

**No:** U.no.2/2004 <sup>1</sup>

**Date:** 16.02.2005

On the basis of Article 110 of the Constitution of the Republic of Macedonia and Article 71 of the Book of Procedures of the Constitutional Court of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia”, No.70/1992), at its session held on 16 February 2005, the Constitutional Court of the Republic of Macedonia passed the following

## **RESOLUTION**

1. NO PROCEDURE SHALL BE INITIATED to appraise the constitutionality of Article 37 paragraph 4 of the Law on Asylum and Interim Protection (“Official Gazette of the Republic of Macedonia”, No.49/2003).
2. The present Resolution shall be published in the “Official Gazette of the Republic of Macedonia”.
3. Stamen Filipov from Skopje submitted an initiative to the Constitutional Court of the Republic of Macedonia to instigate a procedure for the appraisal of the constitutionality of the provision in the Law as noted in item 1 of the present Resolution.

According to the statements in the initiative, the contested provision violated Article 50 paragraph 2 of the Constitution of the Republic of Macedonia which guarantees court protection of the legality of individual acts of state administration and of other institutions performing public mandates.

Namely, according to the submitter of the initiative when certain decision is taken by the administrative branch there must be a possibility for the same to be contested before court, which was in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, the submitter of the initiative defending the arguments given proposes that Article 16 of the Convention for the Legal Position of Refugees should be taken into consideration as well.

Comparing the contents of the provision contested and Article 32 paragraphs 4 and 5 of the same Law, the submitter of the initiative comes to a conclusion that asylum seekers are not treated equally with citizens of the Republic of Macedonia,

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<sup>1</sup> Source: the web site of the Constitutional Court of the Republic of Macedonia (available at the following URL: <http://www.ustavensud.mk/domino/WEBSUD.nsf>).

which is violation also of Article 8 paragraph 1 subparagraphs 1, 3 and 11, Article 9, Article 29 paragraphs 1 and 2, and Article 54 paragraph 1 of the Constitution of the Republic of Macedonia.

4. At its session the Court determined that under Article 37 paragraph 1 of the Law on Asylum and Interim Protection, the right-to-asylum seeker has the right to an appeal against the resolution rejecting the request for recognition of the right to asylum in emergency procedure within three days from the date the resolution was delivered.

Under paragraph 2 of the same provision, the appeal of paragraph 1 of this Article postpones the execution of the resolution, and under paragraph 3 a competent commission of the Government decides on the appeal of paragraph 1 of this Article within 15 days from the date the appeal was lodged.

The contested Article 37 paragraph 4 of the Law envisages that an administrative dispute may not be conducted against the resolution of the Government's competent commission.

5. Pursuant to Article 8 paragraph 1 subparagraphs 1, 3 and 11 of the Constitution of the Republic of Macedonia, the basic freedoms and rights of the individual and citizen recognized in international law and set down in the Constitution, the rule of law, and respect for the generally accepted norms of international law are the fundamental values of the constitutional order of the Republic of Macedonia.

Pursuant to Article 9 of the Constitution, citizens of the Republic of Macedonia are equal in their freedoms and rights, irrespective of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and laws.

Under Article 29 paragraphs 1 and 2 of the Constitution, foreign subjects enjoy freedoms and rights guaranteed by the Constitution in the Republic of Macedonia, under conditions defined by law and international agreements. The Republic guarantees the right to asylum to foreign subjects and stateless persons expelled because of democratic political convictions and activities.

Under Article 50 paragraph 2 of the Constitution, judicial protection of the legality of individual acts of state administration, and of other institutions carrying out public mandates, is guaranteed.

Under Article 118 of the Constitution, international agreements ratified in accordance with the Constitution are part of the internal legal order and may not be changed by law.

6. The Convention for the Protection of Human Rights and Fundamental Freedoms

of the Council of Europe was ratified by Law published in the “Official Gazette of the Republic of Macedonia”, no.11/1997.

Under Article 3 of the Convention, no one may be exposed to torture, inhuman or humiliating treatment or punishment.

The Convention on the Legal Position of Refugees was adopted in 1951 and entered into force on 22 April 1954. Protocol 1 to the Convention entered into force on 4 October 1967.

