The right to freedom versus the State's response to irregular migration - critical observations for North Macedonia

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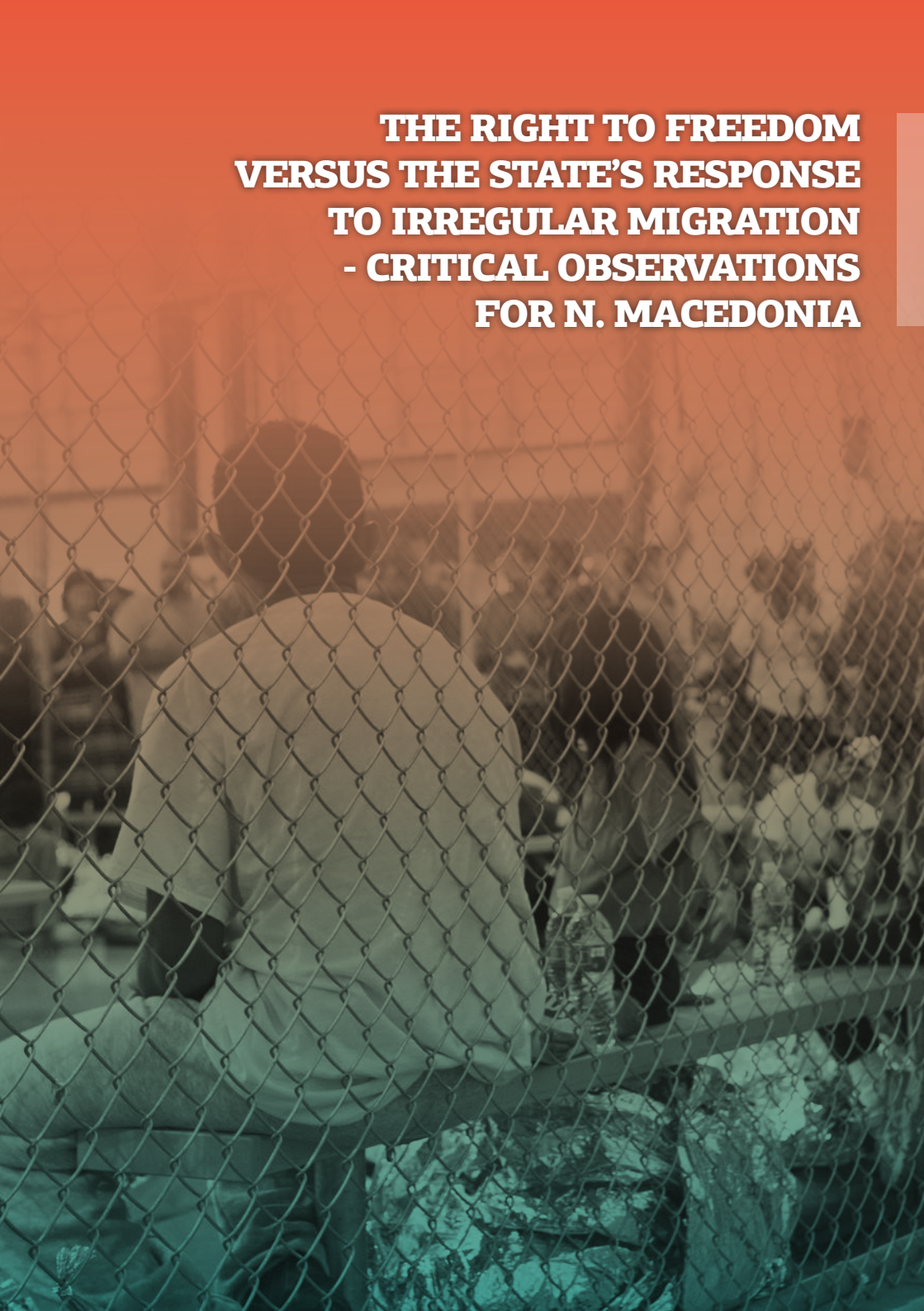

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Macedonian Young Lawyers Association

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Contents

Abbreviations

RNM	Republic of North Macedonia
MYLA	Macedonian Young Lawyers Association
EU	European Union
USAID	United States Agency for International Development
MoI	Ministry of interior
NPM	National Preventive Mechanism
NPM	National Preventive Mechanism
LITP	Law on International and Temporary Protection
LF	Law on Foreigners
LATP	Law on Asylum and Temporary Protection
UN	The United Nations
UNHCR	United Nations High Commissioner for Refugees
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
CoE	Council of Europe
IDC	International Detention Coalition
NGO	Non Governmental Organization

Abstract

> **MAN IS BORN FREE, BUT EVERYWHERE IS IN CHAINS**
>
> *(Jean-Jacques Rousseau)*

The right to freedom of movement is a fundamental human right. It is not an absolute right, i.e. it is subject to restrictions in certain situations. The restrictions on the right to freedom of movement must be clear, precise and predictable, in accordance with internationally accepted standards and conventions, and appropriately applied in national legislation. The right to move freely is also an opportunity. Opportunity to move from one place to another, from one country to another. Provided that the person who is moving has a residence or is a citizen of that particular state.

Notwithstanding the above however, the question is what happens to persons without regulated residence, who have migrated from one country to another with the help of smugglers, using irregular routes or unofficial border crossings? What is their status? Are the restrictions on movement explicitly created for such cases? What happens when the authorities identify a person without regulated residence, or a person who is not a citizen of the country where he or she is found? What are the legal consequences for these people, and what measures are taken by the authorities? Are they detained and investigated? Is their freedom of movement restricted *de jure*, or they are deprived of their liberty *de facto*?

On the other hand, even if these people are deprived of their liberty or, even if their freedom of movement is restricted by the letter of the law, a question related to the conditions in which they are held arises. Are they in place, and what are the standards these places of detention should meet? Finally, what is the treatment and the approach of the authorities towards these people when they are being held?

The recent migration crisis was embodied by daily crossings of borders by thousands of people in search for shelter. In their path, they often met with States' measures for migration management. That process is still ongoing. Restrictions on freedom of movement and deprivation of liberty are the most severe forms of state interference with human liberties.

Therefore, the Macedonian Young Lawyers Association (MYLA) called several theoreticians and practitioners from the country and abroad to share their views and experiences on the above mentioned issues and to provide critical overview of the response of Republic of North Macedonia (RNM) to the migration crisis through the application of measures on restriction of freedom of movement. The authors of these articles, through legal analysis and comparative research, point out the national and international legislation that is applicable in both regular and irregular migration and the measures which are often taken. Moreover, they emphasize the importance for proper treatment towards the people that migrate, regardless of their reasons. Each article contains its own conclusion on the issue that it is addressing, but also lays down recommendations to the authorities to improve and overcome the gaps in the legislation, policies and practices with migration management.

