LEGAL AID AND ADVOCACY FOR REFUGEE RIGHTS
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The dedication can not be a result of any concession! The real human rights activists will, without thinking twice, in a situation of escalation of a conflict in the neighbourhood, dedicate themselves to putting refugee law into practice; firstly, to help those who flee or are forcefully expelled from their homes, to ensure a legal status as a basis for all their remaining rights; secondly, to ensure space, through everyday work with the institutions, for adopting international standards and implementing them as domestic standards; and thirdly, to present the democratic capacities of the Republic of Macedonia in a light that shows that the State ensures law, procedure, standards and legal understanding through which it will protect those in need and ensures legitimacy in front of the international democratic public.

Since the very beginning of military operations in Kosovo in 1999 and the influx of refugees who were forcefully expelled by train, or walked along railway lines to Skopje, confronted with the borders of the railway having been mined, the CSRC was there on the field; present in the threefold encircled Blatse refugee camp of fortune, containing about 60 thousand persons; present in the Tetovo-Gostivar region as well the one of Lipkovo; it was present on the bordering mountains, with lines of women and children trapped between those from the north who were expelling them and those from the south who were denying entrance. But the CSRC was also in and alongside the institutions; at the very beginning, when the law on asylum did not exist and proceedings were made on the basis of one article of the Law on Movement and Residence of Aliens only!

Years of activities to establish the system on a solid ground followed, with substantial support from and the direct participation of UNHCR: in 2003 the first law on asylum in Macedonia was adopted; in 2004 – after 5 years of efforts! – the Law on Citizenship was amended and through a transitional provision it became possible to dramatically reduce de facto statelessness in Macedonia; thousands of completed legal and administrative proceedings resulted in granting asylum to the largest part of the refugees from Kosovo who remained, as well as to newcomers from other countries, and also countless seminars and trainings for organisations, institutions, judges and lawyers were organized. The effort that has been invested can not be measured – statistics do not suffice! But 12 years of struggle, sometimes dirty, along with the whole range of activities invested in its work with refugees, have placed CSRC at the cornerstone of all the achievements of Macedonia and UNHCR in the field of refugees’ rights.

Nevertheless, the work was never going to be easy and the work with the institutions always needed encouragement and support; there were moments of going backwards, too, of slipping of standards previously attained. But through the common engagement of CSRC and UNHCR, new achievements were always encouraging us to the path of dedication: new amendments and improvements of laws and procedures, the visa liberalisation regime, the increasing number of completed refugee proceedings, international successes and especially those before the European Court of Human Rights, etc. Nevertheless, the work is far from being done. This is also evident from the European Commission 2010 Report: Macedonia needs to dramatically improve the knowledge of refugee law and its implementation at all levels, and often needs to contravene established political
stances. And current events, the waves of refugees towards Europe caused by the latest conflicts, as well as the governments of some of the EU member states that are not very keen to implement the established standards, add to the existing challenges to all of those working in this field, who struggle for rights of refugees. This struggle is far from being at an end.

We at the CSRC take the position that after these 12 years of refugee work, we have accomplished our mission. We have shown how to work with dedication and professionalism. We are happy to be establishing the basis of a future construction, about to be accomplished, as part of the overall efforts for the regional and continental integration of Macedonia. During this work, the book that you have in hand will represent an indispensable reference.

Suad Missini

Acknowledgment:

I thank Ms Alma Mustafovska, a dedicated activist of CSRC, for providing various information and opinion regarding issues stated in this book, Mr Suad Missini for the overall support and engagement in production of the book as well as to our language editors, and the IT expert. I also thank UNHCR for the fruitful decade-long cooperation and the financial support for publication of this book. And last but not least, I thank the lawyers and other employees, members and supporters of CSRC whose dedication to the cause of protection of the rights of refugees and other human rights served as a valuable inspiration for designing and writing this book.

Z.G.
PART I: ASYLUM ANALYSES

I.1. COMPLIANCE OF THE MACEDONIAN ASYLUM LEGISLATION AND PRACTICE WITH INTERNATIONAL LAW AND STANDARDS

The primary aim of this analysis is to evaluate the compatibility of the Macedonian asylum law (in particular its general provisions) with the relevant universal and regional legal acts and standards. Where appropriate, the analysis also addresses misinterpretation, non-implementation and related drawbacks in the recent national case-law in asylum matters, occasionally referring for comparison sake to the case-law of international monitoring bodies or foreign authorities. Finally, the recommendations should inspire harmonisation of the national legislation with the international refugee and human rights law, as well as improvement of the practice.

I.1.1. LEGAL BACKGROUND

I.1.1.1. Macedonian legislation

Article 29 of the Constitution of the Republic of Macedonia enforces aliens in the Republic of Macedonia to enjoy freedoms and rights guaranteed by the Constitution under conditions established by law and international treaties, and also guarantees the right of asylum “to aliens and stateless persons persecuted for reasons of their democratic political belief and action”.

The first Macedonian law which contained provisions on asylum was the Law on the Movement and Residence of Aliens of 1992. Eleven years later the advocacy efforts by UNHCR contributed to the adoption of comprehensive asylum legislation. The Law on Asylum and Temporary Protection (hereinafter referred to as LATP) deter-

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1 Zoran Gavriloski, Legal Consultant of CSRC wrote Section I.1. It is an extended and updated version of his lectures at the round table “Introduction to Refugee Law I” (23 - 24 January 2009) and at the training session for the candidates in the Academy for Judges and Public Prosecutors and Their Deputies (29 January 2010).


3 OGRM no. 36/92 of 16 June 1992; repealed by the Law on Aliens of 2006 (footnote 11 below).

4 OGRM no. 49/03 of 25 July 2003 (enacted on 16 July 2003 and entered into force on 3 August 2003); amended in OGRM nos. 66/07, 142/08, 19/09 (consolidated text) and OGRM no. 146/09 of 7 December 2009.
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mines conditions and procedure for determination of asylum, prohibits *refoulement* and regulates the rights and obligations of persons granted asylum as recognized refugees or asylum due to subsidiary protection, and those under temporary protection. Some of the provisions of LATP are elaborated in the Rules on the Form of an Application for Recognition of the Right to Asylum, the Manner of Fingerprinting and Photographing Asylum Seekers, the Form and Procedure of Issuance and Replacement of Documents for Asylum Seekers and Persons to Whom a Right to Asylum or Temporary Protection has been Recognized in the Republic of Macedonia and on the Manner of Making such Registration
5 (hereinafter referred to as the MoI Rules on Fingerprinting and Photographing Asylum Seekers and Issuance and Exchange of Documents).

Rights and duties of asylum beneficiaries are stipulated by the Law on Social Protection, 6 the Law on the Employment and Work of Aliens, 7 the Law on Citizenship of the Republic of Macedonia, 8 etc. Provisions applicable in asylum proceedings can be found in the Law on General Administrative Procedure, 9 the Law on Administrative Disputes 10 and the Law on Aliens. 11 Descriptions of relevant provisions of these legal acts are given in this analysis, where appropriate.

**I.1.1.2. International human rights legal acts**

**I.1.1.2.1. UN human rights legal acts**

On 8 April 1993 the Republic of Macedonia became the 181st Member State of the Organisation of the United Nations 12 (hereinafter referred to as UN) and the same year it decided to accept the obligations arising from the UN legal documents relating to basic human rights and freedoms, including 20 treaties or protocols thereto and the Universal Declaration on Human Rights. 13

**I.1.1.2.1.a. Universal declaration on human rights**

The Universal Declaration on Human Rights of 1948 14 (hereinafter referred to as UDHR), is a milestone document in the history of human rights, as it set out, for the first

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5 OGRM no. 48/04 of 19 July 2004; 76/09, 78/10.
6 OGRM no. 79/09 of 24 June 2009.
7 OGRM no. 70/07 of 5 June 2007; (Dec. U. no. 2/2008 in no. 152/08), no. 5/09, 35/09.
8 OGRM no. 67/92 of 3 November 1992; nos. 8/04, 45/04 (consolidated text), 98/08.
9 OGRM no. 38/05 of 26 May 2005; no. 110/08, (Dec. U. no. 102/2008 in no. 118/08).
11 OGRM no. 35/06 of 23 March 2006; nos. 66/07, 117/08, 92/09, 156/10.
14 Proclaimed by UN General Assembly Resolution 217 A (III) on 10 December 1948.
time, fundamental human rights to be universally protected.\textsuperscript{15} Of particular relevance for refugee law is Article 14 of UDHR, which states: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. UDHR is particularly important for inspiring certain binding human rights documents (treaties).

\textbf{1.1.1.2.1.b. Convention relating to the Status of Refugees and the 1967 Protocol}

The Convention relating to the Status of Refugees of 1951\textsuperscript{16} (hereinafter referred to as the Refugee Convention) defines the term refugee (inclusive clause),\textsuperscript{17} determines when it shall cease to apply (cession clauses)\textsuperscript{18} or shall not apply (exclusion clauses)\textsuperscript{19} and prohibits Contracting States to expel or return ("\textit{refouler}") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (\textit{non-refoulement} principle).\textsuperscript{20} It also regulates refugees’ legal status by stipulating their rights and obligations in host countries, which should be provided through “treatment (at least as favourable) as that accorded to their nationals”\textsuperscript{21}, “the most favourable treatment accorded to nationals of a foreign country in the same circumstances”,\textsuperscript{22} or “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”\textsuperscript{23} The 1967 Protocol relating to the Status of Refugees\textsuperscript{24} (hereinafter referred to as the 1967 Protocol) obliges Contracting States to apply Articles 2-34 of the Convention without temporal and geographical limitation.

The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), by providing information and statistical data concerning the condition of refugees, the implementation of the Refugee Convention and legal acts relating to refugees.\textsuperscript{25} The UNHCR supervisory role (defined by Article 8 of its Statute) is extended by resolutions of UN bodies and universal, regional and national refugee law and standards.\textsuperscript{26}

\textsuperscript{15} http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx


\textsuperscript{17} Ibid., Article 1A(2).

\textsuperscript{18} Ibid., Article 1C.

\textsuperscript{19} Ibid., Article 1D, 1E and 1F.

\textsuperscript{20} Ibid., Article 33.1.

\textsuperscript{21} Ibid., Articles 4, 14, 16.2, 20, 22.1, 23, 24.1 and 29.

\textsuperscript{22} Ibid., Articles 15 and 17.

\textsuperscript{23} Ibid., Articles 13, 18, 19, 21, 22.2 and 26.


\textsuperscript{25} Convention relating to the Status of Refugees, Article 35.

I.1.1.2.1.c. Other UN treaties

The International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) binds each State Party to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized therein without discrimination of any kind. ICCPR established the Human Rights Committee (hereinafter referred to as HRC), entitling it to consider reports on the measures adopted by States which give effect to the rights recognized by ICCPR and on the progress made in the enjoyment of those rights, following which HRC issues Concluding Observations. HRC also considers complaints (“communications”) by State Parties under ICCPR, by individuals under the Optional Protocol to ICCPR (hereinafter referred to as OP-ICCPR or OP) or by States and individuals under the Second Optional Protocol to the ICCPR (hereinafter referred to as OP2-ICCPR or OP2).

The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICESCR) binds each State Party to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized therein without distinction of any kind. ICESCR authorised the UN Economic and Social Council (ECOSOC) to consider reports by State Parties on the measures which they have adopted and the progress made in achieving the observance of the rights recognized therein. ECOSOC established the Committee on Economic, Social and Cultural Rights (hereinafter referred to as CESCR) to carry out monitoring functions. CESCR will also consider individual complaints after the entry into force of the Optional Protocol to ICESCR (OP-ICESCR).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as CAT) obliges each State Party to take effective measures to prevent acts of torture in any territory under its jurisdiction and prohibits expulsion, refoulement or extradition of a person to another State where there are substantial grounds for believing that such removal would expose the person concerned to a real risk of being subjected to torture. The Committee against Torture examines reports on States’ compliance to CAT and considers communications submitted by States or individuals. The Optional Protocol to CAT (hereinafter referred to as OP-CAT) set up the Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as SPT) and requires States Parties to establish one or more National Preventive Mechanisms (NPM).

Other UN treaties (binding the Republic of Macedonia), which establish committees of experts ("treaty bodies") to monitor their implementation, include the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), etc.\footnote{32}

\subsection*{I.1.1.2.2. CoE human rights legal acts}

On 9 November 1995 the Republic of Macedonia became the 38th Member State of the Council of Europe\footnote{33} (hereinafter referred to as CoE) and a few years later signed and then ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose Preamble refers to the commitment of the governments of the CoE member states “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
UN legal act & Refugee & The 1967 & ICCPR & OP-ICCPR & OP2-ICCPR & ICESCR & OP-ICESCR & CAT & OP-CAT \\
\hline
Status/monitoring & Convent. & Protocol & & & & & & & \\
\hline
\hline
Entry into force & 22.4.54 & 4.10.6/ & 23.3./6 & 23.3./6 & 15.12.69 & 3.1./6 & 26.6.8/ & 22.6.06 \\
\hline
\hline
\hline
Succession/accession & 18.1.94 & 18.1.94 & 18.1.94 & 12.9.94 & 26.1.95 & 26.1.95 & 18.1.94 & 12.12.94 & 15.3.09 \\
\hline
EIF* for RM & 18.1.94 & 18.1.94 & 17.9.94 & 12.3.95 & 26.4.95 & 18.1.94 & 12.12.94 & 15.3.09 \\
\hline
Monitoring body & UNHCR & Human Rights Committee & CESCR & UNCAT & \\
\hline
State report to the MB due after/within other duty & information and statistical data & 1 year after EiF; then upon request & information within the report to HRC & in stages, according to the program & follow-up information & 1 year after EiF; then every 4 years & visits by SPI; NPM & \\
\hline
\hline
\end{tabular}
\caption{UN human rights treaties binding the Republic of Macedonia}
\end{table}

\footnote{28}{Source: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en}

\footnote{29}{“Ratification” denotes the day of deposition of an instrument for ratification, not the day when a law ratifying a treaty was enacted or published. The treaties ratified or signed by the Former Socialistic (formerly Peoples’) Federal Republic of Yugoslavia are marked with the abbreviation (Yu).}

\footnote{30}{The abbreviation “a” stands for accession to a treaty after it entered into force.}

\footnote{31}{“EIF for RM” stands for Entry into Force in respect of the Republic of Macedonia.}

\footnote{32}{For detailed information regarding the core UN human rights instruments and treaty bodies, reference is made to the section “International Law” on the website of the Office of the High Commissioner for Human Rights (OHCHR): http://www2.ohchr.org/english/law/index.htm}

\footnote{33}{http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en}
The European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols thereto (hereinafter referred to as ECHR) define rights and freedoms which the High Contracting Parties are bound to secure to everyone within their jurisdiction. ECHR set up the European Court of Human Rights (hereinafter referred to as ECtHR) whose duty is to ensure the observance of the engagements undertaken by the High Contracting Parties, through applying and interpreting ECHR in cases brought before it. The ECtHR case-law provides extraterritorial effect to the protection under Article 3 of ECHR by prohibiting expulsion or extradition of a person to a country where there is a real risk that he or she would face torture or other ill-treatment and by indicating an interim measure of non-expulsion. Judgments issued by the ECtHR are binding for each Contracting Party and their execution is monitored by the Committee of Ministers (hereinafter referred to as CM).

The European Social Charter (ESC) protects fundamental social and economic rights of nationals of Contracting Parties and of migrant workers. The Appendix to the ESC grants to refugees (as defined by the Refugee Convention) the most favourable possible treatment, in any case no less favourable than that which the Contracting Party has to apply under any other international instruments applicable to refugees. The Revised ESC extends the above protection to refugees as defined by the 1967 Protocol. The Committee of Independent Experts examines reports by Contracting Parties regarding their implementation of ESC in law and practice. The Additional Protocol Providing for a System of Collective Complaints (also included in the revised ESC) entitles the Committee (now known as the European Committee on Social Rights or ECSR) to examine complaints by non-governmental organisations.

The Framework Convention for the Protection of National Minorities (FCNM) sets up general aims and principles relating to various rights and freedoms of persons belonging to national minorities, such as peaceful assembly, association, expression, religion, national identity, language, education, participation in cultural life, trans-frontier co-operation, etc. Some of the FCNM provisions are applicable to refugees. The Advisory Committee of FCNM (hereinafter referred to as AC) examines reports by Contracting Parties, hereby assisting CM to evaluate the undertaken measures.

<table>
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<td>CM, AC</td>
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<tr>
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<td>duty to abide to the final judgments of the Court (by taking individual and general measures)</td>
<td>1 report per year</td>
<td>period, reports</td>
<td>access to info. &amp; detention places</td>
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The CoE legal acts with summaries, explanatory reports and status (chart of signatures and ratifications, list of declarations and reservations) are available at: http://www.conventions.coe.int
The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment set up the Committee for the Prevention of Torture and Inhuman, or Degrading Treatment or Punishment (hereinafter referred to as CPT). CPT can visit all places of detention and issues reports that can also deal with conditions of detention of refugees and asylum seekers.

Other CoE acts include the European Agreement for the Abolition of Visas for Refugees, the European Agreement on Transfer of Responsibility for Refugees, Protocol to the European Convention on Consular Functions concerning the Protection of Refugees and resolutions by the Parliamentary Assembly. The now disbanded Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) drafted conventions and recommendations for adoption by CM.

I.1.1.2.3. EU Acquis relating to asylum

On 17 December 2005 the European Council granted candidate status to the Republic of Macedonia, which then started to approximate its legislation to EU Acquis. The Consolidated Version of the Treaty on the Functioning of EU states that the common policy on asylum, subsidiary protection and temporary protection must be in accordance with the Refugee Convention, the 1967 Protocol and other relevant treaties, and that the European Parliament and the European Council shall adopt measures for a common European asylum system. Article 18 of the EU Charter of Fundamental Rights enshrines the right to asylum. The EU acts in the area of asylum or those which are relevant for asylum are described below.

The Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof provides for protection in a total duration of two years.

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38 E.g. Res. 1471 (2005), Accelerated asylum procedures in Council of Europe member states.
43 Ibid., Art. 78.1.
44 Ibid., Art. 78.2.
45 Available at: http://ec.europa.eu/home-affairs/doc_centre/asylum/asylum_intro_en.htm
including provision of residence permit, suitable accommodation, education, vocational training, employment, self-employment, social welfare (in case of lack of funds), medical care, medical and other assistance to persons with special needs, care for unaccompanied minors, etc.

The Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers\(^{47}\) (hereinafter referred to as the Reception Directive) inter \(\textit{alia}\) regulates reception conditions (including information on asylum seekers’ rights and obligations; provision of a document; allowance of residence and freedom of movement; schooling and education of minors, employment, vocational training; adequate standard of living, health care, etc.) and their reduction or withdrawal.

The Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted\(^{48}\) (hereinafter referred to as the Qualification Directive or QD) regulates grant of asylum (involving rights to family unity, residence permit, travel document, social welfare, medical care, care for unaccompanied minors, access to employment, education, accommodation and integration facilities, etc). However, some of its provisions are either too restrictive or inconsistent with the Refugee Convention or ECHR.\(^{49}\)

The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status\(^{50}\) (hereinafter referred to as the Procedures Directive) aims to set up a minimum framework on asylum procedures, including access to the procedure and right to remain in the member State during the examination of the application; various procedural guarantees obliging the authorities (regarding examination and decisions), provision of specific rights to asylum seekers (to be informed on their rights and obligations, to receive services of an interpreter, to communicate with UNHCR or organisations working with UNHCR, to be given a notice within reasonable time on decisions in first and other instances) or their obligations. Yet the Directive “itself embodies violations of fundamental human rights”.\(^{51}\)

The Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national\(^{52}\) sets up principles and hierarchy of criteria to determine responsibility for examining asylum appli-

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\(^{47}\) OJ L 031 of 6 February 2003, p. 18 - 25.


\(^{50}\) OJ L 326 of 13 December 2005, p. 13 - 34.


\(^{52}\) OJ L 050 of 25 February 2003, pp. 1 - 10.
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cations and allows exceptions on humanitarian grounds. Its effective application is supported by the establishment of “Eurodac” for comparison of fingerprints.\(^{53}\)

The Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification\(^ {54}\) determines the conditions for the exercise of the right to family reunification by third country nationals lawfully residing in Member States and also applies to refugees recognized by these States.

The Commission of the European Communities (hereinafter referred to as the European Commission) recently adopted amended proposals for recasting of several legal acts in the area of asylum,\(^ {55}\) which are not a subject-matter of this analysis.

The Court of Justice of EU is competent inter alia to review a particular EU legal act, such as Directive, in the light of international law (e.g. the Refugee Convention).

I.1.1.3. Nexus between ratified treaties and the Constitution

Article 118 of the Constitution states that “[i]nternational treaties that are ratified in accordance with the Constitution are a part of the internal legal order” (hence directly applicable) “and cannot be changed by law” (hence having a stronger legal effect than laws). Article 98.2 states that Macedonian courts adjudicate inter alia on the basis of ratified international treaties, but in practice they do not apply them directly\(^ {56}\) and rarely use the case-law of treaty bodies as res interpretata. Article 8.1 stipulates that human rights and freedoms recognized by international law and stated by the Constitution are fundamental values of the constitutional order, but no Macedonian court equated the legal effect of provisions of ratified treaties with those of the Constitution.\(^ {57}\)

I.1.1.4. Safeguard for the existing human rights

In addition to the State’s obligation to ensure the rights and freedoms guaranteed by ratified treaties, it is also important to note that neither of the above treaties allows anyone to undermine the existing human rights and freedoms or those guaranteed by them.

Article 5 of the Refugee Convention states the following: “Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention” (such as the prohibition of extradition for a political crime


\(^{56}\) CESCR, Concluding Observations of 24 November 2006, para. 10: “The Committee regrets the absence of Court decisions directly applying the rights recognized in the Covenant.”

guaranteed by Art. 29.3 of the Constitution; particular social rights under LATP, etc.). Articles 5.2 of ICESCR and ICCPR stipulate that “[n]o restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.” According to Article 53 of ECHR: “Nothing in it shall be construed as limiting or derogating from

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any of rights and freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” Therefore, no referral to Article 10.2 or 9.2 of ECHR may undermine the non-derogatory character of Article 54.4 of the Macedonian Constitution, which stipulates that the limitation of freedoms and rights cannot refer to, *inter alia*, the freedom of expression, conscience, thought or public expression of thought and religion. The ECHR also states that nothing in it may be interpreted as implying any right to any State, group or individual to destroy or limit rights and freedoms to a greater extent than is provided for in the ECHR.

Article 14.1 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime and Article 40.4 of the CoE Convention on Action against Trafficking in Human Beings state respectively that nothing in them shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein, hence victims of trafficking should benefit of international protection, where appropriate.

The EU Directives set up minimum standards and allow Member States to introduce or maintain and to implement more favourable standards, without any condition, or insofar as those standards are compatible with the respective Directive.

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<tr>
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### I.1.2. Substantive concepts of refugee law

The Refugee Convention (supplemented by the 1967 Protocol) is the core international legal instrument for protection of persons who have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Meanwhile the development of customary international law introduced an “intermediate category” of protection of a “new class of refugees” (at risk of persecution).

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60 2001/55/EC, Art. 3.5; 2003/86/EC, Art. 3.5.
or ill-treatment that is not motivated by any of the Refugee Convention reasons) who benefit from the commitment of states to respect the non-refoulement principle and to grant temporary asylum.\footnote{G. Goodwin-Gill, “Non-Refoulement and the New Asylum Seekers” (1986), 26(4) Virginia J. Intl. L., at 898 (quoted by Hathaway, op. cit., at pp. 24-25).} The development of international human rights law was reflected in regional legal documents, which enhanced the scope of protection beyond the Refugee Convention.\footnote{Dr María-Teresa Gil-Bazo, “The Interaction between the EC Qualification Directive and the ECHR”, the 3rd UNHCR-CoE Colloquy “The European Convention on Human Rights and the New Common European Asylum”, Strasbourg, 14 October 2005, p. 2.} LATP is on the whole approximated with the international law and standards, however there are a number of challenges regarding its further improvement, interpretation and implementation.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter referred to as the UNHCR Handbook)\footnote{UNHCR office, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979; Reedited, Geneva, January 1992.} explains various components of the definition of a refugee set out in the Convention and the Protocol and also provides some guidance on the procedures for determination of refugee status on the basis of principles defined by the UNHCR Executive Committee (hereinafter referred to as ExCom).\footnote{Ibid., p. 2. Foreword by Michel Moussalli, Director of International Protection, Office of UNHCR, para. VII: “The Handbook is meant for the guidance of government officials concerned with the determination of refugee status in various Contracting States. […]”} In December 2006 the Ministry of Interior (hereinafter referred to as MoI) published its own Handbook on Procedures for Implementation of LATP (hereinafter referred to as the MoI Handbook), aimed for the guidance of border police, police sectors and sections, particularly the Asylum Section (hereinafter referred to as MoI - AS),\footnote{Even though decisions are issued by “the Ministry of Interior, Central Police Services, Department for Civil Affairs, Asylum Section”, for practical reasons the abbreviations MoI - AS or occasionally Asylum Section are used in this book.} and other persons associated with asylum determination proceedings.\footnote{Handbook for Implementation of LATP in the Republic of Macedonia, prepared by the Ministry of Interior (MoI Handbook), Skopje, December 2006, p. 7.}

The above handbooks and other relevant documents and information were available to the Macedonian authorities, yet in practice they failed to apply properly some refugee law concepts or fully disregarded them.

### I.1.2.1. Right to asylum

Article 2 of LATP essentially matches Article 2, paragraphs (a), (d) and (f) of the Qualification Directive by stipulating thus:

“The right of asylum is protection granted by the Republic of Macedonia, under the conditions and in procedure defined by this law, to a recognized refugee (a refugee under
the Refugee Convention and the 1967 Protocol) and to a person under subsidiary protection.”

These two forms of protection are granted for various reasons and are associated with different legal regimes of rights and obligations (asylum status). The Refugee Convention does not specifically regulate determination of refugee status, however there are regional treaties (such as the EU Procedures Directive) and national laws which regulate both the grant of refugee status and subsidiary protection, as well as guidance provided in various UNHCR documents.

**I.1.2.1.1. Refugee**

Article 1A(2) of the Refugee Convention as amended by the 1967 Protocol provided the applicable international definition of a refugee as

> “any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.”

The definition in the Refugee Convention does not use the adjective “recognized” before the word “refugee”, as it does not address granting of asylum. Article 1A(2) of the Refugee Convention is applicable only if the persecution feared by the applicant is motivated by his or her civil or political status. The refugee definition was incorporated in Article 2(c) of the Qualification Directive and was also included in Article 4 of LATP, which reads as follows:

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69 Subsidiary protection is a complementary form of protection under international human rights law, which is applicable if a person fearing ill-treatment upon return or expulsion is not meeting the criteria for being recognized as refugee (e.g. because no nexus to a Convention reason exists in his or her case). See Section I.1.2.1.2. for more information.

70 See Section I.1.2.3. about other rights and duties of persons protected by LATP.

71 UNHCR Handbook, para. 189.

72 See Section I.1.3.1.

73 UNHCR Handbook, para. 28: “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. […] He does not become a refugee because of recognition, but is recognized because he is a refugee.”


75 J.C. Hathaway (op. cit. at footnote 62, pp. 8 and 10) commented that the refugee definition is essentially incomplete as it de facto excludes persons who may have a genuine fear on other ground (e.g. war or natural disaster threatening a life) or those denied basic rights as food, health care or education, unless that deprivation stems from civil or political status. However, paragraph 39 of UNHCR Handbook suggests that motifs not stated in the definition of a refugee may not be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the case.
A recognized refugee is an alien who, after examination of his claim, has been found to fulfil the requirements set out in the Convention of Article 2 sub-paragraph 1 of this law, that is, a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or his political opinion, is outside the state of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that state; or who, not having a nationality and being outside the state in which he had a habitual place of residence, is unable, or, owing to such fear, is unwilling to return to it.

One might summarise that a person is a refugee if he or she risks persecution for a Refugee Convention reason. However, the refugee definition is by far more complex and its less clear terms should be interpreted in good faith in accordance with the meaning to be given to the Convention’s terms in their context (including preamble) and the object and purpose of the Convention (which inter alia includes ensurance of the protection of specific rights of refugees). Hence for the purpose of analysis it is advisable to break down the refugee definition into its constituent elements.

I.1.2.1.1.a. „Person” “outside the country of his nationality”, or “outside the country of his former habitual residence“

The Refugee Convention’s phrase “outside the country of his nationality” relates to a national (citizen) of a country other that the country of asylum, while the phrase “outside the country of his former habitual residence” relates to a stateless person. A national of the country of asylum or a stateless person (de facto or de jure) having habitual residence in that country may not be a refugee under international refugee law, however an internally displaced person is entitled to protection by other legal instruments and may receive assistance by the country of origin or UNHCR. While Article 2(c) of the Qualification Directive stipulates that only a third country national or a stateless person may be a refugee, Article 4 of LATP maintains the universal character of refugee protection (provided under Article 1A(2) of the Refugee Convention) by referring to an “alien”, including a stateless person. Therefore MoI - AS was free to consider asylum applications of nationals of EU Member States as well.

The Refugee Convention does not require that an alien or a stateless person must have fled his country of origin to escape the persecution feared, therefore the Convention is also applicable to a person who owing to a Convention reason already found himself or herself in the country of asylum at the time of occurrence of the events which gave rise to his or her persecution.

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76 UNHCR, Interpreting Article 1 of the 1951 Convention relating to the Status of refugees, April 2001, para 7.
77 Ibid., paras. 3 - 4.
78 Ibid., para. 7.
79 UNHCR Handbook, para. 87.
80 The UNHCR mandate is wider than the framework set up by the Refugee Convention and covers various migratory and internal displacements (supra footnote 26).
81 A country which is not EU Member State.
well-founded fear. It is good that MoI - AS decided to grant asylum to refugees *sur place* in two cases\(^83\) before introduction of respective provisions in the domestic law. Article 4-b of LATP, as amended in December 2009, matched Article 5, paragraphs 1 and 2 of the Qualification Directive by stating that a well-founded fear of persecution may be based on events which have taken place or on activities which have been engaged in by the applicant since he left his country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin. UNHCR commented that even where it cannot be established that the asylum seeker has already held convictions or orientations in the country of origin, he or she is still entitled to exercise his or her right to freedom of expression or right to freedom of religion in the country of asylum by changing the respective convictions, *inter alia*, for reason of their disaffection with the religion or policies of the country of origin.\(^84\) LATP does not contain the restrictive wording of Article 5.3 of the Qualification Directive, which entitles Member States to determine that an applicant shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving his country of origin. Nevertheless, MoI - AS should bear in mind the UNHCR position that even a “manufactured” asylum claim deserves proper consideration as to whether it fulfils the requirements of the refugee definition, therefore all the relevant details surrounding the claim should be taken into account, instead to focus by default on the applicant’s “bad faith”. According to Prof. Hathaway, such absolute preoccupation with the possibilities of fraud ignores the basic rights of all persons to be free to express themselves,\(^85\) as well as to enjoy other related civil and political rights.\(^86\) This is so in the Macedonian context, too, as the Constitutional freedoms of belief, conscience, thought, public expression of thought and religion are guaranteed to everyone and can not be restricted.\(^87\)

**I.1.2.1.1.b. “Well-founded fear of being persecuted”**

*b1) Elements and well-foundedness of fear*

UNHCR explained that the phrase “well-founded fear of being persecuted” involves a subjective element in the person applying for recognition as a refugee (“fear”), however the applicant’s fear must be reasonable and supported by an objective situation\(^88\) (“well-founded”), providing that “he can establish to a reasonable degree, that his continued stay in his country has become intolerable for him for reasons stated in the definition, or would

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\(^{83}\) MoI - AS recognized refugee status *sur place* in 2000 and 2008 respectively.


\(^{85}\) J. C. Hathaway, *op. cit.* at footnote 62, p. 37.

\(^{86}\) Please see the table of rights in Section I.1.1.4.

\(^{87}\) Constitution of the Republic of Macedonia, Articles 16.1, 19.1-2 and 54.4.

\(^{88}\) UNHCR Handbook, paras. 37, 38 and 41.
for the same reason be intolerable if he returned there.\(^89\) Therefore it is necessary to evaluate credibility of the applicant’s statements relating to his personal background, his membership to a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences, however conditions in the applicant’s country of origin are also relevant (e.g. experiences of his friends, relatives or other members of the same group, laws of the country of origin or the manner in which they are applied etc.).\(^90\) UNHCR further clarified that all the relevant circumstances of the case should be studied and weighted appropriately, as understated subjective fear may be compensated by objective circumstances capable of running for anyone an obvious risk of persecution, while the applicant’s own background, belief system and activities may support a conclusion that less compelling objective circumstances substantiate his or her fear of persecution, even though the same objective circumstances might not be considered so for another.\(^91\) According to Prof. Hathaway, the term “fear” mandates a forward-looking assessment of risk rather than examination of the emotional reaction of the claimant.\(^92\)

If the fear of persecution is limited to a particular part of the country of origin, it is necessary to determine whether the person has a relevant and reasonable alternative of moving to other part of that country (“internal flight alternative” (IFA) or “relocation principle”), instead of seeking asylum.\(^93\) Article 29(3) of LATP and Article 8 of the Qualification Directive should be amended by acknowledging that IFA is not relevant in principle if the risk emanates from State agents\(^94\) and that IFA is reasonable if it offers “a habitable and safe environment, free from the threat of persecution, where the person can live a “normal” life, including the exercise and enjoyment of civil, political ... economical, social and cultural rights”, and where “the risk giving rise to fear is sufficiently mitigated by available and effective national protection from the feared harm”.\(^95\)

The MoI Handbook refers to the subjective and objective element of fear without attempting to explain the notion of “fear” in details.\(^96\) Without prejudicing the possibility that the Macedonian authorities might had scrupulously examined some or even majority of the asylum cases, their decisions indicate poor analysis and misinterpretation of facts and evidence relating to fear of persecution, regardless of occasional referral to the phrases ”subjective fear” and “objective fear”. For example, statements of applicants who claimed fear owing to threats of serious harm were often undermined by imposing on them a heavy evidentiary requirement to “prove that they had being personally subjected to maltreat-

\(^{89}\) Ibid., para. 42.  
\(^{90}\) Ibid., paras. 37, 39 and 43.  
\(^{91}\) UNHCR, Interpreting Article 1 of the 1951 Convention, para 11.  
\(^{92}\) Hathaway, op. cit. at footnote 62, p. 66.  
\(^{93}\) UNHCR, Interpreting Article 1 of the 1951 Convention, para 12. See also the UNHCR Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 July 2003.  
\(^{94}\) UNHCR, Comments on the Qualification Directive, p. 19.  
\(^{95}\) UNHCR, Interpreting Article 1 of the 1951 Convention, paras. 13 - 15.  
\(^{96}\) MoI Handbook, pp. 22-24 and 36.
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ment amounting to persecution”. In many cases MoI - AS summarily concluded that the stated fear of persecution of asylum seekers from Kosovo was based on the 1999 political-security situation and their claims were rejected as ill-founded by referral to reports of UNHCR or OSCE (often without stating their title and date) or mere referral to “international reports”. In some other cases MoI - AS failed to provide well-reasoned assessment that no fear of persecution for a Convention reason existed and thus granted humanitarian protection on the ground of threatened violation of human rights. Some decisions (including those in cases of asylum seekers arriving from territories other than Kosovo) lacked any reason regarding the fear of persecution, even in substance. In order to avoid the aforementioned imperfections, it is recommended that any future consideration of applicants’ fear of persecution must take into account the relevant guidance and recommendations of UNHCR.