Pursuant to Article 3 of the Constitutional Law on the Enforcement of the Constitution of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia”, no.52/1991), the Republic of Macedonia, being a sovereign and independent state, realises its international position and relations with other states and international bodies, organisations and communities under the generally accepted principles of international law. The Republic of Macedonia, being the equal legal heir of SFRY with other republics takes over the SFRY membership in international bodies, organisations and communities.

With its Resolution A/RES/47/225 of 28 April 1993, the UN General Assembly decided to admit the Republic of Macedonia as a member of the United Nations Organisation.

The decision on the accession of the Republic of Macedonia to the international legal documents on fundamental human rights and freedoms adopted by the UNO, among which the Convention on the Legal Position of Refugees, was published in the “Official Gazette of the Republic of Macedonia”, no.57/1993 of 23 September 1993.

7. Arising from the contents of Article 29 paragraph 2 of the Constitution it derives that the Republic of Macedonia positions the right to asylum as a subjective constitutional right of a foreign citizen, while the conditions under which foreign citizens enjoy freedoms and rights guaranteed with the Constitution are defined by law and international agreements, as set down in paragraph 1 of the same provision. Hence, the right to asylum is not only a subjective constitutional right, but also an internationally recognised right which all states signatories of international agreements are required to respect to the maximum in accordance with their national legislation.

Namely, the Constitution of the Republic of Macedonia does not regulate the question as to how and with how many laws will be governed the conditions and procedure for obtaining and termination of the right to asylum of a foreign national and stateless person, as well as the manner of providing court protection of the right to asylum. The entry of foreign citizens into another state and the realisation of the right to asylum and interim protection is the right for every state to freely

govern with its national legislation, depending on its policy, thereby clearly observing the generally accepted international standards and principles.

The conditions and the procedure for obtaining and termination of the right to asylum and interim protection are regulated in the Law on Asylum and Interim Protection, in which starting from the social and humanitarian character of the problems of the refugees are implemented international standards, but also comparative experiences for the respect of procedural guarantees in the procedure for the realisation of this right in the Republic of Macedonia, harmonised with the interests and economic possibilities of the state, its legal and political system.

By its content the Law on Asylum and Interim Protection is divided into 9 Chapters: general provisions, procedure for recognition of the right to asylum, termination of the right to asylum, documents, legal position, right to interim protection, processing and protection of personal data, penal provisions and transitional and final provisions.

Article 2 of the Law on Asylum and Interim Protection sets down which persons may realise the right to asylum and under this provision, the right to asylum is protection which is given by the Republic of Macedonia under conditions and in a procedure envisaged by this Law to specifically defined categories of persons, as follows: a recognised refugee (refugee after the 1951 Convention of the Status of Refugees and the 1967 Protocol on the Status of Refugees) and a person under humanitarian protection (pursuant to Article 3 of the Convention for the Protection of Fundamental Human Rights and Freedoms of 1950 and Article 3 of the Convention against Torture and Other Forms of Cruel, Inhuman and Humiliating Treatment or Punishment of 1984). Chapter II "Procedure for the recognition of the right to asylum" is divided into three parts: common provisions, regular procedure and emergency procedure.

In the part "Common procedures", what is envisaged is a subsidiary application of the Law on General Administrative Procedure. This part defines the position and role of a making a request for the recognition of the right to asylum, stipulating that when crossing the national border the request is made with the police which are obligated to get the asylum seeker to the Asylum Department (central body within the Ministry of the Interior which decides, in the first instance, on the request for recognition of the right to asylum).

In this part of the Law are contained the provisions on the manner of making the request for the recognition of the right to asylum, taking a photograph of the requester of the right to asylum and taking fingerprints (Article 18), obligation to submit documents possessed by the requester of the right to asylum (Article 20), the right to an interpreter (Article 21), public procedure (Article 22) whereby the general public is excluded, not counting as public the person giving legal

assistance, authorised by the seeker, the interpreter, and the representative of the United Nations High Commissariat for Refugees (UNHCR).

In the regular procedure, under Article 32 paragraph 4 of the Law, there is a possibility to initiate an administrative dispute against the resolution passed by the competent commission, which in the appellate procedure has rejected the request for recognition of asylum. Unlike the legal solution noted, in the emergency procedure with the contested Article 37 paragraph 4 of the Law, it is expressly set forth that the dissatisfied person may not conduct an administrative dispute.