LIMITATION OF FREEDOM OF MOVEMENT OR DEPRIVATION OF LIBERTY - THE IMPORTANCE OF A DISTINCTION

Ivana Roagna

This chapter reviews the provisions of the legislation related to detention of foreigners and asylum seekers in North Macedonia in light of the European Convention on Human Rights (the "ECHR" or "the Convention"), identifying where and how the wording seems to suggest a conflict with the international human rights standards. It does so in the first place by drawing a distinction between the right to liberty and security and freedom of movement, and spelling the conditions under which a limitation of such liberties are possible. It then continues by elucidating the standards applicable in cases of detention. In the last part of the work, these canons are then applied to the selected provisions of the national legislation, and a conclusion as to their compliance is presented. It should be noted that the present article focuses on the legal texts only. It does not extend to the practice that such norms have originated from their judicial interpretation, which might either address the flaws identified or represent an issue of additional concern.

Introduction

In line with customary rules of international law, the ECHR does not guarantee the right to enter or settle into a foreign country. Nor it guarantees, as such, the right to asylum, although pushing back individuals who are at risk of torture or inhuman or degrading treatment or punishment, is prohibited by Article 3 of the ECHR. In regulating access into its territory, however, Member States to the Council of Europe have an obligation to comply with the human rights obligations stemming from the Convention.

Instances related to the movement of people across borders are regulated under the ECHR by two provisions: Article 5.1 f) disciplines deprivation of liberty of foreigners in the context of entry or deportation/extradition proceedings, whereas restriction of movement is governed by Article 2 of Protocol No. 4 ("Article 2P4") ECHR. Defining whether a situation amounts to detention[1] or limitation of movement is key in order to determine the standards applicable. This is easier said than done as, according to the doctrine of the autonomous meaning under the Convention developed by the ECtHR, the terms used by the ECHR are subject to an independent interpretation by the Court, which is not bound by the definitions provided by domestic laws. This approach ensures that States are able to avoid their international obligations by simply relying on the national definitions provided. Thus, when asked to scrutinize a certain instance, the ECtHR will not stop at the formal classification stipulated by internal legislation, but will rather look at its substance.

[1] Detention is a term that under the ECHR is a synonym to deprivation of liberty, regardless of the wording used in the national legislation.

DEPRIVATION OF LIBERTY AND RESTRICTION OF MOVEMENT OF ALIENS UNDER ECHR: THE IMPORTANCE OF A DISTINCTION

Before determining what amounts to a deprivation of liberty, let us explore the definition of freedom of movement under the ECHR.

Article 2 of Protocol No. 4 ECHR Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of 'ordre public', for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

The text of the provision does not explicitly refer to foreigners. However, the distinction it draws between persons who are "lawfully" or "unlawfully" present on a territory obviously marks that difference, as only non-nationals can have an issue related to the legality of their stay.

According to this provision, only lawfully-staying non-nationals enjoy the right to move freely within a State and choose their abode. Whether a migrant can be considered "authorized" to enter the territory of the State is a matter of the domestic legislation[2]. The ECtHR accepts that migrants admitted under certain conditions by the national authorities are "lawfully within the territory" of that State provided that they comply with the conditions applied, for instance, living in a certain area[3]. As a corollary, those foreigners authorized to enter and allowed to remain for a limited time on humanitarian grounds or to transit through the State, may not necessarily derive under the Convention a right of permanent admission. Therefore, they are not entitled to freedom of movement under the ECHR.

[2] *Suso Musa v. Malta,*

[3] *P v. the Federal Republic of Germany.*

Freedom of movement is a qualified right. This means that the right can be interfered with for the purpose of protecting the rights of others or the wider public interest. The conditions for such interference are listed in paras. 3 and 4 of Article 2P4: in addition to the legal basis, restrictions must pursue one of the legitimate aims listed, representing a closed number, and must be necessary and proportionate to the aim pursued. In determining the breadth of the compression, States enjoy a certain margin of appreciation which has to be weighed when striking the balance between the interests at stake (that of the individual and of the wider community).

Conversely, Article 5 ECHR protects the individual against arbitrary interference by the State with his or her right to liberty. After stating a presumption in favor of liberty, the text continues with an exhaustive list of permissible exceptions. Of these, the one listed in sub-paragraph 1.f is relevant to foreigners.

Article 5, Right to liberty and security

> *"1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."
>
> Detention of migrants can occur in a variety of situations: when a person is refused entry into a country, in case of irregular entry, for the purpose of identification, in case of overstay following a regular entry, or when asylum seekers' detention is considered necessary by the authorities.

In the area of immigration, detention should be the exception rather than the rule. The fact that administrative detention of migrants is dealt separately clearly indicates that such category of individuals cannot be assimilated with those who have or are suspected of having committed a crime. Asylum seekers are individuals who have often undertaken and endured lengthy and risky journeys to save their lives from wars or persecutions. For this reason, the Court has expressed reservations in relation to national practices that, for instance, foresee the automatic detention of asylum seekers, without individual assessment of their particular needs[4]. However, the standard of protection provided under paragraph 1.f) is somehow less stringent than those, for example, applicable to the criminal sphere. Therefore, for such a ground to exist, it is not necessary that there is a risk of flight: all that is required is that "action is being taken with a

[4] Thimothawes v. Belgium, Mahamed Jama v. Malta.

view to deportation or extradition", and as long as such proceedings are in place.

Within the architecture of the Convention, Article 5 ECHR qualifies as a limited right. This means that detention can only be justified on the basis of the listed grounds, which are subject to restrictive interpretation. Should the detention be carried out for reasons other than those listed, or without a sufficient legal basis, it will be automatically be considered unlawful. No margin of appreciation or balancing of interests, allowed in general under Article 2P4, can be used when applying Article 5 ECHR in order to justify the deprivation of liberty.

Under the Convention, measures involving limitations of liberty or of movement of aliens are possible and will not always amount to deprivation of liberty. This is the case, for example, of confinement info reception or accommodation centers, or entry points to the country, such as the international zones of airports. The question is then about the criteria that can be used to draw the distinction between such situations, so as to be able to correctly qualify them and apply the relevant standards. As clarified by the ECtHR in the landmark case Guzzardi v. Italy, the difference between deprivation of liberty and restriction on freedom of movement is one of degree or intensity and not of nature or substance, and cannot be merely linked to the confinement itself, its length, and the place where it is enforced. Other factors will have to be considered. These are: the individual's situation, the type, duration, effects and manner of implementation of the measure in question, including for instance the presence of an element of coercion, the physical or psychological distress, the age and conditions of the individual.

THE REQUISITE OF LAWFULNESS OF THE DETENTION

In addition to listing the circumstances in which deprivation of liberty is allowed, Article 5 ECHR also provides for a number of conditions in the absence of which, even within the listed situations, the detention may be rendered unlawful. According to the requirement of legality, the deprivation of liberty must be grounded into national law. This is a requisite that cannot be interpreted literally in the sense that the existence of a legal ground would suffice. Conversely, it is required that the law is accessible, intelligible, sufficiently precise (including, for instance, grounds for ordering and extending detention, time limits) and predictable in its consequences. A law conferring discretion is not as such in contravention with Article 5 ECHR, provided that the scope of discretion is clearly defined and appropriate mechanisms to challenge it are available. In addition, the law itself must comply with the ECHR, including its general principles such as the rule of law, legal certainty in its interpretation and application, and proportionality.