Even though national authorities normally examine the fear of persecution on individual basis, recourse had been given to the so-called “group determination” in situations of displacement of entire groups under circumstances indicating that members of the group could be considered individually as refugees. A few mass-influx arrivals of displaced persons from Bosnia-Herzegovina and from Kosovo respectively to the Republic of Macedonia prompted decisions of the Macedonian Government to grant temporary protection to whole groups of *prima facie* refugees, who thus obtained the status of temporary humanitarian assisted persons.

**b2) Persecution**

Persecution for the purposes of refugee status determination is nowhere defined by international law. With reference to Article 33.1 of the Refugee Convention, it is clear that a threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion is always persecution. UNHCR advises that “persecution comprises serious human rights abuses or other serious harm, but not always with systematic or repetitive element”. Various less harmful activities in combination with other adverse factors such as the atmosphere of insecurity in the country of origin

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97 A.A. & D.A., no. 10.6 - 58174/2 and 58215/2, decision of 28 January 2005.
98 See the description of the two cases in Section I.1.2.2.a.2.
99 For example, in the case of Z.T. (no. 19.11.2 - 7312/6, decision of 11 March 2009), MoI - AS listed the applicant’s personal data and background information relating to the asylum proceedings (p.1), merely presented the facts of the case without precisely referring to particular statements as registered in the minutes of the interview (*ibid.*, pp. 2 - 3) and stated no more than the following “reasons”: “From what has been stated above it was established that the applicant does not fulfil the criteria set forth in Article 2 of the Law on Asylum and Temporary Protection of the Republic of Macedonia. In the course of determination, reasons of Article 4 of this Law were not taken into account pursuant to Article 36 paragraph 2 of the same Law.” (*ibid.*, p. 3 *in fine*)
100 UNHCR Handbook, paragraphs 44 and 45.
101 UNHCR, Interpreting Article 1 of the 1951 Convention, para 16.
may constitute persecution (on “cumulative grounds”), while discrimination may amount to persecution if it results in very serious consequences for the person (e.g. his right to earn for living, to practice religion or to have access to education) or if there is a persistent pattern of consistent discrimination. Persecution for a Convention reason should be distinguished from prosecution under a law of general application, but discriminatory prosecution, discriminatory punishment, punishment amounting to cruel, inhuman or degrading treatment, punishment of conscientious objectors and other improper administration of justice may amount to persecution if it is motivated by a reason set forth in Article 1A(2) of the Refugee Convention.

According to Article 9.1 of the Qualification Directive, acts of persecution must be: a) sufficiently serious by their nature or frequency so as to seriously violate fundamental human rights, in particular the rights from which no derogation can be made under Article 15.2 of ECHR; or b) be an accumulation of various measures or human rights violations which are sufficiently severe to affect an individual in a similar manner as mentioned in a). Article 9.2 of the Qualification Directive states that persecution can take the form of acts of violence, discrimination or related treatment which endangers life, freedom and other fundamental human rights. Article 6(c) of the Qualification Directive specifies that actors of persecution or serious harm include non-state actors, if it can be demonstrated that the State or other entity controlling the State or a substantial part of its territory cannot provide protection. UNHCR welcomed Article 6 of the Qualification Directive, however advised EU Member States to have in mind that the word “demonstrated” in Article 6(c) should not increase the burden of proof of an applicant whose claim is based on well-founded fear of persecution by non-state actors and that the referral to a State actor of protection is of no consequence. Article 7.2 of the Qualification Directive was criticised by UNHCR for the emphasis placed on the steps taken to prevent persecution or serious harm, instead on individual circumstances of each case and the applicant’s fear of persecution.

LATP does not define persecution, while the MoI Handbook provides a working definition of persecution as a State’s continuing failure or failure over a longer period of time to protect a person from threats to his life or freedom and other serious human rights violations. Yet the Macedonian authorities often disregarded other serious human rights violations, apart from those threatening the rights to life, physical integrity and personal liberty.

Therefore the Macedonian legislature should accept the UNHCR recommendation that “the interpretation of what constitutes persecution needs to be flexible, adaptable and suf-

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103 UNHCR Handbook, para. 52.
104 Ibid., paras. 54-55; UNHCR, Interpreting Article 1 of the 1951 Convention, para 17.
105 UNHCR, Interpreting Article 1 of the 1951 Convention, para 18.
106 Article 15.2 of ECHR prohibits derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4.1 and 7.
107 UNHCR, Comments on the Qualification Directive, p. 20
108 Ibid., p. 18.
ficiently open to accommodate the changing forms of persecution.”

In addition, Prof. Hathaway’s classification of rights whose (anticipated) violation amounts to (fear of) persecution may be useful.

I.1.2.1.1.c. Reasons for persecution: “race, religion, nationality, membership of a particular social group or political opinion”

The definition of a refugee stipulates that persecution must be for one or more of the following reasons: race, religion, nationality, membership of a particular social group or political opinion. The Refugee Convention and LATP do not further explain these reasons, however UNHCR documents provide useful guidance.

Article 10.1 of the Qualification Directive provides the following clarification:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs and other religious acts or expressions of view;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct iden-

110 UNHCR, Comments on the Qualification Directive, p. 20

111 James C. Hathaway in his “Law on Refugee Status” (op. cit. at footnote 62, pp. 108-112), categorises the rights in four groups (“levels”): I. Non-derogable rights guaranteed by ICCPR, Articles 6, OP2-1 & OP2-2; 7, 8, 15, 16 and 18, whose violation and lack of effective State protection always amounts to persecution; II. rights under ICCPR, Articles 3, 9, 10, 12, 14, 17, 19, 20, 21, 22, 23, 24, 25 and 26, whose violation is likely to amount to persecution if its enjoyment is restricted or limited in a non-emergency situation or on a discriminatory ground; III. rights under ICESCR, the deprivation of certain of which can in extreme situations amount to persecution, especially if it is based on discriminatory ground and deprives a person of any means of subsistence; IV. rights under UDHR which are not codified in binding terms in the international (UN) treaties, whose violations is not likely to amount to persecution. Compare these groups of rights in the comparative table in Section I.1.1.4. of this book.

112 UNHCR Handbook, paras. 66 - 86; UNHCR, Interpreting Article 1 of the 1951 Convention, paras. 32 - 33; Guidelines on International Protection (GIP) No. 1: Gender Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees; 7 May 2002; GIP No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) ..., 7 May 2002; GIP No. 6: Religion-Based Refugee Claims under Article A(2) ..., 28 April 2004; GIP No. 7: The Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, 7 April 2006; etc.
tity in the relevant country, because it is perceived as being different by the surrounding society (e.g. a group based on a common characteristic of sexual orientation);

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

UNHCR suggested that “other elements not outlined in Article 10 QD may prove equally relevant”, such as the freedom to change one’s religion as a part of the concept of religion or conviction as outlined in Article 10(b); and gender, age, disability and health status under Article 10(d) (in addition to women, families, tribes, occupational groups and homosexuals who were recognized by states as constituting a particular social group), and thus invited states, in cooperation with UNHCR, to adopt guidelines on assessing asylum applications of women and children.\(^{113}\)

Article 23-a (“Vulnerable Persons with Special Needs”) of LATP in its paragraph 5 stipulates that in the course of evaluation of the asylum application it is necessary to take into account forms of persecution typical for belonging to gender.\(^{114}\) To this effect the CSRC Guidelines for Determination of a Refugee Status to Persons Who Have Well-Founded Fear of Gender-based Persecution\(^{115}\) may be useful, as they describe various forms of sex and gender based violence, including abuse of victims of trafficking who may be considered “members of a particular social group”.\(^{116}\)

Article 10.2 of the Qualification Directive states that “[w]hen assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether he or she actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.” LATP failed to state that such “imputed” affiliation to a Convention reason is relevant to warrant grant of international protection and it seems that MoI - AS had not invoked this concept in its case-law.

In many cases MoI - AS failed to establish a Refugee Convention ground which apparently existed, as described elsewhere in this book. In most of the cases the applicants claimed fear of persecution for reason of their “nationality” (that is their ethnic origins), sometimes on cumulative ground with “race”. The reason of “political opinion” attracted little attention by MoI - AS, even though “it is for the examiner, when examining the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met in this respect”.\(^{117}\) Even less, it seems that MoI - AS considered

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\(^{114}\) LATP, amended as of 3 December 2009, OGRM no. 146 of 7 December 2009.

\(^{115}\) Available at: [http://www.icgo.mk](http://www.icgo.mk), or in printed form upon request.

\(^{116}\) For comparison, the UK Immigration Appelate Tribunal in the case of SB Moldova CG [2008] UKAIT 00002 stated that “[i]n the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group.”

\(^{117}\) UNHCR Handbook, para. 67.
the reasons of “membership of a particular social group” and “religion” at training events rather than in asylum determination.

I.1.2.1.1.d. “Unwilling to avail himself of the protection of that country ... or to return to it”

The ability/willingness of a person to avail of state protection was differently interpreted, ranging from a view of some theoreticians and jurisprudence of many countries that it refers to protection inside the country of origin (thus forming an important part of the test for refugee status, together with the well-founded fear of persecution test) to an interpretation that it refers to external protection (based on textual analyses) and that “unwillingness to avail oneself of external protection means unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur” (historical analysis).118 UNHCR clarified that “the internal protection element is best considered and determined as an element of well-foundedness of fear” and provided the following contemporary interpretation: “if the country of origin is unable to provide protection against persecution (whether the inability be despite best efforts of a weak state or on account of the total failure of the state), then the victim will fear persecution in case of return and therefore has good reason to be unwilling, owing to that fear, to avail himself or herself of the protection of that country.”119

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The process of refugee status determination involves interpretation of a seemingly simple definition which is by far more complex. Therefore, the law-drafters and the legislature should have in mind the need of further clarification of the refugee definition, with a view of harmonising it with the Qualification Directive referred to in the text above. MoI officials and courts should be constantly aware of the need of interpreting the refugee definition in line with the UNHCR guidance and, possibly, in the light of the development of the practice of the countries with a long-lasting tradition of refugee status determination.

I.1.2.1.2. A person under subsidiary protection

I.1.2.1.2.a. From humanitarian to subsidiary protection

a1) Legal background

The LATP of 2003 in its Article 2, indent 2 defined humanitarian protection as a protection provided “in accordance with Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”. In the light of the need to harmonise LATP with the 2004 Qualification Directive, the May 2007 amendments introduced subsidiary protection and defined a person under subsidiary protection as

118 UNHCR, Interpreting Article 1 of the 1951 Convention, para. 35 - 36.
119 Ibid., para. 37.
“an alien who does not qualify as a recognized refugee, to whom the Republic of Macedonia shall grant the right of asylum and give a permission to remain within its territory because there are substantial reasons for believing that he or she would face a real risk of suffering serious harm in case of returning to the state of his nationality, or in the state in which, not having a nationality, he has a habitual place of residence”.

It is good that the legislature opted to use the Refugee Convention’s term of “alien” instead of the phrase “third country national or a stateless person” that was used in the Qualification Directive, however the above provision fails short of including the last part of Article 2(e) of the Qualification Directive, which reads as follows: “is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”

Further existence of humanitarian protection appeared to be superfluous in the light of the fact that the 2007 Amendments of LATP incorporated the essence of Article 5 (“A person under humanitarian protection”) in indent 2 of Article 4-a.2. Even though the November 2008 Amendments deleted Article 5 of LATP, the legislature unreasonably failed to include a transitional provision foreseeing a transfer of humanitarian to subsidiary protection, which caused concerns regarding 1,145 persons under humanitarian protection. At the very end of 2008 MoI - AS clarified its obligation “to extend the acquired right to asylum with the newly established institute of international protection - subsidiary protection” within a reasonable time and not later than 30 April 2009, however the transfer of the status continued throughout 2009. Despite the stated obligation of reconsidering whether persons under humanitarian protection fulfilled the requirements for granting a status of recognized refugee, the process resembled the previous “copy-paste” technique and resulted in no new recognition of refugee status to any of the protected persons.

With reference to Recital 24 of the EU Qualification Directive, which states that “subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”, Article 30 of LATP provided that in an event of non-fulfilment of criteria for granting refugee status, the Asylum Section shall ex officio consider the existence of reasons and conditions for granting the right to asylum for subsidiary protection. This provision essentially matched the UNHCR recommendation to States to provide legislative primacy to the refugee protection, by interpreting progressively the refugee definition and with the necessary flexibility to take changing forms of persecution into account.

\textit{a2) Misuse of humanitarian and subsidiary protection}

In spite of the solid legal background described above, the necessity to ensure that the Refugee Convention is not undermined by resorting to subsidiary protection in cases which

\textsuperscript{120} MoI, Guidance for the Work of the Asylum Section regarding Granting the Right to Asylum for Subsidiary Protection and Extension of the Right to Asylum for Subsidiary Protection, non-dated (presumably issued at the end of 2008), p. 2

\textsuperscript{121} \textit{Ibid.}, p. 3.

\textsuperscript{122} UNHCR, Comments on the Qualification Directive, January 2005, p. 11.

\textsuperscript{123} \textit{Ibid.}, p. 31

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actually fall under the definition of a refugee of the Refugee Convention was not observed in the practice of MoI - AS. In comparison to the EU average of granting refugee status to 49.87% of positively decided cases in 2009, the proportion of applicants granted refugee status vis-à-vis those granted humanitarian or subsidiary protection in the Republic of Macedonia from 2003 to 2010 amounted to 2% : 98%.

The decisions in these cases, mostly involving asylum seekers from Kosovo, lacked appropriate rationale for why no nexus to any of the Refugee Convention reasons existed, in spite of the fact that the information available to MoI - AS obviously demonstrated the relevance of nexus to nationality, race and/or political opinion.

The two cases described below (which involved claims of extremely grave persecution that had been exercised over two related families at the same place and time by armed perpetrators) are indicative of the unreasonable practice of MoI - AS to favour the humanitarian/subsidiary protection. MoI - AS did not dispute the credibility in the first case and explicitly acknowledged the credibility in the second case. The applicants’ statements that perpetrators entered the applicants’ house with a view of extracting information regarding a family member who had collaborated with the police (“imputed political opinion”) and that in the course of committing horrible violent acts the perpetrators shouted the applicants’ ethnic origins (“nationality”), clearly indicated a risk of at least reasonable degree that the applicants could become victims of persecution in Kosovo for reasons of their ethnicity, race and imputed political opinion, particularly in the light of the situation in Kosovo at the time of determination (summer-autumn 2004). However, MoI - AS failed to mention the above facts that were crucial for establishing a nexus to the Ref-

124 Ibid.
125 Eurostat, “EU Member States granted protection to 78,800 refugees in 2009”. Press release 89/2010 of 18 June 2010: “Of the 78,800 persons who were granted protection status [in 2009], 39,300 persons were granted refugee status, 29,900 subsidiary protection and 9,600 authorisation to stay for humanitarian reasons.” The average recognition rate on EU level amounted to 27% for first instance decisions and 19% for final decisions on appeal.
127 The reason of “nationality”, and sometimes “political opinion” and “race” were invoked, described and proved by CSRC lawyers in particular cases. In addition, MoI - AS must have been aware that the persecution feared by Kosovan asylum seekers (whose cases amounted to more than 90% of the asylum caseload) was generally motivated by their ethnic origins, which was obvious from the plenty of translated country of origin information (COI) and other documents submitted by UNHCR (e.g. UNHCR position papers on the Continued need of protection of individuals from Kosovo) and CSRC (300-pp. COI kit back in 2005).
128 Applications nos. 10.6-55250/1 and 10.6-55249/1, decision of 28 June 2004; applications nos. 10.6-55255/1 and 10.6-55256/1, decision of 5 October, 2004. For reasons of confidentiality, details and initial letters of the applicant’s names are not given.
129 Decision of 5 October 2004, supra footnote: "In addition to the expressed emotional anxiety of the applicants during the interview, the composure, consistency and continuity of their statements is registered, which constitutes a circumstance contributing to the assessment of the truthfulness and credibility of the applicants."
130 UNHCR Handbook states that the previous persecution of a person is “a good reason why he individually fears persecution” (para. 45).
ugee Convention reasons. Furthermore, the decisions in the two cases stated that the situation in Kosovo became improved in general, even though no MoI - AS official could have been unaware that, several months before the asylum interviews took place, widespread violence of a few days against ethnic minorities in Kosovo resulted in death of 19 civilians, injuries of 950 persons, damage or destruction of approximately 730 houses belonging to minorities, and displacement of more than 4,100 members of the minorities by 23 March 2004!\textsuperscript{131} In the first case MoI held that the applicants in an event of being returned shall face only discrimination on basis of their ethnic origins (without explaining why systematic and serious discriminatory measures against the applicants’ ethnic community do not amount to discrimination on the aforementioned ground of ethnic origins, i.e. “nationality”\textsuperscript{132}),\textsuperscript{133} while the decision in the second case merely stated that Article 2(2) and 5 of LATP are applicable.\textsuperscript{134} The Administrative Court rejected the lawsuit in the first case, \textit{inter alia}, because the persons already enjoyed asylum for humanitarian protection,\textsuperscript{135} and rejected the lawsuit in the second case as the persons “claimed no new circumstances for changing their humanitarian protection status in the Republic of Macedonia”.\textsuperscript{136}

MoI - AS granted humanitarian protection to many Kosovo asylum seekers belonging to ethnic minorities who were allegedly safe from persecution in the light of the protection from the UN and local administration, however, regard was given to the fact that “applicants could be subjected to events which could adversely affect their durable integration in Kosovo”.\textsuperscript{137} Humanitarian or subsidiary protection was often warranted by stating that “conditions have not been created for safe return, residence and integration of the said person in the place of residence [in her/his country of origin]”.\textsuperscript{138} In some recent cases “the Asylum Section made insight into the case files and considered the relevant international reports recommending extension of already granted international protection to persons who are members of ethnic minorities originating from Kosovo”, however failed to even mention that the requirements for granting refugee status have not been met yet.\textsuperscript{139} There were no cases in which subsidiary protection was advanced to refugee status.

The resort to humanitarian/subsidiary protection on a large scale instead of granting refugee status might have resulted from various factors, including: a) legal, to be addressed to MoI - AS officials; or b) “political” (if any!?) to be addressed to the head of MoI - AS who

\begin{footnotes}
\item[131] UNHCR Position Paper on the Continued International Protection Needs of Individuals from Kosovo, August 2004.
\item[132] Compare paras. 54 and 55 of the UNHCR Handbook.
\item[133] Decision of 28 June 2004, \textit{supra} footnote, p. 3.
\item[135] U-6 no. 918/2010, judgment of 24 September 2010.
\item[137] A.B. & F.B., nos. 10.6 - 53418/2 & 10.6 - 53417/2, decision of 11 July 2007.
\item[138] R.G., no. 10.6-58235/6, decision of 12 November 2008; S.F., no. 10.6-55230/6, decision of 6 November 2008 etc.
\item[139] B.A., no. 10.6 - 55590/7; decision of 28 September 2010.
\end{footnotes}
approves and signs decisions and his or her superiors within MoI. CSRC through litigation and advocacy emphasized and now reiterates that MoI - AS must scrupulously examine asylum applications and recognize refugee status as a primary form of protection, where appropriate.

1.1.2.1.2.b. Serious harm

Article 4.2 of LATP copies Article 15 of the Qualification Directive, by listing three types of serious harms: (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. UNHCR welcomed this development of the EU Acquis, however commented that subsidiary protection would be required (and thus applied) only in situations where such violations have no link to a Convention ground.

b1) Death penalty or execution

This ground for granting subsidiary protection reflects the development of international human rights law, in particular the abolition of death penalty under the Second Optional Protocol to ICCPR, as well as Protocol no. 6 to ECHR (except in time of war) and Protocol no. 13 to ECHR (absolute abolition). In addition, the right to life guaranteed by Article 6 of ICCPR, Article 6 of the Convention on the Rights of the Child and Article 2 of ECHR, can be breached if execution of a decision to expel or extradite a person puts him or her at real risk of arbitrary deprivation of life or flagrant denial of justice.

b2) Torture or inhuman or degrading treatment or punishment

For the purposes of the Convention against Torture

“torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has commit-

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140 This analysis proves beyond reasonable doubt that asylum determination from 2003 to 2010 favoured humanitarian protection from reasons which are hardly explainable from a legal point of view, however does not imply that particular instructions were given to MoI - AS to undermine the character of international protection, hence the legitimate concern is stated above in conditional terms (“if any!?”). For differences between the consequences of such determination, compare the status of recognized refugees to the status of persons under subsidiary protection in Section I.1.2.3.

141 The Macedonian legislature opted to use plural form (“violations”).

142 UNHCR, Comments on the Qualification Directive, p. 32 (emphasis added)

143 Bader and Kanbor v. Sweden, no. 13284/04, § 42, ECHR 2005-XI. “42. … a Contracting State’s responsibility might be engaged under Article 2 of the Convention or Article 1 of Protocol No. 6 where an alien is deported to a country where he or she is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise (see among others, S.R. v. Sweden (dec.), no. 62806/00, 23 April 2002; Ismaili v. Germany (dec.), no. 58128/00, 15 March 2001; and Bahaddar v. the Netherlands, judgment of 19 February 1998, Reports 1998-I, opinion of the Commission, pp. 270-71, §§ 75-78).”
ted or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The above definition has two major drawbacks: 1) it covers only acts of torture which could be attributed to State agents; 2) it does not provide protection from lawful sanctions whose execution might harm a person’s integrity or dignity.

CAT, Article 7 of ICCPR, the introductory part of Article 37(a) of the Convention of the Rights of the Child and Article 3 of ECHR prohibit torture, inhuman or degrading treatment or punishment in absolute terms, regardless of the conduct of the person, even if it poses a danger to the national security. Even though these bodies occasionally referred to the CAT definition, they interpreted the provisions of the respective treaty to the effect of establishing their own definitions of the prohibited treatment. Below are given some definitions from the ECtHR case-law. Torture is “deliberate inhuman treatment causing very serious and cruel suffering”, which may take the form of severe beating, beating focused on the palms of the feet (“phalanx”), or beating following which no necessary medical aid has been given, “Palestinian hanging” of hands tied over the back, rape, etc. Inhuman treatment is deliberately causing severe suffering, mental or physical, which in the particular situation is unjustifiable, but is insufficiently serious (intensive) to amount to torture. Degrading treatment is a treatment arising in victims a feeling of fear, anguish and inferiority, capable of debasing and humiliating them and possibly breaking their physical or moral resistance. For a particular treatment to fall into the scope of Article 3 of the ECHR, it must attain a minimum level of severity, the establishment of which is relative, depending on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

144 CAT, Article 1, para 1.
145 Article 142 „Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” of the Criminal Code (OGRM no. 19/2004 of 30 March 2004) adopted the CAT definition in essence, but regrettably refers to a “non-permissible means” instead using the phrase “any act.”
147 Selmouni v. France, no. 25803/94, §§ 97 and 99, ECHR 1999-V.
148 Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, § 167.
149 Selmouni v. France, quoted above, §§ 102-105.
150 Salman v. Turkey, no. 21986/93, §§ 46, 52, 71 and 72, ECHR 2000.
151 İlhan v. Turkey, no. 22277/93, §§ 86-87, ECHR 2000.
152 Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, §§ 60 and 64.
155 Ireland v. the United Kingdom, quoted above, § 167.
156 Hilal v. the United Kingdom, no. 45276/99, § 60, ECHR 2001-II.
157 Ireland v. the United Kingdom, quoted above, § 162.
The prohibition of torture provided by the aforementioned human rights instruments incorporates prohibition of *refoulement*, which was explicitly stated in Article 3.1 of CAT with the following wording:

“No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

An author of a communication under Article 3 of CAT must establish that the danger of being subjected to a prohibited ill-treatment is personal and present.\(^{158}\) Article 3.2 of CAT stipulates the following:

“For the purpose of determining whether such grounds exist, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Committee against Torture has held regarding these circumstances that: 1) their existence does not as such constitute a sufficient ground if there are no additional grounds to show that the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return; and 2) their absence does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.\(^{159}\)

ECtHR stressed that in the circumstances where an asylum seeker faces a real risk of being subjected to treatment contrary to Article 3 of ECHR in a country of destination, a State Party could be responsible for ill-treatment that might occur for reason of foreseeable consequences (anticipated risk) of implementing a decision to expel\(^{160}\) or extradite.\(^{161}\) In addition, ECtHR also emphasised that the applicant should be able to show that his personal situation is worse than the situation of other members of the group or community to which he or she belongs,\(^{162}\) except in particular circumstances where he or she proves his or her belonging to a group or community that is systematically exposed to a practice of ill-treatment.\(^{163}\) The advantage of ECHR (similarly to ICCPR) is that it also applies where the risk of ill-treatment emanates from non-state actors in the country of destination.\(^{164}\)

The wording in decisions granting humanitarian protection based on Articles of CAT and ECHR or subsidiary protection (see Section I.1.2.1.2.a above) did not seem to reflect the character of the protection afforded by the relevant international human rights instru-


\(^{161}\) *Manatkulov and Askarov v. Turkey* [GC], no. 46827/99 and 46951/99, § 67, ECHR 2005-I.

\(^{162}\) *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 34, § 111.

\(^{163}\) *Abdolkhani and Karimmia v. Turkey*, no. 30471/08, § 75, 22 September 2009.

ments. Furthermore, MoI - AS and other authorities in asylum proceedings did not refer to the case-law of the treaty monitoring bodies, regardless of the fact that they were provided with ample training and literature.

b3) Serious and individual threats for reason of violence in armed conflicts

UNHCR made plain that persons fleeing their country of origin as a result of armed conflicts are not normally considered refugees under the Refugee Convention, however, they have the protection provided for in the Geneva Convention on the Protection of War Victims and the 1977 Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts. These safeguards are supplemented by Article 15(c) of the Qualification Directive and then included in Article 4-a.2(3) of LATP, which both stipulate that serious harm may consist of serious and individual threat to a civilian’s life and person for reason of indiscriminate violence in situations of international or internal armed conflict.

UNHCR commented that the risk of occurrence of serious harm should be immediate and not merely be a remote possibility (as, for example, when the conflict and the situation of generalized violence are located in a different part of the country concerned) and that the notion of “individual” threat should not lead to an additional threshold and higher burden of proof (as generalized violence involves indiscriminate and unpredictable risks for civilians). The European Court of Justice in its interpretation of Article 15 QD in conjunction with Article 2(e) QD held that in order to qualify for subsidiary protection, an individual need not be specifically targeted by reasons of factors particular to his personal circumstances. In a recent case MoI - AS was familiar with “the well known situation of the conflict in his country” (in Africa, between local tribes) and found credible the applicant assertion that he has been shot there, however described his presence at the shooting spot as “incidental” and rejected his claim owing to alleged lack of fear of persecution or risk of harm and the failure to apply for asylum in Turkey and Greece.

I.1.2.1.3. Family reunification

Article 8.1 of LATP stipulates that the right of asylum can be granted to members of the immediate family of a recognized refugee or of a person under subsidiary protection, upon their request.

Pursuant to Article 8.2 of LATP, immediate family members include the spouse of a recognized refugee or of a person under subsidiary protection, providing that their marriage was concluded prior to the arrival in the Republic of Macedonia, their unmarried minor children; and parents whose minor children acquired the right of asylum. In comparison to Article 2(h) of the Qualification Directive, Article 8.2 of LATP does not include the unmarried partner of the beneficiary of refugee or subsidiary protection status with whom he

165 UNHCR Handbook, para. 164. See also the Handbook’s Annex VI on p. 89.
166 UNHCR Comments on the Qualification Directive, p. 32.
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or she is in a stable relationship and their children born out of wedlock who are unmarried and dependent of them. UNHCR noted that “other family members who live in the same household normally should benefit from the principle of family unity” and that “families which have been founded during flight or upon arrival in the asylum State also need to be taken into account” by the countries of asylum, through applying liberal criteria in identifying the family members who can be admitted with a view of promoting a comprehensive reunification of the family. Of course, its is the legislature who should consider these recommendations, not the authorities determining asylum claims, as by applying the applicable law they had to deny the right to family reunification to a few spouses of persons under subsidiary protection whose marriage wasn’t concluded at the time of the arrival in the Republic of Macedonia.

Without prejudice to the decision whether to grant asylum on ground of family reunification, in determining whether to allow a family member to join his or her relatives in the country of asylum, due weight should be given to the Strasbourg case-law, which takes into account the established family life of aliens with long-lasting residence and secure status in the country of asylum, unlike those with temporary residence or humanitarian status.

I.1.2.1.4. Exclusion clauses

Sections D, E and F of Article 1 of the Refugee Convention contain provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1A, are excluded from refugee status. The first two sections (which exclude from refugee status persons who receive protection or assistance from organs or agencies of UN other than UNHCR or persons who are recognized by the competent authorities of their country of residence as having the rights and obligations attached to the possession of the nationality of that country) were included in Article 12.1 of the Qualification Directive, but not in LATP. Section F of Article 1 of the Refugee Convention exhaustively enumerates reasons for considering a person to be undeserving of international protection, therefore UNHCR suggested that exclusion clauses should be interpreted restrictively and applied with great caution, only after a full assessment of the individual circumstances of the case and in a manner proportionate to their objective, so that the gravity of the offence is weighted against the consequences of expulsion.

173 UNHCR Handbook, para. 140.
174 For more details, see UNHCR Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, October 2009.
175 For more details, see UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees, March 2009.
Article 6.1 of LATP incorporates these exclusion clauses (similarly to Article 12.2 of the Qualification Directive\textsuperscript{177}) in the following way:

“An alien cannot enjoy the right of asylum in the Republic of Macedonia if there is a well-founded suspicion that:

- He has committed a crime against peace, a crime against humanity or a war crime, according to the international acts drawn up to make provision in respect of such crimes;
- He has committed a serious (non-political) crime, outside the territory of the Republic of Macedonia prior to his admission in it as a refugee; and
- He has been guilty of acts contrary to the purposes and principles of the United Nations.”

The above provisions substitute the Refugee Convention’s phrase “serious reasons for considering” with the phrase “well-founded suspicion”. The phrase used in LATP must not be interpreted in a way lowering the standard and (the authorities’) burden of proof relating to existence of grounds for exclusion. In this respect reference is made to the British case-law, according to which:

“In any case an adjudicator intends to apply the exclusion clauses, he should make findings about the serious crime or act committed by the claimant and then explain how that fits within a particular sub-category”.\textsuperscript{178}

Article 17, paragraphs 1(d) and 3 of the Qualification Directive added two more clauses for exclusion from subsidiary protection, to which UNHCR objected by reiterating the exhaustive enumeration of the exclusion clauses in the Refugee Convention and the close linkages between refugee status and the subsidiary forms of protection.\textsuperscript{179} Regrettably, these two clauses were also included in Article 6.2 of LATP, which reads as follows:

“In addition to the reasons stated in paragraph 1 of this Article, a person under subsidiary protection cannot enjoy the right of asylum in the Republic of Macedonia if:

- He constitutes a danger to the security of the Republic of Macedonia;
- Before arriving to the Republic of Macedonia he has committed one or more crimes not covered by paragraph 1 of this Article for which penalty is provided in an event of committing such crimes in the Republic of Macedonia and if he had left his country of origin for the purpose of escaping criminal sanctions for the committed crimes.”\textsuperscript{180}

\textsuperscript{177} In addition, Article 12.3 of the Qualification Directive states that Paragraph 2 applies to persons who instigate or otherwise participate in acts mentioned therein.

\textsuperscript{178} Indra Gurung v. The Secretary of State for the Home Department, decision of the UK Immigration Appeal Tribunal of 15 October 2002, Summary of Conclusions, para. 151(2).

\textsuperscript{179} UNHCR, Comments on the Qualification Directive, pp. 27 and 34.

\textsuperscript{180} Article 6.2 of LATP does not explicitly cover instigators or accessories of the above acts.
By contrast to Article 17.1(d) of the Qualification Directive, which speaks of “a third country national or a stateless person [who] is excluded from being eligible for subsidiary protection”, Article 6.2(1) of LATP is neither a clause that excludes a person from being eligible to be granted the right of asylum (as it deals with the acquired right of “a person under subsidiary protection”), nor can it be a revocation clause (such are the clauses set forth in Article 19 QD). Having in mind that subsidiary protection complements the protection afforded under international refugee law, reference is made to the following UNHCR clarification on the distinction between the provisions of Article 1F and Article 33.2 of the Refugee Convention:

“Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes. Article 1F is to be distinguished from Article 33(2) of the 1951 Convention, which provides for the exceptions to the principle of non-refoulement. The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community, Article 33(2) was not, however, conceived as a ground for terminating refugee status.”

Therefore, a “decision to exclude an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention”.

Furthermore, the proponent of LATP and/or the legislature sought to additionally extend the scope of the exclusion clause of Article 6.1(2) of LATP (which excludes from the right to asylum a person who has committed a serious non-political crime before being admitted in the Republic of Macedonia as a refugee) by adding the provision of Article 6.2(2), which denies the granted right of asylum to a person under subsidiary protection who before arriving to the Republic of Macedonia has committed one or more crimes which are punishable by Macedonian laws and had left his country of origin for the purpose of

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181 UNHCR, Note on the Cancellation of Refugee Status, 22 November 2004, para. 1(ii).


escaping criminal sanctions. Article 6.2(2) is neither an exclusion clause for it denies already granted right to asylum; nor it appears to be a cancellation clause.\textsuperscript{184}

Without intention to explore the LATP drafting history and background reasons, the placement of the above provisions in the LATP Article titled “Exclusion clauses” warrants referral to the UNHCR comments issued regarding the aforementioned exclusion clauses of the Qualification Directive and a conclusion that both sub-paragraphs of Article 6.2 of LATP should be removed from LATP for reason of the inappropriateness of using the subsidiary protection (a complementary one to the protection provided by the Refugee Convention, particularly that afforded by its Article 1F) to undermine the overall international protection of displaced persons seeking asylum. The removal of the two controversial provisions from LATP on ground of their incompatibility with the Refugee Convention would not undermine the State’s commitment to harmonise its legislation to the EU Acquis, as the Qualification Directive, which sets up minimal standards and allows more favourable standards to be introduced on a national level, states that the Refugee Convention and its Protocol “provide the cornerstone of the international legal regime for the protection of refugees”.\textsuperscript{185}

The unfortunate incorporation of the State security ground in a wrong provision of the Macedonian legislation (as a ground for denying the granted right to asylum for subsidiary protection according to Article 6.2(1) of LATP) was nevertheless (mis)used\textsuperscript{186} to exclude asylum seekers as being ineligible for the right to asylum in the Republic of Macedonia. In several recent cases MoI - AS invoked the state security ground and referred to confidential notices from “competent authorities”,\textsuperscript{187} without providing the necessary procedural safeguards, such as access to the confidential case files, even to the Administrative Court, which thus annulled the respective decisions.\textsuperscript{188} In this context UNHCR advised that secret evidence or evidence considered \textit{in camera} should not be relied upon to exclude,\textsuperscript{189} while ECtHR recognized (though in the context of examining \textit{habeas corpus} proceedings) in a case of an asylum seeker suspected of terrorism

\begin{quote}
\textquotedblquote{that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.}\textsuperscript{190}
\end{quote}

\textsuperscript{184} UNHCR, Note on the Cancelation of Refugee Status, 22 November 2004, paras. 1(i) and 4: “Cancelation: a decision to invalidate a refugee status recognition which should not have been granted in the first place” ... “where there are indications that at the time of the initial decision the applicant did not meet the inclusion clauses of the 1951 Convention or an exclusion clause should have been applied to him or her.”