In the part emergency procedure (“accelerated procedure”), and notably Article 34 of the Law, such procedure is conducted when the request for recognition of the right to asylum is apparently unfounded, except when the request has been made by a minor without accompaniment or person with mental disability.

Under Article 35 paragraph 1 of this Law, the request for the recognition of asylum is considered to be apparently unfounded if:

- there is no ground for claiming fear from prosecution, since the request has not been made for the reasons defined by this Law, but because of the possibility for employment and better living conditions or when the requester does not provide any data of having been exposed to prosecution or when his/her claims are impossible or contradictory;
- the request is base on a premeditated fraud or misuse of the procedure for recognition of the right to asylum;
- the person arrived from a safe country of origin, except if proven that the country of origin is not safe for him/her;
- the person arrived from a third safe country, where he/she could have requested recognition of the right to asylum, except if proven that the third country is not safe for him/her.

Under paragraph 2 of this Article, the requester of the right to asylum is committing a premeditated offence of fraud and misuse of the procedure for recognition of the right to asylum pursuant to paragraph 1 subparagraph 2 of this Article in case if:

- without reasonable explanation, he/she premeditatedly gives untruthful statements in his/her request for recognition of the right to asylum, verbally or in writing, and such statements are essential in nature and importance for determining his/her status of a recognised refugee;
- without reasonable explanation based his/her request on false identity or on forged documents, for which he/she claims to be authentic ones;
- intentionally destroys, damages or conceals a travel document, other document or evidence of significance for the procedure, with a view to obstructing the

course of the procedure and misleading the bodies competent for the recognition of the right to asylum in respect of his/her identity;

- the request for recognition of asylum is submitted with a view to preventing the execution of the decision on expelling him/her from the territory of the Republic of Macedonia, while the requester previously had a sufficient possibility to request recognition of the right to asylum;
- the request for recognition of the right to asylum to the person was rejected in another country, following the examination of the essence of the request, in a procedure which contained corresponding procedural guarantees, in accordance with the provision of Article 2 subparagraph 1 of this Law; and
- has obtained the right to asylum in another country and continues to enjoy the protection of that country.

The reasons when the request is considered to be as apparently unfounded, that is when it is considered that the requester is making a premeditated fraud and misuse of the procedure for recognition of the right to asylum correspond with the London Resolution for apparently unfounded requests for asylum of the ministers of the European Union members of 1 December 1992.

According to the Court, important is also the content of Article 15 of the Law, under which the provisions of the Law on General Administrative Procedure shall be applied accordingly in the procedure for recognition of the right to asylum, unless otherwise defined by this Law. Article 9 paragraph 1 item 2 of the Law on General Administrative Procedure (“Official Gazette of SFRY” no.4/1977 and “Official Gazette of the Republic of Macedonia” no.44/2002) sets forth that an administrative dispute may not be conducted against acts adopted on the matters for which according to an express legal provision an administrative dispute may not be conducted. Hence, taking into consideration the cited provisions, the Court decided that the specific case does not concern legal exception.

Namely, while the right to asylum is a subjective constitutional human right, at the same time it is political right in the governing of which comes to expression the sovereign right of the state from which asylum is requested to determine whether in case of violation of this right it shall protect it only by envisaging an appellate procedure or it shall allow court protection as well when such right is violated. The constitutional obligation under Article 15 of the Constitution is realised with the determination that in the emergency procedure of the Law the dissatisfied requester may lodge an appeal to the competent commission within the Government of the Republic of Macedonia and the envisaged suspensive effect of the appeal.

Thereby, the need for existence of an emergency procedure as to the apparently unfounded requests and the exclusion of the right to court protection is realised for the need for rapid, urgent, economical settlement of requests which are not made by persons expelled because of democratic political beliefs or activities. The

emergency procedure, in the opinion of the Court, finds its justification also in the preventive role of the state to select the requests for right to asylum which contain misuse of this right aiming at realising an alibi to avoid responsibility in the home country, or to avoid some other type of responsibility through the realisation of the same.

Judging the provisions in the Law on Asylum and Interim Protection in general, according to the Court, the Law meets the standards regarding the right to appeal and the right to court protection, with that that the exception or the lack of possibility for court protection in emergency procedures may not bring into question the concordance of the contested provision with the Constitution.