As the purpose of Article 5 ECHR is to protect against arbitrariness and unjustified detention, the legal basis is not sufficient as the overall restriction must be "lawful". That of lawfulness is a complex concept that bears a number of facets: it implies that the deprivation of liberty must be closely linked to the detention ground relied upon (in the case of migrants it will be the one spelled out under sub-paragraph 1.f), is carried in good faith, in a place, under conditions, in an environment and for a duration that are appropriate, also having in mind the individual concerned (for instance in cases of sick person or a child). In cases when detention is ordered with a view to deportation or extradition, not only there must be a reasonable prospect of removal, to the country of origin or to a third country, but the related proceedings must be carried out with due diligence, without unjustified delays or periods of inactivity. A poor or non-existing reasoning in the detention decision, including when the decision is excessively brief and contains no reference to the legal basis, will also render the detention unlawful.

Being an exceptional measure, detention should last the least possible amount of time. In the case of administrative detention or detention pending deportation or extradition, even if the measure is considered necessary, the ECtHR has clarified that *"the length of the detention should not exceed that reasonably required for the purpose pursued"*[5]. Failure to do so will result in the detention being unlawful. Similarly, release from detention may be subject only to minor delays of few hours due to procedural formalities.

Confinement conditions also have a play in determining the lawfulness of the detention. Administrative detention must thus be enforced in dedicated centers, offering material conditions and a regime appropriate to the legal and factual situation of migrants and asylum seekers, and manned by suitably qualified staff. As stated by the ECtHR, there must be a relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention: premises should not be prison-like and should have adequate indoor and outdoor space and enjoy adequate light, ventilation, sanitary equipment; adequate food, medicine and care, and recreational options should be ensured. Under Articles 3 (Prohibition of torture, inhuman or degrading treatment or punishment) and 8 (Right to private and family life, home and correspondence) ECHR, States have a positive obligation to protect and care for vulnerable individuals by adopting all reasonable and suitable measures. Thus, for instance, families with children and unaccompanied children, should be provided with separate accommodation, catering for their needs and, as such, including for instance medical care and recreational and educational facilities suitable for the children's age. .

[5] Saadi v. United Kingdom.

PROCEDURAL OBLIGATIONS UNDER ARTICLE 5 ECHR

Contrary to Article 2P4, Article 5 ECHR contains a precise list of procedural obligations. This, together with the presence of a *numerus clausus* of situations, is by far the most important difference between the two provisions. Such obligations represent minimum standards, as States are free to set higher ones. In case they do so, however, they will not have a possibility to renegotiate the set standards, lowering them.

The first procedural obligation applicable to administrative detention is the following:

> *2. [e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

This is a basic safeguard against arbitrariness. It encompasses the right to be given, even orally, an explanation of the essential legal and factual grounds for detention in a simple, non-technical language that the individual can understand, also taking into account his/her education. In case of foreigners, this right encompasses also the required interpretation. In relation to extradition, it is accepted that the information given may be less complete, as such detention is disjointed from the merits of the charge. The rationale of this provision is to enable the individual to challenge the decision before a court of law. Unfortunately neither the ECHR nor the ECtHR have set a time-limit beyond which the information cannot be regarded as prompt. An indication, however, can be derived from *Saadi v. the United Kingdom*, where a 76-hour delay was deemed excessive.

The ensuing obligation to judicial review of the detention order is spelled out in Article 5.4 ECHR

> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

The purpose of this provision is to ensure that any deprivation of liberty is subject to a meaningful judicial oversight, which has to be accessible and carried out speedily. In case of continuous detention, the provision calls for a periodic review. The remedy available must be effective, both in theory and in practice. The actual accessibility must be assessed in light of the eventual obstacles, capable of frustrating it, such as the lack of interpretation, of free legal assistance, of preparation time, or of an appointed guardian in case of a minor.

The court invested with the case must be able to look into the lawfulness, not only the legality, of the detention, and have the power to order the release of the individual. This means that the court – a body bearing the features of judicial independence - must be able to scrutinize the detention place, the regime and condition and assess their compliance also in light of Articles 3 and 8 ECHR. This is to be done in the course of an adversarial procedure bearing the feature of due process, such as equality of arms. After the deprivation of liberty has been terminated, the right to challenge the lawfulness of the detention will fall within Article 13 ECHR (Right to an effective remedy), whereas the conditions of detention will have to be impugned under Article 3 ECHR.

Should a detention be found unlawful, either by a national authority or by the ECtHR, victims have a direct and enforceable right to monetary compensation under Article 5.5 ECHR which states:

> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

This right refers to financial compensation for both material and moral damages (distress, anxiety, frustration) that an individual has suffered as a result of a violation of Article 5 ECHR. It cannot be satisfied by alternative forms of redress, such as the detained person's release, which is covered by Article 5.4 ECHR. The award of an amount which is negligible or wholly disproportionate to the seriousness of the violation would fall short of the Convention requirement, as this would devoid the right of any meaning.

APPLICATION OF THE ECHR STANDARDS TO THE LEGISLATION OF NORTH MACEDONIA CONCERNING FOREIGNERS AND ASYLUM SEEKERS

Administrative detention of foreigners and asylum seekers in North Macedonia is regulated primarily by two laws (acts): the Law on Foreigners[6], covering all foreigners, including failed refugees, that is asylum seekers who had their claim rejected (and finally determined) and the Law on International and Temporary Protection[7], applicable only to asylum seekers.Both frameworks are subject to compliance with the ECHR and its interpretation.

[6] Law on Foreigners, Official Gazette of the RoM, no. 97/2018 from 28.5.2018

[7] Law on International and Temporary Protection, Official Gazette of the RoM, no. 64/2018 from 11.4.2018

The first thing that attracts attention when examining the above-mentioned legislation is the terminology used: whilst articles 158 and 183 of the Law on Foreigners define the conditions under which the temporary *detention* of foreigners is allowed,[8] articles 63 and 64 of the Law on Asylum and Temporary Protection define the cases, to be regarded as "exceptional", in which the *freedom of movement* of asylum seekers can be restricted.[9] As already mentioned, language or

[8] Article 158 - Temporary Detention of a foreigner
(1) In order to ensure the removal procedure, the foreigner may be detained by the Ministry of Interior not longer than 24 hours.
(2) The foreigner referred to in paragraph (1) of this Article shall immediately be notified of the reasons for the detention and of the possibility, upon his or her request, to inform the diplomatic mission/consular post of the state whose nationals he or she is, to contact the legal representative and members of his or her family.
(3) In the event of detention of unaccompanied minor, the Social Work Centre and the diplomatic missions/consular post of the country whose national the minor is, shall be immediately notified.
(4) The detention of the foreigner shall terminate immediately after the reasons for his or her detention ceased to exist, at the latest by the expiration of the period laid down in paragraph (1) of this Article.
Article 183 - Detention of a foreigner Whose Identity Cannot be Established
(1) If the foreigner refuses or is unable to prove his or her identity, the authorised officials of the Ministry of Interior may detain the foreigner in order to establish his or her identity but no longer than 12 hours.
(2) If the identity of the foreigner cannot be established within the period referred to in paragraph (1) of this Article, the authorised officials of the Ministry of Interior shall lodge a request for initiating misdemeanor procedure to the competent court.
(3) On the basis of the court decision imposing the measure "detention of a foreigner in the Reception Centre" to the foreigner, the authorised officials of the Ministry of Interior shall detain the foreigner in the Reception Centre.
(4) The foreigner referred to in paragraph (1) of this Article may be detained in the Reception Centre on the basis of the decision by the court until information about his or her identity is obtained.