\textsuperscript{185} UNHCR, Comments on the Qualification Directive, Recital 3.

\textsuperscript{186} The prefix in the brackets is self-explanatory given the arguments in the previous few paragraphs, according to which the state security reason can not be invoked in asylum determination proceedings.

\textsuperscript{187} S.A., no. 10.6-56482/8; A.Z., no. 10.6-54749/9, decisions of 19 May 2010.

\textsuperscript{188} A.K., U-6. no. 1111/2010, judgment of 6 October 2010.

\textsuperscript{189} UNHCR, Application of Exclusion Clauses, para. 36.

\textsuperscript{190} \textit{Chahal v. the United Kingdom}, quoted above, § 131.
As Article 1F was authoritatively interpreted to be a provision excluding an applicant whose case would otherwise be arguable for refugee status, and in the light of the fact that in any event exclusion must be followed by assessment of the risk whether his or her removal to another country could subject him or her to serious harm, it is advisable to conduct exclusion proceedings with simultaneous examination whether the applicant faces well-founded fear of persecution (save in very exceptional circumstances) and/or risk of serious harm. Such “inclusion before exclusion” approach should be also applied in the practice of MoI-AS and if it was already applied in the aforementioned cases of persons excluded under Article 6 of LATP, the central issue in the revised determination in these cases should be whether the stated exclusion ground of Article 6 exists indeed.

Article 8.3(1) stipulates that the principle of family reunification shall not be applied if there are reasons for exclusion set forth in Article 6 of LATP (for comparison, Article 23.3 of the Qualification Directive refers to the exclusion clauses set forth in the Directive’s chapters III and V). In addition, Article 8.3(2) of LATP envisages that the principle of family reunification shall not apply if the immediate family members are nationals of another state which can provide protection to them.

UNHCR correctly stated that a person against whom exclusion clause was applied may still be protected against refoulement under international human rights law if in the country of destination he or she would be at risk of torture or related ill-treatment. Thus Article 7.3 of LATP allows a person who was excluded as ineligible for asylum to remain in the territory of the Republic of Macedonia as long as he or she would be subjected to torture, inhuman or degrading treatment or punishment in his or her country of origin.

**I.1.2.1.5. Cessation clauses**

Cessation in the meaning of Article 1C of the Refugee Convention denotes end of refugee status because of specific actions of a refugee (enumerated in Article 1C (1))

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[194] UNHCR, Comments on the Qualification Directive, pp. 28 and 34.
[195] See Section I.1.2.2.
[196] See the text of Article 1C in Section I.2.5.4 of this book.
[197] UNHCR, Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses), 10 February 2003, para. 4: “Cessation differs from cancellation of refugee status. Cancellation is based on a determination that an individual should not have been recognized as a refugee in the first place. That is, for instance, so where it is established that there was a misrepresentation of material facts essential to the outcome of the determination process or that one of the exclusion clauses would have been applicable had all the relevant facts been known. Cessation also differs from revocation, which may take place if a refugee subsequently engages in conduct coming within the scope of Article 1F(a) or 1F(c).”
- (4)) or because of fundamental changes in his or her country of origin (“ceased circumstances” set forth in Article 1C (5) and (6)).\(^{198}\) The cessation clauses of Article 1C are exhaustively enumerated and should be strictly interpreted in fair, clear and transparent procedures.\(^{199}\)

Article 1C of the Refugee Convention was generally incorporated in Article 11 of the Qualification Directive and in the consolidated (“write-erase”)\(^{200}\) text of Article 38 of LATP, which reads as follows:

“The right to asylum recognized in the Republic of Macedonian shall cease to a person who:

- Has voluntarily re-availed himself of the protection of the State whose national is;
- Having lost his nationality of that State, he has voluntarily re-acquired it;
- Has acquired a new nationality, and enjoys the protection of the State of his new nationality;
- Has voluntary re-established himself in the State which he left or outside which he remained owing to fear of persecution;
- Can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; and\(^{201}\)
- Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

For cessation of the right of asylum for reasons stated in paragraph 1 of this Article, proceedings for recognition of the right to asylum is conducted, as established by this law.”

The first paragraph of the above provisions would have matched Article 1C of the Refugee Convention if it weren’t for the failure (similar to that of Article 11.1 of the Qualification Directive) to include exceptions to the cessation provision stated in the second parts of 1C (5) and (6) of the Refugee Convention, allowing a refugee to invoke compelling reasons arising out of previous persecution (such as torture in detention, sexual violence, etc.)\(^{202}\) for refusing to avail himself or herself to the protection of the country of his

\(^{198}\) Ibid., para. 1.

\(^{199}\) Ibid., para. 7.

\(^{200}\) In spite of the UNHCR position that “no additional ground would justify a conclusion that international protection is no longer needed”, the 2007 Amendments of LATP introduced four more cessation clauses (death, acquisition of citizenship, acquisition of residence permit and voluntary departure from the territory of the Republic of Macedonia), which were fortunately erased by the 2009 Amendments of LATP.

\(^{201}\) The word “and” between the 5\(^{th}\) and the 6\(^{th}\) indent does not necessarily mean that cessation should be cumulatively based on two or more grounds. For comparison, Article 1.C of the Refugee Convention used the word “or” (Edit. note).

\(^{202}\) UNHCR Guidelines on Cessation of Refugee Status under Article 1C (5) & (6) of the 1951 Convention relating to the Status of Refugees, para. 20.
nationality of for not being able to return to the country of his former habitual residence. UNHCR interpreted the “compelling reasons” exception to extend beyond the actual wording of Article 1A(2), in accordance with the general humanitarian principle that is well established in State practice, thus persons under subsidiary protection should be also entitled to invoke compelling reasons against cessation.

Article 38.2’s modest referral to the obligation of conducting proceedings where cessation is considered and the general referral to the procedure for recognition of the right of asylum must be amended by taking into account particular features of these proceedings (e.g. the burden of proof shifts to the authorities).

The case-law of MoI - AS in cases involving cessation was extensive and rather controversial. While referral to some cessation clauses was undisputable (e.g. re-establishment in the country of origin), however their application was occasionally regarded inappropriate owing to the failures of MoI - AS to precisely state the applied cessation clause (at least in essence), the extensive interpretation of particular cessation clauses without properly establishing the relevant facts at interview, or even procedural reasons (e.g. discontinuation of proceedings instead of conducting proceedings as prescribed by Article 38.2 of LATP ). In some cases the right to asylum ceased owing to short-term visits to Kosovo (particularly in the recent period). More often MoI - AS ceased the right to asylum because the persons concerned exercised a short-term visit to Serbia for the purpose of obtaining personal or other documents (such as birth certificates, citizenship certificates, documents relating to pension) or temporary took their passport to approach the Serbian Embassy (for purposes such as including a newborn child in a passport, regulating their entitlement to shares etc.). It appears that MoI - AS disregarded the UNHCR position that a refugee who in circumstances beyond his control had recourse to a measure of protection from his country of nationality if no other such measure would have the necessary international recognition, or who acquired documents from the national authorities for which non-nation-

\[203\] Ibid., para. 21.
\[204\] UNHCR Comments on the Qualification Directive.
\[205\] N.A. & S.A., nos. 10.6 - 56216/8 and 10.6 - 56217/8, decision of 30 October 2009.
\[206\] Only in a small number of cases MoI fully referred to the applied cessation clause by stating the number of the applied provision (e.g. Art. 38.1(9), now indent 5, in Q.G., no. 19.6 - 55498/9, decision of 4 December 2009; G.A. & Q.A., nos. 10.6 - 51975/9 & 10.6 - 51974/9, decision of 30 October 2009; A.G., no. 10.6 - 56771/10, decision of 22 July 2010 etc).
\[207\] A.G. v. MoI - AS, no. 10.6 - 56771/10, decision of 22 July 2010.
\[208\] M.B., no. 10.6 - 58006/7, decision of 22 April 2009, annulled by the Administrative Court’s judgment U. no. 2591/2009 of 17 June 2009.
\[209\] Ibid.; A.D., no. 10.6 - 54285/11, decision of 29 September 2010.
\[210\] A.M., no. 10.6 - 56859/6, decision of 9 July 2008.
\[211\] O.B., no. 10.6 - 57941/12, decision of 30 July 2009.
\[212\] M.B., no. 10.6 - 56195/7, decision of 18 September 2009.
\[213\] I.G., no. 10.6 - 58237/10, decision of 9 October 2009.
\[214\] B.S. & A.S., nos. 10.6 - 48604/6 & 10.6 - 53085/6, decision of 1 October 2007.
\[215\] UNHCR Handbook, § 120.
als would likewise have to apply (such as birth or marriage certificate) cannot be regarded as re-availing himself of protection of that country.\textsuperscript{216}

The administrative authorities failed to consider that Serbia, though formally a state of nationality of most of the refugees in respect of whom Article 38.1 of LATP was applied, could neither obviate the risk of persecution or ill-treatment of these persons in Kosovo, nor it could offer a reasonable internal flight alternative.\textsuperscript{217} However, the judicial instances recently acknowledged in some cases that Serbia is not a country of origin of the Kosovan refugees.\textsuperscript{218}

The controversial cessation clause of voluntary departure from the territory of the Republic of Macedonia (former Article 38.1(8) of LATP, deleted by the December 2009 Amendments of LATP) was often interpreted extensively so that to deny asylum (by a conclusion\textsuperscript{219} or by a decision\textsuperscript{220}) even to persons who attended a funeral in the country of origin\textsuperscript{221} or to a spouse and/or dependants of a person who shortly visited his or her country of origin, regardless of the dependants’ wish to remain in the Republic of Macedonia as protected persons.\textsuperscript{222} The Administrative Court recently reminded MoI - AS that the dependants’ right of asylum may not cease because of a visit of the head of the family to the country of origin\textsuperscript{223}) and instructed MoI - AS that any dependant who became adult at the time of conducting the proceedings must be interviewed in person according to Article 38.2 of LATP before reaching a decision under Article 38.1.\textsuperscript{224}

The apparently clear provision (though non-existing in the Refugee Convention) allowing cessation of asylum to a person who regularised his or her status according to the Law on Aliens (former Article 38.1(7) of LATP) was often extensively interpreted to the detri-

\textsuperscript{216} Ibid., § 121.
\textsuperscript{217} For further arguments see Section II.1 of this book.
\textsuperscript{218} In the judgment of the recently determined case of N.B. v. GAC, U-6. no. 1258/2010 of 12 November 2010, the Administrative Court considered that a person who carried out a short-term visit to Serbia proper for a legitimate reason does not abuse the asylum, moreover as he did not travel to his native country Kosovo. In another case the Supreme Court stated thus: “The plaintiff did not abuse the recognized right to asylum for subsidiary protection because he stated the needs owing to which he left and again returned to the Republic of Macedonia. Moreover, the plaintiff did not travel to his native state, as invoked by the authority and accepted by the Administrative Court, but to another State, the Republic of Serbia. The State in which this person faces real risk of suffering serious harm is Kosovo.” (M.B. v. the Administrative Court, UZP. no. 466/2010, judgment of 4 October 2010).

\textsuperscript{219} Dž.K., no. 10.6 - 55883/6, conclusion of 9 June 2009.
\textsuperscript{220} A.K. & Dž.K., nos. 10.6 - 59114/8 & 10.6 - 59126/9, decision of 15 May 2009.
\textsuperscript{221} N.B. & F.B., nos. 10.6 - 58593/8 & 10.6 - 58594/9, decision of 30 October 2009.
\textsuperscript{223} In the case of O.B. v. MoI - AS (U no. 5964/2009, judgment of 17 December 2009) the Administrative Court reiterated that the principle of family unity operates in favour of dependants, and not against them (though without explicitly referring to paragraph 185 of the UNHCR Handbook).
ment of a person who “neither undertook, nor instigated any activity as indicated and advised regarding his social, full integration on basis of marriage”. Reasons provided for cessation of asylum on the above ground were sometimes combined with referral to the fact that the person’s parents left Macedonia or with unreasoned referral to the “ceased circumstances”. Even after the aforementioned provision was removed from LATP by the 2009 Amendments to LATP, MoI - AS ceased asylum to a person linked to a Macedonian citizen who failed to regularise her status, however the Administrative Court reverted the case to MoI - AS, holding that Article 38.1 of LATP does not envisage such failure as a cessation clause.

The last two sub-paragraphs of Article 38.1 of LATP incorporate the “ceased circumstances” clauses of Articles 11.1 and 16.1 of the Qualification Directive, however without referring to the need of having regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee’s fear of persecution can no longer be regarded as well-founded (Article 11.2 QD) or whether in such circumstances the person under subsidiary protection no longer faces a real risk of serious harm (Article 16.2 QD). MoI - AS rarely tried to justify cessation on the “ceased circumstances” ground by invoking one or more reports of inter-governmental organizations and quite often merely stated that the situation in the country of origin was improved in general. The Administrative Court in general failed to address substantive issues relating to cessation of the right of asylum, however reverted for revised determination some cases in which MoI - AS failed to adduce evidence regarding cessation of the circumstances, or failed to submit the case files to the Court. In the revised determination MoI - AS applied the same clause to “reject the asylum application”, (even under a non-existing ground, such as a failure to obtain temporary residence permit), as if the persons concerned had not enjoyed asylum at the time of revised determination. Reference is made to the MoI guidance, according to which a first instance decision for cessation should not in principle affect asylum status

225 M.B., no. 10.6 - 54278/7, decision of 2 October 2009.
227 F.B. v. Mol - AS, UP no. 35/II - 117/2, decision of GAC of 16 April 2008: “Besides that reason [failure to regularize residence on ground of family link to a Macedonian national], the complainant had done nothing to prove that by returning to P. he would face a situation the same or similar to that of 1999 when he in fact left [the towns of] K. and P., except the fact that he would have to be separated from his common-law husband and child.” (emphasis added). Besides the above, GAC stated nothing to justify exclusion on “ceased circumstances” ground, hence failed to discharge its own burden of proof.

228 S.D., no. 10.6 - 59096/9, decision of 1 June 2010.
230 A.S., no. 10.6 - 53421/6, decision of 11 April 2008.
231 D.M., no. 10.6 - 55261/7, decision of 18 May 2009.
234 F.B., no. 10.6 - 58007/5, decision of 6 July 2009
235 E.H., no. 10.6 - 53429/6, decision of 12 May 2009.
until final completion of judicial proceedings, hence these persons clearly regained their right to asylum after annulment of the first instance decision in their case. MoI - AS was, therefore, supposed to properly bear the burden of proof in the revised determination by establishing that criteria for extension of the right to asylum no longer exist and by providing proper reasons for its findings.

Furthermore, UNHCR recommended that situations involving cessation of the right of asylum in cases of persons who cannot be expected to leave the country of asylum due to a long stay in that country resulting in strong family, social and economic links should be dealt with by providing them with an alternative residence status, which retains previously acquired rights. CSRC assisted nearly hundred persons of concern to UNHCR (including mostly persons whose right to asylum ceased) to obtain temporary residence permits under the family link ground of the Law on Aliens (LA), however there are many more of those residing in the Republic of Macedonia for nearly 11 years who cannot fulfil the general requirements for regularization of residence under Article 50 of LA and some of the specific requirements under particular provisions (e.g. family link, possession of a working permit). Anyway, in the light of their acquired rights under the international human rights law standards (such the right to respect for family life) and by taking into account good examples from other countries, the national legislation and its interpretation should facilitate continued residence and integration of those who can not return for a legitimate reason.

To sum up, the exhaustively enumerated cessation clauses should be restrictively applied and the burden of proof should rest on the authorities. In the light of the frequent failure of MoI - AS to properly identify and interpret cessation clauses, even in revised determination, the Administrative Court should extend its consideration of cases involving cessation to cover substantive issues as well. In spite of the absence of “compelling reasons” exceptions to the “ceased circumstances” clauses, MoI - AS should apply these exceptions by direct referral to Article 1C (5) or (6) of the Refugee Convention, until their inclusion in Article 38.1 (5) and (6) of LATP. Those whose asylum status ceased after many years of enjoying protection in the Republic of Macedonia and who can not reasonably be expected to return to their country for a legitimate reason, should be allowed to obtain alien residence permit or otherwise (continuously) allowed to remain in the Republic of Macedonia.

I.1.2.2. Prohibition of refoulement

I.1.2.2.1. Non-refoulement in refugee and human rights law

The principle of non-refoulement enshrined in Article 33 of the Refugee Convention (to which no reservations or derogations are permitted) is a cornerstone of international

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236 Mol Handbook, p. 65; Mol Guidance Note regarding granting and extension of SP, p. 3. *Argumentum fortiori*, a person must be considered to have asylum status after the first instance decision for cessation of the right to asylum was annulled by the Court.

237 UNHCR Guidelines on Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention, para. 22.


239 Compare the UK experience described in Section I.2.5.2. of this book.
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refugee protection, even though it does not, as such, entail a right of the individual to be granted asylum in a particular State. Article 33.1 of the Refugee Convention contains the following prohibition of *refoulement*:

“No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Given the declaratory character of recognition of a refugee, Article 33.1 of the Refugee Convention protects even a “refugee” who has not had his or her status formally declared. In spite the phrase “expel or return ("refouler")” might seem restrictive, UNHCR made plain that the subsequent phrase “in any manner whatsoever” indicates that the prohibition of *refoulement* under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions” and non-admission at the border and that the State is bound by its obligation under Article 33.1 of the Refugee Convention wherever it exercises effective jurisdiction.

The drafting history of the Refugee Convention indicates that the phrase “life or

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241 Ibid., para. 6 (and para. 28 of the UNHCR Handbook): “A person does not become a refugee because of recognition, but he or she is recognized because he or she is a refugee.”

242 Atle Grahl-Madsen referred to the Refugee Convention’s Travaux Préparatoires to conclude that the drafters did not intend Article 33 to encompass extradition, though their intention was that the phrase “expel or return” (“refouler”) “should be broad enough to cover the different practice followed in various countries.” (“Commentary on the Refugee Convention (Articles 2-11, 13-37)”, Geneva, 1963, published by UNHCR in 1997, pp. 227-229).

243 UNHCR, Advisory Opinion on Non-refoulement, paras. 7 and 8, relying on the Refugee Convention’s Travaux Préparatoires, in particular the statement of the US representative Mr Henkin in the Ad Hoc Committee on Statelessness and Related Problems that “[w]hether it was a question of closing the frontier to a refugee who asked admittance, or to turning him back after he crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same” (para. 30). Atle Grahl-Madsen acknowledged that *refoulement* may mean non-admittance at the frontier, however reminded that the delegates in the 1950 Conference of Plenipotentiaries intended to exclude this aspect of the term *refoulement* from Article 33.1 of the Refugee Convention (op. cit., pp. 229 - 230).

244 UNHCR Advisory Opinion on Non-refoulement, para. 43. The extraterritorial applicability of the obligation set out in Article 33.1 is evident from the ordinary meaning of “return” and the English translation of “refouler” (ibid., para. 27). Furthermore, paragraphs 1 and 2 of Article 33 address different concerns and Article 33.1 does not contain explicit restriction of territorial scope in contrast to other clauses (ibid., para. 28). Interpreting the scope of Article 33.1 as not extending to measures whereby a State, acting outside its territory returns or otherwise transfers a refugee to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian purpose of the Refugee Convention and its Protocol (ibid., para 29).
freedom would be threatened” was meant to encompass other human rights violations (capable to amount to “persecution” under Article 1A(2) of the Refugee Convention.\textsuperscript{245}

The non-refoulement principle was incorporated in Article 21.1 of the Qualification Directive by way of general referral to the international obligations of EU Member States, which in addition to the obligations under the Refugee Convention also include prohibition of refoulement under international human rights law.\textsuperscript{246} In particular, Article 3 of CAT prohibits States to “expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.” The interpretation of Article 7 of ICCPR by HRC and of Article 3 of ECHR by ECtHR extended the protection from refoulement to cover situations where substantial grounds have been shown for believing that execution of a decision to expel or extradite a person faces him or her with a real risk of being subjected to torture, inhuman or degrading treatment or punishment or to arbitrary deprivation of life or death penalty.\textsuperscript{247}

Article 7.1 of LATP states the following prohibition of refoulement:

“An asylum-seeker, a recognized refugee or a person under subsidiary protection cannot be expelled, or in any manner whatsoever by force be returned to the frontiers of the state:

- in which his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion; and

- where he would be subjected to torture, inhuman or degrading treatment or punishment.”

The first indent of the above provision essentially incorporated Article 33.1 of the Refugee Convention. While extension of the scope of protected persons is welcome and substitution of the word “territories” with the word “state” would not hopefully cause problems in practice, the placement of the phrase “whatsoever by force” between the verbs “expelled” and “returned” is a bit puzzling. The second indent of the above provision fails to fully reflect the development of international human rights law, as arbitrary deprivation of life and death penalty are not mentioned among rights whose threatened violation would necessitate observance of the non-refoulement principle.

\textsuperscript{245} Atle Grahl-Madsen, \textit{op. cit.}, pp. 231 (“the United Kingdom delegate, Sir Leslie Brass, reflected that “threat to freedom was a relative term and might not involve severe risks”. And the Chairman of the Committee found that there was agreement on principle that refugee fleeing from persecution … should not be pushed back into the arms of their persecutors.”) and 232.

\textsuperscript{246} According to the UNHCR’s Advisory Opinion on Non-refoulement, the prohibition of refoulement under international refugee law, complemented by the prohibition of refoulement under international human rights law, constitutes a rule of customary international law, which is binding even to those States which have not yet become parties to the Refugee Convention (such as USA) or its 1967 Protocol.

\textsuperscript{247} See Section i.1.2.1.2.b.
MoI - AS generally respected the *non-refoulement* principle, particularly in the recent years, notably owing to the UNHCR and CSRC successful advocacy\(^{248}\) and legal representation\(^{249}\) including indication of four interim measures by ECtHR regarding non-expulsion of asylum seekers.\(^{250}\) Only occasionally the rights of particular asylum seekers not to be returned to an unsafe country were jeopardised.

In 2001 a person who claimed a fear of persecution for reason of his political opinion and invoked previous persecution and torture against him, was threatened with expulsion after rejection by the administrative instances. ECtHR indicated to the authorities that it would be desirable not to expel the applicant until further notice, which was utilised by UNHCR to resettle him to a safe country.\(^{251}\)

A year later MoI - AS discontinued one asylum proceedings after the competent court instigated proceedings for extradition of the asylum seeker who was allegedly involved in terrorist activities in her country, where she was convicted, imprisoned and allegedly tortured. Had MoI - AS established that real risk of torture existed, the *non-refoulement* guarantee of Article 39 of the then applicable Law on the Movement and Residence of Aliens would have been applied as an absolute ban of *refoulement*, in the light of the ECtHR case-law that resolved the conflict between the obligations under Article 3 of ECHR and an extradition treaty/law by giving precedence to ECHR.\(^{252}\) Article 518 of the then applicable Law on Criminal Procedure (LCP) entitled the Minister of Justice to refuse or postpone extradition, *inter alia*, for political or minor criminal offences,\(^{253}\) while the ECtHR case-law established that international cooperation in criminal matters (including a request for extradition) could be refused “where it emerges that the conviction is the result of a flagrant denial of justice.”\(^{254}\) The 2004 Amendments to LCP entitled the Minister of Justice to refuse extradition of an alien if serious reasons exist for suspecting that he or she may be subjected to torture or other cruel, inhuman or degrading treatment or punishment or sentenced to death penalty,\(^{255}\) however by then UNHCR had transferred the lady to a safe country.

Non-observance of the *non-refoulement* principle was registered in a case of persons under temporary humanitarian protection who were threatened with expulsion after having been convicted in a criminal trial on account of use of forged documents. ECtHR

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\(^{248}\) See Sections II.3 and II.5 in this book.

\(^{249}\) See Section II.1 and II.2.

\(^{250}\) Application no. 70133/01, decision of 20 September 2001; Application no. 8200/02, decisions of 13 March 2003 and 27 January 2005; Application no. 60855/00, decision of 10 March 2005; Application no. 44922/04, decision of 9 October 2007.

\(^{251}\) *Eshmanov v. the Republic of Macedonia*, no. 70133/01, decision of 20 September 2001.

\(^{252}\) *Soering v. the United Kingdom*, quoted above, §§ 37 and 111.

\(^{253}\) LCP of 26 March 1997, OGRM no. 15/97, 3 April 1997.

\(^{254}\) *Soering*, quoted above, § 113; *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, § 110.

\(^{255}\) Law Changing and Amending LCP, OGRM no. 74/04, 22 October 2004, Article 568.3 in the consolidated text of LCP, OGRM no. 15/05, 7 March 2005.
indicated an interim measure of non-expulsion a day after the request for interim measures was lodged and the Government complied with the indicated interim measure.\footnote{Berisha and Others, application no. 60855/00, decision of 10 March 2005.}

**I.1.2.2.2. Exception from the non-refoulement principle**

Article 32.2 of the Refugee Convention departs from the non-refoulement principle in the following terms:

“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

The above provision deals with situations where a refugee (either recognized or not) becomes an extremely serious threat to the country of asylum that cannot be avoided by any other measure. Hence Article 33.2 should be distinguished from expulsion of a refugee under Article 32.1 of the Refugee Convention\footnote{According to Atle Grahhr-Madsen (op. cit., p. 218), Article 33.2’s requirement of criminal conviction in order to justify forcible return to a country of persecution may seem to be the basic difference between the phrase “danger to the community of that country” envisaged in this provision and the concept of “public order” envisaged in Article 32.1, which exceptionally allows the Contracting States to “expel a refugee lawfully in their territory” [...] however, “only in pursuance of a decision reached in accordance with due process of law”.
} (though the exception under Article 33.2 must be applied only through individualised determination of the danger reached in accordance with due process of law),\footnote{Nuala Mole & Catherine Meredith, “Asylum and the European Convention on Human Rights”, Human Rights files No. 9, Council of Europe Publishing, 2010, p. 32.} as well as from the exclusion clauses which concern asylum seekers who are ineligible for asylum for reason of committing grave or heinous acts.\footnote{UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, para. 10.}

Article 7.2 of LATP envisaged the following exception from the non-refoulement principle:

“The prohibition of paragraph 1, indent 1 of this article does not refer to an alien who constitutes a danger to the security of the Republic of Macedonia or who, having been convicted by a final judgment of atrocity or a particularly serious crime, constitutes a danger to the citizens of the Republic of Macedonia.”

With reference to Article 33.2 of the Refugee Convention, the above provision of LATP substituted the word “refugee” with the word “alien”, the phrase “whom there are reasonable grounds for regarding as” with the word “constitutes”, the word “community of that country” with the phrase “citizens of the Republic of Macedonia” and also added the phrase “atrocity or”.

\footnote{Berisha and Others, application no. 60855/00, decision of 10 March 2005.}
\footnote{According to Atle Grahhr-Madsen (op. cit., p. 218), Article 33.2’s requirement of criminal conviction in order to justify forcible return to a country of persecution may seem to be the basic difference between the phrase “danger to the community of that country” envisaged in this provision and the concept of “public order” envisaged in Article 32.1, which exceptionally allows the Contracting States to “expel a refugee lawfully in their territory” [...] however, “only in pursuance of a decision reached in accordance with due process of law”.
\footnote{UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, para. 10.}
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Article 7.3 of LATP secured the right of non-refoulement to a potential victim of torture or ill-treatment who was denied the right to asylum under Article 6 of LATP:

“The person referred to in Paragraph 1 indent 2 of this law, who owing to reasons of Article 6 of this law cannot enjoy the right of asylum in the Republic of Macedonia, shall be allowed to remain in the territory of the Republic of Macedonia as long as in the state whose national is, or in case of being a stateless person, in the state in which he had former habitual residence, he or she would be subjected to torture, inhuman or degrading treatment or punishment.”

The above provision generally reflected the UNHCR stance that “the provisions of Article 33.2 of the Refugee Convention do not affect the host State’s non-refoulement obligations under non-derogable norms of international human rights law”. Article 7.3’s inclusion of persons to whom Article 6 was applied does not leave unprotected from threatened serious harm upon return the perpetrators who would be undeserving of protection under international refugee law. However, Article 7.3 fails to mention other serious human rights violations, such as arbitrary deprivation of life or death sentence (similarly to the failure of Article 7.1 of LATP).

The Qualification Directive tried to resolve the possible collision of the exception from the non-refoulement principle under the international refugee law and the prohibition of refoulement under international human rights law. Article 21.2 of the Qualification Directive allows Member States to refoule a refugee where not prohibited by their international obligations relating to non-refoulement, which should be understood to also include the prohibition of refoulement according to the explicit wording of CAT or interpretation of ICCPR and ECHR. The above human rights treaties provide absolute protection from refoulement, irrespective of the person’s (in)eligibility for refugee status (no nexus to any of the Refugee Convention grounds is required and exclusion under Article 1F is irrelevant) and his or her conduct, regardless how undesirable or dangerous it might be (no expulsion or extradition is possible by invoking Article 32 or Article 33.2 of the Refugee Convention). Therefore, the Macedonian legislature and decision-makers should have in mind the above in their efforts to comply with the State’s international obligations and to ensure protection from serious harm even to persons who would be otherwise undeserving of protection under the refugee law.

I.1.2.3. Other rights and duties of persons protected under LATP

LATP envisages different rights and duties for asylum seekers, recognized refugees, persons under subsidiary protection and persons under temporary protection, similarly to

260 UNHCR, Advisory Opinion on Non-refoulement, para. 11.
261 See Section I.1.2.1.2
the Qualification Directive. While the different treatment of asylum seekers and those granted asylum is reasonable, the distinction between the rights and duties of recognized refugees and persons under subsidiary protection according to both the Qualification Directive and LATP is inappropriate. UNHCR rejected the arguments of the European Commission in support of differences between the two statuses, i.e. to preserve the primacy of the Refugee Convention and to meet the need of subsidiary protection that is only temporary in nature. Therefore it may be assumed that such objection is valid with regard to the different regimes of rights under LATP. Nevertheless, it should be stressed that the recently enacted legislation developed the social and economic rights of the protected persons in comparison with the situation at the time of adoption of LATP.

UNHCR recommended that the status of recognized refugees, whose duration is not restricted to a particular time frame, “should not in principle be subject to frequent review”. Article 24.1 of the Qualification Directive stated that residence permits issued to recognized refugees must be valid for at least three years, while Article 50 of LATP entitles recognized refugees to obtain residence permits, as well as identity documents under Article 41 (valid five years for 5-year period if the person is above 27-years old and 3-year period if the person is below 27 years). Article 24.2 of the Qualification Directive envisages that residence permit for persons under subsidiary protection must be valid for at least one year and this provision was incorporated in Article 58 of LATP, as amended in 2009 (until then persons granted the right to asylum for humanitarian or subsidiary protection were issued residence permits valid up to a year and periodically extended).

Rights are more generously provided to recognized refugees, who according to Article 51.1 of LATP, unless LATP or other law envisages otherwise, “shall have the same rights and duties as Macedonian citizens“, except the voting right, military conscription and the rights to work or associate, where Macedonian citizenship is a prerequisite for enjoyment of these rights. For comparison, persons under subsidiary protection, according to Article 60.2 of LATP “shall have the same rights and duties as aliens with temporary residence permit in the Republic of Macedonia, unless this or other law stipulates otherwise.”

Particular rights are wider in scope for recognized refugees, such as the right to accommodation (up to two years under Article 52.1 of LATP) in comparison with persons

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262 Article 48.1 of LATP stipulates that the asylum seekers until the issuance of a final decision in the procedure have the right to residence; accommodation and care in a Reception Centre; basic health care; work only within the Reception Centre; and communication with the High Commissioner for Refugees, as well as with non-governmental humanitarian organisations for the purpose of offering legal advice in the course of the asylum procedure. The Ministry of Labour and Social Policy provides means of subsistence and health care for the asylum seekers, while they find themselves in the Reception Centre.


266 Cf. supra footnotes 21 - 23.
under subsidiary protection (up to one year under Article 59 of LATP). Recognized refugees and persons under subsidiary protection are equated with Macedonian citizens regarding social welfare rights (Articles 53 and 60.1 of LATP respectively, with referral to the Law on Social Assistance\(^{267}\)) or the right to basic health care until gaining the status of an insured person (Article 54 of LATP and Article 60.1 of LATP respectively, with reference to Article 54 of LATP). The right to gain property is provided to recognized refugees under Article 51.2 of LATP, with reference to laws regulating this right for aliens. Some rights are not explicitly stated in LATP for particular categories of protected persons. For example, the right to education is enumerated in Article 64 of LATP as one of the rights pertaining to persons under temporary protection, however no such right is explicitly listed in the chapters “Rights and Duties of Recognized Refugees” and “Rights and Duties of Persons under Subsidiary Protection”. While the above legal gap as such represented no legal obstacle in practice, it appears that until several years ago some refugee children either remained out of the school desks or faced some other obstacles.\(^{268}\)

Persons acquiring the right of asylum through family reunification pursuant to Article 8 of LATP are not explicitly mentioned in Chapters regulating rights and duties,\(^{269}\) which did not cause concern in the handful cases of refugees or persons under subsidiary protection recognized through family reunification. However, LATP failed to incorporate the minimal standards set up by Article 23.2(1) of the Qualification Directive, according to which family members of the beneficiary of refugee or subsidiary protection status who do not individually qualify for such status are entitled to claim the benefits referred to in Articles 24 to 34 of the Directive, in accordance with national procedures and as far as it is compatible with his or her legal status. With reference to sub-paragraphs 2 and 3 of Article 23.2 of the Qualification Directive, the State concerned may define the conditions applicable to such benefits and shall ensure that any benefits provided guarantee an adequate standard of living.