Starting from the analysis of the constitutional and legal provisions and the circumstance that foreign citizens enjoy freedoms and rights under conditions defined by law and international agreements, while the Law on Asylum and Interim Protection has not determined a right to conduct an administrative dispute in case of a refused apparent unfounded request, the Court has judged that no question may be brought as to the concordance of the disputed provision with Article 29 paragraphs 1 and 2 of the Constitution. Namely, the Constitution allows for a law to regulate under which conditions and in what procedure a foreign citizen may realise the right to asylum and the right to interim protection. In any case, the person whose request for asylum has not been accepted has the possibility to request the realisation of rights as a foreign citizen in the Republic of Macedonia or to request the right to asylum in another state.

In the opinion of the Court, the contested provision may not be questioned also in respect of its agreement with Article 50 paragraph 2 of the Constitution. Namely, the requester of the right to asylum is a foreign citizen and he/she does not enjoy the same rights and freedoms as the citizens of the Republic of Macedonia do, while the provision cited refers to guaranteed court protection only in respect of the citizens of the Republic of Macedonia, and not in respect of foreign citizens.

Also, the disputed provision may not be questioned regarding its agreement with Article 9 of the Constitution, which guarantees equality of citizens in their freedoms and rights, since this constitutional provision does not refer to foreign citizens, or, in the specific case, to the seekers of the right to asylum, but it exclusively refers to the citizens of the Republic of Macedonia.

On the other hand, there is no international legally binding act, an integral part of the legal order of the Republic of Macedonia, which more specifically governs the procedure for the realisation or loss of the right to asylum, as a result of which the statement in the initiative to bring into question the disputed provision regarding Article 8 paragraph 2 subparagraphs 1, 3 and 11 of the Constitution, may not be accepted.

Pursuant to Article 110 subparagraph 1 of the Constitution, the Constitutional Court of the Republic of Macedonia decides on the conformity of the laws with the Constitution, which means that the Court is not competent to decide on the conformity of the laws with international agreements, as a result of which it did not enter into assessing the foundation of the statements regarding a violation of Article 6 of the European Convention for the Protection of Fundamental Human Rights and Freedoms and Article 16 of the Convention on the Status of Refugees.

8. On the basis of what has been stated, the Court has decided as in item 1 of this Resolution.

9. The Court has passed this Resolution with the majority of votes in the following composition: the President of the Court Mrs Liljana Ingilizova – Ristova, and the judges: Dr Trendafil Ivanovski, Mr Mahmut Jusufi, Mrs Mirjana Lazarova Trajkovska, Mrs Vera Markova, Mr Branko Naumoski, Dr Bajram Polozani, Mr Igor Spirovski, and Dr Zoran Sulejmanov.

**U.no.2/2004**

16 February 2005

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**PRESIDENT**

of the Constitutional Court of  
the Republic of Macedonia

Liljana Ingilizova – Ristova

## SUMMARY OF THE RESOLUTION № 2/2004 <sup>2</sup>

In its Resolution № 2/2004 of 16 February 2005, published in the “Official Gazette of the Republic of Macedonia” № 23/2005, the Constitutional Court decided not to instigate a procedure for evaluation of constitutionality of Article 37 paragraph (hereinafter referred to as “§”) 4 of the Law on Asylum and Temporary [Interim] Protection regarding lack of entitlement of asylum seekers to lodge remedy before a court following rejection in accelerated proceedings.<sup>3</sup> Mr Stamen Filipov in his submission to the Constitutional Court claimed that the disputed provision violated the right to judicial review of individual acts of the state administration, also referring to the European Convention on Human Rights and the Convention relating to the Status of Refugees.

The Court compared Article 37 § 4 of the Law on Asylum and Temporary Protection with the provisions of Article 8 § 1 (indents 1, 3 and 11), Article 9, Article 29 §§ 1 and 2, and Article 54 § 1 of the Constitution of the Republic of Macedonia and concluded that Article 37 § 4 of the Law on Asylum and Temporary Protection was not contrary to the aforementioned provisions of the Constitution. The Court did not consider whether the provision of the Law on Asylum and Temporary Protection violated the aforementioned ratified international treaties because, according to Article 110 (indents 1, 3 and 11) of the Constitution, the Constitutional Court decides on the compatibility of domestic laws to the Constitution, but not on their compatibility to international treaties. The Court based the reasons of the Resolution upon five arguments in order to warrant the exclusion of the right to judicial protection that has been imposed by the law. The judge Igor Spirovski disagreed. The summary of the Dissenting opinion of the judge Spirovski is given in brackets (formatted in *italics* letters).