[9] *Article 63 - Limitation of freedom of movement*
(1) The applicant may, by exception, have his freedom of movement limited, if other less coercive alternative measures in accordance with the national legislation (confiscation of an identification document, regular reporting) cannot be applied effectively.
(2) The exceptions referred to in paragraph (1) of this Article shall include only:
- establishing and checking of identity and nationality;
- establishing the facts and circumstances on grounds of which the asylum application has been submitted, which cannot be established without limitation of the freedom of movement, especially if it is estimated that there is a risk of absconding;
- protection of public order or national security; or
- detention of the foreigner for the purposes of a procedure in accordance with the regulations on foreigners on return of foreigners who reside in the country illegally, in order to prepare the return or to implement the process of removal, when he/she has already had access to the asylum procedure, and there is reasonable ground to believe that he/she has submitted an application for international protection in order to postpone or obstruct the execution of the decision for return.
(3) The risk of absconding of the applicant shall be assessed on the basis of facts and circumstances for an individual case, especially taking into consideration previous attempts to voluntarily leave the Republic of Macedonia, refusal to have their identity checked and established, presenting of false data about his/her identity and nationality.
Article 64 - Measures for limitation of freedom of movement

definitions contained in the national legislation are not decisive. Therefore, before concluding as to which standards apply (whether the discipline of Article 2P4 or 5 ECHR), it is important to examine the legislation with recourse to the doctrine of autonomous concepts.

A joint examination of the provision contained in Articles 62, 63 and 64 of the Law on International and Temporary Protection reveals the first flaw of the legislation. Indeed, even though the provisions refer to "restriction of freedom of movement", if an asylum seeker is coercively confined into a closed Reception Center (or other accommodation), from where the person cannot leave, that amounts without any doubt to a deprivation of liberty. As a consequence, all guarantees stemming from Article 5 ECHR apply. The situation would be different in case where asylum seekers are provisionally admitted to a certain area, for instance that of a town, pending the examination of their claim. This, however, is not the case in North Macedonia. In such cases, as established in Omwenyeke v. Germany, the person would be regarded as "lawfully" present only in that portion of territory. As a consequence, the asylum seeker can invoke freedom of movement only within that area. However, should the confinement into a certain district be accompanied by restrictive prescriptions, such as a curfew, to inform the authorities of every movement, to seek authorization to make phone calls, disclosing the names of the interlocutors, visit public or private places or attend events, then in application with the principles established in Guzzardi v. Italy, the restriction of movement could well be qualified as a deprivation of liberty. As the provisions clearly indicate an instance of deprivation of liberty, this terms, or the term *detention*, will be used in the remainder of this work instead of the *restriction of movement* used by the Law on International and Temporary Protection.

Legal certainty seems also at stake for two reasons. First, the provisions do not seem sufficiently clear in relation to the two situations depicted: a) permission to temporarily leave the place; b) request to reside outside the Reception Center. For both situations, that appear distinct, the conditions under which the approval can be granted or refused are not listed. This poses a serious problem in terms of compliance with the ECHR, as it may lead to unfettered discretion which is incompatible with the protection against arbitrariness. In addition, it seems pos-

(1) The freedom of movement from Article 63 of this Law may be limited with the following measures:
- prohibition of movement outside the Reception Centre for Asylum-Seekers or another place of accommodation determined by the Ministry of Labour and Social Policy; or
- Accommodation in a Reception Centre for Foreigners.
(2) The measures for limitation of freedom of movement referred to in paragraph (1) of this Article shall be imposed for a maximum period of three months from the day of delivery of the decision imposing limitation of freedom of movement, and by exception, provided that the reasons for their imposing continue to exist, they may be extended by a maximum of three months.
(3) The manner of limitation of freedom of movement for an applicant shall be prescribed by the Minister of Interior.

sible to conclude that in case of refusal of such permission or request, the asylum seeker has no choice but to remain in the Reception Center, under conditions that, for the reasons illustrated below, amount to a deprivation of liberty. Secondly, Article 64.3 of the Law on International and Temporary Protection indicates that the manner of limitation of movement (rectius: detention) shall be prescribed by the Ministry of The Interior. Should only internal regulations or directions be adopted, substantially affecting the scope of application of the provision enabling deprivation of liberty, the legal basis might not bear all the features needed to equate it to a "law". Therefore, its implementation will automatically be in breach of ECHR.

Article 63 of the Law on International and Temporary Protection clearly lists the grounds according to which the deprivation of liberty can be enforced and correctly states that deprivation of liberty is to be regarded as a measure of last resort, when less intrusive measures cannot be imposed. Alternatives to detention is an important aspect to be taken seriously, as its compliance falls within the notion of "lawfulness" of detention. Therefore, the reasons grounding the detention order must encompass this aspect too, and cannot be satisfied with a formalistic reference. In other words, any automatism or standardized application should be avoided and the individual situation subject to specific assessment.

In terms of grounds justifying the administrative detention of asylum seekers, there are a few additional concerns. First, the legislation seems to mix the administrative detention with that for reasons other than immigration control. This is illustrated by the reference made by Article 63 of the Law on International and Temporary Protection to the "protection of public order or national security", which is presented as one of the grounds able to autonomously justify administrative detention. This wording certainly does not fit into the provision of Article 5.1 sub-paragraph 1.f). What appears to happen is that the national legislation provides for an expansion of the normative basis for the administrative detention of migrants: this is not possible in light of Article 5.1.f ECHR, which is subject to a restrictive interpretation. Under the ECHR, an administrative detention is lawful insofar as it is functional to prevent an unauthorized entry or to effect a person's removal. As a consequence, reference to public order or national security as autonomous grounds should be expunged. These can only become relevant in the context of a decision related to expulsion or extradition. Any other reason for detaining migrants, for instance because they are being regarded as witnesses in other cases, cannot be used to justify detention.