\(^{267}\) Law on Social Assistance (LSA), OGRM no. 79/09, 24 June 2009, Article 47, paras 1 and 2: “1. The amount of financial social welfare for the holder of the right amounts to 2,140 denars (hereinafter: base). 2. For any subsequent member of the household the base is to be increased for the coefficient 0.37, up to five members.” For persons unfit to work, materially unsecured and unable to provide means of subsistence on ground of other regulations, Article 61 of LSA stipulates that the base set forth in Article 47.1 is to be increased for the coefficient 1.5 and that the amount is to be further increased with the coefficient 0.40 for another person enjoying the right and with the coefficient 1.0 for two or more such persons.

\(^{268}\) CESCR, Concluding Observations E/C.12/MKD/CO/1, issued after consideration of the initial report of the Republic of Macedonia under ICESCR, 24 November 2006: “The Committee is deeply concerned about the high dropout rate in primary and secondary education … among Roma children, Roma and Ashkaelia refugee children …” (para. 27, p. 4); “The Committee recommends the State party to end the practice of segregating Roma and refugee children in separate schools […]” (para. 48, p. 7).

\(^{269}\) The Law on Aliens (LA) in Article 73 enumerates the rights of family members who acquired residence permit by family reunification, however, this provision is not applicable to aliens applying for protection from the Republic of Macedonia according to LATP, unless this LA stipulates otherwise (Art. 3(1)), and LA does not do so regarding family reunification.
A person who cannot enjoy the right to asylum owing to reasons stated in Article 6 of LATP (Exclusion clauses) and who would be allowed to remain in the territory of the Republic of Macedonia because of the risk of torture or other ill-treatment in the country of origin, would be also provided with the same rights and duties as persons under temporary protection (Article 7.4 of LATP). These rights \textit{inter alia} include the right to residence and provision of means of subsistence in accordance with the economic possibilities of the State, right to work, health care and pension insurance under the same provisions designated for aliens with temporary residence permit, humanitarian assistance and basic health care for unemployed persons, primary and secondary education, identity document, etc.

The Citizenship law entitles recognized refugees to apply for citizenship after six years of continuous legal residence and they need not prove fulfillment of two other criteria for granting citizenship (facilitated naturalization).\textsuperscript{270} Several recognized refugees already became Macedonian citizens under these facilitating terms.\textsuperscript{271} Regarding applications for citizenship that might be lodged by holders of the right to asylum for subsidiary protection under the regular naturalization provisions of Article 7 (which requires eight years of continuous legal residence), it is not apparent whether these applications would be smoothly processed and appropriately determined, particularly in the context of legality of the stay. Since the right of these persons to residence is regulated by Article 58 of LATP and accompanied by issuance of appropriate documents, their residence is legal, regardless the fact that it is stipulated by \textit{lex specialis} (as opposed to the provisions of the Law on Aliens). Article 64.2 of LATP excludes only persons under temporary protection from the possibility of benefiting of considering their residence “legal for the purposes of the Law on Aliens and the Law on Citizenship of the Republic of Macedonia”. Had the legislature any doubt about any ineligibility of persons under subsidiary protection to utilize their status to apply for citizenship, it would have been stated so. Having in mind the above, it appears that there is no legal dilemma whether persons under subsidiary protection who regularly extended their residence in the stipulated time frames fulfill the continuous legal residence criterion of the Citizenship law. However, the practice in upcoming citizenship cases of persons under subsidiary protection (due in 2011 and later, as the first persons were granted asylum for humanitarian protection under LATP in 2003) is yet to show whether this legal issue will be determined by rule of law or rule of politics.

Although Article 55 of LATP stipulates that the Ministry of Labour and Social Policy is taking care of providing of means of subsistence, accommodation and health care and that the funds are provided from the Budget of the Republic, for several years after adoption of LATP the Macedonian authorities failed to fully assume their obligations of providing particular rights guaranteed by LATP and/or other laws, which were still provided thank-

\textsuperscript{270} OGRM no. 67/92, as amended in OGRM no. 8/04; consolidated text in no. 45/04; amended in no. 98/08. The amended Article 7-a absolved recognized refugees from the obligation of submitting a proof of not being convicted or prosecuted in their state of nationality.

\textsuperscript{271} Mr A.N.M. was the first recognized refugee who became Macedonian citizen in the spring of 2008 and then citizenship was granted to four recognized refugees of the R. family.
fully to the UNHCR financial support. In 2009 the State started to cover accommodation and living costs of the persons granted asylum, which resulted in certain decrease of the amount of financial assistance in comparison to the funds already provided to them by UNHCR, as well as in occasionally delayed payment of monthly allowances by the Ministry of Labour and Social Policy. Until 2009 MoI - AS failed to issue proper identity documents to recognized refugees and persons under humanitarian/subsidiary protection in the form envisaged by Articles 13 and 14 of the MoI Rules on Fingerprinting and Photographing Asylum Seekers and Issuance and Exchange of Documents. The right to travel document according to Article 42 of LATP could not be effectively enjoyed by at least one recognized refugee as the issued travel document apparently did not match the requirements of Article 18 of the aforementioned MoI Rules and thus the holder of this document was not issued a visa by a foreign Embassy.

Having in mind the number of failed asylum seekers in the Republic of Macedonia (400 - 450 in the last few years, informally known as “the 450 group”) and that their continued residence is lasting from a few to several years, the absence of a particular chapter in LATP that would regulate their rights in general could become worrying, particularly after possible decrease or withdrawal of UNHCR funding. As these persons from the “450 group” were/are apparently allowed to reside in the country for humanitarian reasons, it would be equally humanitarian to provide them with entitlement to basic means and facilities for a human and dignified life. *Mutatis mutandis*, the following UNHCR comments on the Qualification Directive (given in the context of revocation, end or refusal to renew refugee status) may be invoked:

“Status granted to a refugee” is therefore understood to refer to the asylum (“status”) granted by the State rather than refugee status in the sense of Article 1A(2) of the 1951 Convention (see comment on Article 2(d)). States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.272

I.1.3. Determination of Asylum

The 1951 Refugee Convention and its 1967 Protocol do not provide indication regarding the type of procedures that have to be adopted for the determination of refugee status, thus leaving this issue to each Contracting State.273 Governments used this “vacuum” to manipulate asylum systems by prescribing their own procedural rules and thus were reluctant to agree common binding standards.274

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272 UNHCR, Comments on the Qualification Directive, p. 28 (emphasis added).
273 UNHCR Handbook, para. 189.
On 12 October 1977 the Executive Committee (ExCom) of the High Commissioner’s Programme issued Conclusions on determination of refugee status, recommending that asylum procedures should satisfy several basic requirements (marked with italics in the paragraphs below). On 31 May 2001 UNHCR reiterated the relevance of the above Conclusions and the obligations of states under international instruments (including the Refugee Convention and international humanitarian and human rights law) in designing national procedures for asylum and provided instruction regarding certain procedural concepts, such as first country of asylum, safe third country, safe country of origin, appeals, etc. EU responded by drafting a Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status which, despite numerous critics (including a few interventions by UNHCR) of erosion of procedural standards in asylum matters, was adopted on 1 December 2005. Section I.1.3.1 provides a brief overview of the way in which the UNHCR recommendations of 1977 were included in LATP and the Procedures Directive, leaving space for a more detailed elaboration of procedural concepts enshrined in the general provisions of LATP (Sections I.1.3.2 - I.1.3.4) and the recent administrative and judicial case-law (Sections I.1.3.5 - I.1.3.6).

I.1.3.1. Comparative overview of UNHCR 1977 recommendations on determination of refugee status and the respective provisions of LATP and the Procedures Directive

UNHCR recommendation (i): A competent official to whom the applicant addresses at the border or in the territory of the Contracting State should have instructions for dealing with cases and should be required to act in accordance with the principle of non-refoulement.

Article 6.5 PD obliges Member States to “ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.” Article 35 PD regulates the border procedures (including special ones). Article 16.1 LATP entitles an asylum seeker to lodge an application for asylum to the police at the border point (where according to Article 25.1(1) of the Law on Aliens he or she may not be refused to enter) or in the nearest police station. The police’s obligation to bring the asylum seeker to MoI - AS relates both to situations where the application was lodged at the border (Article 16.1 LATP) or where the

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275 UN High Commissioner for Refugees, Determination of Refugee Status, 12 October 1977, No. 8 (XXVIII) - 1977.
276 Global Consultations for International Protection, EC/GC/01/12 of 31 May 2001, second meeting, Asylum Processes (Fair and Efficient Asylum Procedures).
277 Cathryn Costello, op. cit. at footnote 274, p. 7.
278 The MoI Handbook and the Guidelines for the Macedonian police (prepared by MoI - AS and a Danish asylum expert in the frame of the AMV AENES project, non-dated) were presumably available to police officials at the border, but their impact to the effect of increasing the admission rate of asylum seekers without document is uncertain.
applicant illegally entered or illegally resides in the Republic of Macedonia (Article 17.2 LATP).

**UNHCR recommendation (ii):** *The applicant should receive the necessary guidance as to the procedure to be followed.*

Similarly to Article 10.1 (a) and (c) PD, Article 18.4 LATP entitles asylum seekers to information, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum, in writing, and in a language that they may reasonably be supposed to understand, on the manner of conducting asylum proceedings, on the rights and obligations in those proceedings and the reception conditions, on the right to legal aid and the right to contact legal aid providers, representatives of UNHCR and humanitarian NGOs in all stages of the proceedings regardless of asylum seekers’ whereabouts.\(^{279}\)

**UNHCR recommendation (iii):** *There should be a clearly identified authority responsible for RSD determination.*

Article 4 PD prescribes that Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications in accordance with this Directive. Article 27 LATP designates MoI - AS to conduct the first instance procedure for granting the right of asylum.

**UNHCR recommendation (iv):** *The applicant should be given the necessary facilities, including services of a competent interpreter for submitting his case to the authorities and contacting a representative of UNHCR.*

Services of an interpreter to/from a language which the applicant understands and coverage of the expenses from public funds is provided by Article 10.1(b) PD (Article 35.3(c) for border procedures) and Article 21 LATP. Article 21 LATP obliges the interpreter to keep confidential the information acquired in the proceedings, while Article 13.2 PD generally speaks of the need of providing confidentiality of the asylum interview. Article 21.4 LATP entitles asylum seekers to an interpreter of the same sex. Contacts with UNHCR are guaranteed by Article 10.1(c) PD and Article 14.2-3 LATP.

**UNHCR recommendation (v):** *The recognized refugee should be issued documents certifying his refugee status.*

QD obliges Member States to issue to the beneficiary of refugee status a residence permit (Article 24.1) and a travel document (Article 25.1). For comparison, LATP entitles recognized refugees to a residence permit (Article 50) and a travel document (Article 42).

**UNHCR recommendation (vi):** *The non-recognized refugee shall be given reasonable time and facilities for a formal reconsideration of the decision.*

Article 39.2 PD states that Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy, which ac-

\(^{279}\) OGRM no. 146 of 7 December 2009 (Article 6 of the Amendments, amending Article 18).
According to Article 39.1 PD can be lodged before a court or tribunal. Article 32 LATP allows an asylum seeker to challenge MoI - AS decision by lodging a lawsuit within 30 days.

**UNHCR recommendation (vii):** The applicant should be permitted to remain in the country pending a decision in asylum proceedings unless his request is abusive and should be also permitted to remain in the country pending decision of a higher administrative authority or courts.

An asylum seeker in EU Member State is entitled to remain there pending determination of his or her claim (Article 7.1 PD), including at border zones (Article 35.3(a) PD) and may be entitled to remain during appeals procedure (Article 39.3(a) PD). The applicant for asylum in the Republic of Macedonia is entitled to reside as long as the proceedings lasts (Article 48.1(1) LATP), including the proceedings upon lawsuit which adjourns the execution of the decision (Article 32.2 LATP). The non-refoulement obligations under Article 21.1 QD and Article 7.1 LATP provide an additional guarantee that the asylum seeker will remain in the country pending a decision upon appeal or lawsuit.

**I.1.3.2. Burden and standard of proof**

The terms “burden of proof” and “standard of proof” are typical in countries whose legal systems are based on common law, where legal arguments may revolve around whether the applicant has met the requisite “standard” for showing that he is a refugee. The issue of burden of proof is also relevant in countries with legal systems based on Roman law; however, in such legal systems no particular standard of proof is required apart from the “freedom of proof” principle, according to which evidence produced to prove the facts alleged by the claimant must fully convince the adjudicator that the allegations are truthful.

**I.1.3.2.a. Burden of proof**

According to UNHCR, an applicant in refugee status determination proceedings discharges his or her burden of proof by rendering a truthful accounts of facts relevant to the claim to enable reaching a proper decision. Then the person charged with determining the status (examiner) is under a duty to assess the validity of any evidence and credibility of the applicants’ statements. Often, however, the applicant may not be able to support his statements by documentary or other proof, so the examiner may share (with the appli-
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cant) the duty to ascertain and evaluate all the relevant facts,\textsuperscript{285} \textit{inter alia} through familiarising himself or herself with the objective situation in the country or origin concerned.\textsuperscript{286} Pronouncing on the issue of burden of proof of asylum-seekers claiming fear of asylum owing to practice of discrimination, the US Court of Appeal stated that:

“\textbf{The more the group to which an applicant belongs is discriminated against, harassed, or subjected to violence, the less the individualized showing an applicant must make to establish eligibility for asylum.}”\textsuperscript{287}

UNHCR further advised that the examiner may need to clarify any apparent inconsistencies and resolve contradictions in a further interview, and to find an explanation for any misinterpretation or concealment of material facts.\textsuperscript{288} Furthermore, in cases of minor asylum seekers “the burden of proof should be applied flexibly and liberally, by fact-finding and gathering supporting evidence in any manner possible.”\textsuperscript{289} The authority asserting the applicability of exclusion or cessation clauses have a duty to establish the reasons for exclusion\textsuperscript{290} or cessation.\textsuperscript{291}

The Qualification Directive states the applicant’s duty to submit as soon as possible elements that would substantiate his application for international protection (Article 4, paragraphs 1 and 2) and the Member State’s duty to assess an application on individual basis taking into account \textit{inter alia} all the relevant facts relating to the country of origin, the statements and evidence presented by the applicant and the individual position and personal circumstances of the applicant (Article 4.3). This investigating burden of the Member State involves a duty to cooperate with the applicant by continuously communicating the result of the assessment to the applicant so that he or she would be able to fulfil the burden of assertion through additional information and clarification, as well as by providing him or her with access to information listed in Article 4.3. (c), (d) and (e).\textsuperscript{292} However, Article 4.4 QD should be interpreted so as to shift the burden of proof from an applicant who had already presented information which resulted in the authorities’ ascertainment that he or she was subjected to persecution or serious harm, thus “in order for Article 4.4 QD to have value, the Member State itself must present the “good reasons to consider that such persecution of harm will not be repeated”, rather than to generally refer to altered circumstances in the country of origin.”\textsuperscript{293} Article 14.2 QD envisages the State’s duty

\begin{itemize}
\item \textsuperscript{285} \textit{Ibid.}, para. 196.
\item \textsuperscript{286} UNHCR, Note on Burden and Standard of Proof, para. 7.
\item \textsuperscript{287} \textit{R.J. Singh v. the Immigration and Nationality Service} (94 F.3d 1353), judgment 95-70008. of 6 September 1996 (available at: http://openjurist.org/94/f3d/1353).
\item \textsuperscript{288} UNHCR Handbook, para. 199.
\item \textsuperscript{289} UNHCR, Comments on the Qualification Directive, p. 15.
\item \textsuperscript{290} UNHCR, Application of the Exclusion Clauses, quoted above, para. 34. See also para. 31 of the same guidelines.
\item \textsuperscript{291} UNHCR, “The International Protection of Refugees: Interpretation of the 1951 Convention relating to the Status of Refugees”, Geneva, April 2001, § 10.2.
\item \textsuperscript{292} Gregor Noll, Evidentiary assessment and the EU qualification directive, p. 5.
\item \textsuperscript{293} \textit{Ibid.}, p. 11.
\end{itemize}
to “demonstrate that the person concerned has ceased to be or has never been a refugee”. Article 19.4 QD prescribes a similar burden of proof with respect to those whose subsidiary protection status is under reconsideration, however its introductory phrase “without prejudice to the duty of the third country national or stateless person in accordance with Article 4.1 to disclose all relevant facts and provide all relevant documentation at his/her disposal” must not undermine his right to remain silent, if he or she wishes so.\footnote{294}

In proceedings involving claims that a decision to expel, return (“refoul”) or extradite a person would expose him or her to a real risk of being subjected to torture, cruel or inhuman or degrading treatment or punishment in breach of Article 3 of the CAT, the burden is upon the author of a communication to the Committee against Torture to present an arguable case involving sufficient factual basis for his or her position to require a response from the State Party for the purpose of assessing whether there are substantial grounds for the fear of being tortured.\footnote{295}

The general burden of proof in proceedings before ECtHR is stated thus:

“It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3.”\footnote{296}

However, if an asylum seeker establishes that he is a member of a group systematically exposed to a practice of ill-treatment,\footnote{297} ECtHR would not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection afforded by Article 3, hence the risk of ill-treatment would be determined in the light of the applicant’s account and the information on the situation in the country of destination in respect of the group in question.\footnote{298} In a recent case ECtHR rejected the Respondent State’s objection that the applicant failed to individualise the risk of ill-treatment threatened upon sending him back to the country where he had previously applied for asylum, holding that it was in fact up to the authorities of the sending country to first verify how the authorities of the receiving country are applying their national legislation, which gave rise to the applicant’s fear of real risk.\footnote{299} ECtHR also held that if an asylum seeker produced a medical certificate seriously indicating that he has been tortured, it is for the asylum body to dispel any doubts that might have persisted as to the cause of such injuries.\footnote{300} If the source of ill-treatment emanates from non-state agents, an applicant before ECtHR would have a more onerous burden of proving that the State’s authorities are unable to alleviate the risk by providing effective protection.\footnote{301}

\footnote{294} Ibid., p. 15.
\footnote{295} CAT, General Comment No. 1, quoted above, §§ 5 and 7.
\footnote{296} NA. v. the United Kingdom, no. 25904/07, 17 July 2008, § 111.
\footnote{297} Saadi v. Italy, quoted above, §§ 132.
\footnote{298} Abdolkhani and Karimnia v. Turkey, no. 30471/08, § 75, 22 September 2009.
\footnote{299} M.S.S. v. Belgium and Greece, no. 30696/09, § 359, 20 January 2011.
\footnote{300} R.C. v Sweden, § 53, no. 41827/07, 9 March 2010.
\footnote{301} H.L.R. v. France, quoted above, § 43.
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Article 49.1 LATP merely obliges asylum seekers to co-operate with the asylum authorities. The MoI Handbook specifies that the asylum-seeker should provide as much as possible plausible information and evidence that might assist in showing the truthfulness of the claim and he/she should certainly speak the truth and also instructs MoI officials to use all available means for providing necessary evidence in support of the claim, which may include conducting an independent research of the situation in the country of origin.\(^{302}\) For comparison, Article 140.2 of the LGAP \textit{inter alia} envisages that an applicant is under duty to offer evidence and to submit it unless the evidence could be provided more quickly by the authority in charge of the proceeding. Article 36.1 and Article 30 of the Law on Administrative Disputes stipulate that the competent court adjudicates the dispute on the basis of the facts established in the administrative proceedings or on the basis of the facts established by itself, including at a hearing.

However, MoI - AS often failed to properly ascertain the facts and to assess the evidence and rarely invested meaningful efforts to independently establish facts. The Courts did not establish any practice of clarifying the facts by themselves, despite numerous requests by CSRC lawyers to allow rejected asylum seekers to state reasons for their fear of persecution in person. Admittedly, the Administrative Court ordered MoI - AS to properly ascertain the facts in the revised determination of four cases involving cessation of the right to asylum to persons who shortly visited their country of origin. The legal gap and the inappropriate case-law call for amendment of LATP or adoption of a by-law or other document so as to guide the Macedonian authorities in respect to ascertaining the facts in asylum cases and avoiding imposition of unreasonable burden of proof on asylum-seekers.

\textbf{I.1.3.2.b. Standard of proof}

UNHCR suggested that “the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree that his continued stay in his country of origin became intolerable to him for the reasons stated in the [refugee] definition, or would for the same reason be intolerable if he returned there”.\(^{303}\) “Credibility is established where the applicant presents a coherent and plausible claim, which does not contradict generally known facts and therefore is, on balance, capable of being believed”,\(^{304}\) however if some statements of such a claim are not susceptible of proof, the applicant should be given the benefit of the doubt, unless there are good reasons to the contrary.\(^{305}\)

The UNHCR position that “to establish ‘well-foundedness’, persecution must be proved to be reasonably possible”,\(^{306}\) was supported by the jurisprudence of countries with legal systems based on common law,\(^{307}\) which rejected the “balance of probabilities” standard

\begin{itemize}
\item[^{302}]{MoI Handbook, 2006, pp. 33 and 35-36.}
\item[^{303}]{UNHCR Handbook, § 42.}
\item[^{304}]{UNHCR Note on Burden and Standard of Proof, § 11.}
\item[^{305}]{UNHCR Handbook, §§ 196, 203 and 204}
\item[^{306}]{UNHCR Note on Burden and Standard of Proof, § 17.}
\item[^{307}]{Ibid. - Annex: “Overview of some recent jurisprudence” (quoted in the footnotes below).}
\end{itemize}
(more likely than not) in favour of the more generous “reasonable possibility” test, the “reasonable chance”, or the “reasonable degree of likelihood”. UNHCR further suggested that in applying an exclusion clause under Article 1F, clear and credible evidence (including reliable testimonies of witnesses) should be presented by the host country, thus although national authorities in general consider that the criminal standard of proof (“beyond reasonable doubt”) does not need to be met, the threshold should be higher than the “balance of probabilities” to ensure that genuine refugees are not excluded erroneously.

The Qualification Directive addresses the issue of credibility in Article 4.5(e), whose application in the UNHCR view should also involve application of the principle of the benefit of the doubt in the case of a generally credible asylum-seeker, but contains no rule on standard of proof. Interpretation of the word “substantiate” in Article 4.1 QD as implying a standard of proof would be unreasonable, as “substantiation” is usually required in the context of proving a defendant’s guilt (by a prosecuting authority) “beyond reasonable doubt”, thus it appears that “substantiate” was used in the context of qualifying the elements of the applicant’s facultative burden of proof.

The Committee against Torture pronounced on the standard of proof in the following terms: “The risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable”, and the aim of determination is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return.

ECtHR has stated that its “examination of the existence of an individual risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3”. The phrase substantial grounds for believing that a decision to extradite or expel an applicant would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, means that the applicant should prove his allegations

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308 INS v. Cardoza-Fonseca, judgment of the USA Supreme Court, 467 U.S. 407 (1987), Justice Stevens: “One can certainly have a well-founded fear of an event happening when there is less than 50% chance of the occurrence taking place.”

309 Josef Adjei v. The Minister of Employment and Immigration, judgment of the Canadian Court of Appeal.


311 UNHCR, Application of the Exclusion Clauses, Article 1F of the 1951 Convention, para. 35.

312 UNHCR, Background Note on the Application of the Exclusion Clauses : Article 1F of the 1951 Convention relating to the Status of Refugees, para. 107.

313 UNHCR Comments on the Qualification Directive, p. 16.

314 Gregor Noll, op. cit. at footnote 292, p. 3.

315 CAT, General Comment No. 1, loc.cit., §§ 5 and 7.


317 Saadi v. Italy, quoted above, § 128; with reference to Chahal v. UK, quoted above, § 96.

318 This phrase in the French text of the Strasbourg case-law and Article 3 of the CAT reads “motifs sérieux”, while the LATP translates “substantial” as “cvrst” (=solid).
of forthcoming risk beyond mere possibility,\textsuperscript{319} but a high degree of foreseeability (“beyond reasonable doubt”) is not required for establishing a (potential) violation of Article 3, in comparison to cases involving allegations of ill-treatment that has been inflicted by agents of a Respondent State.\textsuperscript{320} Furthermore, the overall credibility of a person claiming to face a real risk of torture upon return to his country of origin should not be undermined by less important inaccuracies in the facts presented by him.\textsuperscript{321}

Rules on a standard of proof are lacking in LATP, however Article 15 refers to the provisions of LGAP. Article 12 of LGAP provides that an authorised official decides which facts to consider as being ascertained according to his conviction on the basis of scrupulous and careful examination of each evidence separately and of all evidence together, as well on the basis of the result of the whole proceedings. The MoI Handbook guides examiners regarding influence of false, forged or damaged documents and diminished credibility of an application,\textsuperscript{322} however remains silent regarding other aspects of the standard of proof, including the benefit of the doubt. Article 11.1 of the Law on the Courts stipulates that the judge decides impartially by applying the law on the basis of free assessment of evidence.\textsuperscript{323}

Regrettably, the Macedonian administrative and judicial practice undermined the legislative guarantees of assessing well-foundedness of asylum claims and tended to disregard the relevant standards, such as the benefit of the doubt.\textsuperscript{324} While some concepts and principles might have been perceived to be “intrusive” in the internal legal order, they are still relevant as asylum is a synonym for international protection, based on the State’s international obligations. For comparison sake, it is worthwhile mentioning that the Canadian authorities considered that applying different standards for protection from potential serious harm in the same asylum proceedings leads to confusion and inconsistent decisions,\textsuperscript{325} hence they suggested that such dual standard of proof should be avoided.\textsuperscript{326} In any event, the Macedonian decision-makers must have in mind that the likelihood of occurrence of the persecution or ill-treatment feared must be lower in comparison to the likelihood in other types of proceedings and that in the particular situation of lack of evidence, asylum-seekers who present credible claims should be given the benefit of the doubt.

\textsuperscript{319} Vilvarajah and others v. UK, quoted above, §§ 108 and 111.
\textsuperscript{320} Nachova v. Bulgaria, nos. 43577/98 and 43579/98, § 166, 26 February 2004.
\textsuperscript{321} R.C. v. Sweden, cited above, § 52.
\textsuperscript{322} MoI Handbook, pp. 34 and 35.
\textsuperscript{323} Law on the Courts, OGRM no. 58/2006 of 11 May 2006; 35/08, 150/10.
\textsuperscript{324} See Sections I.2.3.1. and I.2.3.6.-14 in this book.
I.1.3.3. Legal aid, contacts with NGOs/UNHCR and role of UNHCR

The entitlement to legal aid in the first instance is a common feature of Article 15.1 PD and Article 14.1 LATP. Article 15.2 PD allows Member States to subject their obligation of ensuring free legal assistance and/or representation upon appeal to wide restrictions, while the Macedonian legislation allows only Bar Chamber members to provide legal assistance in judicial proceedings. Article 12.3 of the Law on Free Legal Aid provides the right to free advice and legal representation to, inter alios, recognized refugees, internally displaced persons and persecuted persons having residence in the territory of Macedonia, without explicitly mentioning other persons who seek asylum or who were already granted asylum for subsidiary protection.

Contacts between asylum seekers and UNHCR are guaranteed by Article 21.1(a) and 10.1(c) PD and Article 14.2-3 LATP. Article 21.2 PD ensures the same entitlement to organisations working on behalf of UNHCR pursuant to an agreement with a particular Member State. Article 14.2 LATP allows asylum seekers to contact humanitarian non-governmental organisations and legal aid providers, however entitles only UNHCR to have access to asylum seekers and to contact them. LATP allows contacts in any stage of the procedure, while PD uses the phrase “any stage” in Article 21.1(c), which entitles UNHCR to present its views to the competent authorities of the Member State regarding individual applications for asylum.

The obligation of Member States under Article 21.1(b) PD to allow UNHCR to have access to information on individual asylum applications, procedures and decisions subject to the asylum seeker’s agreement is matched by Article 13.1 of LATP which obliges the national authorities to co-operate with UNHCR by providing information and statistical data relating to the situation of asylum seekers and persons recognized the right to asylum in the Republic of Macedonia. However, on a few occasions the State failed to meet its obligations under Article 35.2(c) of the Refugee Convention to provide information about draft asylum legislation (particularly the 2007 and 2008 Amendments to LATP) so as to enable UNHCR to submit comments in a timely manner. The authorities were aware that UNHCR is the most authoritative source of information and expertise on asylum matters, hence they maintained regular contacts with UNHCR and also attended many training and information sharing events (e.g. round tables) organised by UNHCR. However the UNHCR Handbooks, Guidelines, Position papers and other documents weren’t given due weight in the course of refugee status determination and the judicial review proceedings. In general the cooperation between UNHCR and the national authorities can be considered satisfactory, however there is a room for its advancement.

I.1.3.4. Safe countries

The concept of first country of asylum was “upgraded” for creation of the concept of safe third country, which by the end of the 1990s became part of Western European States’
policy to transfer responsibility for receiving asylum seekers and assessing their claims.  

While regional treaties or other legal acts determining a state responsible for examining an asylum claim may justify return of an asylum seeker to the previous country where an asylum seeker delayed himself, their application may still be contrary to the obligations under international human rights law. In a case involving a decision to return an asylum seeker to Germany, where a deportation order was previously issued to remove him to Sri Lanka, ECtHR stated that

“indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.”

The implementation of the “safe third countries” concept in the Republic of Macedonia as far as determination of asylum is concerned has an implication of regarding an application by a person arriving from a safe country as manifestly ill-founded, unless the person proves that this country is not safe for him.

I.1.3.4.1. Safe country of origin

In spite of the fact that the “safe country of origin” policy is inherently flawed and is likely to result in restriction of access to asylum systems, EU Member states and those who aspire to become Member states follow the obligatory trend of including the “safe country of origin” concept in their national legislations.

Article 9 of LATP provides the following definition:

„Safe country of origin as a state in which its citizens or stateless persons, having there their last habitual place of residence, are safe from persecution for reasons referred to in Article 4 of this Law or from suffering serious harms referred to in Article 4-a of this Law or from torture, inhuman or degrading treatment or punishment that is determined particularly based upon the respect for human rights defined by the international acts; existence of democratic institutions (democratic processes, elections, political pluralism, freedom of thought and public expression of the thought, availability and effectiveness of the legal protection) and the stability of the country.

The asylum seeker, during the procedure for recognition of the right to asylum, may prove that the country of origin is not safe for him.”

The first paragraph of Article 9 of LATP lists factors that should be taken into account in the national designation of safe countries of origin, similarly to the provisions of Article 328

Cathryn Costello, op. cit. at footnote 274, p. 4.

329 T.I. v. the United Kingdom (dec.), no. 43844/98, ECHR 2000-III

330 Statewatch, “EU divided over list of “safe countries of origin” - Statewatch calls for the list to be scrapped”, September 2004.
30, paragraphs 2 and 4 of the Procedures Directive and its Annex II, paras. 2(b) and 2(d). However, while the Directive’s Annex II in para. 2(c) refers to the non-refoulement principle according to the Refugee Convention, LATP fails to do so. Similarly to Article 23.4(c)(i) of the Procedures Directive, Article 35.1(3) of LATP (amended as of 2009) presumes that an application for asylum by an asylum seeker arriving from a safe country of origin (including EU Member State, as of 2009\(^{\text{331}}\)) shall be regarded as manifestly ill-founded, unless the asylum seeker proves that the country of origin is not safe for him.

**I.1.3.4.2. First country of asylum**

The December 2009 Amendments of LATP introduced Article 9-a with the following text:

„First country of asylum is a state which readmitted an asylum applicant because:
- his status as a refugee has been recognized in that country and he/she can still avail himself/herself of that protection; or
- he/she enjoys sufficient, that is effective protection in that country, including the benefiting from the principle of non-refoulement. “

The above provision is based on Article 26.1 of the Procedures Directive,\(^{\text{332}}\) whose paragraph 2 states that in applying the concept of first country of asylum to the particular circumstances of an applicant for asylum, criteria relevant for applying the “safe third country” concept may be taken into account.

**I.1.3.4.3. Safe third country**

Article 27.1 PD stipulates that Member States may apply the safe third country concept only where the competent authorities are satisfied that in the receiving country: (a) the asylum seekers’ life and liberty are not threatened for the Refugee Convention reasons; (b) the principle of non-refoulement in accordance with the Refugee Convention is respected; (c) the prohibition of removal in breach of the freedom from torture and other ill-treatment is respected; (d) the possibility exists to request refugee status and to receive protection under the Refugee Convention.

Article 10 of LATP reflected Article 27.1 PD in the following way:

„Safe third country is a state in which the asylum seeker delayed himself, prior to his arrival in the Republic of Macedonia, and in which it may be presumed that he can be returned safe from persecution, pursuant to Article 4 of this Law, or from suffering serious

\(^{\text{331}}\) In the case of *M.W.* (no. 19.12.2 - 18686/3, decision of 15 May 2009), before the 2009 Amendments MoI - AS established that the requirements of Article 9 of LATP “exist in the light of the fact that ____ is EU Member State”.

\(^{\text{332}}\) The Procedures Directive specifies that “[a] country can be considered to be a first country of asylum for a particular applicant for asylum if: [...] b) he/she otherwise enjoys sufficient protection ...” (emphasis added).
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harm and treatment stated by Article 4-a or from torture, inhuman or degrading treatment and punishment.

As a safe third country shall be considered the state:
- In which there is no serious risk of persecution in the sense of Article 9 paragraph 1 of this Law;
- Which respects and implements the principle of non-refoulement; and
- Which will admit the asylum-seeker, provide him access to an asylum procedure, provide the basic procedural safeguards and will examine the claim in substance.

During the procedure, the asylum seeker may prove that the third country is not safe for him.

The safe third country principle of paragraph 1 of this Article shall not be applied if the spouse of the asylum seeker, the children or the parents lawfully reside in the Republic of Macedonia."

The requirements of the three sub-paragraphs of Article 10.2 must be cumulatively fulfilled for considering that a third country is safe. The adjective “serious” in Article 10.2(1) must not be interpreted to the effect that in establishing whether the country is safe the authorities are allowed to decrease the degree of probability lower than “well-founded” fear of persecution or “real risk” of serious harm. The general referral to the non-refoulement principle in Article 10.2(2) of LATP encompasses the prohibition of refoulement under refugee law (reference to Article 27.1(b) PD) and the prohibition of refoulement under international human rights law (reference to Article 27.1(c) PD). In spite of the difference between the wording of Article 27.1(d) PD and Article 10.1(3) LATP (which contains more detailed description of the procedural guarantees in asylum procedures required by a third country, however without referral to the Refugee Convention), both provisions speak of the possibility of receiving protection in the third country, but do not address the issue of actual availability and effectiveness of the protection.333 Furthermore, Article 10.1 of LATP only defines the notion of a safe third country, however no provisions in this law or any by-law prescribe “rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant”, as required by Article 27.2(b) of the Procedures Directive.

