be ordered for a maximum of seventy-two hours. The refugee authority may propose the extension of the

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<sup>212</sup> Act LXXX of 2007 on Asylum <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=55c9c7724>

<sup>213</sup> Fidesz party's blog: Hungary toughens anti-terror laws [http://fidesz-eu.hu/en/hungary\\_toughens\\_anti\\_terror\\_laws](http://fidesz-eu.hu/en/hungary_toughens_anti_terror_laws)

<sup>214</sup> On the amendment of certain Acts related to strengthening the procedure conducted in the guarded border area - Rapporteur: Dr. Sándor Pintér Minister of Interior (2017) [https://www.helsinki.hu/wp-content/uploads/Bill\\_No-13976\\_20-February-2017.pdf](https://www.helsinki.hu/wp-content/uploads/Bill_No-13976_20-February-2017.pdf)

asylum detention beyond seventy-two hours at the district court competent for the location of the detention, within 24 hours of ordering it. The court may extend the duration of the detention by sixty days at the most, which duration can be extended upon a proposal from the refugee authority for another sixty days at the most. The refugee authority may submit a motion to extend the detention several times with the provision that the full duration of the detention cannot exceed six months. The motion for an extension shall be received by the court at least eight working days before the due date of the extension. The refugee authority shall be required to state the reasons for its motion. Asylum detention shall last no longer than six months or, in the case of a family with minors, thirty days. Detention shall be terminated without delay if a period of six months – or in the case of a family with minors, thirty days – has elapsed since detention was ordered; the reason for the detention order no longer exists; it has been established that the detainee is an unaccompanied minor seeking recognition; the detained person seeking recognition requires extended hospitalization for health reasons; the conditions of implementing transfer or return under the Dublin procedure exist; or it becomes obvious that the Dublin transfer cannot be carried out. The refugee authority shall carry out the asylum detention in a detention center designated for and serving the purpose of performing asylum detention, with the contribution of the agency established to perform general policing tasks. Asylum detention may not be ordered for the sole reason that the person seeking recognition has applied for recognition. Asylum detention may not be ordered in the case of an unaccompanied minor seeking recognition. Families with minors may only be placed in asylum detention as a measure of last resort, and taking the best interests of the child into account as a primary consideration.

## LEGAL AID

Even if an asylum-seeker is being held in detention, in principle they have the same right to legal aid as non-detained asylum-seeker would<sup>215</sup>. There have been many reports of insufficient legal representation however; hired lawyers unprepared to assist their clients, not able to communicate with them, and be passive during hearings and interviews. Many asylum-seekers in detention stated that they were not aware of their right to a lawyer. All asylum-seekers have the right to free legal aid according to Section 37(3) of the Asylum Act, but this is not available to them in practice. The legal aid system does not cover translations and very few lawyers speak the asylum-seeker's native language. In 2016, only 5.7% of asylum-seekers have received state legal aid<sup>216</sup>. Most meaningful legal services are offered by the Hungarian Helsinki Committee which ensures free of charge legal counseling and representation at all places where persons in need of international protection are accommodated or detained in Hungary.

## CONCLUSIONS AND RECOMMENDATIONS

Since 2015, Hungary has introduced major changes in its asylum system in response to the so called refugee crisis. Unprecedented increase in the number of asylum seekers seeking protection in Hungary led to a heated political debate about the risks related to mass migration. These new ramifications resulted in adopting a more strict and closed approach towards refugees and asylum seekers by the Hungarian government.

The asylum system currently in place in Hungary and the related practices, besides serving domestic political agendas, have been designed and are continuously amended to deter asylum-seekers from claiming asylum in Hungary. The lack of integration services and scarcity of possibilities of residence and sustainable livelihood forces even those who have been granted a protected status in Hungary to leave the country.

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<sup>215</sup> Hungarian Helsinki Committee: Legal assistance for review of detention (on Asylum Information Database (AIDA)) <http://www.asylumineurope.org/reports/country/hungary/legal-assistance>

<sup>216</sup> Hungarian Helsinki Committee: Regular procedure(on Asylum Information Database (AIDA)) <http://www.asylumineurope.org/reports/country/hungary/asylum-procedure/procedures/regular-procedure>

While some provisions of asylum and migration related legislation and measures in many cases stand in open conflict with the principles of international refugee law and other applicable human rights standards, the government keeps prolonging the 'state of crisis due to mass migration' in order to justify such extraordinary measures. Additionally, procedures prescribed by international (and Hungarian) law are applied only formally, asylum-seekers go through the procedures without in-merit legal assistance. The absence of NGOs in the transit zones and the inaccessibility of assistance services, transparency of the procedures cannot be guaranteed. There is no way of making sure asylum-seekers make informed decisions regarding their asylum claims, or the withdrawal thereof and the asylum mechanism, as applied in the transit zones, are also meant to exhaust them. As a consequence, the number of those attempting to file an asylum claim with the Hungarian authorities has considerably decreased, let alone of those who do file an asylum claim and are granted protection. Since the inception of the latest legal amendments, recognition of the right to protection has decreased to almost negligible numbers. Because of the long waiting list at the gates of the transit zones only those are trying to get asylum in Hungary who have a well settled case and a high chance to get protection. On the other hand, it creates unnecessary harms especially in the humanitarian and legal help channels. Organizations and/or activists are kept away from asylum seekers, the applicants are living in a closed environment, the public opinion is very hostile and negative towards them and the integration work is also reduced close to zero, so they have a little chance to be a successful member of the host society. On the needed level the Hungarian asylum system was well functioning before the changes in 2015 and as the big refugee wave from Syria ended would make sense to get back to certain solutions. The current asylum system if only one formally working, in reality however is non-functional. Therefore, we recommend the following:

- To establish open refugee centers where applicants with children or asylum-seekers with well documented identities can wait for the outcome of their procedure.
- To design and provide effective integration support services for protected persons and families
- Give access for helpers to give legal, integration and even humanitarian support to the applicants.
- End the uncontrolled push-backs to Serbia – these can cause human rights violations and also it is a possible security loophole toward the other direction.
- Gain back the neutrality of the field – give clear and direct feedback to any public discussion about refugees, not let false information to spread about refugees.