When dealing with the requisite of lawfulness, the duration of the measure depriving liberty under the present law seems to open the door to misinterpretation. Indeed, Article 64.2 of the Law on International and Temporary Protection sets the maximum period of detention but does not specify that the detention should be enforced for the shortest period required for carrying out the envisaged

identification and assessment tasks. Circumstances such as the exceptional and unexpected number of asylum seekers or administrative difficulties may be taken into account, at least in the short to medium term, to justify lengthy detention of asylum seekers. The existence or automatic application of the maximum period of detention, however, cannot be regarded as exempting the State from the due diligence and good faith required when dealing with situations falling under Article 5.1 ECHR.

In terms of procedural obligations, the relevant provisions of the Law on International and Temporary Protection read as follows:

> *Article 65 - Authority taking a decision for limitation of freedom of movement*
>
> (1) The Ministry of Interior shall take a decision imposing a measure for limitation of freedom of movement for an applicant, determining the validity period of the measure.
>
> (2) Against the decision referred to in paragraph (1) of this Article, the applicant has the right to appeal before a competent court within five days of the day of receipt of the decision.
>
> (3) The appeal shall not postpone the execution of the decision.
>
> (4) The procedure before the competent court shall be accelerated.

> *Article 66 - Rights of the applicant regarding limitation of freedom of movement*
>
> (1) The applicant that has had a measure of limitation of freedom of movement imposed has the right to be immediately informed about the right to appeal and exercising of the right to free legal assistance in a language the applicant can reasonably be presumed to understand.
>
> (2) For vulnerable persons and unaccompanied minors, the measure accommodation in a Reception Center for Foreigners shall be applied only on the basis of an individual assessment, as well as prior consent from the parent, i.e. the legally determined guardian, that such accommodation is suitable to their personal and special circumstances and needs, taking into consideration their health condition.
>
> (3) The accommodation of unaccompanied minors and vulnerable persons in a Reception Center for Foreigners shall be prescribed with an act of the Reception Center for Foreigners.

The Law on Foreigners, conversely, states that:

> *Article 158 - Temporary Detention of a Foreigner*
>
> (1) In order to ensure the removal procedure, the foreigner may be detained by the Ministry of Interior not longer than 24 hours.
>
> (2) The foreigner referred to in paragraph (1) of this Article shall immediately be notified of the reasons for the detention and of the possibility, upon his or her request, to inform the diplomatic mission/consular post of the state whose nationals he or she is, to contact the legal representative and members of his or her family.
>
> (3) In the event of detention of unaccompanied minor, the Social Work Centre and the diplomatic missions/consular post of the country whose national the minor is, shall be immediately notified.
>
> (4) The detention of the foreigner shall terminate immediately after the reasons for his or her detention ceased to exist, at the latest by the expiration of the period laid down in paragraph (1) of this Article.

The wording used by both provisions seems problematic. Contrary to the language used by Article 5.2 ECHR, Article 66 of the Law on International and Temporary Protection foresees that the applicant has to be informed about *"the right to appeal"* and not of the reasons for which deprivation of liberty is imposed. Conversely, Article 158 of the Law on Foreigners, elucidates the content of the information (*"reasons for the detention"*). It does not mention, however, the possibility of challenging the decision in front of the Administrative Court. Instead, the provision foresees the possibility to inform the diplomatic mission of the country of nationality. Both provisions appear unsatisfactory. The right to be informed about the reasons for the deprivation of liberty is functional to the possibility to initiate proceedings challenging the lawfulness of the detention. The mere information that the decision can be challenged, therefore, cannot be considered sufficient. Nor would be the bare indication of the legal basis justifying the deprivation of liberty: instead, the information, to be provided in plain, non-technical language, must encompass the essential legal and factual grounds for the detention. At the same time, the individual must also be clearly informed about the judicial avenues available to challenge both the legality and the lawfulness of the order and the ensuing detention.

In terms of duration of the detention in the Reception Center ordered by the Ministry of Interior, Article 161 of the Law on Foreigners clarifies that an extension can be granted when there is a risk of absconding, or if the foreigner avoids or obstructs the removal procedure. The wording seems to suggest a punitive intent of the detention, which is certainly not in line with the spirit of Article 5 ECHR.

However, Article 162 of the same law mitigates this impression by clarifying the importance that the detention is carried out in good faith: should it become apparent that the removal is no longer possible, then release should be ordered even if the maximum period has not yet elapsed.

Another issue of concern is linked to the powers of the court tasked with the judicial review. Article 66.2 of the Law on International and Temporary Protection refers to the possibility to appeal against the detention decision. This gives the impression that the judicial body will only be able to rule on the legality of the measure, whereas in order to comply with Article 5.4 ECHR the appeal body must be able to review the "lawfulness" of the detention in the meaning of Article 5.1 ECHR (thus including detention conditions) and have the power to order release if the detention is deemed unlawful. Similarly, Article 163 of the Law on Foreigners foresees that the temporary detention shall be terminated if the decision on detention has been annulled, suggesting that only the legality of the confinement is subject to scrutiny. If this is the case, then the national legislation is not compliant with the ECHR and, therefore, should be interpreted departing from the letter of the law.

Last but not least, in the absence of any cross-referencing or coordinating provision, it is not clear whether an unlawful administrative detention would give rise to a direct and enforceable right to compensation as foreseen by Article 5.5 ECHR.

CONCLUSION

The introduction of clear norms regulating the detention of migrants (whether asylum seekers or foreigners, under certain conditions) is certainly to be welcomed as it fills a vacuum where arbitrary deprivation of liberty could take place. The intent of the law to consider detention as a last resort is also commendable. However, the wording used by both the Law on Foreigners and that on International and Temporary Protection is at times misleading as it suggests that the measures foreseen for asylum seekers do not amount to detention, but rather to a limitation of the freedom of movement. Yet, a close look at the provisions seems to suggest the opposite. In addition, the recognition of discretionary powers to the administrative authorities able to impose such measures poses is the object of concerns. All this imposes an interpretative burden that, if not correctly discharged, may have detrimental consequences, in terms of the legal certainty of the relevant provisions, the possibility to effectively challenge decisions imposing a deprivation of liberty also under the angle of their lawfulness, as well as the right to seek monetary compensation in cases of violation.

LEGAL FRAMEWORK ON THE DETENTION OF ASYLUM SEEKERS IN NORTH MACEDONIA AND ITS COMPLIANCE WITH EU LAW

Flip Schüller and Isa van Krimpen

The aim of this chapter is to analyze the compliance of the current legal framework on detention of asylum seekers in North Macedonia with the Common European Asylum System (CEAS) and the EU standards regarding immigration detention. It begins by briefly describing the legal framework on immigration detention in North Macedonia before and after 2018. It will then go on to compare this national legal framework with the legal framework and standards on detention of asylum seekers at European Union level.