The third paragraph of Article 10 of LATP allows an asylum seeker to rebut the safe third country presumption similarly to Article 27.2(c) of the Procedures Directive, however by using a different wording. Claims by asylum seekers in the Republic of Macedonia that Turkey, which “admitted no asylum seekers”334 and Greece, which “did not accept

333 Cf. Cathryn Costello, op. cit. at footnote 274, p. 11.
334 The statement within the quotation mark above was given by two asylum seekers and is quoted from the decisions of 25 February 2009: E.A., no. 17.12.2 - 89371/2 and A.E.A, no. 17.12.2 - 89372/2 (both decisions were upheld by judgments of 1 April 2009).
asylum seekers and gave them no documents”, 335 and where “asylum was difficult to be received”, 336 were disregarded by the asylum authorities, which considered that Greece and Turkey are “countries with international legal acts in the area of refugee law”, 337 or even “countries with a fully developed asylum system”. 338 Such assessments are unacceptable for the reasons stated below.

Turkey had ratified the 1967 Protocol, but consistently refused to conduct RSD proceedings for asylum seekers arriving out of Europe (including some of those who afterwards applied in Macedonia 339 ), who can only benefit under “temporary asylum seeker status” pending his or her resettlement to a third country by UNHCR. 340 Asylum seekers in Turkey faced inhuman conditions of detention in police facilities 341 or centres for admission and accommodation of foreigners, such as Kirklareli 342 and were often returned to the neighbouring unsafe countries, such as Iraq or Iran. 343

Greece was frequently condemned by ECtHR for the inhuman treatment of asylum seekers, involving degrading conditions of detention (e.g. including serious overcrowding, absence of sleeping facilities, combined with inordinate length of the period of detention and degrading living conditions. 344 Hence a host state familiar with such circumstances may not invoke an international treaty (such as the Dublin Regulation) or a law (e.g. LATP) to expose an asylum seeker to the real risk of being subjected to degrading conditions of detention or living by sending him or her back to Greece, 346 whose “Government utterly failed to meet its most basic responsibilities to protect refugees” and granted refugee status at first instance to only 11 out of almost 30,000 applicants in 2009. 347

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335 Statement of A.E.A. noted in the decision no. 17.12.2 - 89372/2.
336 Statement of E.A., noted in the decision no. 17.12.2 - 89371/2.
337 E.A., decision quoted above; A.E.A, decision quoted above.
339 MoI - AS did not (could not possibly!) state that Turkey is a safe third country in the case of Z.T. (whose application was nevertheless rejected with referral to Article 35 of LATP), as the applicant stated on 20 February 2009 that the Turkish officials physically maltreated him to prevent lodging an application for asylum and returned him by plane back to the Republic of Macedonia no fewer than 12 times! The interview in the above case was conducted five days before MoI - AS issued the decisions in the aforementioned cases of E.A. and A.E.A., where it was stated that Turkey is a safe third country.
340 Regulation on the procedures and principles related to possible population movements and foreigners arriving in Turkey, either as individuals or in groups, wishing to seek asylum either from Turkey or requesting a residence permit in order to seek asylum from another country, 30 November 1994, Article 3.
343 Abdolkhani and Karimnia v. Turkey, no. 30471/08, §§ 77-92, 22 September 2009.
344 Dougoz v. Greece, no. 40907/98, §§ 57-58, ECHR 2001-II.
345 M.S.S. v. Belgium and Greece, quoted at footnote 299, §§ 233, 234, 263 and 264
346 Ibid., §§ 359 and 360.
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The “European safe third countries concept” (the so-called “supersafe third countries” concept) of Article 36 PD allows Member States to provide that no, or no full, examination of the asylum application shall take place where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country, which is a party to ECHR and the Refugee Convention, has in place an asylum system prescribed by a law and has been designated as safe by the Council. LATP did not introduce this concept, which might result in transfer of asylum seekers to some European states that fail to provide a proper asylum procedure and accompanying guarantees to asylum seekers.\(^\text{348}\)

I.1.3.5. First instance determination of asylum cases

I.1.3.5.1. Legal provisions regulating the first instance procedure

Applicants in asylum procedure are entitled to lodge their application in written form or by verbal statement which should be registered in the minutes (Article 18.1 of LATP), are obliged to submit their documents to MoI - AS (Article 20 of LATP) and are entitled to free services of an interpreter (Article 21 of LATP) and legal assistance (Article 14.1 of LATP).

MoI - AS conducts regular proceedings (Article 27 LATP) and accelerated proceedings for manifestly ill-founded claims, unless the applicant is an unaccompanied minor or a mentally handicapped person (Article 34 LATP). MoI - AS hears the applicants in person and registers his or her statements in minutes (Article 28 of LATP).

An asylum application shall be considered as withdrawn and the procedure shall be discontinued by a conclusion, if the asylum seeker without valid reason failed to report upon summons of MoI - AS (Article 24.1 of LATP). The first instance decision should be delivered within 2 months from the day of lodging the claim (Article 27 of LATP). Application is rejected when it is established that: there is no well-founded fear of persecution; there are reasons for exclusion; the persecution is limited only to a particular geographic area of the state of the applicant’s nationality or habitual residence, and there is a possibility for efficient protection in another part of the state, unless in the light of all circumstances it cannot be expected that the person will seek protection there (Article 29). In cases where it will be established that the asylum seeker does not meet the conditions for granting asylum pursuant to Article 2.1(1) LATP, MoI - AS shall, in line of duty investigate the existence of reasons and conditions for granting asylum for subsidiary protection (Article 30 of LATP).

The 2008 Amendments of LATP abolished the second instance. However, owing to lack of transitional provisions GAC continued to examine pending cases before it and also had to reconsider some cases which were specifically returned to it by the Administrative Court.\(^\text{349}\)


I.1.3.5.2. The case-law of MoI - AS from 2008 to 2010

The first instance procedure in the last few years continued to suffer from various drawbacks (already noted by CSRC from 2003-2007\textsuperscript{350}), ranging from misinterpretation or non-application of some substantive refugee law concepts to certain procedural failures. In general, interviewing rarely met the relevant domestic and international standards inherent to the obligation of MoI - AS to establish facts and to identify the correct legal ground and there was no scrupulous examination of the evidence given by the applicants, while determination often lacked consistency, properly reasoned decisions (elaborated, thorough and still focused) and compliance with relevant standards (e.g. stating the standard of proof or at least consistently applying it). In particular, refugee status determination appeared to be only formal (no one was granted refugee status after the spring of 2008) and rarely referred to the relevant international standards and guidelines;\textsuperscript{351} the policy of favouring humanitarian/subsidiary protection was devoid of legal logic;\textsuperscript{352} exclusion from the right of asylum was done on arbitrary basis in several cases without respecting the procedural safeguards in this context;\textsuperscript{353} cessation of the right to asylum involved resort to non-existing grounds and extensive interpretation of the existing cessation clauses.\textsuperscript{354} The above shortcomings necessitate the need for continuous training of MoI - AS officials, - if deemed appropriate and feasible - with involvement of experienced practitioners from one or more EU Member States.

I.1.3.6. Judicial review of asylum cases

I.1.3.6.1. Competence in administrative disputes

Article 4 of the Law on Administrative Disputes (LAD) stipulates that administrative disputes in the Republic Macedonia are determined by the Administrative Court as a first instance court, by the High Administrative Court as a second instance court and by the Supreme Court of the Republic of Macedonia while examining extraordinary remedies. According to Article 32 of LATP, an administrative dispute may be lodged against a first instance decision within 30 days from the day of delivering the decision (para. 1), the lawsuit postpones execution of the decision (para. 2), and the competent court shall bring the decision within 2 months from the day of lodging the lawsuit (para. 3).

I.1.3.6.2. Recent jurisprudence in asylum matters

The recent judicial review of asylum cases still suffered from certain shortcomings and was conducted mainly on procedural aspects rather than on merits.\textsuperscript{355} The Courts focused

\textsuperscript{350} See Section I.2 of this book.
\textsuperscript{351} See Section I.1.2.1.1.
\textsuperscript{352} See Section I.1.2.1.2.
\textsuperscript{353} See Section I.1.2.1.4.
\textsuperscript{354} See Section I.1.2.1.5.
their examination on assessing lawfulness of decisions, however most often relying on the facts and findings ascertained by the administrative authorities. Unlike the Supreme Court of the Republic of Macedonia, which tolerated various procedural failures, the Administrative Court introduced a practice of annulling individual administrative acts on various procedural grounds.

I.1.3.6.2.a. Recent jurisprudence of the Administrative Court (2008 - 2010)

The Administrative Court most often questioned whether facts were properly and thoroughly established in administrative proceedings (as required by Article 9 of LGAP) and gave modest or improper reasons for dismissal of lawsuits as ill-founded. The Administrative Court was reluctant to deal with substantive issues (by the way, no CSRC request to hear the plaintiffs was accepted) and found it more appropriate to revert to the administrative authorities even some cases that could have been perhaps adjudicated on merits. In spite of the apparent development of the case-law of the Administrative Court, it occasionally remained inconsistent (both regarding interpretation of some refugee law concepts or determination as such).

356 In judgments dismissing lawsuits (e.g. B.D. v. GAC., U. no. 6134/2009, 9 December 2009), quite often the Courts reiterated the facts and findings of the administrative authorities and summarily stated that “the Court evaluated the claims of the lawsuit, however bearing in sight the stated reasons and the quoted legal provisions, could not have accepted them and did not establish a ground for a different determination.”

357 From 2001 to 2007 the Supreme Court found well-founded only one lawsuit in asylum matters lodged by CSRC and the Macedonian Legal network (less than 1%) by annulling the respective decision on ground of erroneous and incomplete ascertainment of facts and reverting the case for revised determination (U. no. 970/2002, judgment of 9 October 2002).

358 The regular phraseology “that the disputed decision is lawful and does not breach the law [owing] to the correct and thorough establishment of the facts by the respondent authority” at the beginning of the reasons-section of the judgments gives more than a good hint how “deeply” cases were/are examined at judicial level.

359 For example, in B.U and G.U. v. GAC (U. no. 2507/2008, judgment of 18 May 2009) the Court used the phrase quoted in the above footnote to substantiate dismissal of plaintiffs’ claims (they challenged the cessation on ground of departure of their parents from the Republic of Macedonia) and failed to examine their fear of persecution or risk of ill-treatment in the light of the security situation in the country of origin.

360 For example, in the case of A.G. v. MoI - AS (supra footnote in I.1.2.1.5) the Court found that the respondent authority did not establish the relevant facts which would be substantiated by appropriate proof, however did not accept the proposal to schedule hearing owing to its assessment that “the facts would be more appropriately and more economically established in the proceedings before the first instance body”.

361 For example, in the case of F.B. and R.K. v. GAC, the Administrative Court referred to the Republic of Serbia as native State in upholding the decision to maintain the granted humanitarian protection to Kosovan refugees who claimed refugee status instead (U-6. no. 1510/2010, judgment of 6 October 2010). Only 6 days later, in the context of annulling an administrative decision that ceased the right to asylum to a Kosovan refugee who contacted the Serbian authorities to obtain documents, the Administrative Court held that the Republic of Serbia is not a country of his origin (N.B. v. GAC, U-6. no. 1258/2010 of 12 November 2010).
The Administrative Court reverted for revised determination several cases owing to various failures of MoI - AS, such as the failures to ascertain facts (most often through the failure of conducting proceedings for cessation under Article 38.2 of LATP\textsuperscript{362}) and to adduce evidence,\textsuperscript{363} the failure to provide proper reasons (for decisions ceasing the right to asylum\textsuperscript{364} or for decisions dismissing claims for refugee status and thus upholding the first instance grant of humanitarian protection\textsuperscript{365}), and the failure to submit the case files to the Court (in proceedings for determination of asylum\textsuperscript{366} or in proceedings involving cessation of asylum\textsuperscript{367}). In cases of asylum seekers who had apparently left the country, the Court held that the failure of serving summonses on their proxies and the assumption of MoI - AS that the applicants wished to withdraw their application under Article 24 of LATP, resulted in unlawful discontinuation of proceedings under Article 134.2 of LGAP.\textsuperscript{368}

In one case the Court held that MoI - AS wrongly discontinued the proceedings because of the applicant’s delayed arrival at the interview (though he excused himself in advance).\textsuperscript{369} The Administrative Court also held that asylum may not cease by a conclusion for discontinuation of proceedings without conducting an interview under Article 38.2 of LATP, regardless of whether protected persons or their relatives exercised a short-term visit to the country or origin (most often Serbia),\textsuperscript{370} or signed a statement that they wish to leave the Republic of Macedonia.\textsuperscript{371} Though it appears that in general MoI - AS complied with the Court’s instructions, the recent revised determination of reverted cases did not result in a meaningful positive outcome.\textsuperscript{372}

In a few administrative disputes the Administrative Court held that MoI - AS shouldn’t have excluded asylum seekers under Article 6.2 of LATP merely by referring to notices by other “competent authorities” on the alleged risk which the asylum seekers posed to the

\textsuperscript{362} Q.Z. v GAC, U-6 no. 1489/2010, judgment of 12 November 2010.
\textsuperscript{363} N.B. v GAC, U-6 no. 1258/2010, judgment of 12 November 2010.
\textsuperscript{367} A.Š. v. GAC, U. no. 2505/2008, judgment of 19 February 2009; S.Š. v. GAC, U. no. 2508/2008; judgment of 19 February 2009; etc.
\textsuperscript{372} For example, in the case of M.B. v. MoI - AS (U. no. 4801/2009) which came before the Administrative Court for the second time, following the Court’s annulment of the conclusion for discontinuation of proceedings (22 April 2009), “the respondent authority acted in accordance with the Court’s instructions” and issued a decision for cessation of the right to asylum (23 July 2009), which was upheld by the Administrative Court on 18 November 2009.
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State security and instructed MoI - AS to properly ascertain the facts in the revised determination.373

I.1.3.6.2.b. Recent jurisprudence of the Supreme Court (2008 - 2010)

Most of the judgments of the Supreme Court of the Republic of Macedonia in the last few years dismissed the appeals against the judgments of the Administrative Court merely by providing unreasoned statements regarding non-fulfilment of the criteria under Article 4 and 4-a [5],374 or regarding non-fulfilment of the criteria under Article 3 of ECHR.375 The Supreme Court did not accept some applicants’ claims of having being compelled to sign a prejudicial statement of withdrawal of the right to asylum before travelling to the country of origin (needed to inscribe their child in a Birth Registry Book), regardless of the fact that they withdrew the statements soon after returning to the Republic of Macedonia.376 However, the Supreme Court recently altered a judgment of the Administrative Court (which upheld cessation of the right to asylum due to a short-term visit to Serbia) and instructed the asylum authority to establish legally relevant facts regarding cessation of the right to asylum in the revised determination.377

374 B.A. & S.A. v. the Administrative Court, Uzhp. no. 165/2010, judgment of 21 June 2010, which invoked both Article 4-a and the deleted (!) Article 5, and gave no more than the following “reasons” for dismissal: “The Court assessed the claims in the appeal that [...] however did not accept them as well-founded for reaching a different decision, considering the fact that the substantial facts for determination of the claim have already been ascertained, and those are that [they] are not a recognized refugee or a person under subsidiary protection.”
377 M.B. v. the Administrative Court, UzhP. no. 466/2010, judgment of 4 October 2010.
I.1.4. RECOMMENDATIONS

MoI - AS and other proponents of legislation relevant for asylum seekers and refugees, as well as the legislature should make their best efforts to harmonise the national legislation with international refugee law, international human rights law and EU Acquis. In this respect, however, it should be noted that the standards of the Refugee Convention and the standards under international human rights instruments are not fully reflected in some provisions of the EU directives relating to asylum, which only set up minimal standards and do not prevent Member States to introduce more favourable standards (nor is, mutatis mutandis, anything stopping the Republic of Macedonia from doing so).

It is even more important to improve the implementation of the laws through setting up consistent implementation procedures, through adopting or updating clear by-laws, guidelines, instructions and other documents on issues such as use of country of origin information, internal flight alternative, standard of proof, etc. In the light of the fact that LATP provides international protection, the authorities should take into account the development of international human rights law through its interpretation by the treaty monitoring bodies, as well as the best practices of EU Member States and other states with well-developed asylum systems. In this respect a mini-“twinning” project involving the Republic of Macedonia and EU Member State(s) can be beneficial in increasing the knowledge and know-how of Macedonian officials dealing with various aspects of asylum (determination in asylum proceedings, provision of social assistance, etc.).

The Macedonian authorities should continue their cooperation with UNHCR (which includes provision of timely information on draft legislation pursuant to Article 35.2(c) of the Refugee Convention) and use all available means and information towards the goal of creating a solid asylum system based on international obligations of the State. Hoping that this analysis could contribute to achieving this goal, the following recommendations are respectfully submitted to the authorities and to others who might be concerned.

Recommendations regarding improvement of the asylum legislation

- The refugee definition of Article 4 of LATP should be further clarified, either in this law or by-law, by a flexible and adaptable interpretation of persecution, so as to comply with Article 9 of the Qualification Directive and the UNHCR comments to it.
- A list of actors of persecution should be provided, including non-state actors, in line with Article 6 of the Qualification Directive and the UNHCR comments to it.
- With reference to the UNHCR recommendations given in the context of Article 8 of the Qualification Directive, Article 29(3) of LATP should clarify that where the risk
emanates from state agents in the country of origin, the internal flight alternative is not relevant (a presumption which can be rebutted if the authorities establish that foreign state’s agents do not exercise effective control over the whole territory of their state) and it should also state that an asylum application can not be rejected under Article 29 of LATP if the applicant cannot safely relocate to any part of his country without undue hardship.

- With reference to Article 10 of the Qualification Directive and the UNHCR comments to it, particular reasons for persecution should be explained, especially the reason of “membership of a particular social group”, and an imputed affiliation to a Refugee Convention reason should be included, too.

- With reference to Article 4.4. of the Qualification Directive and the UNHCR comments to it, LATP should be amended by a provision that “compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant the grant of asylum even where the assessments indicates likelihood that the persecution or serious harm will not be repeated”.

- Article 38.1 (5) and (6) of LATP must incorporate the exceptions to the cessation clauses under Article 1C (5) and (6) of the Refugee Convention, thereby allowing a protected person who had suffered severe persecution to invoke “compelling reasons” for refusing to avail him/herself of the protection of the country of his nationality or for inability to return to the country of his former habitual residence, regardless cessation of the circumstances owing to which he or she was granted asylum.

- Owing to the complementary nature of refugee protection and subsidiary protection, the exclusion clauses of Article 6.2 of LATP should be deleted as they run counter to the purpose and object of the exclusion clauses of Article 1F of the Refugee Convention and the conceptual framework of that Convention.

- In addition to the prohibition of *refoulement* where there is a real risk of torture, the provisions of Article 7.1(2) and 7.3 of LATP should also encompass risk to serious violation of other fundamental human rights (the right to life, prohibition of death penalty etc.), in accordance with the State’s *non-refoulement* obligations under international human rights law.

- The list of family members who may benefit of family reunification should be extended in line with the UNHCR comments relating to Article 2(h) of the Qualification Directive.

- The right to access to the file must be guaranteed to the applicant and to the proxies;

- The burden of proof of the authorities in applying cessation clauses, exclusion clauses or in expulsion proceedings should be clearly stated.

**Recommendations on determination in asylum proceedings**

MoI - AS and other authorities (where appropriate) should interpret and apply the asylum law, and particularly the refugee definition of Article 4 of LATP and Article 1A(2) of the Refugee Convention, in the light of interpretation of various
concepts of international refugee law and international human rights law by UNHCR, EU and bodies that monitor implementation of international human rights treaties. In particular they should:

- Examine whether the “fear” is well-founded by taking into account all the relevant circumstances (including whether an effective State protection and a relocation alternative exist);
- Extensively interpret the notion of “persecution” in the light of the UNHCR recommendations and the Qualification Directive so as to encompass harmful treatments not specifically encompassed by the Refugee Convention;
- Extensively interpret the Convention reasons, particularly the reason of “membership of a particular social group”, for which purpose guidelines and handbook should be prepared in cooperation with UNHCR (meanwhile some other documents, such as the CSRC Guidelines on SGBV may be consulted for information purposes);
- Vigorously identify reasons for persecution, including “imputed affiliation” to a Convention reason;
- Consider whether an internal flight alternative is relevant and reasonable (explaining whether/why safe relocation without undue hardship is possible);
- Take into account all relevant circumstances of sur place claims (for reaching a proper decision as to whether the applicant fears persecution) even where it can not be established that he has already held orientations or convictions whose manifestation after leaving his country of origin gave rise to his fear of persecution, rather than focus on his “bad faith”;
- Interpret the LATP provisions on subsidiary protection in a manner which does not undermine international protection to the detriment of the protection provided under the Refugee Convention. Therefore decisions granting asylum for subsidiary protection must state clear and thorough reasons why no nexus to the Refugee Convention ground exists;
- Refrain from applying Article 6 of LATP by referral to the national security reason;
- Discontinue the practice of ceasing asylum to persons who stayed in their country of nationality (in a part of it where they do not fear persecution) for legitimate purposes such as obtaining a document, attending a funeral, etc;
- Restrictively apply the provisions of LATP on the safe country of origin, first country of asylum and particularly “safe third country” (specifically excluding from the latter list the countries such as Greece and Turkey, which fail to provide proper access to asylum procedures and to observe the non-refoulement principle);
- Set up the standard of “reasonable degree of likelihood” according to para. 42 of the UNHCR Handbook (a lower standard of proof than the standard of “more likely than not”) and consistently apply and state it in decisions;
- Provide procedural safeguards in asylum proceedings, with regard to respect of the non-refoulement principle; services of an interpreter of the same sex in a language sufficiently understood by the applicant; access to confidential case files to the
Court in any event; conducting asylum proceedings under Article 38.2 of LATP as a prerequisite to apply a cessation clause etc.

**Recommendations on the rights of the protected persons**

- All benefits and entitlements should be fully provided in a timely manner according to the applicable legal acts, including (where appropriate) by direct referral to binding international legal acts.
- Regularly extended residence of persons under subsidiary protection who apply for citizenship must be considered legal for the purpose of Article 7.1(2) of the Citizenship law and no unreasonable burden of proof should be imposed on these persons in citizenship proceedings.
- Persons whose right to asylum ceased after many years of residence in the Republic of Macedonia, where they developed strong links or family life which are, however, not sufficient to warrant grant of temporary residence permit on the ground of family link, should be able to benefit from the possibility of regularising residence under any “humanitarian grounds” in line with the international obligations of the State (in particular Article 8 of ECHR).
- Rejected asylum seekers who are informally permitted to stay in the territory of the Republic of Macedonia for humanitarian reasons should be entitled to basic benefits until their departure from the country.

**Recommendations regarding mandate and practice of the Constitutional Court**

- The Parliament of the Republic of Macedonia should amend Article 110 of the Constitution to the effect of entitling the Constitutional Court to review compliance of the national legislation with “international treaties ratified in accordance with the Constitution”, which according to Article 118 are “a part of the internal legal order” (directly applicable) and “cannot be changed by a law” (stronger legal effect vis-à-vis laws).
- Given that fundamental human rights and freedoms recognized by international law and stated by the Constitution are listed among basic values of the Macedonian constitutional order, the Constitutional Court is encouraged to state in its decisions, where appropriate, that interpretation of ratified human rights treaties by treaty monitoring bodies (thus complementing the content of these rights and freedoms) is directly applicable in the internal legal order.
I.2. ANALYSIS OF THE REFUGEE STATUS DETERMINATION PROCEEDINGS IN THE REPUBLIC OF MACEDONIA 2003-07

September 2007

I.2.1. EXECUTIVE SUMMARY

The focus of this analysis is the Refugee Status Determination (hereinafter referred to as RSD) proceedings in the Republic of Macedonia. The RSD proceedings are scrutinized starting with the pre-decision stage (the asylum application form and asylum interview); continuing with the initial decision-making process by the Ministry of Internal Affairs - Asylum Section (hereinafter referred to as MoI - AS); the judicial decision-making process; and ending with other, more general parts of the RSD proceedings such as for example the domestic law on fresh claims, reasons for cessation of the right to asylum granted due to humanitarian protection etc. The analysis is based upon case-studies of asylum-seekers represented by the Civil Society Research Centre (hereinafter CSRC). Due to the confidential nature of the information disclosed, full names of individuals are not used in the analysis.

Although the analysis concentrates on the areas of the RSD procedure that could/should be improved, the positive trends and developments in the practice of the MoI - AS are also noted. The objective of the analysis is not only emphasizing the weaknesses in the RSD proceedings, but to offer an alternative – a way in which the identified fault could be remedied. This is done by either referring to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter UNHCR Handbook), or to the RSD proceedings in the United Kingdom (hereinafter referred to as UK), as well as to decisions reached by the British courts in asylum cases given only as examples on how the asylum law could, or should, be interpreted. The references to the British asylum law and practice used in this analysis must not be interpreted as saying that the British asylum system is perfect and needs no improvement on its own part nor is this analysis saying that the British asylum system is better than the one practiced in the Republic of Macedonia. Despite

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378 This analysis was written on behalf of CSRC by Ms Maja Kalanoska, CSRC Research Consultant from 2009 to October 2010, CSRC lawyer from 2006 to 2007 and previously in the UK (2002-2006). As the analysis was completed in September 2007, it refers to then applicable case-law and relevant legislation. The editor of this book had to shorten the analysis owing to space constraints and edited it (where necessary) to reflect the legislative development since 2007. The integral text of the analysis could be received by e-mail upon submitting a request addressed to csrconline@yahoo.com (Edit. note).

379 The humanitarian protection was supplemented and replaced with subsidiary protection by the Amendments to the LATP in 2007 and 2008 respectively (Edit. note).
the weaknesses identified in this analysis, when one looks at the high percentage of persons who have sought international protection in the Republic of Macedonia and have been granted the right to asylum for reasons of humanitarian protection in comparison with some EU Member States, the Macedonian asylum law and practice seems, to say the least, fair. However, when we look at the number of overturned initial decisions by the Government Appeals Commission (three in the period between 2003 and 2007), or by the Supreme Court (none within the same period), it becomes obvious that the Macedonian asylum system has many faults as well.

There is no perfect asylum system, and there will always be genuine asylum-seekers who are treated unfairly in any country of asylum. On the other hand, there will be those who abuse the asylum system, and gain a recognized refugee status when they are in no real need of international protection. What the Republic of Macedonia should aim for, is to bring the number of those cases to a bare minimum (if not eradicate such practice completely), by improving the legislation and practice and implementing a fair asylum procedure.

I.2.2. The main problems with the asylum procedure in the pre-decision stages

I.2.2.1. The asylum application form

The asylum application form issued by the MoI - AS is vague and unclear, as it mostly contains questions regarding the applicant’s personal information, information about the applicant’s family members, and one general question that states: The reasons why you are applying for a right of asylum. This question is not sufficiently clear so as to encourage the applicant to state all the reasons why he/she fled the country of origin. Most asylum applicants have no knowledge of the 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (together hereinafter referred to as the “Convention”), and they will not be in a position to state all the reasons that will eventually prove relevant to the asylum claim. In the current form used by the MoI - AS there are only two specific questions - Question No. 21, referring to the applicant’s military service; and Question No. 22, relating to the applicant’s political activities. However, even these two questions are not sufficiently precise so as to enable the MoI - AS official to establish whether there is a Convention ground of political opinion or membership of a particular social group, applicable to the claim. For example, a person may be viewed as holding political opinions, when in fact he/she is not politically active, and will answer None to Question No. 22. The question about military service, also requires further precision, for example a person may have deserted an army, and has as a result become a subject of persecution; or family members of a person who served in an army may have suffered, or have well-founded fear that they will suffer persecution in the country of origin, however they themselves have never been in the army, and will answer No to Question No. 21.

380 The part regarding the Government Appeals Commission is removed from the book (Edit. note).
An application form should contain several sections, each corresponding to one of the Convention reasons, and further sub-sections. E.g. a section about political opinion may contain several sub-questions, such as: Are you a member/supporter of a political party; have you ever been suspected of being a member/supporting a political party; is any of your family members a member/supporter of a political party; is any of your friends/associates a member of a political party; is the political party/group/organisation banned in your country of origin?, etc. These sections could be followed by a more general section of Additional Information, which will give the applicant an opportunity to state further reasons for fleeing the country of origin, including those which could lead to granting asylum for humanitarian protection (as an alternative to the status of recognized refugee).

The above methodology will encourage the applicant for asylum to give more detailed information about the experiences in the country of origin, thus prevents a situation to arise when a fact which may prove not only relevant, but crucial to the asylum claim is left out at this initial stage. This will also enable the MoI - AS official to appropriately prepare for the asylum interview, to assess the claim and identify all the Convention grounds and possible breaches of the applicant’s human rights as protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) or the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) that the applicant may face if an event of being returned to the country of origin.

The above is particularly relevant to the asylum procedure in the Republic of Macedonia where the majority of the asylum-seekers are members of ethnic minorities from Kosovo, hence the MoI - AS automatically assess their claims solely under the Convention ground of “nationality”. However, in addition to the importance of assessing the merits of each claim individually, the MoI - AS should bear in mind the ample objective evidence showing that members some ethnic groups from Kosovo, for example Kosovan Roma, were viewed by the Kosovan Albanians as collaborators with the Serbs, hence supporters of the Milosevich’s regime. Thus the Convention ground of (imputed) political opinion may be applicable to many of their claims (in addition to those of nationality and race) and will be more readily identified if the application form allows an opportunity to the applicant to elaborate on the issue of the political beliefs/activities that he or his family member/friend/associate either holds, or is suspected to hold. Further, there are many cases where the whole family was subjected to ill-treatment as a result of the service of one of its members in the Yugoslav Army, and when applicants complete the current application form it is very likely that they would fail to mention the army service.

The shortcomings of the current application form are presented below through several cases.

In the case of Mr B.R. the applicant was suspected of being a member of the X Party, however since Question No. 22 of the Application form only refers to political activities, and the applicant was not politically active, he did not mention this fact, which not only relevant, but may have proved a core issue of his asylum claim. The applicant disclosed this information during the asylum interview however the MoI - AS official merely regis-
tered the answer in the interview record and failed to ask further questions with regards to the applicant’s imputed political opinion (please see below for more details about the asylum interview process). It is considered that had the applicant been given the opportunity to complete a more precisely drafted section referring to Political Opinion in an initial application form, it is highly likely that he would have mentioned the fact that he was suspected of being a member of the X political party. Then the MoI - AS official would have paid greater attention to this fact and would have identified the possible applicability of the Convention ground of political opinion in the applicant’s case. Using the current application form the MoI - AS assessed the applicant’s claim solely on the basis of nationality and disregarded the fact that the applicant was suspected of being a member of a political party, failing to mention this fact in the negative decision.

In the case of Mr N.B. the applicant failed to answer No. 22, as the question only refers to political activities, and the applicant was not politically active. However, during the asylum interview the applicant explained that he and his father were supporting the X political party, and his father even held the political party’s membership card, while his brother, also an asylum-seeker in the Republic of Macedonia, was a supporter of another political party. The applicant was not asked to elaborate on this point during asylum interview, and this fact was not even mentioned in the MoI - AS negative decision.

In the case of Mr A.A. the applicant did not answer Question No. 22, since he himself was not politically active. However, as it turned out during the asylum interview, the applicant’s brother was a President of the Organisation Z, and the applicant’s house was searched on several occasions by a group of Kosovo Albanian men. Again, the interviewer did not ask further questions on this point.

If a clear and detailed statement is provided and the sequence of relevant events is given on a more detailed asylum application form, then the asylum interview will proceed much more smoothly, as the interviewer will have gained a better understanding of the basis of the claim. When one takes into consideration the irregularities that occur during asylum interviews (please see parts I.2.2.2.-6 below) and the applicant’s inability to verbally elaborate his claim in the higher instances, the need for such detailed asylum application form is even more pressing. The above problem appears in all the asylum applications and was characteristic for all the cases that are elaborated in this analysis.

### I.2.2.2. Delay between the lodging of the asylum claim and the asylum interview

Although not regularly, the problem of delay between the lodging of the asylum claim and the asylum interview does occur in the Republic of Macedonia. The Law on Asylum and Temporary Protection (hereinafter LATP) of 2003 provides in Article 27 that the MoI - AS is bound to make a decision on the asylum application within two months of the date of lodging the claim.

Considering the large number of asylum applications received by the MoI - AS in the second half of 2003, after the LATP was passed by the Macedonian Parliament in July 2003, the period of three months between the lodging of the claim and the asylum inter-
view should be seen as reasonable (the cases of Mr N.B. and Ms A.F. and of Mr A.A. and Mrs N.A) and the period of seven months was still not excessive (the case of Mr A.K. and Mrs N.B.). On the other hand, the unexplained delay of one year and three months after submission of applications in autumn 2003 in the case of Mr and Mrs R. is a considerable lapse of time and may have led to discrepancies in the applicants’ statements, which may have subsequently lead to adverse credibility findings, although they may have had a genuine need of international protection. In the case of Mr E.M., the applicant was invited for an asylum interview in September 2007, over six months after the claim was lodged. The asylum interview was scheduled after the applicant’s legal representatives’ written intervention, of which the first was ignored by the MoI - AS. Considering the requirements provided by Article 27, LATP 2003, in addition to the fact that there were very few newly arrived asylum applicants in that time, six months is unreasonably long period of time to lapse between the lodging of the claim and the asylum interview.

I.2.2.3. Providing interpreters

In most cases the MoI - AS provide interpreters where necessary. In the case of Mr and Mrs A. the applicants sought the assistance of an interpreter during the asylum interview and an interpreter was provided by the MoI - AS.

However, there occur situations when the asylum applicant is not provided with an interpreter, which although rare are considered sufficiently serious so as to be a part of this analysis. In the case of Mr A.M.H., the applicant’s legal representative received the letter of invitation for an asylum interview only two days before the date the interview was scheduled for, stating that should there be a need for an interpreter, the MoI - AS would provide one. The applicant’s legal representative submitted a written request that an interpreter speaking the applicant’s mother tongue is provided and the same day she received a telephone call from the MoI - AS stating that they could not find an interpreter. The legal representative provided contact details of an interpreter speaking the applicant’s mother tongue. When the applicant and the legal representatives attended the asylum interview they were told that the MoI - AS had never received a request for an interpreter to be provided. The request for adjournment of the interview was refused, the MoI - AS insisting that the applicant spoke English, although the applicant was not fluent in that language.

Not only asylum-seekers should not be asked to speak English during the asylum interview, when this is neither their mother tongue, nor they are fluent in it, but care should be taken about the applicant’s specific dialect. For example, an asylum-seeker from Sudan will not easily understand Arabic speaking interpreter using Lebanese dialect.

I.2.2.4. Presence of legal representatives at interview

The MoI - AS inform the applicants of their right to be accompanied by their legal representative at the asylum interview, and in most cases the MoI - AS interview applicants

381 See for example the UK Court of Appeal decision in Thirukumar [1989] Imm AR 402 (per Bingham LJ at para. 414).
only in the presence of their legal representatives. The MoI - AS however warns the legal representative present at the asylum interview that he or she is not allowed to interfere during the interview, and to only make his/her comments at the end of the interview. It must be noted however, as a positive development, that in practice the MoI - AS officials allow legal representatives to interfere, if for example misunderstandings occur during interviews.