1. The Court considered that the Law on General Administrative Procedure allows the possibility of excluding an administrative dispute by means of enacting *lex specialis*.

*The judge Spirovski explained that this Law was enacted in 1986 on the basis of the former federal Constitution, which provided the possibility of ex lege exclusion of judicial protection in administrative matters. Hence he concluded that the said provision of the Law on Asylum and Temporary Protection was not compatible to the Macedonian Constitution, since the latter did not stipulate a possibility of ex lege exclusion of right.*

2. The Court considered that the State has a sovereign right to decide whether to protect the right to asylum by stipulating only a right to appeal, or - if no such a right is stipulated - by allowing judicial protection.

*The judge Spirovski wondered why the legislature would wish to provide guarantees by law only for the right to appeal in administrative procedure and not for the right to judicial protection, taking into account that the Constitution equally protected the two rights.*<sup>4</sup>

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<sup>2</sup> The Dissenting opinion of judge Spirovski was not included in the translated Resolution at the Court's web site. The present summary (prepared by CSRC) reflects the main points of both the Resolution and the Dissenting opinion.

<sup>3</sup> The then valid Article 37 § 4 of LAMP stated that “against the decision of the Competent Commission of the Government, an administrative dispute may not be initiated.”

<sup>4</sup> Around ten months after the Court's decision, on 7 December 2005 the legislature enacted Amendment XX, which stipulated that the right to appeal in administrative matters shall be regulated by law. The Amended Law on Asylum and Temporary Protection at present contains no more provisions on the right to appeal, but ensures judicial protection in both regular and accelerated asylum proceedings.

3. The Court considered that the exclusion of the right to judicial protection is a result of the need of quick, urgent and economical decision-making in asylum matters, in cases of applicants who lack a well-founded fear of persecution on account of their democratic political belief or activities. The court also considered that the accelerated procedure is justified by the preventive role of the State to avoid abuses of the right to asylum.

*The judge Spirovski accepted the need of acceleration of certain types of asylum procedures, but argued that the relevant regional instruments do not require exclusion of judicial protection for such a procedure. In particular, he referred to the non-binding 1992 London Resolution on Manifestly Unfounded Asylum Claims and the EU Council Proposal for a Procedures Directive of 2004, the latter stipulating judicial review on the basis of Article 234 of the TEC, in order to explain that EU instruments do not require that such provisions be included in domestic laws.*

4. The Court referred to Article 29 of the Constitution, according to which the Law regulates the criteria and the procedure for acquisition of the right to asylum.

*The judge Spirovski objected that the issue of implementing the Constitutional provision of Article 29 is not relevant, since the guarantee of the Constitutional right to judicial review is at stake there.*

5. The Court considered that an asylum applicant of a foreign nationality does not enjoy the same rights and freedoms as citizens of the Republic of Macedonia and that the guarantee of Article 50 paragraph 2 relates only to judicial protection to citizens of RM, but not to foreigners.

*The judge Spirovski did not accept the “crown argument” of the majority, as it would mean that foreigners in principle do not have a right to judicial review, unless the legislature does not provide them with such a right by enacting a law. He made plain that any parallel to the nationals of the Republic of Macedonia is groundless because only foreigners can enjoy the right to asylum. The judge wondered whether the rule of law is compatible to taking care only for the equal legal treatment of its own nationals, thereby excluding foreign nationals from the scope of judicial protection. He expressed his fears that the position of the Constitutional court might be, for example, abused to deny judicial protection to holders of asylum status who have not been provided with some social right(s). He also referred to the practice of Western European countries, whose courts are developing their jurisprudence in administrative matters thankful to their decision-making in cases involving foreigners. The judge concluded by expressing his opinion that the guarantee of judicial review of decisions of the administration is a constitutional guarantee and that ex lege exclusion of such a right violates the Constitution.*