Introduction

Since the entering into force of the Stabilization and Association Agreement between the Member States of the European Union and North Macedonia, both parties to the association agreement have agreed to (i) cooperate in the area of visa, border control, asylum and migration and (ii) cooperate in order to prevent and control illegal immigration.[10] As such, North Macedonia is required to gradually bring its legal framework concerning the immigration detention of asylum seekers in accordance with European Union law. To comply with the European Union legal framework on immigration detention, North Macedonia has recently adopted the Law on Foreigners[11] and the Law on International and Temporary Protection[12], superseding the Law on Foreigners from 2006 and the Law on International and Temporary Protection from 2003[13] respectively.

[10] Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13 that entered into force on 1 April 2004, arts 75-76.

[11] National Legislative Bodies / National Authorities, *The former Yugoslav Republic of Macedonia: Law on Foreigners (from 2006, as amended in 2015, and superseded by: 2018 Law on Foreigners)* [North Macedonia], available at: https://www.refworld.org/docid/44b2668a4.html ("Law on Foreigners 2018").

[12] National Legislative Bodies / National Authorities, *North Macedonia: Law on International and Temporary Protection of 2018*, 11 April 2018, available at: https://www.refworld.org/docid/5b55e5de4.html ("Law on International and Temporary Protection 2018").

[13] National Legislative Bodies / National Authorities, *The former Yugoslav Republic of Macedonia: Law on Asylum and Temporary Protection (from 2003, as amended in 2016, and superseded by 2018 Law on International and Temporary Protection)* [North Macedonia], 11 April 2016, available at: https://www.refworld.org/docid/53072d144.html ("Law on International and Temporary Protection 2003").

THE LEGAL FRAMEWORK UNTIL 2018

In the Constitution of the Republic of North Macedonia (hereafter: North Macedonia), Article 29 guarantees "the right of asylum to foreign subjects and stateless persons expelled because of democratic political convictions and activities."[14] It is further provided that "[f]oreign subjects enjoy freedoms and rights guaranteed by the Constitution in the Republic of [North] Macedonia, under conditions regulated by law and international agreements."[15] Concerning "international agreements", reference should be made to the Convention relating to the Status of Refugees (hereafter: Refugee Convention) and the subsequent Protocol relating to the Status of Refugees (hereafter: Protocol) to which North Macedonia succeeded on the 18th of January 1994.[16]

From 2006 until 2018, the legal framework on immigration detention in North Macedonia was laid down in the Law on Foreigners (2006) and the Law on Border Control (2011).[17] In the Law on Foreigners, the entry into, exit from, and stay of foreigners, as well as their rights and obligations, in North Macedonia, were governed.[18] In the Law on Asylum and Temporary Protection (2003), the granting and cessation of international protection in North Macedonia, as well as the rights and duties of asylum seekers and beneficiaries of international protection, was governed.[19] Additional rules concerning the operation of the immigration detention center were included in the Rulebook for the Reception Center for Foreigners.[20]

In brief, a person could be temporarily detained on the following grounds: (i) for a maximum of 24 hours to enable border control procedures[21]; (ii) for a maximum of

[14] *Constitution of the Republic of Macedonia* [North Macedonia], 6 January 1992, available at: https://www.refworld.org/docid/3ae6b4dcc.html [accessed 2 August 2019], art 29.

[15] ibid.

[16] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ("Refugee Convention"); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 ("Protocol"); See also https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en: "The former Yugoslavia had signed and ratified the Convention on 28 July 1951 and 15 December 1959, respectively declaring that it considered itself bound by alternative (b) of Section B(1) of the Convention."

[17] National Legislative Bodies / National Authorities, *The former Yugoslav Republic of Macedonia: Law on Border Control (from 2011, as amended in 2015)*, Official Gazette of the Republic of Macedonia, no. 171/2010 ("Law on Border Control 2011").

[18] Law on Foreigners (2006), art 1.

[19] National Legislative Bodies / National Authorities, *The former Yugoslav Republic of Macedonia: Law on Asylum and Temporary Protection (from 2003, as amended in 2016, and superseded by 2018 Law on International and Temporary Protection)* [North Macedonia], 11 April 2016, available at: https://www.refworld.org/docid/53072d144.html.

[20] National Legislative Bodies / National Authorities, *North Macedonia: Rulebook for the Reception Center for Foreigners*, Official Gazette of the Republic of Macedonia, No. 06/2007, amended 53/2009 and 75/2013.

[21] Law on Border Control 2011, art 13.

24 hours in order to ensure his or her deportation;[22] or (iii) for a maximum of 12 hours in order to establish a person's identity.[23] A person could be detained until the reasons preventing his or her deportation from the territory of North Macedonia ceased to exist, but not longer than 12 months.[24]

Asylum seekers were exempted from immigration detention. This followed from the Law on Foreigners (2006), which applied to all foreigners, except for those who were seeking protection from North Macedonia in accordance with the Law on Asylum and Temporary Protection (2003).[25] In addition, the Law on Asylum and Temporary Protection lacked any provisions on the immigration detention of asylum seekers. In its observations on the situation of asylum seekers and refugees in North Macedonia dated 2015, the United Nations High commissioner for Refugees ("UNHCR") thus made a general positive assessment of the applicable legal framework in North Macedonia concerning the right of asylum seekers "to enjoy freedom of movement and to be protected from arbitrary arrests or detention."[26]

CURRENT LEGAL FRAMEWORK

Law on Foreigners 2018

The purpose of the Law on Foreigners 2018 is to regulate the condition of entry, exit, departure, stay, return of illegally staying foreigners, as well as the rights and obligations of foreigners in the Republic of Macedonia.[27] The grounds for detention of foreigners in the Law on Foreigners 2018 are similar to those in the Law on Foreigners 2006.[28]

First, the Ministry of Interior may detain a person for a maximum of 24 hours to ensure his or her administrative removal.[29] The detention shall immediately

[22] Law on Foreigners 2006, art 108.

[23] Law on Foreigners 2006, art 132.

[24] Law on Foreigners 2006, art 109.

[25] Law on Foreigners 2006, art 3.

[26] UN High Commissioner for Refugees (UNHCR), *The Former Yugoslav Republic of Macedonia as a country of asylum: Observations on the situation of asylum-seekers and refugees in the Former Yugoslav Republic of Macedonia*, August 2015, available at: https://www.refworld.org/docid/55c9c70e4.html, p. 9.

[27] Law on Foreigners 2018, art 1.

[28] Law on Foreigners 2018, art 158-164, 183.