### 1.2.2.5. Interviewing female asylum-seekers

Another problem regularly occurring in the RSD pre-decision procedure is the failure of the MoI - AS to follow precisely set guidelines when dealing with female asylum-seekers where a claim may arise which is based on a sexual or gender based violence. It is a regular practice of the MoI - AS to interview female asylum-seekers in the presence of the male members of the family, their spouses in particular, as well as their children. The MoI - AS need to follow the practice of other countries, and adopt precisely set guidelines to be followed when dealing with gender-related claims and in the meantime to take into account numerous documents issued by UNHCR for dealing with such claims. It is correct to say that not all female asylum-seekers will have experienced gender-related violence, but the current practice of the MoI - AS does not give an opportunity for a woman claiming asylum to disclose details about possible gender-related persecution she had suffered in her country of origin. A better practice would be that the initial asylum interviews of the husband and the wife are conducted separately, which could be merged if it becomes obvious that the asylum claim of the wife arises solely from the experiences of the husband (or the other way around), or if the applicants themselves request so.

In her application for asylum Mrs V.R. had stated that a group of armed Albanians forcefully entered her home in U., and maltreated her husband. She had stated, *inter alia*, that she and her children were taken to the upper floor, while her husband was beaten. This was also stated by her husband, Mr B.R. Thus, the MoI - AS should have been more sensitive and aware of the possibility that Mrs R. might have been subjected to gender-based violence, and they should not have interviewed Mrs and Mr R. together. In addition to the above Mrs V.R. had submitted an asylum claim in her own right, hence she should have been interviewed separately in order for the MoI - AS to establish the full details of her experiences in Kosovo, which caused her to flee and seek international protection. Instead, she was asked only one question during the asylum interview: “V., what do you have to say?” This can in no way be regarded as a substantial interview and it is contrary to Paragraph 200 of the UNHCR Handbook.

In the case of Mrs N.A. the applicant was interviewed in the presence of her husband, despite the fact that her husband (an asylum-seeker himself) had been in Germany when the Kosovan Egyptians, including Mrs N.A., began experiencing problems in Kosovo. The applicant had clearly stated in her request for asylum that she was in Kosovo with her children, with no male protection. This became further evident during the asylum interview when the applicant explained that shortly after the bombing a group of Albanian men visited her house and maltreated her son. The MoI - AS official did not even at this point stop the interview to ask for the applicants to be interviewed separately.
In the cases of Ms H.B., Ms F.D. and Ms A.F. the applicants were interviewed together with the common-law husband respectively, although they had claimed asylum in their own right.

**I.2.2.6. The asylum interview as insufficient to determine the applicant’s reasons for claiming asylum**

The applicant, Mr B.R., during the asylum interview replied to Question No. 4 that in August 1999, four armed Albanians entered his house by force, he was mistreated, beaten and held at a gun-point. The applicant explained that he was accused of being a member of the X Party and that the four men were looking for weapons. The information given indicates that the applicant was subjected to the maltreatment because of his political opinion, or rather imputed political opinion. Especially so, when the applicant’s own evidence is combined with the objective evidence showing that the Kosovo Roma were regarded by the Kosovo Albanians as collaborators with the Serbs. However, the MoI - AS official failed to ask any further questions in relation to this event, which would assist her in determining whether there was a Convention basis of an imputed political opinion, which was so obviously crucial for the applicant’s claim. Considering the way this interview was conducted (contrary to Paragraph 205 (b) of the UNHCR Handbook), it was impossible for the interviewing officer to properly assess the applicant’s claim and understand the fear of persecution he had in Kosovo.

Further, the asylum-seeker him/herself in a majority of cases will not be aware of the Convention ground/s on which he/she may base the asylum claim. It is the duty of the examiner/interviewer to determine the existence of the Convention ground(s). In this regard paragraphs 66 and 67 of the UNHCR Handbook should be noted:

“66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the Refugee Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.”

In addition to the above, the MoI - AS official in Mr B.R.’s case, asked the applicant at Question No. 15, “What maltreatment, I have not heard anything about maltreatment yet”, and then at Question No. 16 “You mention maltreatment what kind of maltreatment do you mean?” despite the applicant’s answer given at Question No. 4 (please see above), hence she was confusing the applicant, who then, began to speak about matters which were less relevant to his asylum claim.
In the case of Mr N.B. the applicant replied two questions by stating that he and his father were supporters of the X Party, that his father had the party’s membership card and that the applicant’s brother supported Y Party (both X and Y were notorious Serb hardliner parties). No further questions were asked during the interview regarding the political opinions the applicant and his family had. The MoI - AS decision only stated that the applicants based their claims on their nationality, despite the fact that the applicant described his fear of persecution due to his involvement in the Yugoslav Army and the threats he was subjected to as a result of this.

In the case of Mr A.A. at the asylum interview the applicant was asked whether he was a member of a political party or group. He answered that he himself was not, but his brother was a President of the Organisation Z. No further questions were asked about the political activities of the applicant’s brother until the legal representative was given the opportunity to ask further questions at the end of the asylum interview, when he asked the applicant if his brother took part in the negotiations that took place in R., to which the applicant answered in the affirmative. The applicant also stated that a group of Albanians were searching his house in order to find his brother, since they believed that the applicant was hiding his brother. The information given by the applicant indicates on the applicability of the Convention ground of (imputed) political opinion to the applicant’s claim; however this was not even mentioned in the MoI - AS decision.

In the case of Mr A.K. during the asylum interview (Question No. 7) the applicant informed the interviewer that he served in the Yugoslav Army and gave detailed account of the duties he had performed in the Army. The applicant also informed the interviewer that the Kosovan Albanians, one of them a KLA officer, were looking for him at his house. They told the applicant’s father that they were aware of the applicant’s service in the Yugoslav army, and they were also aware that he had a few days leave from the army and he came home. They put a gun in the applicant’s father’s mouth, in order to force him to disclose information about the applicant’s whereabouts. The applicant left his house the same night and returned to complete his military service, and his family left their house the following day and fled to the Republic of Macedonia, where the applicant joined them after completion of his military service in 2000. No further questions followed by the interviewer.

1.2.2.7. Joining of asylum claims

Another problem is that the MoI - AS joins the asylum applications of spouses when:

- they have submitted separate claims for asylum;
- the factual background of the husband’s claim does not reflect that of the wife’s;
- the applicants have never requested their cases to be joined.

This problem of joining the asylum claims of spouses not only means that one of the asylum applicants (usually the wife) is not substantially interviewed in relation to the reasons why she is claiming asylum, (a problem that was addressed above in section I.2.2.5.) but further, and more importantly means that there is only one decision on the asylum claims, the reasons for which do not always reflect the wife’s circumstances.
Mr B.R.’s claim for asylum was refused due to his travels to Serbia and Kosovo (although the latter in the presence of UNHCR) while he was an asylum-seeker. Mrs R. had never travelled to either Kosovo or Serbia proper, and she had claimed asylum in her own right - independently of her husband’s claim. Her claim was based on her ethnicity, which in her case could be considered as both race and nationality for the purposes of the Convention. It follows that the MoI - AS should have issued a separate decision on Mrs R.’s claim, since the factual situation established, as well as the reasons for refusal, did not reflect her position.

I.2.3. PROBLEMS WITH THE DECISION-MAKING IN ASYLUM CLAIMS

I.2.3.1. Standard of proof in asylum and ECHR Article 3 claims

It is a well-known fact that it is for the applicant for asylum to prove his claim of well-founded fear of persecution for Convention reasons, however, decision-makers should constantly be aware of the fact that the applicant for asylum who proves all aspects of his claim will be an exception rather than a rule. The standard of proof, decided by the UK House of Lords is not as high as it is in normal civil proceedings. Instead of demonstrating that it is ‘more likely than not’ that the individual would be persecuted if sent back to his country of origin, it must only be shown that there is a “reasonable degree of likelihood” or “serious possibility” of such danger. The standard of proof is therefore at the lowest end of the scale, similar to showing a “one-in-ten” chance. Any indication of a higher standard of proof being applied should render the asylum decision flawed. Bearing in mind that the LATP recognized a right to asylum due to humanitarian (now subsidiary) protection in circumstances where a breach of Article 3 ECHR is threatened, it is relevant that the European Court of Human Rights (hereinafter referred to as ECtHR) considers that in expulsion cases in which a violation of Article 3 is asserted, the standard of proof is whether there are “substantial grounds for believing” that there is a real risk of a breach of the right guaranteed by Article 3.

The Macedonian authorities fail to state in their decisions in asylum cases what burden and standard of proof they are applying (e.g. MoI - AS in the case of Mr B.R.). In the case of Mr N.B. the Government Appeals Commission stated that the applicant, who stated that he had served in the Yugoslav Army, should have provided the photos showing him in a uniform and holding weapons. The Commission invoked Article 137 (now 140), paragraph 2 of the Law on the General Administrative Procedure (LGAP), which requires an applicant to produce evidence in support of his statements.

This high standard of proof applied by the Government Appeals Commission is contrary to paragraph 197 of the UNHCR Handbook, which states:

„The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status

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382 UNHCR Handbook, paragraphs 196 and 197.
383 Sivakumaran [1988] Imm AR 147.
384 Chahal v UK (1997) 23 EHRR 413.
finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

Reference is made here to the British Immigration Appeal Tribunal which has held that even the Adjudicator set out and applied the appropriate standard of proof, use of phraseology which might be taken to imply a higher standard opens the determination up to attack on the basis of irrationality if not clear error of law.385

**I.2.3.2. Lack of precisely set removal directions**

The MoI - AS negative decisions on the asylum claims merely state that the applicant must leave the Republic of Macedonia within 30 days of receiving negative decision. There are no precisely set removal directions as to the place where the applicant will be removed, which renders the appealing of such decisions unnecessarily difficult. Since in the Republic of Macedonia most asylum-seekers are members of minorities from Kosovo, the MoI - AS may mean that the applicants can be returned to Kosovo, or Serbia proper, and the applicant (or rather the applicant’s lawyer) must address the legality of the decision to return the applicant to Kosovo, and then the decision to return the applicant to Serbia proper.

**I.2.3.3. Failure to accurately establish the Convention ground applicable**

In the case of Mr N.B. the applicant described his fear of persecution due to his involvement in the Yugoslav Army and the threats he was subjected to as a result of this. The applicant’s legal representative in the final submissions during the asylum interview stated that the applicant may be also considered as a member of a particular social group, because of the fact that he served in the Yugoslav army. In addition to the above the applicant stated during the asylum interview that he and his family members supported Serbian political parties, leaders of which were people responsible for the atrocities committed against the Albanian population before the NATO bombing. However this was not taken into account and the MoI - AS erroneously stated that the applicants based the claims on their nationality. MoI - AS should have been aware of the applicability of the Convention reason of “political opinion” in the applicant’s case, especially so in the situation where people of Roma ethnicity who had served in the Yugoslav Army (like the applicant) were seen as Serb collaborators by the alleged persecutors. According to paragraph 75 of the UNHCR Handbook:

> “The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific ‘nationality’ “.

385 Guney [2002]UKIAT01937, per Mr C M G Ockelton.
In the case of Mr A.A. the MoI - AS stated that the applicant based his claim for asylum on the grounds of race. This was despite the applicant’s evidence that his brother was a President of the Organisation Z, and participated during the negotiations at R., and that the applicant’s house was searched by a group of Albanians who believed that the applicant was hiding his brother.

In the case of Mr A.K. and Ms N.B. the MoI - AS stated that the applicants fled Kosovo due to security reasons and the pressure they were subjected to by the Kosovan Albanians. The MoI - AS failed to precisely state the Convention reasons in accordance to which they were assessing the applicants’ cases, despite the fact that the first applicant gave detailed account of his experiences in Kosovo, which occurred as a result of his service in the Yugoslav Army, which could be considered as both the Convention reason of membership of a particular social group, or political opinion, considering the fact that the applicant was viewed by his persecutors as a collaborator with the Serbs.

I.2.3.4. Inappropriate application of the asylum law

In the case of Mr N.B. (described in Section I.2.3.3), the MoI - AS state that the threats were addressed to the applicant’s brother and not the applicant himself, and refused the applicant’s claim. Such MoI - AS’s statements indicate that they do not apply the LATP and the Convention in an appropriate manner. The UNHCR Handbook states thus:

“43. These considerations need not necessarily be based on the applicant’s own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person’s character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is ‘well-founded’.

In the case of Mr I.A., the MoI - AS refused the applicants’ asylum claims since it decided that the applicants, in accordance with their own statements, experienced no problems in Kosovo with the Albanian population, and the applicant had friends of Albanian ethnicity who were even visiting him in S., and had given him money. However there is no mention of the applicant’s statements of persecution suffered in the past, as well as the applicant’s wife’s statement that her mother was killed by Albanians in a deliberate attack involving the bombing of her house, because of her ethnicity. The MoI - AS decision shows serious misapplication of the LATP and the Refugee Convention, as it is contrary to the UNHCR Handbook, paragraph 29 of which states:

“29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the Refugee Convention and the 1967 Protocol have to be applied to the facts thus ascertained.”
The above mentioned process has not been carried out by the MoI - AS in the applicant’s case. The relevant facts have not been established, which is proved by the fact that the MoI - AS mentioned irrelevant factors such as the applicant’s friendship with some members of the Albanian population in Kosovo, however fails to mention a core element of fear of persecution, namely the deliberate killing of the applicant’s wife’s mother in 2001, which was mentioned by the applicant’s wife, since the initial claim for asylum. This killing was as a result of the applicant’s wife’s mother’s Roma ethnicity. This combined with the applicant’s own statements of past persecution suffered by his brother due to his ethnicity, which was never disputed by the MoI - AS, proves the existence of a Convention reason.

There is no requirement in the Convention that the applicant must show a fear of persecution arising from the whole of the population belonging to a different ethnic group in the country. What the MoI - AS need to assess is whether there is a fear of persecution by the state or non-state agents, and whether, in case of non-state agents of persecution the state can offer sufficient protection. In the case of the applicant the fact that he has Albanian friends can not be seen as effective protection from persecution. In fact the assistance to an asylum-seeker by members of the ethnic group that in general is the perpetrator of the persecution, will in no way mean that his fear of persecution is not well founded, or that he/she can obtain efficient protection in the country of origin. Paragraph 65 of the UNHCR Handbook states:

“65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” [emphasis added]

In the aforementioned case of Mr I.A. the Supreme Court’s Judgment states that the Court’s conclusion is that the applicants will not be subjected to persecution if removed to Kosovo. As reasons for such conclusion the Court gives the fact that the applicants were never a subject of persecution themselves, before they left G., and they never had problems with the Albanian population there, but they claimed asylum due to the fact that the applicant’s brother was beaten by unidentified persons. Again, the Supreme Court disregards the guidance provided in the UNHCR Handbook (see above citation of paragraph 43) and international asylum law. This is particularly worrying since it is the last chance for an asylum-seeker to have his claim properly considered by an independent body.

I.2.3.5. Erroneous application of the internal flight alternative (IFA) argument

In the case of Mr N.B., the MoI - AS accepted that the applicant has a fear of persecution, however they state that this fear was limited to a certain geographic area of the country of origin, and that the internal flight alternative (hereinafter referred to as IFA) is applicable. The MoI - AS also stated that the applicants could have enjoyed protection in
the Republic of Serbia, without considering whether it is reasonable to expect the applicants to move there. In the case of Mr. A.K., the MoI - AS rejected the application by invoking the IFA, without properly pronouncing in the applicant’s evidence that the Albanians residing in the town of B. in Serbia knew that he had served in the Yugoslav Army. Such a practice of the MoI - AS is contrary to the UNHCR recommendation that the IFA argument is not applicable to Kosovan Roma. The UNHCR Handbook states at paragraph 91:

“The fear of being persecuted need not always extend to the whole territory of the refugee’s country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.”

In addition to the above mentioned paragraph of the UNHCR Handbook, and bearing in mind that Kosovo since 1999 was under the administration of UNMIK, it should be noted that there is no basis in law to suggest that an asylum applicant must claim asylum in the first available country. Such “direct flight requirement” was unequivocally refuted by UNHCR, the British courts and some leading academic authorities on the Convention (e.g. Professor Hathaway).

I.2.3.6. Failure to precisely state the evidence considered

MoI - AS and other authorities fail to state precisely in their decisions what evidence they have considered.

In the case of Mr B.R. the MoI - AS stated that the asylum claims and other submitted documents had been considered, as well as evidence regarding the situation in the country and the place of origin, however they failed to state precisely what documents had been considered. Further, the fact that there is no reference to any documentary evidence, or country of origin information elsewhere in the decision, brings into question the fact whether the MoI - AS have considered any objective evidence at all.

The British Court of Appeal held the following:

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386 R v Uxbridge Magistrates’ Court, ex p Adimi [2001] QB 667, Simon-Brown LJ was persuaded by the Travaux préparatoires to the Convention, UNHCR and the writings of the leading commentators that an element of choice was indeed open to refugees as to where they claimed asylum. Newman J stated in the same case: “The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum ... There have been distinctive and differing state responses to requests for asylum. Thus there exists a rational basis for exercising choice where to seek asylum.”


388 R v IAT, ex p Amin [1992] Imm AR 367, 374, per Schiemann J.
"[...] adjudicators should indicate with some clarity in their decisions: (1) what evidence they accept; (2) what evidence they reject; (3) whether there is any evidence as to which they cannot make up their minds whether or not they accept it; (4) what, if any evidence they regard as irrelevant."

The cases that were described in this analysis established that this is a problem that often occurs in the decisions.

**I.2.3.7. Failure to consider applicant’s own evidence**

In the case of Mr A.K. the MoI - AS gives detailed account of the applicant’s wife’s statements, but fails to state the statements given by the applicant himself, although he had a better founded fear of persecution in Kosovo. The only facts stated by the MoI - AS is that the applicant served in the Yugoslav Army in the period between 1999 until 2000, and after the completion of his military service he went to Ba., where he stayed for a month, and using ordinary transport (coach), without experiencing any problems during the journey, he fled to the Republic of Macedonia. This in no way reflects the experiences of the applicant in Kosovo, and the reasons why he claimed asylum. There is no mention of the main aspects of the claim: the awareness of the Kosovan Albanians (including KLA officer) of the fact that the applicant completed military service in the Yugoslav Army, the fact that some Kosovan Albanians were already looking for him at his house, and the fact that the knowledge about the applicant’s service in the Yugoslav Army had spread amongst the Albanian population in B., where the MoI - AS states that the applicants could safely return.

**I.2.3.8. Contorting the applicants’ own oral evidence**

In the case of Mr B. R. although the applicant during the asylum interview stated his belief that the group of Albanians visited his house with the sole purpose of committing a burglary, he never stated why he believed this to be the case, nor was he asked such question during the asylum interview. In addition, the applicant gave the information that he was told not to report the incident to KFOR, in order to explain to the interviewer that there would be no sufficient protection in Kosovo available to him, the full answer given was: “Do you know what they told me when they came to my home, you will call KFOR but they can only guard you for 24 hours, and what then?” The MoI - AS summarised the applicant’s evidence in the following terms:

“Regarding the problems the applicants had with the armed group of Albanians, who physically attacked the [first] Applicant at their home, the applicants themselves considered that the aim of the group was to scare them and rob their house, because when they [the group of Albanians] were leaving, they told them to stay calm and not to report the incident to KFOR.”

Hence instead of considering the applicant’s statement in support of his asylum claim, and in relation with sufficiency of protection, the MoI - AS is contorting the applicant’s evidence with the purpose of using the same evidence against the applicant’s claim.
In the case of Mr B.N. the MoI - AS stated that the threats described by the applicant were addressed at the applicant’s brother, and not the applicant himself, despite the fact that during the asylum interview the applicant stated that he himself was threatened, and asked questions such as “How many Albanians did you kill?”

In the case of Mr A.A. the MoI - AS states in their decision:

“They [the applicants] are in the Republic of Macedonia since 1999 together with their family. They all lived in O., where they owned a house. After the bombing of Kosovo started, Mr A.A. went to Germany, where he stayed until July 1999. In the meantime his family lived in O. The residents of the neighbourhood [where the applicants lived] decided to leave the village and to leave behind all their belongings.”

This is contrary to the applicants’ statements that they and their neighbours left the village due to the problems they were experiencing with the Kosovan Albanians, and that they were expressly told to leave, hence they did not decide to leave voluntarily. There is no mention of the applicant’s wife’s statements about the looting and the beating of their son by Albanian men. Further in the case of Mr A.A. the decision of the MoI - AS states that:

“the applicants wish to return to Kosovo-Serbia and Montenegro, not in their former place of residence as offered by the UNHCR, but in K.P. This is supported by the fact that their daughter lives in U., and she has not experienced any problems there. Mr A.A. has another brother who was granted temporary humanitarian protection in the Republic of Macedonia, however he voluntarily returned to live in K.P., in the village of R., and Mrs N.A. has two brothers living in P. In O., where the applicants used to live, non-Albanian population has already returned in the centre of O., and they are still living there, hence in the case of the applicants’ return to Kosovo, they could reintegrate in the environment without experiencing specific problems”

The above does not reflect the applicants’ statements during the asylum interview that when the situation becomes such that everyone respects the law in Kosovo, and if everyone else returns, and if their houses are rebuilt then they would wish to return. It is not clear how the MoI - AS established the above factual background, however it is clear that the MoI - AS is contorting the applicants’ evidence and they are presenting evidence with the aim of refusing the claim.

I.2.3.9. Relevant/irrelevant considerations

In the case of Mr B.R. there was no mention of the applicant’s statement that he was accused by the Albanians of being a member of the X Political Party. Hence what could be the most relevant information regarding the applicant’s asylum claim has not been considered, whilst irrelevant matters such as the presence of the applicants’ family members in the country of origin have been given too much weight, and is one of the reasons for concluding that it is safe for the applicant to return to Kosovo and for refusal of his asylum claim. Had the claim of Mr B.R. been properly assessed by MoI - AS (by considering the above evidence of imputed political opinion), it would have become apparent that, unlike the applicant, the other members of his family still present in the country of origin may not have been viewed as supporters of the X Political Party. Reference is made to the Asylum
Policy Instructions issued by the UK Home Office - Immigration and Nationality Department, which warns decision makers against making an “irrational judgement” based on the applicant’s family’s continued presence in the country of feared persecution.389

In the case of Mr A.A. and Mrs N.A. the MoI - AS completely failed to mention Mrs A.’s statements that a group of armed Albanians came to her house and maltreated her son, nor there is a mention of Mr A.’s statements that his house was searched by a group of Albanians believing that the applicant was hiding his brother. Both statements were relevant to the asylum claim however the MoI - AS failed to mention this evidence of past persecution suffered by the applicants, and refused the claim on the basis of the continued presence of the applicants’ family members in Kosovo, which is an irrelevant consideration.

In the case of Mr I.A. the MoI - AS refused the applicants’ claim on the basis of the fact that the applicant stated that he had Albanian friends some of whom have visited the applicant in Skopje, and had given him money. The MoI - AS failed to mention the applicant’s fear of persecution as a result of the applicant’s brother’s experiences in Kosovo, and the fact that the applicant’s wife’s (an asylum-seeker herself) mother was killed in a deliberate attack targeting her in Kosovo in a bomb explosion, due to her ethnicity.

I.2.3.10. Decision unsupported by evidence

The analyzed cases show that the MoI - AS often fail to support their decisions by any evidence.

In the case of Mr B.R and Mrs V.R. the MoI - AS concluded that the fear is not objectively well-founded on the basis of their statements with regards to the conditions, circumstances and reasons why they fled Kosovo, information about their family members, and inter alia, the improved circumstances in Kosovo. The finding that the circumstances that prevailed in Kosovo when the applicants fled, no longer existed, is unsupported by any evidence.

In the case of Mr N.B. the MoI - AS, as well as the Government Appeals Commission, concluded that the applicants could relocate to another part of the Republic of Serbia, despite the evidence produced, which shew that the applicants will have no legal access to another part of the country, will have to live in a substandard living conditions, their children will not be able to go to school, they will have no access to medical facilities etc. The MoI - AS and the Government Appeals Commission not only disregard this evidence, but they also fail to provide trustworthy evidence to the contrary, to support their finding that IFA is applicable contrary to the UNHCR recommendations.

I.2.3.11. Failure to consider objective evidence even when MOI - AS have been expressly referred to it

In the case of Mr and Mrs R. the applicants’ legal representative, as a final submission at the end of the asylum interview relied on the UNHCR position paper on the Continued

389 API Mar/01, Ch, s 2(10).
Protection Needs of Individuals from Kosovo in Light of Recent Inter-Ethnic Confrontations, issued in August 2004, which stated that Roma originating from Kosovo, should continue to enjoy international protection (particularly refugee status) as it is not safe for them to return. The MoI - AS however disregarded this evidence, and made no mention of it in their decision.

In the case of Mr N.B. the MoI - AS failed to state what, if any evidence they have considered, whether they accept or reject the evidence, and reasons why, despite the fact that the legal representative substantiated the applicant’s claims in the final submissions at the asylum interview by referring to the Amnesty International’s report titled “Prisoners in Their Own Homes”, a report prepared by the Norwegian Refugee Council documenting the problems the Kosovan Roma face in Serbia as IDPs, and a report by the American Refugee Committee. None of these documents was mentioned in the decision, nor is there anything in the decision to indicate that they have been considered.

In the case of Mr A.A. and Mrs N.A. the Government Appeals Commission stated that they are not bound by the enclosed reports by international organisations.

In the case of Mr A.K. although the grounds of appeal argued that the IFA is not applicable in the applicants’ case, and referred to a UNHCR document stating that persons originating from Kosovo, should not be removed to another part of Serbia, the Government Appeals Commission do not even mention this argument and the evidence produced in their decision, and conclude that there are no legal or factual basis on which a different outcome of the claim could be reached, than the one made by the MoI - AS.

I.2.3.12. Failure to give reasons for decision

In the case of Mr and Mrs R., the MoI - AS, having concluded that the applicants do not qualify for refugee status, stated in the first instance decision merely that the applicant did not qualify for asylum due to humanitarian protection, according to Article 2, indent 2, and Article 5 of the LATP, i.e. that there would be no violation of Article 3 ECHR, and Article 3 CAT, if they were returned to Kosovo. No reasons for this finding were provided by the MoI - AS. Both MoI - AS and the Government Appeals Commission made the same failure in the case of Mr I.A.

Reference is made to the British Court of Appeal’s statement that:

“Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed.”

I.2.3.13. Failure to make clear findings of credibility

Clear findings of credibility must be an essential part of any asylum decision, but that rule was rarely followed in the Macedonian legal practice.

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390 R v Immigration Appeal Tribunal ex p Khan.
In the case of Mr A.K. the MoI - AS stated that the applicant travelled to B. on several occasions, hence it is unreasonable for him to rely on his fear of persecution there. Not only is this finding contrary to the applicant’s evidence that he only travelled to B. once to take his wife to her parents’ house, and he himself did not stay there, but the MoI - AS has failed to make a clear finding of credibility of his statement about his fear of persecution in B. The MoI - AS decision is ambiguous. The fact that the MoI - AS relied on the IFA in order to refuse the claim would mean that they did accept the applicant’s claim of fear of persecution in G., Kosovo. However MoI - AS then stated that the applicant could remove safely to B., despite the applicant’s statements that he is known there as a Serb collaborator. The MoI - AS again failed to state what evidence they accept, what evidence they reject and reasons why.

In the case of Mr N.B. the Government Appeals Commission have indicated doubts in relation to the applicant’s claim that he had served in the Yugoslav Army, in that they stated that he failed to provide the photographs showing him in the Army uniform, and holding weapons. Not only the Government Appeals Commission erred in law in that they applied a standard of proof higher than the one required in asylum cases, but they also erred in law in that they failed to make clear findings of credibility. The decision-makers should have assessed the credibility of the applicant taking into consideration all the relevant factors, the consistency of his own oral evidence, the objective evidence that supports his claim etc. However, the credibility of the applicant was never questioned by the MoI - AS, hence if the Government Appeals Commission found the applicant’s statement not to be credible with regards to any part of his claim, they should have expressly stated so, so as to give the applicant opportunity to do all he can to prove the veracity of his claim.

The asylum applicants were quite rarely invited to give further evidence before higher instance with regards to the reasons why they are claiming asylum (only several complainants were invited at sessions of the Government Appeals Commission), despite requests by their proxies. Hence it is difficult to see how an independent body (a court) considering an asylum appeal would be able to assess an asylum applicant’s credibility, as the initial findings on credibility would be binding for the Court, unless the Court hears the applicant to give evidence (which has never occurred in the Republic of Macedonia). It is strongly recommended that this practice changes and asylum appellants are invited to give oral and other evidence before those considering their remedies.

I.2.3.14. Inconsistent decision-making

The case of Mr A.K. is a typical example of inconsistent decision-making. The MoI - AS decision on the applicant’s brother’s (B.) application states that after the asylum interview it could be concluded that the problems experienced by B. occurred because of the fact that his brother (Mr A.K.) served in the Yugoslav army. Similar reasons, regarding the risk associated with Mr A.K.’s service in the army, were given in the cases of Mr A.K.’s mother and father and Mr A.K.’s sister. All the aforementioned members of Mr A.K.’s family were granted a right to asylum for humanitarian protection, but not the applicant himself, even though he had the strongest asylum claim.
A British Court has held the following:\(^{391}\)

"It goes without saying that consistency is an important ingredient of justice. If courts of law or tribunals reach decisions which are inconsistent (or which appear to be inconsistent) that may stem from error in one or other of the decisions. At the very least it may give the appearance of injustice, and engender a sense of grievance in people who are the subject of adverse decisions which they think are inconsistent with more favourable decisions."

I.2.4. Problems characteristic for the supreme court judgments

I.2.4.1. Failure to make clear findings of credibility

In the case of Mr B.R. the Supreme Court’s decision summarizes the initial decision by the MoI - AS and the decision by the Government Appeals Commission (both not disputing the applicant’s credibility); the applicable law, and bases the rejection on a single sentence, which states thus:

"The question of the well-founded fear of persecution in the country of origin in the frame of the entire criteria, the situation in the country of origin, the persons’ characters, their past, do not lead to a conclusion that they would be subject to persecution, and in the frame of the subjective and the objective side of the fear."

It is not stated what evidence considered by the Court shows that the situation in the country of origin is such that leads to the conclusion that the applicants would not be subjected to persecution. It is not stated what in the persons’ characters shows that they will not be subject to persecution if returned. Furthermore, it is not clear whether the Court rejects as non-credible the applicants’ evidence that they were mistreated in the past.

The British Immigration Appeal Tribunal has repeatedly emphasized the need for adjudicators to make clear findings of credibility, and that a clear finding on its own, without going into the main aspects of the appellant’s evidence to show why it is incredible, will not suffice either\(^{392}\).

I.2.4.2. Failure to consider evidence and give reasons for decision

In the case of Mr B.R. the Supreme Court repeat the findings reached by the MoI - AS in their initial decision and fail to consider evidence as well as to provide reasons for their decision, which is worrying given the position of this Court in the Macedonian justice system.

In the case of Mr A.K. the Supreme Court decided that the applicants could return to another part of their country of origin, meaning the Republic of Serbia, since the evidence shew that they travelled there on several occasions, despite the applicant’s evidence that he

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\(^{391}\) Firmin Gnali v IAT [1998] Imm AR 331, per May LJ, para 336.

\(^{392}\) Kwarteng (11472).
only travelled once, and never stayed there, and despite the objective evidence that shew
that the IFA is not applicable to the Kosovan Roma, with regards to relocation to another part
of Serbia. The Supreme Court state that they could not accept the arguments raised in the
grounds of appeal, however the reasons for this are not clear. The Court merely stated thus:
“this Court could not accept these arguments, taking into account the submitted reasons and
the cited legal provisions”. In addition, there is no consideration of a possible breach of the
applicants’ human rights as protected by the ECHR, although the LATP provides for the
grant of asylum due to humanitarian protection in cases of breach of Article 3.

I.2.5. OTHER

I.2.5.1. Lack of anxious scrutiny

What is characteristic for all the decisions (MoI - AS decisions, the Government Ap-
peals Commission decisions and the Supreme Court decisions) is the lack of appreciation
of the seriousness of the matter before them, i.e. the danger the applicants might face if
they are returned to their countries of origin. This is particularly worrying in the case of the
Supreme Court, as a last independent body to consider the asylum case.

British court have emphasised a Special Adjudicator’s heightened duty to examine ma-
terial in asylum cases, which demands that there be given the most anxious scrutiny to
the claim.

I.2.5.2. Keeping the rejected asylum-seekers in a limbo

In September 2007 there were around 450 asylum applicants who have received neg-
ative decisions by the Supreme Court, hence they have exhausted all domestic appeal rights,
and have been informed that they have to leave the country as they have no legal bases on
which to remain. It should be emphasized that the MoI - AS has not undertaken removal
actions in these cases. Nevertheless, there were allegations made by many failed asylum-
seekers that they are constantly being threatened with removal by the MoI - AS officials.
The practice of non-removal of rejected asylum-seekers is a positive development, bear-
ing in mind the risk they may face if returned to Kosovo/Serbia. However, the fact that the
MoI - AS refrains from removing such applicants should be viewed as their implied ac-
ceptance that conditions are not created in Kosovo for their safe return, and warrants a
grant of further legal leave to remain, in particular considering the fact that many of them
have been in this state of limbo – neither removed to their country of origin, nor legally
residing in the Republic of Macedonia, with no access to rights as a result of their unregis-
tered legal residence, for years.

393 De Carvalho [1996] Imm AR 435, 441; Bugdaycay [1987] AC 514, 534A.
394 R v IAT ex parte Anton Judes C2000-3549, per L.J. Schiemann, at para. 3.
Many countries of asylum are facing the problem of a large number of rejected asylum-seekers who have not been removed. Most countries deal with such situations by granting some type of “amnesty”, such as residence permit to certain categories of refugees. In the UK for example such problem occurred in 2003, when there were a substantial number of asylum-seekers, mostly from Kosovo, who had came to the UK in 1998-1999, arriving there mostly as part of families. On 23 October 2003 the then Secretary of State for the Home Department, Mr Blunkett, announced the so called “family amnesty” under which families who had claimed asylum before 2 October 2000, and had children under the age of 18 either at the date of 2 October 2000, or as was amended later, by 23 October 2003, when the amnesty was introduced, could apply for Indefinite Leave to Remain (ILR) in the UK. An individual who had claimed asylum as a single person, but by 2 October 2000 or 23 October 2003 had established a family also qualified under the amnesty. The estimation that around 15,000 rejected asylum-seekers and 50,000 asylum-seekers would benefit from the amnesty in no way meant that the country did not maintain effective immigration control.

The above is only given as an example. Another, more pressing reason for regulating the status of the circa 450 rejected asylum-seekers in the Republic of Macedonia is the fact that most of these people arrived in the country in 1999. Most of them are families with children, who were either at a very young age when they arrived, or they were born in the Republic of Macedonia and spent their whole lives there. Removal of such families from the Republic of Macedonia may amount to a breach of their right to respect for private and family life as protected by Article 8 ECHR (a ratified treaty which is a part of the internal legal order in accordance with Article 118 of the Constitution), hence decision-makers should directly apply this and other related provisions of the ECHR.