[29] Law on Foreigners 2018, art 158(1).

be terminated upon the termination of the reasons for his or her detention.[30] The foreigner shall be immediately informed about the reasons for the detention and the possibility, on his/her request, to inform the diplomatic and consular representative office of the country of citizenship, to make a contact with a legal representative and the members of his or her family.[31] The Social Service Center and the diplomatic and consular representative office of the country of citizenship shall be immediately informed about the detention of an unaccompanied minor.[32]

The Minister of the Interior may decide to detain a foreigner in the Reception Center in the following situations:

- a foreigner who cannot be removed from the territory of the Republic of North Macedonia for whatever reason within 24 hours;
- a foreigner who stays in North Macedonia illegally and for whom a decision on return is not made due to a risk of absconding;
- a foreigner avoids or hinders the return procedure;
- a foreigner for whom a decision on return is made, but he or she does not possess a valid travel document so he or she cannot voluntarily leave the Republic of North Macedonia;
- an asylum seeker for whom a decision on limitation of freedom of movement is made;
- an unaccompanied minor who cannot be delivered immediately to his or her country of origin due to objective reasons (in a special room for minors and the Social Service Center shall be informed in order to assign a guardian) taking into consideration the best interest of the child;
- unaccompanied minors and families shall be detained in the Reception Center only as a last resort and for the shortest period possible.[33]

A foreigner may object to this decision before a competent court.[34] The procedure before this court shall be urgent, but it does not have suspensive effect.[35]

The foreigner shall be temporarily detained in the Reception Center until the termination of the reasons which have prevented his or her removal from North Macedonia, but not for longer than six months.[36] The detention may be extended for an additional 12 months at most, provided that the foreigner: (i) refuses to give

[30] Law on Foreigners 2018, art 158(4).

[31] Law on Foreigners 2018, art 158(2).

[32] Law on Foreigners 2018, art 158(3).

[33] Law on Foreigners 2018, art 159.

[34] Law on Foreigners 2018, art 160 (2).

[35] Law on Foreigners 2018, art 160 (3-4).

[36] Law on Foreigners 2018, art 161.

personal or other data and documents that are necessary for his/her removal or has given false data, (ii) hinders or prolongs the removal in any other manner, or (iii) if it is justifiably expected that the travel or any other documents, which are necessary for removal, are to be delivered.

The Ministry of Interior shall decide on the termination of the temporary detention of the foreigner in the Reception Center by a decision.[37] The foreigner may initiate an administrative dispute against this decision before a competent court.[38] The procedure before a competent court shall be urgent, but it does not have suspensive effect.[39] The temporary detention of the foreigner in the Reception Center shall terminate under the following circumstances:

- by removal of the foreigner;
- upon expiry of the deadline for which temporary detention is determined;
- if the stay of the foreigner becomes legal;
- if the decision on detention is quashed;
- if the reasons for which the decision on detention has been made cease, and
- by release from the Reception Center.[40]

In addition, the foreigner shall be released from the Reception Center if:

- the circumstances point out that the removal cannot be made and;
- the foreigner is temporarily detained in the Reception Center and the identity cannot be determined, but a new decision on temporary detention in the Reception Center is not adopted after the determination of the identity.[41]

Moreover, the foreigner may be released from the Reception Center in a case where the removal of the foreigner is postponed due to violation of the principle of non-refoulement and the conditions of Article 162 being met.[42]

Second, the authorized officers of the Ministry of Interior may detain a foreigner for the purpose of establishing his or her identity for a period not longer than 12 hours, if the foreigner refuses or is unable to prove his or her identity.[43] If the for-

[37] Law on Foreigners 2018, art 163(4).

[38] Law on Foreigners 2018, art 163(5).

[39] Law on Foreigners 2018, art 163(6-7).

[40] Law on Foreigners 2018, art 163(1).

[41] Law on Foreigners 2018, art 163(2).

[42] Law on Foreigners 2018, art 163(3): "Article 162: A foreigner who cannot be removed, as well as the foreigner referred to in Article 159 paragraph (3) of this Law, provided that he/she has accommodation and means of subsistence in the Republic of Macedonia and considering the circumstances of the case it may be assessed that he/she does not need accommodation in the Reception Center, the Ministry of Interior may adopt a decision limiting the movement only in the place of accommodation and shall determine an obligation for his/her regular reporting in particular time periods to the Ministry of Interior."

[43] Law on Foreigners 2018, art 183(1).

eigner's identity is not established within 12 hours, the authorized officials of the Ministry of Interior must file a motion for initiation of a misdemeanor procedure with the competent court.[44] The authorized officials of the Ministry of Interior may only detain the foreigner in the Reception Center on the basis of a court decision.[45] The foreigner may on the basis of this court decision be detained in the Reception Center until data on his or her identity is supplied.[46]

It should be observed that asylum seekers remain exempted from the articles on temporary detention of foreigners under the Law on Foreigners 2018.[47] This follows from the scope of application, which provides that the Law on Foreigners shall apply to all foreigners, except for those who seek international protection from North Macedonia in accordance with the Law on International Protection 2018.[48]

Law on International and Temporary Protection

With the recent adoption of the Law on International and Temporary Protection (2018) (hereafter: LITP 2018"), North Macedonia has further harmonized its national legislation concerning the treatment of asylum seekers with the Refugee Convention and the EU acquis.[49] The purpose of the LITP is the further alignment with the directives of the European Union concerning asylum, including the Qualification Directive[50], the Asylum Procedures Directive[51], the Reception Conditions Directive[52] and the Max Influx Directive.[53]

44 Law on Foreigners 2018, art 183(2).

45 Law on Foreigners 2018, art 183(3).

46 Law on Foreigners 2018, art 183(4).

47 Law on Foreigners 2018, art 158-164.

48 Law on Foreigners 2018, art 3.

49 National Legislative Bodies / National Authorities, *North Macedonia: Law on International and Temporary Protection of 2018*, 11 April 2018, available at: https://www.refworld.org/docid/5b55e5de4.html.

50 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 ("Qualification Directive").

51 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 ("Asylum Procedures Directive").

52 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96 ("Reception Conditions Directive").

53 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 [2001] OJ L 212/12 (""Mass Influx Directive").

In the draft of the LITP, it was emphasized that "[i]ntegration into the European Union is a clearly and unequivocally expressed strategic interest and a priority goal of the Republic of Macedonia, until its fully-fledged membership of the European Union. One of the basic demands for integration of the Republic of Macedonia in the European Union is the alignment of the national legislation with that of the European Union."[54] The draft was based on (i) respect for the right to asylum, as guaranteed by Article 29 of the Constitution and (ii) respect for human rights and freedoms, as safeguarded by the Constitution, the national law and ratified international treaties.

Articles 63 to 66 of the LITP 2018 provide for the limitation of the freedom of movement of asylum seekers, *i.e.* immigration detention. In Article 63 paragraph 1, the LITP 2018 provides that an asylum seeker "may, by exception, have his freedom of movement limited, if other less coercive alternative measures in accordance with the national legislation (confiscation of an identification document, regular reporting) cannot be applied effectively."[55] These exceptions are limited to the following situations:

i. to establish and check the identity and nationality;

ii. to establish the facts and circumstances on grounds of which the asylum application has been submitted, which cannot be established without limitation of the freedom of movement, especially if it is estimated that there is a risk of absconding;

iii. to protect public order or national security;

iv. to detain the foreigner for the purposes of a procedure in accordance with the regulations on foreigners, on the return of foreigners who reside in the country illegally, in order to prepare the return or to implement the process of removal, when he/she has already had access to the asylum procedure, and there is reasonable ground to believe that he/she has submitted an application for international protection in order to postpone or obstruct the execution of the decision for return.[56]

With respect to the assessment of the risk of absconding, the individual's facts and circumstances shall be taken into consideration, in particular (i) previous attempts to voluntarily leave North Macedonia, (ii) a refusal to have their identity checked and established and/or (iii) the presentation of false information about his or her identity and nationality.[57]

[54] See UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments on the Proposed Law on International and Temporary Protection, January 2018, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b066b354, para 1.