The British Immigration Appeals Tribunal has held that:

“6. For the reasons described above, we conclude, in the light of the Respondent’s own seven-year concession and the fact that none of the adverse factors in that policy apply to the Appellant, that the Respondent’s policy of maintaining fair and effective immigration control does not in fact require the removal of the Appellant and her daughter, and would not be undermined by allowing them to remain in this country. Indeed, her remaining in this country with her daughter would appear to be in line with the Respondent’s own published policy.

…

17. In those circumstances, given the substantial private and family life that has been developed by the Appellant and her daughter, who have now been in the UK for some 8 years, we hold that it would be disproportionate under Article 8 to remove them.

395 It should be noted however that the situation of the rejected asylum-seekers of Roma ethnicity from Kosovo in the Republic of Macedonia, differs from those who have been rejected right to asylum however they have not been removed as a result of an administrative errors on the part of the immigration/asylum authorities.
18. Accordingly for the reasons given above this appeal is allowed in respect of Article 8 only.\footnote{[2004]UKIAT00008 N(Kenya).}

One way for the MoI - AS to deal with the rejected asylum-seekers is to issue questionnaires to these people and establish the circumstances of each individual, regarding not only the situation the applicant awaits if returned to Kosovo, in terms of housing, access to education for the children if any, etc. and in terms of exercising basic human, social and cultural rights there, but also with regards to the length of time spent in the Republic of Macedonia, the ties established with the Republic of Macedonia, whether there are children in the family, their age, education, languages they speak, etc. The MoI - AS should then decide whether to grant the applicant legal leave to remain in the country.

\subsection*{1.2.5.3. Fresh claims}

Article 33 of the LATP refers to fresh asylum claims and state:

“In cases where the asylum-seeker submits fresh claim for asylum, he must provide evidence that his circumstances have changed significantly since the decision was made to refuse his previous claim for asylum. If he is not able to do that, the fresh asylum claim will be rejected by the MoI - AS.”

It follows from the above that the MoI - AS will only consider claims where the circumstances have changed significantly, however, situations when the applicant had been refused previously because of, for example, lack of credibility, and he has been able to subsequently obtain evidence that post-dates the previous refusal and proves he has well-founded fear of persecution for the same reasons he has always claimed, will not fall within this article when literal interpretation is applied.

Therefore it is recommended that Article 33 of the LATP 2003 is amended so as to cover situations where fresh evidence is available that proves the applicant has a well-founded fear of persecution for the same reasons he had claimed earlier. Reference is made to paragraph 353 of the UK Immigration Rules HC395 (as amended), which states thus:

“When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

i. had not already been considered; and

ii. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.”

Hence, although the above also contains the phrase “significantly different” this refers to the submissions, and it does not require that the applicant’s “situation” differs signifi-
The Court of Appeal has interpreted the Immigration Rules relating to fresh claims in a way requiring that “there should be a realistic prospect that a favourable view could be taken of the new claim” (SSHD v Ali Senkoy [2001] Imm AR 399).

In the case of B. the applicant obtained fresh evidence in relation to his claim and a request for re-instigation of the asylum procedure was submitted in 2005. No response has been received to date to this request despite the enquiries made by his lawyers.

I.2.5.4. Cessation of asylum

Article 1C of the Refugee Convention provides the following:

“...The Convention shall cease to apply to any person falling under the terms of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily re-acquired it; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntary re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of his nationality; or

(6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.“

Paragraph 113 of the UNHCR Handbook makes plain that the cessation clauses are negative in character and are exhaustively enumerated. The LATP (as amended) in Article 38\(^{397}\) adduces four more reasons for cessation of asylum contrary to paragraph 116 of the UNHCR Handbook. Two of the reasons refer to regulating legal status in the Republic of Macedonia on the bases provided by the Law on Aliens or the Law on Citizenship and another one involves leaving the territory of the Republic of Macedonia. This article is contradictory to Article 42 of the LATP, regarding issuance of a travel document to rec-

\(^{397}\) Please see the text of Article 38.1 of LATP in section I.1.2.1.5 of this book. (Edit. note).
Legal aid and advocacy for refugee rights

Recognized refugees, since, if leaving the territory of Republic of Macedonia would mean that the refugee will lose his/her right to protection that he/she enjoys there, what is the purpose of holding a travel document? Article 38 of the LATP should be amended as a matter of urgency, since not only it does not comply with international standards on asylum law, but is contrary with other articles within the same Act. Further, it reduces these persons’ rights to freedom of movement, rendering them prisoners in the country of asylum.

In addition to the above the MoI - AS make decisions to cease the right to asylum and do not state which cessation clause they are relying upon. In the case of S. S. the applicant was granted a right to asylum due to humanitarian protection in 2004 based on his well-founded fear of persecution in Kosovo, which was subsequently extended several times. In July 2007, the applicant submitted a request to the MoI - AS asking that his passport be returned so that he could leave the Republic of Macedonia voluntarily and permanently re-settle to Republic of Serbia (proper). An interview was held, in the presence of the applicant’s legal representative. The applicant expressly confirmed that his previously accepted well-founded fear of persecution in Kosovo, his country of origin, was still persisting. However, few days later the applicant approached his legal representative and informed her that he had only given such statements following a family dispute and while he was still affected by the dispute, and had no real intention to leave the Republic of Macedonia and re-settle in Serbia. The applicant’s legal representative wrote to the MoI - AS withdrawing the request for the applicant’s passport to be returned and explaining the applicant’s situation, hence requesting that the interview record is not given weight when considering the extension of the applicant’s right to asylum due to humanitarian protection. The applicant’s legal representative referred to paragraphs 122 and 123 of the UNHCR Handbook, citing provisions that state that a person will not cease to be a refugee merely because of the fact he has submitted a request for repatriation, and when a person who has stated that he is willing to avail himself of the protection of country of origin changes his mind and renounces that intention, his status should be determined afresh, and will depend on the explanation he provides and the circumstances prevailing in the country of origin. However, the MoI - AS reached a decision to cease the right to asylum granted to the applicant because the applicant has stated during the interview (mentioned above) that he is entitled to receive a pension and intends to buy a property in the country of origin, meaning Republic of Serbia. It is not clear which of the cessation clauses the MoI - AS is applying since none of them is applicable to the applicant. The reasons given for cessation of the right to asylum are irrelevant, and there is no consideration of the fact whether the applicant will have a well-founded fear of persecution if removed to Kosovo, which is the applicant’s country of origin. Although the applicant appealed against this decision, the second instance decision stated that although the grounds of appeal are legally and factually partly correct, they can not stand. However, they do not give reasons for such statement, and they find that the applicant is entitled to receive means of livelihood in the country of persecution, and as such he is not entitled to protection by the Republic of Macedonia according to the LATP, nor is he entitled to legal or financial aid by the UNHCR Skopje. Again, the Government Commission has not considered whether the applicant has a well-founded fear of persecution in the country of origin, and it is not clear which of the cessation clauses they are applying.
Another reason for which the MoI - AS frequently make decision to cease the right to asylum due to humanitarian protection is marriage, or rather common-law marriage to a Macedonian national. This is primarily wrong because it is contrary to paragraph 116 of the UNHCR Handbook, however there are several further reasons why this practice should cease. The persons who enter into marriage with Macedonian citizens are entitled to Macedonian citizenship after three years of registered marriage, during which period a person who loses his right to asylum will be completely dependent on his/her spouse regarding his/her status in the Republic of Macedonia. It is recommended that the cessation of right to asylum due to humanitarian protection for reasons of entering into a marriage with Macedonian national as a rule should cease, and that each case is considered individually and on its own merits, and international standards on asylum law are observed.

Lastly, as a positive development, the fact that the MoI - AS officials usually warn persons who are in common law-marriage with Macedonian nationals that their right to asylum would cease in six months to a year, hence giving them sufficient period of time to regularise their stay, without becoming liable to removal. In some cases there is more than one timely warning such as these given before the right to asylum ceases eventually.

Recommendations

- Introducing an Asylum Application Form which will contain, in addition to the personal information sections, five more sections, each corresponding to one of the Convention grounds, and containing several sub-sections, asking for more detailed information about the persecution suffered and the reasons why.
- Interviews should be conducted soon after the initial claim is lodged, as provided by the LATP of 2003 (so that to allow that the decision be reached within two months of submitting the asylum claim).
- Interpreters speaking the applicant’s mother tongue, or a language that the applicant is fluent in, not merely understands, should be provided during the asylum interviews, and there should be no exceptions from this rule.
- Care should be taken when asylum claims from female applicants are considered and the first asylum interview should be conducted with the asylum applicant alone, without presence of family members in the interview room.
- MoI - AS officials/interviewers should prepare before the asylum interview and make a list of specific questions based on the information provided in the detailed application form, asking more questions as the interview proceeds, and giving special attention to each detail, especially statements of past persecution. In addition, the MoI - AS officials need to understand that their role during the asylum interview is to assist the asylum-seeker, and should make everything they can to obtain as much information as possible ensuring at the same time that the applicant is comfortable giving evidence and not confused by particular questions.
- Asylum claims of family members where the factual background of the husband’s case does not reflect that of his wife should not be joined, in cases of refusal
separate decisions giving specific reasons for refusals should be issued and both the
husband and the wife should have a right to appeal in their own rights.

- The decisions must state the applied standard of proof, bearing in mind that the
asylum-seeker will have difficulties to provide evidence proving all aspects of his
case, hence the LATP should contain a clause which expressly determines a stand-
ard of proof in an asylum case that corresponds with the UNHCR Handbook and the
ECHR case-law regarding standard of proof in Article 3 ECHR cases.

- The decisions must precisely state exactly where the asylum seeker is to be re-
moved, thus showing that due consideration is given to the risks the asylum-seeker
is facing if removed to a specific country and allowing his legal representative to
address only the removal to that country.

- Decision-makers must identify the applicable Convention ground or grounds, which
is particularly important in the cases of asylum-seekers in the Republic of Macedo-
nia, most of whom are members of minority groups (Roma, Ashkaelia, Egyptians)
from Kosovo, whose claims should not be considered only under the Convention
reason of “nationality”, but also under the Convention reason of “race” and occasion-
ally under the Convention reasons of “political opinion” and “membership of a
particular social group”.

- Decision-makers should be constantly aware of the guidance provided in the UNH-
CR Handbook as well as other international instruments when they are considering
the applicability of the Convention in an asylum-seeker’s case, particularly refraining
of rejection of asylum application or cessation of the right to asylum based on
considerations which do not warrant such decision in the particular circumstances
(e.g. presence of family members in the country of origin, lack of past persecution,
receiving a pension from the country of nationality etc.)

- Decision makers should state all the evidence they have considered, and on which
they are basing their conclusions and must clearly state the parts of the evidence
they accept as credible, the parts of the evidence they reject and why. MoI - AS
must consider the evidence on the situation in the country of origin given in the
reports of relevant international and inter-governmental organization if there are no
evidence that proves the contrary or should expressly state the source of such
evidence (if any) and give the applicant an opportunity to address this in his/her
appeal.

- Decision-makers should always give reasons for their decisions, enabling asylum
applicants to effectively challenge them. Decisions not to grant refugee status must
explain why the Convention is inapplicable and must also give proper and adequate
consideration to the fact whether the applicant’s rights under Article 3 ECHR will
be breached by removal.

- The decision-makers must be aware of the seriousness of the matter before them -
the danger the asylum applicant will face if he/she is returned to the country of
origin, and consequently must apply anxious scrutiny when considering an asylum
application or remedy.
• The Court must look at the matter afresh, and be under no influence of the MoI - AS decisions made before that and if facts ascertained by the MoI - AS are accepted, reasons must be stated why. In addition, the Court must consider the grounds of appeal and all the evidence and clearly state why these are rejected or accepted.

• Article 33 of the LATP should be amended in order to give an opportunity to an asylum-seeker who has obtained fresh evidence to prove the veracity of his earlier asylum claim to have his claim reconsidered.

• Article 38 of the LATP “Cessation of the right to asylum” must be amended as a matter of urgency, in order to comply with paragraph 116 with reference to paragraph 113 of the UNHCR Handbook.
PART II. SUBMISSIONS FOR REFUGEE PROTECTION

II.1. LAWSUIT TO THE ADMINISTRATIVE COURT

To: The Administrative Court

PLAINTIFFS: ______, born on __.__.____ in _______, Kosovo; his wife _______, born on __.__.____ in _______, Kosovo; and their minor-age children ______ and _____, at present residing in _______ on ________ St. represented by the proxy ___________

RESPONDENT PARTY: MINISTRY OF INTERIOR - ASYLUM SECTION

LAWSUIT FOR INSTIGATION OF AN ADMINISTRATIVE DISPUTE

VERSUS: The decision of the Ministry of the Interior - Asylum Section, nos. ____ and ____ of ________, served to the plaintiff’s proxy on __.__.____

The Ministry of the Interior (MoI) - Asylum Section delivered the decision nos. _____ and _____ of __.__.____, thereby ceasing the plaintiff’s right to asylum in the Republic of Macedonia.

Being unsatisfied with this decision, the plaintiffs through their proxy, in a manner and period of time stipulated by Article 8 para. 2 and Articles 10, 20, 21 and 23 of the Law on Administrative Disputes (LAD) lodge this lawsuit with the Administrative Court for instigation of an administrative dispute versus the decision nos. ___ and ____ of __.__.____, issued by the Asylum Section and invite the Administrative Court according to Article 39 para. 3 and Article 40 para. 1 of the LAD to accept the lawsuit of the plaintiffs and to alter the disputed first instance decision so as to grant them the right to asylum in the Republic of Macedonia or to annul the disputed decision and revert the case for a revised determination.

REASONS

The plaintiffs _____ and _______ and their children ____ and ____ are former residents of _______, Kosovo, of Romani ethnic origin, citizens of the Republic of Serbia.

On __.__.____, owing to the unrest in Kosovo and the frequent assaults, insults, threats and maltreatment, the plaintiffs fled to the Republic of Macedonia, where the Government of the Republic of Macedonia by its decision granted them temporary humanitarian pro-
tection. In the next four years the Government extended the temporary protection to the Kosovo ethnic minorities who were not able to return safely to Kosovo. After the Law on Asylum and Temporary Protection (LATP) entered in force (July 2003), the plaintiffs lodged an application for recognition of a right to asylum in the Republic of Macedonia, claiming a well-founded fear of being persecuted in Kosovo because of their ethnic origins and (imputed) political opinions.

The Ministry of the Interior - Asylum Section by its decision nos. ___ and ___ of __.__.____ granted the right to asylum for humanitarian protection to the plaintiffs (then asylum-seekers), which was extended by decision nos. ___ and ___ of __.__.____ and decision nos. ___ and ___ of __.__.____. Following the amendments of the LATP, this right was transformed to a right to asylum for subsidiary protection by decision nos. ___ and ___ of __.__.____. The right to asylum ceased according to Article 38 para. 1 of the LATP by decision nos. ___ and ___, issued by the Asylum Section on __.__.____.

The aforementioned decision of the Asylum Section is contrary to the provisions of the LATP and the Law on General Administrative Procedure (LGAP) as it:

A. was based on **incomplete and erroneously ascertained facts** in certain substantial points;
B. was delivered with erroneous application of the substantive law;
C. does not contain proper reasons.

**A. INCOMPLETE AND ERRONEOUS ASCERTAINMENT OF FACTS**

The Asylum Section has not completely and properly ascertained the facts of the present case as a prerequisite for reaching a proper decision as to whether the plaintiffs have a continuous need of international protection. The competent authority was supposed to: a) obtain and record the statements and the responses of the interviewed persons regarding the reasons and circumstances owing to which they are unable or unwilling to return to their country of origin (**subjective element**); and b) to ascertain the facts relevant for the situation in the country of origin, thereby establishing whether their fear of persecution was well-founded (**objective element**). The need for such a course of action is recommended by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (hereinafter referred to as the UNHCR Handbook), which has been accepted worldwide as guidance for government officials concerned with the determination of refugee status.

**A.1. Facts relating to the fear of the plaintiffs**

In the procedure conducted under Article 38 para. 2 of the LATP, the plaintiffs stated before the Asylum Section that during 1999 in Kosovo they were constantly subjected to assaults, insults, threats and maltreatment because of their ethnic origins. In March 1999 members of the Kosovo Liberation Army (KLA) wandered on several occasions into their house and maltreated them because of their kinship to the father of the first plaintiff, whom they considered a traitor because of his membership of a Serbian political party and his
engagement with the protection of Romani rights. During one of these intrusions they threatened to shoot the brother of the first plaintiff, pointing a gun at his head.

These incidents were recorded in the minutes by shortened and paraphrased versions of the statements.

Evidence:
- Minutes of the hearing by the MoI - Asylum Section, p. __.

The plaintiffs reported the assaults and the other incidents, but did not receive protection from the Kosovo Police Service or other authority in Kosovo, therefore they fled to the Republic of Macedonia in 1999. The same year their house was burgled. During the riots in 2004, their house and their neighbours’ houses were burned and destroyed by crowds of ethnic Albanians who committed violence against the non-Albanian population in Kosovo. The competent Kosovo authorities nevertheless did not take action against the perpetrators. The plaintiffs stated during the hearing before MoI - AS that they are afraid of returning to Kosovo.

The respondent authority did not consider as ascertained some of the aforementioned facts and it did not explain why some statements and submitted evidence are not relevant for the ascertainment of the facts.

Evidence:
- Minutes of the hearing by the MoI - Asylum Section, p. __.
- Document of the Housing and Property Directorate in Kosovo, no. (...) of __.__.___.

The respondent authority in the reasons for its decision stated that the first plaintiff travelled to Serbia with the intention of collecting salaries from the business in whose Kosovo branch office he had worked until 1999. He also visited his mother who resided in Serbia as a internally displaced person, as a result of which he remained in Serbia two days longer than the anticipated period.

However, the first instance decision does not contain the statement of the first plaintiff that because of his ethnic origins he was and would be subjected to discriminatory practice in Serbia in comparison to his colleagues of Serbian ethnic origin, who allegedly collected their salaries. The decision also failed properly to record his statement regarding the sickness of his mother, which motivated him to visit her and thus to prolong his stay in Serbia for two more days.

398 Available at: http://www.unhcr.org/refworld/docid/412eec8b4.html
399 Available at: http://www.osce.org/kosovo/32700
Evidence:
- Notice from the enterprise no. ____ of ____.__.____.
- Minutes on the hearing by the MoI - Asylum Section, p. __.

The second applicant stated during the interview that her state of mental health had seriously deteriorated as a consequence of the 1999 events (including the acts of violence to which she and her family had been subjected). She also complained that her serious mental disorder requires continuation of the medical treatment which she currently receives, and which will most likely be unavailable to her if she is returned to her country of origin. MoI - AS did not comment this complaint.

Evidence:
- Medical certificate no. ___, issued by _____ on __.__.____, p. __.
- Minutes on the hearing by the MoI - Asylum Section, p. __.

A.2. Situation in the country of origin

The Asylum Section also did not establish the objective element of the fear of persecution, because it did not properly ascertain whether the fear of the plaintiffs was objectively founded and whether they continuously need international protection. The most relevant of the documents which were submitted to the Asylum Section and also enclosed with this lawsuit is the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Individuals from Kosovo of 9 November 2009. In this document UNHCR recommended that particular risks associated with belonging to certain communities or groups should be taken into account by the authorities and judiciary in reaching decisions on asylum applications (which should be expected in the light of the obligation of the state to co-operate with UNHCR according to Article 13 para 1. of the LATP).

The Guidelines described the situation in Kosovo in the following way:
- Human rights protection is inefficient or inconsistent, and Roma, Ashkaelia and Egyptians (RAE) suffer restricted freedom of movement and political, economic and social exclusion (pp. 7-8).
- The overall situation of minorities has not significantly improved since the issuing of UNHCR’s June 2006 position and there are also no indicators to show that it will do so in the near future (p. 9).
- From 1 June to 15 September 2009 there was concern about the growing number of security-related incidents affecting minority communities and requiring appropriate follow-up and action by the Kosovo authorities (e.g. during September 2009 at least four Kosovo Roma were injured in an attack near Gnjilane, and 20 Romani families from Uroshevac complained that they have been physically and verbally harassed on several occasions) (p. 9);
- In addition to sporadic shootings and murders, members of minority communities continue to suffer from ethnically motivated incidents, arson, stoning, intimidation, harassment and looting, and there is no willingness or ability to implement the law when ill-treatment and violence have an ethnic dimension (pp. 10-11);
- The reluctance of members of ethnic minorities to report attacks or incidents (e.g. the repeated attacks over Roma in the Abdullah Presheva neighbourhood of Gnjilane, allegedly committed by ethnic Albanians), is aggravated by a lack of confidence in the judiciary and fear of reprisals from the perpetrators (p. 11);

- Kosovo Roma are said to be reluctant to move beyond protected zones (enclaves) due to security-related fears and have been the target of threats and violence when travelling outside locations where they represent the majority, which affects the exercise of their right to religion and their access to education (p. 12);

- Kosovo Roma continue to be subject to pervasive social and economic discrimination, particularly in respect of access to social services and employment, while the lack of civil registration prevents them to enjoy other civil and social rights, such as education, health care, employment, property and social security (pp. 13-14).

The Guidelines described the situation in Serbia in the following way:

- The severely strained Serbian social welfare system cannot meet the needs of the large number of internally displaced persons (IDPs);

- Kosovo RAE as IDPs most often reside in illegal buildings or metal containers, often without electricity, running water or sanitation, which seriously worsens their health;

- Kosovo RAE can only in theory, but not in practice, register their residence as they cannot provide proof of place of residence in Serbia, which affects their effective access to certain rights and services, such as medical care, unemployment benefits, pensions and education;

- Registration as an IDP can provide an alternative means of access to certain social and economic rights, however such registration is available only to those who enter Serbia directly from Kosovo (p. 22).

The Human Rights Watch in its World report 2009 describes the events of 2008 in Serbia by stating that Roma face discrimination and marginalisation, inhuman living conditions and social exclusion, and that returns of IDPs from Serbia to Kosovo are hampered by the unstable political situation and the lack of conditions for sustainable return, including employment and social services.

Evidence:

UNHCR Guidelines for Kosovo of 9 November 2009400 (unofficial translation)


400 Available at: http://www.unhcr.se/Pdf/Positionpaper_2009/Kosovo_finalcopy_09Nov2009.pdf
401 Available at: http://www.UNHCR.org/refworld/docid/49705f93c.html
B. ERRONEOUS APPLICATION OF THE SUBSTANTIVE LAW

The Asylum Section has erroneously applied the provision of Article 38 para. 1 for cessation of the right to asylum, wrongly concluding that the first plaintiff by going to Serbia (where he lodged a request with a Serbian business) voluntarily availed himself of the protection of the country of which he is a national.

The analysis of Article 38 para. 1 clearly indicates that:

- the first plaintiff did not go to Serbia for the purpose of voluntarily re-establishing himself there, but for a short-term visit with different aims; he has not availed himself of the protection of the country of which he is a national;

- even assuming that the decision to cease the right to asylum to the first plaintiff was well-founded because of his visit to Serbia, that reason is irrelevant for the other plaintiffs who did not travel there, so there is no legal basis for the cessation of their right to asylum;

- the plaintiffs can continue to refuse to avail themselves of the protection of the country of which they are nationals because the circumstances warranting their fear still exist (risk of serious harm caused by persecution in Kosovo for reasons of their Romani ethnic origins or very bad living conditions involving possible discriminatory denial of access to social and economic rights in Serbia; as well as by the inability to afford them effective state protection);

- no other ground for cessation of the right to asylum under Article 38 para. 1 of the LATP is applicable in the present case.

There is no foundation in the MoI - AS’s assessment that the first plaintiff’s travel to Serbia using a Serbian passport in ______ (year) indicates the existence of any intention on his part to return or voluntarily re-avail himself of the protection of the country of which he is a national, because the use of a national passport in circumstances beyond a refugee’s control, such as acquiring documents from the national authorities for which non-nationals would likewise have to apply, or visiting an old or sick parent, should not result in the termination of refugee status (paragraphs 120, 121, 124 and 125 of the UNHCR Handbook). The plaintiffs did not avail themselves of the protection of the state of which they are nationals because they expressed no intention to use Serbian passports (which they possessed before 1999) for the purpose of voluntary re-establishment of themselves in Serbia (paragraphs 119 and 122 of the UNHCR Handbook). Neither did the first plaintiff go to Serbia to seek protection from a state authority (paragraph 121 of the UNHCR Handbook), nor was protection given to him during the visit or afterwards (paragraphs 119 and 122 of the UNHCR Handbook). Even when a refugee acquires a national passport intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country (which did not occur in the present case) and subsequently renounces either intention, his refugee status needs to be determined afresh and he will need to explain why he changed his mind and to show that there has been no basic change in the conditions which originally made him a refugee (paragraph 123 of the UNHCR Handbook). This means that in such situations the competent authority has a duty to examine whether the person concerned has a well-founded fear of persecution and whether there
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is a relevant and reasonable alternative for his relocation to another part of his country of origin, rather than automatically to reach a decision to end his right to asylum.

If the respondent authority had conducted a procedure properly ascertaining the facts on the basis of the submitted evidence and properly applying the substantive law, in particular the definition, (as suggested by paragraph 29 of the UNHCR Handbook), the applicants should have been granted refugee status because they have a well-founded fear of persecution for reasons of their nationality (which according to paragraphs 74-75 of the UNHCR Handbook is understood not only as citizenship, but also encompasses national, ethnic or linguistic groups in a particular country) and the political opinion attributed to them (in accordance with paragraph 80 of the UNHCR Handbook). The subjective fear which they expressed before the Asylum Section was founded on the objectively assessed risk of persecution by "non-governmental agents of persecution" which they would face if returned to Kosovo, where for reasons of their ethnic origins and imputed political opinion they had already been subjected to serious assaults, insults, threats and other maltreatment by local Albanians, including KLA members (as described in part A.1 of this lawsuit). For the same reasons they are unable and unwilling to return there, and neither Kosovo nor Serbia can provide sufficient protection from persecution (which follows from the adduced written evidence described in part A.2 of this lawsuit). The statements of the plaintiffs are consistent with each other and with the information regarding the situation in Kosovo and the other evidence adduced in the proceedings, thus their \textit{prima facie} credibility cannot be questioned. Therefore, even if the respondent authority had considered the claims to be not adequately proved, in the aforementioned circumstances it should nevertheless have applied the inclusive clause of Article 4 of the LATP, according to the "benefit of the doubt" principle (paragraphs 196, 203 and 204 of the UNHCR Handbook).

The UNHCR 2009 Guidelines on the internal flight alternative (IFA) stated that IFA is physically possible for ethnic minorities from Kosovo, however such relocation of Kosovo RAE may not pass the "reasonableness test". The UNHCR Handbook states the following: "[i]n ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all circumstances it would not have been reasonable to expect him to do so." (paragraph 91). The circumstances of this case indicate that it cannot be reasonably expected of the plaintiffs of Romani ethnic origin to establish themselves as IDPs in Serbia, where they would have no effective possibility of registering residence, obtaining personal documents, earning a living or benefiting of health care, social services, education and other rights. The UNHCR (Paragraph 54 of the UNHCR Handbook), asylum authorities of some countries and a number of legal theoreticians (e.g. J. C. Hathaway) consider that there is persecution in the meaning of the 1951 Convention even when the state of origin is able to provide enjoyment of basic social and economic rights (e.g. the right to an adequate standard of living or healthcare), if however in a selective and discriminatory manner it unjustly denies access to these rights to certain groups of the population for reasons stated in the 1951 Convention.
The right to asylum was originally granted to the plaintiffs and then extended for reason of humanitarian (after 2008 subsidiary) protection under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the case-law of the European Court of Human Rights (ECtHR) and the Committee against Torture, such protection is granted when there are substantial grounds for believing that execution or forthcoming a decision to return, expel or extradite an asylum seeker or refugee to another country would place him in a real risk of being subjected to torture, inhuman or degrading treatment, providing that the ill-treatment attains a minimum level of severity. The severity of the violence threatened in Kosovo meets the minimum threshold and the same could be said of the exposure of Romani persons to very bad living conditions as IDPs in Serbia (described in the lawsuit and the enclosed documents), which their native state should (but does not!) address by giving special consideration to the needs of members of the Roma community (Oršuš v. Croatia, no. 15766/03, §§ 147-148, 16 March 2010, ECHR-). According to the Strasbourg case-law, “discrimination based on race could, in certain circumstances, of itself amount to degrading treatment in the meaning of Article 3” of ECHR (East African Asians v. the United Kingdom, decision of the European Commission of Human Rights of 6 March 1978, nos. 4715/70, 4783/71 and 4827/7, D.R. pp. 17 and 20). In very exceptional circumstances there can be a violation of Article 3 of ECHR if a decision to expel a person to his country of origin would deprive him of the possibility of continuing to benefit from medical, social and other assistance which he already receives (D. v. the United Kingdom, judgment of 2 May 1997, Reports 1997-III, § 54).

The plaintiffs discharged their burden of proof that they are in risk of ill-treatment prohibited by Article 3 of ECHR, because they proved that they belong to a vulnerable group which, in the state of which they are nationals and the state arising from it, has been exposed to systematic practices of ill-treatment (Saadi v. Italy, no. 37201/06, § 132, 28 February 2008, ECHR 2008-). In such a situation it should not be insisted that the parties concerned show the existence of further special distinguishing features if to do so would render illusory the protection afforded by Article 3 (Salah Sheekh v. the Netherlands, no. 1948/04, § 148, ECHR 2007-I), as this will be determined in the light of the applicants’ account and the information on the situation in the country of destination in respect of the group in question (Abdolkhani and Karimnia v. Turkey, no. 30471/08, § 75, 22 September 2009, ECHR 2009-).

The statements of the plaintiffs and other evidence in this case, the provisions of LATP and the 1951 Convention (and its interpretation by the UNHCR Handbook) and the Strasbourg case-law unequivocally point to the need to extend the right to asylum.

C. LACK OF PROPER REASONING

The first instance authority has committed a violation of the second paragraph of Article 212 of the Law on General Administrative Procedure (LGAP), which envisages that in “other matters” (which unlike the first paragraph of Article 212 are not “simple matters in which one party participates”), “the rationale of the decision contains: a brief descrip-
tion of the claim of the parties, the ascertained facts, if necessary the reasons which were
decisive for the assessment of evidence, reasons for not considering certain of the parties’
claims, the legal acts and the reasons which in the light of the ascertained facts point to a
such decision as stipulated in its operative provisions”.

Asylum proceedings, particularly when they require application of the substantive norms
of the LATP, cannot be regarded as simple at all, because among other things they involve
assessment of the risk of persecution jeopardising fundamental human rights, such as the
rights to life, freedom, physical integrity, etc. However, the MoI - AS in its decision:

- neither quoted nor paraphrased the key parts of the plaintiffs’ statements pointing to
  the fear of persecution, nor did it ascertain the objective situation in the applicant’s
  country of origin for the assessment of the well-foundedness of their fears;
- neither clearly stated which reasons were decisive in the assessment of evidence,
  nor what standard of proof was applied in the decision-making, i.e., whether it was
  guided by Article 12 of the LGAP or applied with appropriate modification the standard
  applied by ECtHR when ruling whether an expulsion of an asylum seeker or refugee
  can violate Article 3 of ECHR;
- did not state quite clearly whether, in the course of assessing claims which cannot
  be proved with a high probability, it interpreted the notion of evidence from Article
  140 of the LGAP so as to impose on the parties an obligation to prove their claims
  in full, instead of applying the „benefit of the doubt“ principle in view of the consist-
  ency of the parties’ statements with other information regarding the situation in
  Kosovo and Serbia;
- neither stated which reasons were decisive in the decision-making (even though the
  poor reasons hint that the visit of the first plaintiff to the Republic of Serbia was a
  decisive reason for ceasing the right to asylum of all the plaintiffs), nor did it state
  which sub-paragraph of Article 38 para. 1 was applied.

REQUEST: According to Article 30 para. 2 of the Law on Administrative Disputes,
for the purpose of ascertaining the facts in this case we request the Administrative Court
to schedule a hearing, at which the parties and their proxy will be invited.

On the basis of the aforementioned, we invite the Administrative Court to accept the
lawsuit of the plaintiffs and to alter the disputed first instance decision so as to grant
them the right to asylum in the Republic of Macedonia or to annul the decision and
revert the case for a revised determination.

Plaintiffs:

____________ (signed in their own hands)

In Skopje, on __.__.____

This model lawsuit was prepared by Zoran Gavriloski on behalf of CSRC.
II.2. REQUEST FOR INTERIM MEASURE
IN THE K. V. MACEDONIA CASE

RULE 39 - URGENT !!!

To the European Court of Human Rights

REQUEST FOR INTERIM MEASURE
Lodged under Rule 39 of the Rules of the Court
on 17 December 2004

1. Names, places/dates of births of the applicants
1-n: Mr K. [...], Mrs K. [...] and their children _____ and _____ [...] 403

2. Address
The applicants temporarily resided in the town of S. before they went into hiding. They are not disclosing their present address before having their ECHR Article 3 claim examined by the authorities.

3. Ethnicity
The applicants are of __ (ethnic origins) from Kosovo.

4. Nationality
The applicants originate from the province of Kosovo, administrated by the United Nations (UN) Interim Administrative Mission to Kosovo (UNMIK).

5. Legal Representatives
Z.G. and A.M., lawyers of the Civil Society Research Centre (co-ordinating agency of the NGO Legal Network), Borka Taleski St. 11/2, Skopje MK-1000, Macedonia; phone & fax: +389 2 3217940.

6. Respondent State
Republic of Macedonia.

7. Background information relating to reasons for leaving Kosovo
Mr K., his wife Mrs K. and their children ____ and ____ fled Kosovo several years before the events of 1999, because of the serious threats to their lives, physical integrity and human dignity to which they were subjected, and went to ______ (country) in ____ (year),

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403 For data confidentiality reason, in this book only the first letter of the personal or family name is provided (e.g. K.) and places and dates are not written (instead them there is ____ or __.______ respectively), except those relating to the proceedings.
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where they were granted a right to asylum. According to the applicants’ statement, following the cessation of their right to status in _____, they were returned to Kosovo at the end of October 2003. However, they were not able to move in their own house in the town of V. because an Albanian family which has occupied the house did not want to move out. The applicants spent around 5 months in their friend’s house in the town of _____ before returning to their house on __.__.2004.404

On 18 March 2004, at approximately 17:00 hrs, a crowd of 200-300 persons gathered at the St. ____ Orthodox church in the town of V. According to one report: “The mob desecrated the cemetery, even disinterring human remains, and joined with another mob, led by local criminals, which was attacking, looting and burning Ashkaelia houses.”405 The applicants saw the violent crowd, armed with knives, bottles of petrol and other arms coming to the Ashkaelia neighbourhood. The applicants and some other Ashkaelia gathered in the house of the first applicant’s cousin.406 The attackers continually threw stones at the house, knocked forcefully on the door and shouted “Get out of here, Gypsies! We will burn you with the house!”407 The applicants called the Kosovo Police Service (KPS) about 15 times before police officers came.

Some of the police officers played an active part in the violence, by burning Ashkaelia homes and by arresting and maltreating Ashkaelia who attempted to defend their homes.408 An interviewed Ashkaelia man testified that “the police hit him twice in the back with the butt of an automatic weapon while arresting him and that as he was being led away in handcuffs, police kicked his wife in the groin and leg when she ran up to him holding their two-year-old son.”409 Soon after the arrests of several Ashkaelia men, allegedly for shooting at the Albanian crowd, the KPS officers returned to evacuate the remaining Ashkaelia families. As soon as the KPS arrived, the Albanian crowd stopped burning homes and retreated, allowing the police officers to cordon off the main Ashkaelia Street. The KPS went from house to house, ordering the Ashkaelia to evacuate immediately and stating that they could not guarantee their safety. As soon as the Ashkaelia were evacuated, the

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404 Evidence a) & b) - Minutes of 28 July and 6 August 2004.
406 According to the Report of Human Rights Watch (evidence i)): “They [the attackers] had all kinds of weapons - wooden sticks, axes, gardening tools, and bottles of petrol.” According to the Report of Amnesty International (evidence j)): “[The attackers] started throwing bottles with petrol. They had hoes, spades and metal bars”.
408 Evidence l) - the ERRC Letter of Concern quotes a statement of an eyewitness: “… the crowd intended to burn the houses to the ground while people were still inside.”
409 Evidence i) - HRW. According to evidence l): “The first house burnt was the house of [X.B]. Some of the attackers allegedly tried to rape a girl from the [B.] family. According to Mr [H.Z.], an Ashkaeli eyewitness to the pogrom, neighbours gathered in the yard of the [Q.] house in order to help the family, but officers of the Kosovo Police Service (KPS) intervened. The representatives of the Ashkaeli group alleged that some of the KPS (police) officers acted in complicity with the attackers. Three members of the [Q.] family were then arrested by KPS officers.”
entire Ashkaelia neighbourhood was burned. The applicants, as well as many other minority members, had to run before the oncoming Albanians to save their lives.

Approximately 70 houses belonging to Ashkaelia were set on fire by Albanian attackers. The total number of persons expelled from the town of V. in the attack was 257; there were 85 women, two of whom were pregnant, and 87 children of whom 13 under 3 years of age, and 18 babies under 6 months. According to information from UNHCR, the Ashkaelia have not returned to the town of V because of the unpredictable and unstable situation at present. The pogrom of the Ashkaelia was part of the 3-day violence throughout Kosovo, during which a total of 19 civilians died, more than 950 were injured and approximately 730 houses belonging to minorities were damaged or destroyed, and by 23 March more than 4,100 members of the minorities were displaced. In addition, from 1999 to 2004 the ethnic minorities in Kosovo were continuously subjected to ethnically motivated violence. In most of the cases from 1999 to 2004 no effective investigative action was taken. UNHCR considers that these developments clearly demonstrate that ethnic minorities originating from Kosovo continue to face serious security threats which place their lives and fundamental freedoms at risk.

The applicants resided for a few days in the village of ____ near the town of _____ and then for seven weeks in the ____ camp. They had to leave the camp because ethnic Albanians threw stones at the Ashkaelia on a daily basis. Then the applicants stayed in ____ (place) for around two months. As being afraid for their safety, they kept guard every night in front of the house, sharing the guarding duties in shifts with members of two other Ashkaelia families. As the applicants were under permanent pressure of becoming victims of lethal assaults and were subjected to national/racial hatred and limitation of freedom of movement because of their ethnicity, they left Kosovo on __.__.____.

The applicants cannot possibly avail themselves of protection of the state of which they are nationals because, owing to severe discrimination against RAE communities in Serbia and Montenegro, they would have to live there a life of poverty without dignity and without identity documents which allow for access to education, housing and health care. An internal flight alternative is not relevant for members of the Kosovo ethnic minorities who in Serbia and Montenegro would lack effective legal access to basic social and economic rights (owing to the inability to register as IDPs) and would face severe discrimination and

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411 Evidence i) - Report of Human Rights Watch.
412 Evidence f) - Interview of UNMIK spokesman for Northern Kosovo.
413 Evidence l) - ERRC Letter of Concern.
414 Evidence h) - UNHCR Position on International Protection Needs of Individuals from Kosovo.
415 Evidence g) - UNHCR Update; Evidence m) - ERRC, “Serious Protection Problems for RAE in Kosovo”.
416 Inter alia, Evidence j), l) etc.
417 Evidence h) - UNHCR Position paper of 2004.
418 Evidence a) and b) – Minutes of 28 July and 6 August 2004.
8. Date of arrival in the Respondent State

The family of Mr K. arrived in Macedonia on ____.__.____ in an illegal manner.

9. Application for asylum in the Republic of Macedonia

The applicants applied for asylum in the Republic of Macedonia under the Law on Asylum and Temporary Protection on 28 July 2004. The same day the Ministry of Interior - Asylum Section (MoI - AS) interviewed the applicants without providing presence of a legal representative and decided to conduct accelerated proceedings, as the applicants several years ago sought and were granted the right to asylum in another state, which then ceased. The MoI - AS interviewed the applicants in the presence of their proxy on 6 August 2004. The applications were rejected by a decision of 11 August 2004, served on them on 13 August 2004. Deciding upon the appeal of 16 August 2004, the Government Appeals Commission, composed, inter alios, of officials of the Ministry of Interior, did not interview the applicants and presumably consulted the MoI - AS before making the second instance decision of 13 September 2004, which was served on the applicants on 17 September 2004.

10. Decision to expel

10.a) Time period for leaving the country

The MoI Asylum Section on 11 August 2004 ordered the applicants to leave the Republic of Macedonia within five days of the day of receipt of the decision, which expired following rejection of their appeal by the Government Appeals Commission.

10.b) The reasons for deportation

According to the reasons for the decisions, the competent authorities considered that the applicants had abused the asylum procedure because their right of asylum in another State Party to the Convention relating to the Status of Refugees has ceased on the grounds of the improvement of the situation in Kosovo. The competent authorities failed to make any reference whatsoever to the very much worsened situation in Kosovo after the violent incidents of March 2004 and the potential risk for the applicants to be subjected to inhuman or degrading treatment in Kosovo.

10.c) Date of expected expulsion

The applicants were informed that they should leave the territory of the Republic of Macedonia after receiving the second instance decision in an accelerated asylum procedure on 17 September 2004. The expulsion may occur at any moment.

\[^{421}\] Evidence b) – Minutes of 6 August 2004.
\[^{422}\] Evidence q) – Report of the United States Committee on Refugees and Immigrants, covering 2003: “The official who made the decision in the initial proceeding participates in the administrative Appeal commission which issues the appeal decision.”
10.d) Country of destination

UNMIK administered province of Kosovo (Serbia and Montenegro).

11. Grounds for fear

The applicants are persons of Ashkaelia ethnic origin who have a well-founded fear of persecution for reasons of their ethnic origins (nationality) and race and they also face a real risk of being subjected to inhuman or degrading treatment and lethal assaults in the case of enforcement of the expulsion to their country of origin. The fear of the applicants is well-founded since they have been subjected to violence during the riots in Kosovo in March 2004 which placed their lives and fundamental freedoms at risk, and there is still a real risk that they would become victims of serious maltreatment in any part of Kosovo in case of forced return. Forcible expulsion of the applicants to Kosovo just few months after the March 2004 incidents will be contrary to the UNHCR conclusions and the UN Security Council Resolution 1244 (which reaffirms the right of all refugees and displaced persons to safely return to their homes in Kosovo) and will seriously jeopardise their fundamental rights under the European Convention on Human Rights (ECHR).

12. Evidence submitted

a) Minutes of the interview before the Asylum Section of 28 July 2004.
b) Minutes of the interview before the Asylum Section of 6 August 2004.
f) Interview with the UNMIK Spokesperson for Northern Kosovo, Magyar Hirlap 19 April 2004.
g) UNHCR Update on the Kosovo Roma, Ashkaelia, Egyptian, Serb, Bosniak, Gorani and Albanian communities in a minority situation, June 2004.
h) UNHCR Position on the Continued International Protection Needs of Individuals from Kosovo, August 2004.


l) European Roma Rights Centre (ERRC), Letter of Concern to Kosovo and European Authorities over Violence against Roma, Ashkaelia, Egyptians and Others Regarded as “Gypsies” in Kosovo, and Long-Term Impunity for their Persecutors, 31 March 2004.431

m) ERRC, “Serious Protection Problems for RAE in Kosovo”, 2003.432

n) Unofficial translation of selected Articles of the Law on Asylum and Temporary Protection and the Law on the Movement and Residence of Aliens (LMRA).


o) UNHCR, The Possibility of Applying Internal Flight or Relocation Alternative within Serbia and Monte Negro to Certain Persons Originating from Kosovo and Belonging to Ethnic Minorities There, August 2004.434


q) United States Committee on Refugees and Immigrants, World Refugee Survey 2003, Report on Macedonia.436


13. Articles of the Convention invoked by the applicants

*Articles 2 and 3 of ECHR could be violated in case of expulsion of the applicants to Kosovo or to Serbia and Montenegro.* According to the case-law of the European Court of Human Rights (ECtHR), whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.437 The *risk of irreversible harm is real* 438 in the light of all the material placed before the ECtHR 439

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432 http://www.errc.org/cikk.php?cikk=1438&archiv=1
434 http://www.unhcr.org/refworld/pdfid/41249b504.pdf
436 http://www.uscr.org/world/countryrpt/europe/2003/macedonia.cfm
437 Chahal v. the United Kingdom, judgment of 15 November 1996, § 80.
438 Evidence a), b) and f)-m).
and in view of the reluctance or disability of the authorities of the receiving state to obviate the risk of violation of Articles 2 and 3.\textsuperscript{440} The risk emanates from the widespread violence against ethnic minorities in Kosovo,\textsuperscript{441} inflicted by non-state agents of persecution.\textsuperscript{442} The personal position of the applicants is worse than other members of the Roma, Ashkaelia and Egyptian (RAE) communities,\textsuperscript{443} because of: a) The risk of recurrence of the ill-treatment already inflicted on them and some other Ashkaelia in their town; and b) The suspension of the UNHCR programme of voluntary repatriation to V.

The applicants in an event of their expulsion to Kosovo face ill-treatment that attains the minimum level of severity, considering the severity of the ill-treatment to which members of the RAE communities were subjected during the March 2004 incidents and before, consisting of assaults, stoning, grenade attacks and house looting.\textsuperscript{444} There is no effective protection by the Kosovo authorities in the light of their failure to conduct effective investigations into allegations of ill-treatment.

\textit{Article 13 of ECHR in conjunction with Article 3 has been violated} because the remedies available to the applicants were not “effective” in laws as well as in practice to examine the substance of an “arguable complaint” under the Convention and to grant appropriate relief.\textsuperscript{445} In the particular case, the applicants were deprived of meritorious determination of their Art. 3 claim and of procedural safeguards due to: a) The decision of MoI - AS to conduct an accelerated asylum procedure and not to determine the risk of violation of Article 3; b) Consideration of the appeal by a Government body (composed by officials subordinated to the Minister of Interior) which is not independent and transparent;\textsuperscript{446} c) Lack of the Supreme Court protection\textsuperscript{447}; and, d) the non-suspensive character

\textsuperscript{439} Chahal, cited above, §§ 97-107.
\textsuperscript{440} Evidence i)-l).
\textsuperscript{441} Vilvarajah \& others v. the United Kingdom, judgment of 30 October 1991, § 107: “... the existence of risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting state at the time of expulsion.”
\textsuperscript{442} H.L.R. v. France, judgment of 29 April 1997, § 40.
\textsuperscript{443} Unlike the applicants in Vilvarajah \& others, quoted above, § 113.
\textsuperscript{444} Evidence m). In the case of Akdivar v. Turkey (decision of 19 October 1994) the European Commission of Human Rights considered that deliberate destruction of homes of evicted peaceful civilians breached the right under Article 3. This applies, mutatis mutandis, to the K. case because of the failure and reluctance of the Kosovo authorities to provide appropriate protection.
\textsuperscript{445} Hilal v. U.K., no. 45276/99, § 75, ECHR 2001-II; Jabari v. Turkey, no. 40035/98, § 50, ECHR 2000-VIII: “... the notion of effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim ... [ under Art. 3] ... and the possibility of suspension of the measure impugned”.
\textsuperscript{446} Evidence q): “On appeal, the applicant is not heard.”
\textsuperscript{447} The case should be distinguished from Sijaku v. Macedonia (Appl. 8200/02, decision of 13 March 2003), where the asylum claim was examined in a regular procedure and the applicant was afforded the Supreme Court proceedings. Argumentum a contrario, the absence of basic guarantees for protection of Art. 3 rights violates Art. 13 in conjunction with Art. 3!
of the request for non-expulsion under Article 39 of the LMRA and absence of any re-
sponse of the competent authority to the request in this case (and in many other cases\textsuperscript{448}).

14. Interim measure requested

The applicants must not be expelled until the ECtHR’s decision under Articles 2 and 3 and Article 13 in conjunction with Article 3.

15. Domestic remedies

The applicants appealed against the decision of the MOI - AS delivered in an accelerated procedure. The appeal was rejected on 13 September 2004. Following the receipt of the negative second instance decision on __.___.____, the applicants were not entitled to lodge a lawsuit to the Supreme Court. On 23 October 2004 the applicants lodged a request for non-expulsion under Article 39 of the LMRF (based on Article 3 of the ECHR), which does not suspend execution of the expulsion order. MoI did not respond to the request.

16. Any other domestic authority competent to stop expulsion

There is no other effective remedy before any domestic authority capable of suspending the execution of the expulsion order.

17. Assessment of the CSRC regarding the case

The Civil Society Resource Centre (CSRC) possesses detailed and credible information on the situation in the applicant’s country of origin indicating that return of the applicants to Kosovo would place them at real risk of very serious treatment prohibited by Article 3 of ECHR, hence CSRC urges that they should not be forcibly returned.\textsuperscript{449}

**Follow-up proceedings after the request under Article 39 was lodged**

On 22 December 2004 ECtHR indicated to the Government of the Republic of Macedonia that it would be desirable in the interest of the parties and the proper conduct of the proceedings to apply the interim measure of non-expulsion. The interim measure was extended on 13 January 2005. The Government expressed its commitment to comply with the indicated interim measure.

However, the rejected asylum seekers (who at the time of lodging the request under Rule 39, were hiding owing to fear of expulsion on different locations for several weeks), just before the date of indication of the interim measure had left the country without informing the legal representatives and then stated that they do not want to pursue the application. On 9 October 2007 the Court decided to strike the application out of its list of cases.

\textsuperscript{448} The vast majority of the requests remained unanswered by MoI and a few were rejected.

II.3. CSRC SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE WITH REFERENCE TO THE REPORT OF THE REPUBLIC OF MACEDONIA UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 2007

Issue of concern: Lack of effective remedy in an accelerated asylum procedure.

Summary: The absence of lawsuit in an accelerated asylum procedure constitutes a disrespect of the right to effective remedy under Article 2, paragraph 3 of the International Covenant on Civil and Political Rights [ICCPR] and poses a threat to the exercise of asylum seekers’ right under Article 7 of the ICCPR.

Articles 2 and 7 of ICCPR

According to the Law on Asylum and Temporary Protection (LATP) of 2003, regular asylum proceedings is conducted by the Ministry of Interior’s Asylum Section (MoI - AS) in first instance (Article 27) and the Government Appeals Commission competent of, inter alia, internal affairs in second instance (Article 32, paragraphs 1-3) and a rejected asylum-seeker is entitled to lodge a lawsuit to the Supreme Court (Article 32, paragraph 4). Accelerated procedure is stipulated (inter alia) for manifestly unfounded cases (Article 34),\(^450\) and Article 37, paragraphs 1-3 of the LATP regulates the second instance accelerated procedure, but Article 37, paragraph 4 of the LATP does not permit lodging a lawsuit against a decision issued in an accelerated proceedings.

A substantial number of members of the Government Appeals Commission in charge of internal affairs come from the MoI and they usually have a higher ranking and less expertise compared to MoI - AS officials. The involvement of officials of the same Ministry both in first and second instance decision-making is contrary to the legal principle nemo judex in causa sua. Furthermore, no effective examination on merits seems to exist in both instances in an accelerated asylum procedure, following which there is no any effective remedy capable of preventing the expulsion. It is regrettable that even the Constitutional Court refused to instigate proceedings for evaluation of constitutionality of Article 37, paragraph 4 of the LATP, concluding that Article 9 and Article 50, paragraph 2 of the Constitution guarantees non-discrimination and judicial protection respectively only to “citizens” of the Republic of Macedonia.\(^451\)

We should like to emphasise the importance of this issue on the basis of experience accumulated from representing nearly 2,500 asylum seekers in the period 2001-2007, in-

\(^{450}\) The asylum claim is manifestly ill-founded if the fear of persecution is groundless or based on deception, if the claimant has arrived from a safe third country etc. (Article 35 of the LATP)

\(^{451}\) Decision U no. 2/2004 of 16 February 2005, published in OGRM no. 23/2005 on 12 April 2005. In his dissenting opinion one judge objected that, inter alia, Macedonian citizens cannot claim and enjoy the right to asylum and that exclusion of foreign citizens from judicial protection is incompatible with the rule of law.
cluding nearly 2,300 under the LATP. In several cases processed under accelerated procedure we observed that the lack of entitlement of rejected asylum seekers to lodge a lawsuit put them in a real and imminent danger of being removed to an unsafe country, potentially jeopardising their right under Article 7 of the ICCPR, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\textsuperscript{452} and Article 11 of the Constitution.

Article 2, paragraph 3 of the ICCPR reads as follows:

> “3) Each State Party to the present Covenant undertakes:
> 
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> 
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.
> 
> (c) To ensure that the competent authorities shall enforce such remedies when granted.”

Article 7 of the ICCPR, \textit{inter alia}, stipulates the following:

> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. […]”

CAT defines torture (Article 1), obliges States Parties to prevent acts of torture (Article 2), and provides extraterritorial guarantees for prevention of torture (Article 3, paragraph 1):

> „1. No State Party shall expel, return (“refoul”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”

Article 11 of the Constitution, \textit{inter alia}, stipulates the following:

> „[…] Any form of torture, inhuman or degrading treatment or punishment is prohibited […]“

Articles 3 and 13 of the ECHR contain basically the same guarantees as Article 7 and Article 2, paragraph 3 of the ICCPR respectively. The European Court of Human Rights (ECtHR) has established in cases under Article 13 of the ECHR in conjunction with Article 3 that the remedy should be “effective” in practice as well as in law to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief,\textsuperscript{453} and that the notion of effective remedy under Article 13 requires independent and

\textsuperscript{452} All aforementioned legal acts are ratified and are an integral part of the internal legal order, in accordance with Article 118 of the Constitution.

\textsuperscript{453} \textit{Hilal v. U.K.}, no. 45276/99, § 75, ECHR 2001-II.
rigorous scrutiny of a claim under Article 3 and the possibility of suspending the measure impugned. In one case the ECtHR indicated interim measures of non-expulsion following our claims that the lack of effective remedy in an accelerated asylum procedure posed a threat of ill-treatment of the rejected asylum seeker in the receiving country (Application no. 44922/04).

We also rely on the General Comment No. 31[80] of the Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant of 2004”, which reiterates that “[...] the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees [...]” (paragraph 10). Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed” (paragraph 12). “Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order [...]” (paragraph 13). “[...] A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State” (paragraph 14). Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.” (para. 15).

On the basis of the above, we invite the Republic of Macedonia to observe its obligations under Article 2, paragraph 3 and Article 7 of the ICCPR and to provide judicial protection in an accelerated asylum procedure.

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454 Jabari v. Turkey, no. 40035/98, § 50, ECHR 2000-VIII.
455 Adopted on 29 March 2004 at the 2187th meeting.
456 Zoran Gavriloski wrote on behalf of the CSRC this submission (available at: http://www2.ohchr.org/english/bodies/hrc/docs/ngos/CSRC.pdf), which was lodged on 27 July 2007 and signed by Mr Suad Missini in his capacity of Executive Director. CSRC also enclosed an analysis on the appeal system, which can be found in Section II.5 of this book (Edit. note).
II.4. CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE, 17 APRIL 2008 (EXCERPTS)

The Human Rights Committee, having considered the report of the Republic of Macedonia under the ICCPR\textsuperscript{457} and the information from CSRC and other NGOs\textsuperscript{458} on its 97\textsuperscript{th} session from 17 March to 4 April 2008, issued its Concluding Observations on 17 April 2008,\textsuperscript{459} emphasising, \textit{inter alia}, the following:

“16. The Committee notes the State party’s commitment not to forcibly return rejected asylum-seekers to Kosovo and to fully cooperate with the Office of the UN High Commissioner for Refugees in order to ensure a return in safety and dignity, but remains concerned about the system of appeal regarding the independence of the appellate instance (arts. 7, 12, 13).

The State party should ensure that return is always fully voluntary and not enforced where return in safety and dignity cannot be assured. To this end, the State party should particularly ensure that an effective system of appeal is in place.”

\textbf{FOLLOW-up EVENTS}

The Republic of Macedonia continuously complied with the above recommendation by allowing around 450 rejected asylum seekers to remain in its territory, and in general respected the \textit{non-refoulement} principle. The right to lawsuit in accelerated procedure was regulated by the Law Changing and Amending the LATP in November 2008.\textsuperscript{460}

\textsuperscript{457} Report submitted by the Republic of Macedonia under Article 40 of ICCPR to the Human Rights Committee, 6 November 2006, CCPR/C/MKD/2 (available at: http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.MKD.2.pdf). \textit{Inter alia}, the report states the following:

“149. In 2000, five families of Roma ethnic background, who were refugees from Kosovo, had been conditionally sentenced to six months imprisonment for forgery of travel documents and were waiting for the security measure of deportation from the country imposed against them to be executed. They submitted an application against the Republic of Macedonia before the European Court of Human Rights for alleged violation of their right to life and their right to humane treatment under articles 2 and 3 of the European Convention on Human Rights. In reviewing the application’s admissibility, the European Court decided to impose an interim measure against the Republic of Macedonia, requesting it not to expel the applicants. In the meantime, two of these families voluntarily returned to Kosovo.”

CSRC, whose lawyer brought the case before the ECtHR (appl. 60855/00), gladly notes that the State complied with the indicated interim measure by permitting the members of the remaining family to remain in its territory as temporary humanitarian assisted persons. (Edit. note)

\textsuperscript{458} http://www2.ohchr.org/english/bodies/hrc/hrccs92.htm


\textsuperscript{460} Please see the last paragraph of Section II.6 in this book.
II.5. CSRC SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE WITH REFERENCE TO THE REPORT OF THE REPUBLIC OF MACEDONIA UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 2008

Issue of concern: Suspensive character of appeal/effectiveness (issue no. 8 in the list of issues of the Committee against Torture)

Summary: The lack of a lawsuit in accelerated asylum procedure is contrary to Article 3 of the Convention against Torture (CAT).

Article 3 of the Convention against Torture

1. According to the Law on Asylum and Temporary Protection (hereinafter referred to as LATP) of 2003, regular asylum proceedings are conducted by the Ministry of Interior’s Asylum Section (hereinafter referred to as MoI - AS) in first instance (Article 27 of the LATP) and by the Government Appeals Commission in second instance competent, inter alia, for internal affairs, to which an appeal can be submitted within 15 days from the day of serving the first instance decision (Article 32, paragraph 1 of the LATP). A lawsuit can be lodged within 30 days from the day of serving the administrative act to the party (Article 32, paragraph 4 of the LATP). An appeal has suspensive effect (Article 32, paragraph 2 of the LATP), while a lawsuit does not have automatically such effect. Therefore, the lawyers of the Civil Society Research Centre (hereinafter referred to as the CSRC) were lodging requests to MoI to suspend expulsion of rejected asylum seeker pending judicial outcome, which were often accepted, however under rather vague criteria.

2. The LATP stipulates an accelerated procedure for manifestly ill-founded asylum claims (Article 34)\(^{461}\) and an appeal against first instance rejection (Article 37, paragraphs 1-3), but administrative decisions in an accelerated procedure are not subject to judicial control (Article 37, paragraph 4). There are no other remedies capable of preventing deportation following dismissal of appeal in an accelerated procedure.

3. The CSRC (coordinator of UNHCR project) and the Macedonian legal network represented around 2,500 asylum seekers in the past eight years. As of 31 March 2008 there were 1,840 refugees and asylum seekers in the Republic of Macedonia, of which 1,123 were enjoying the right to asylum due to humanitarian protection (including those whose

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\(^{461}\) The asylum claim is ill-founded if the fear of persecution is groundless or based on deception, if the claimant has arrived from a safe third country, etc. (Art. 35 LATP)
cases were pending judicial decision upon appeal against cessation of asylum), and around 450 finally rejected asylum seekers were tolerantly permitted to stay.

The rate of rejection of appeals amounted to around 99%, probably because the Government Appeals Commission:

- Is not an independent and impartial body, as the Government establishes it by appointing officials from the ministries concerned, who have a higher rank than the MoI - AS officials,
- Works in a non-transparent manner, in spite of accepting several requests of complainants and their proxies to attend its sessions a few years ago;
- Is ineffective because it merely repeats the findings of the MoI - AS, instead of paying sufficient attention to the enclosed evidence and arguments;
- Lacks sufficient knowledge and relevant experience with regard to asylum, because of the broad range of issues which fall within its competence (internal affairs, judiciary, state administration, local self-government and matters of a religious character).

Therefore the Commission should be either strengthened by external members who are knowledgeable in a particular area (asylum), or replaced by an independent and impartial appeals body, such as a Refugee appeal board.”

4 In addition to the aforementioned shortcomings, there was no substantive examination in an accelerated asylum procedure, including assessment whether execution of a decision to expel can put a rejected asylum seeker in real and imminent risk of being subjected in another country to treatment prohibited by Article 3 of the CAT, Article 7 of the ICCPR, Article 3 of the ECHR and Article 11 of the Constitution. In one such case the European Court of Human Rights, having considered our allegations that the lack of effective remedy in the aforementioned circumstances amounts to a violation of Article 13 in conjunction with Article 3, indicated an interim measure of non-expulsion (Application no. 44922/04), which was observed by the State.

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462 A person under humanitarian protection is an alien to whom the Republic of Macedonia shall grant the right of asylum on humanitarian grounds and give a permission to remain within its territory because he would be subjected to torture, inhuman or degrading treatment or punishment in the state of his origin. (Article 5 of the LATP).

463 Please see below the annex “Proposal for Reforming the Appeal System in Asylum Procedure”, CSRC, 2004.

464 “No one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment. […]” (Article 3 of ECHR has a similar wording).

465 “[...] Any form of torture, inhuman or degrading treatment or punishment is prohibited [...]”

466 Regarding the issue of effectiveness of remedy in conjunction with the prohibition of torture, the ECtHR established that the notion of effective remedy under Article 13 requires independent and rigorous scrutiny of a claim under Article 3 and the possibility of suspension of the measure impugned (Jabari v. Turkey, no. 40035/98, § 50, ECHR 2000-VIII).
5. Article 3, paragraph 1 of the CAT reads as follows:

“1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

6. To substantiate the claimed need of introducing an effective remedy in an accelerated procedure, reference is made to the General Comment No. 31 [80] of the Human Rights Committee, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004)”\(^{467}\), which reiterates that “[…] the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees […]” (para. 10) and that the States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights …” (para. 15)

7. The CSRC welcomes the fact that the State does not return rejected asylum seekers to Kosovo and draws attention to paragraph 16 of the Concluding Observations of the Human Rights Committee, issued on 17\(^{th}\) April 2008.

“16. The Committee notes the State party’s commitment not to forcibly return rejected asylum-seekers to Kosovo and to fully cooperate with the Office of the UN High Commissioner for Refugees in order to ensure a return in safety and dignity, but remains concerned about the system of appeal regarding the independence of the appellate instance (arts. 7, 12, 13).

The State party should ensure that return is always fully voluntary and not enforced where return in safety and dignity cannot be assured. To this end, the State party should particularly ensure that an effective system of appeal is in place.”

8. The CSRC is concerned about the fact that the appeal body lacks independence, impartiality and effectiveness, and that there is no judicial protection of asylum seekers who are rejected in an accelerated procedure. Therefore, CSRC urges the Republic of Macedonia to introduce by law a right to instigation of an administrative dispute following dismissal of appeal in an accelerated procedure.

CSRC, 6 May 2008\(^{468}\)

\(^{467}\) Adopted on 29 March 2004 on the 2187\(^{th}\) meeting.

\(^{468}\) Zoran Gavriloski wrote the submission to the CAT (available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/OMCTCivilSocietyResearchCenter_FYROM40.pdf), here edited. He also wrote the general part of the alternative report of OMCT - Geneva, CSRC & ESE to the CAT (http://www2.ohchr.org/english/bodies/cat/docs/ngos/CSRCAppeal_Macedonia40.pdf).
Legal frame of the second instance procedure

The Law on the Government of the Republic of Macedonia stipulates that the Government establishes commissions for determining matters in administrative procedure in second instance in particular areas (hereinafter referred to as commissions), which adopt their own Rules, governing the internal organisation and the manner of work. Rules of particular commissions are not available to the public. However, CSRC was able to obtain “Draft Rules of a commission […]”, which states that designated State officials have a right and duty to participate in the work of a particular commission during examination and decision-making upon appeals, and that they are responsible for legal, impartial and efficient performance of tasks falling within the mandate of that commission.

The Government Commission Determining Matters in Administrative Procedure in Second Instance in the Area of Internal Affairs, Judiciary, State Administration, Local Self-government and Issues of Religious Character (hereinafter referred to as the Commission) is composed of State servants (including at least 1-2 MoI officials), whose names are not publicly disclosed. Such composition of the Commission is contrary to the legal principle “nemo judex in causa sua” and, having in mind possible pressure over MoI officials by their superiors for decision-making in a certain way in particular cases, this scheme can affect asylum seekers’ right to effective remedy, protected by relevant international standards.

Furthermore, it is less likely that members of this Commission, in charge of so broad range of issues, have sufficient capacity to deal competently with complex asylum issues, as they are less experienced and trained on asylum in comparison with the MoI-AS officials.

Second instance processing of asylum cases 2000-2004

From 2000 up to now, while dealing with appeals lodged by asylum seekers, the Commission Determining Internal Affairs did not scrutinise the facts and evidence objectively, nor it provided appropriate rationales (merely repeating and even copy-pasting the MoI-AS officials).

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469 Analysis by Zoran Gavriloski on behalf of CSRC, shortened in this book (Edit. note).
470 Law on the Government of the Republic of Macedonia, OGRM nos. 59/00, (dec. no. 131/2000 in no. 26/01) and 12/03, Article 23, paragraph 2.
471 Rules for the work of the Government of the Republic of Macedonia, OGRM nos. 38/01, 98/02, 9/03, 47/03, 64/03 and 67/03, Articles 59 and 63.
472 Unpublished document, presumably intended to serve as a draft model for the commissions.
473 A President (a highly-ranked oficial, whose name is the only one appearing in the decisions), representatives of the Ministry of Interior (Advisers or Inspectors), a representative of the Ministry of Justice (State Adviser) and a representative of the Commission for Relations with the Religious Communities and Groups.
474 The Council of Europe’s 1998 Recommendation no. R. 98 (13) regarding the right of rejected asylum seekers to effective remedy stipulates that cases should be reviewed by a judicial, quasi-judicial or administrative authority composed of independent and impartial members.
AS findings and reasons), and only from 2003 and onwards did it start to refer to the human rights reports which we enclosed to our appeals.

Even though the Law on General Administrative Procedure entitles the second instance authorities to supplement the procedure and remedy the observed shortcomings if the facts were incompletely or erroneously ascertained in the first instance procedure, the Commission determining asylum appeals failed to do so, as it had not conducted any independent research, nor did it summon complainants and their legal representatives to state facts and evidence in person at the Commission’s sessions (in spite the CSRC lawyers requested so). In the aforementioned circumstances international standards require effective examination at second instance, as the failure of ascertaining facts at first instance would render ineffective the asylum proceedings as a whole.

**RECOMMENDATIONS**

The lack of ineffectiveness could be probably dealt with by providing the members of the Commission with training on asylum and updated information regarding a particular country of origin. The lack of transparency could be partially overcome by summoning the rejected asylum seekers and their proxies to attend the Commission’s sessions. However the lack of independence and impartiality is a serious weakness, which requires reform of the system of consideration of appeals in asylum cases. Therefore, civil society representatives should be allowed to participate in the work of the Commission determining asylum appeals (at least in advisory capacity), until a law establishes a decision-making body examining appeals in a higher instance, composed of independent and impartial members. 

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475 Law on General Administrative Procedure, OGPFRY no. 52/56; OGSFRY nos. 10/65, 4/77, 11/78, 9/86 and 16/86; OGRM no. 44/02, Article 242, paragraph 1.

476 The Danish Refugee Board is a quasi-judicial body composed of a judge (a chairman) and two other members appointed by the Ministry of Refugee, Immigration and Integration Affairs and the Danish Bar and Law Society, competent of reviewing cases which were rejected by the Danish Immigration Service in regular procedure. The Australian Refugee Review Tribunal is an independent body composed of lawyers, public servants and refugee advocates, competent of reviewing cases which were initially examined by Australian immigration officers.
II.6. CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE, 21 MAY 2008 (EXCERPTS)

The Committee against Torture, having considered the report of the Republic of Macedonia under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the alternative reports and other submissions of CSRC and other NGOs at its 40th session from 28 April to 16 May 2008, issued its Concluding Observations on 21 May 2008, emphasising inter alia the following:

“8. The Committee is concerned at the inadequate functioning of the system for processing and determining asylum claims, especially with respect to those claims channelled through the so-called “accelerated procedure”.

The State party should ensure that a thorough review of each individual case is provided for asylum claims. In this respect, the State party should ensure that effective remedies are available to challenge the decision not to grant asylum, especially when the claim is channelled through an accelerated procedure. Such remedies should have in any case the effect of suspending the execution of the above decision, i.e. the expulsion or deportation.”

FOLLOW-UP EVENTS

The Law Changing and Amending the LATP of November 2008 abolished the second instance asylum procedure before the Government Appeals Commission; however no new second instance body was established. Article 37, paragraph 1 of the amended LATP entitles rejected asylum seekers whose application has been processed in accelerated procedure to lodge a lawsuit for instigation of an administrative dispute before the Administrative Court, which suspends execution of the decision delivered in accelerated procedure.


478 Information provided to the Committee by non-governmental organisations (available at: http://www2.ohchr.org/english/bodies/cat/cats40.htm).


481 The amended Art. 37.2 of the LATP reads as follows: “The law-suit of paragraph 1 of this Article suspends the execution of the decision” (delivered in accelerated procedure”), without subjecting that suspension to any approval by the Administrative Court or the MoI-AS.