[55] LITP 2018, art 63 para 1.

[56] LITP 2018, art 63 para 2.

[57] LITP 2018, art 63 para 3.

If it is established that the freedom of movement of an asylum seeker may be limited on the basis of Article 63 of the LITP 2018. Article 64 of the LITP 2018 provides for two measures: (i) prohibition of movement outside the Reception Center for Asylum-Seekers or another place of accommodation determined by the Ministry of Labor and Social Policy or (ii) accommodation in a Reception Center for Foreigners.[58] These two measures shall be imposed for a maximum period of three months from the day of delivery of the decision imposing a limitation on freedom of movement.[59] By exception, the measures may subsequently be extended by a maximum of three months, provided that the reasons for their imposing continue to exist.[60]

The manner of limiting the freedom of movement of an asylum seeker shall be prescribed by the Minister of the Interior.[61] Pursuant to provision 62 paragraph 3 of the LITP 2018, the Minister of Interior adopted the Rulebook on the Manner of Limitation of Freedom of Movement of an Applicant for International Protection.[62] In this Rulebook, the manner of limitation of freedom of movement of an applicant for international protection is prescribed.[63]

The Ministry of Interior is authorized to take a decision for imposing a measure for limitation of freedom of movement for an asylum seeker and determining the validity period of the measure.[64] Against this decision, an asylum seeker has the right to appeal before a competent court in an accelerated procedure within five days of the day of receipt of the decision, which shall not postpone the execution of the decision.[65]

The rights of asylum seekers, who have been subjected to a decision limiting their freedom of movement are summarized in Article 66 of the LITP 2018. Most importantly, the asylum seeker, who has been subjected to a measure of limitation of his or her freedom of movement, has (i) the right to be immediately informed about the right to appeal and (ii) the right to free legal assistance in a language the applicant can reasonably be presumed to understand.[66] With respect to vulnerable persons and unaccompanied asylum-seeking children, they will only be

[58] LITP 2018, art 64 para 1.

[59] LITP 2018, art 64 para 2.

[60] ibid.

[61] LITP 2018, art 64 para 3.

[62] National Legislative Bodies / National Authorities, *North Macedonia: Rulebook on the Manner of Limitation of Freedom of Movement of an Applicant for International Protection*, Official Gazette of the Republic of Macedonia, no 239, 25 December 2018, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d35b5234.

[63] ibid, art 1.

[64] LITP 2018, art 65 para 1.

[65] LITP 2018, art 65 paras 2-4.

[66] LITP 2018, art 66 para 1.

accommodated in a Reception Center for Foreigners on the basis of an individual assessment, as well as prior consent from the parent, i.e. the legally determined guardian, that such accommodation is suitable to their personal and special circumstances and needs, taking into consideration their health condition.[67] This measure has to be prescribed with an act of the Reception Center for Foreigners.[68]

COMPLIENCE WITH THE EU LAW

In the European Union, the immigration detention of applicants for international protection is in principle regulated by the Reception Conditions Directive and the Asylum Procedures Directive.[69] According to the Asylum Procedures Directive, "Member States shall not hold a person in detention for the sole reason that he or she is an applicant" for international protection.[70] It is further emphasized that "the grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with" the Reception Conditions Directive.[71] If an asylum seeker is detained, "Member States shall ensure that there is a possibility of speedy judicial review in accordance with" the Reception Conditions Directive.[72]

In view of the foregoing, the Law on Asylum and Temporary Protection in North Macedonia concerning the immigration detention of asylum seekers has to be in accordance with the legal framework and standards on immigration detention under the Reception Conditions Directive. In this regard, it should be observed that the grounds of the limitation of the freedom of movement under Article 63 of the LITP 2018 are in accordance with the grounds of detention ex Article 8(3) of the Reception Conditions Directive. Nonetheless, Articles 63 to 66 of the LITP 2018 have been criticized for failing to safeguard the legal and procedural rights of asylum seekers, as prescribed by Article 9 of the Reception Conditions Directive.[73]

[67] LITP 2018, art 66 para 2.

[68] LITP 2018, art 66 para 3.

[69] See also Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189, para 41; Case C-534/11 *Arslan* [2013] ECLI:EU:C:2013:343, para 44.

[70] Asylum Procedures Directive, art 26(1); See also Reception Conditions Directive, art 8(1).

[71] Asylum Procedures Directive, art 26(1).

[72] Asylum Procedures Directive, art 26(2).

[73] See UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments on the Proposed Law on International and Temporary Protection*, January 2018, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b066b354;
UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the 2018 Law on International and Temporary Protection of the former Yugoslav Republic of Macedonia*, 31 January 2018, available at: https://www.refworld.org/docid/5b066b172e.html

First, in Articles 63 to 66 of the LITP, the special guarantees for vulnerable persons, including children, families and female asylum seekers are not sufficiently guaranteed. Article 66(2) of the LITP 2018 merely provides that "accommodation of vulnerable persons and unaccompanied minors in the Reception Center for Foreigners shall be applied only on the basis of individual assessment, as well as previous consent from the legally established guardian that such accommodation conforms to their personal and special circumstances and needs, taking into account the health condition of these persons."[74] The LITP considers the following persons vulnerable: "persons without procedural capacity, minors, unaccompanied minors, persons with serious health condition, disabled persons, elderly persons, pregnant women, single parents with minors, victims of human trafficking and persons who were exposed to torture, rape or other serious forms of psychological, physical or sexual violence."[75]

While the LITP acknowledges the necessity of special guarantees for vulnerable persons and children, the current provisions fall short of the guarantees provided for in Articles 11 and 21 of the Reception Conditions Directive. Member States are required to take into account "the specific situation of vulnerable persons (...) in the national law implementing the Reception Conditions Directive."[76] As regards the detention of vulnerable persons, "Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health."[77] It is further stated that families shall be provided with separate accommodation in detention and women shall be detained separately from men (unless the latter are family members and all individuals concerned consent thereto).[78]

In contrast to the LITP 2018, the Reception Conditions Directive provides detailed guarantees for (unaccompanied) minors in detention. As regards children, the Reception Conditions Directive states that they "shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

[74] LITP 2018, art 66 para 2.

[75] LITP 2018, art 35.

[76] Reception Conditions Directive, art 21: "vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation".

[77] Reception Conditions Directive, art 11(1).

[78] Reception Conditions Directive, art 11(4-5).

Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age."[79]

The possibility for Member States to detain unaccompanied asylum seeking children are even more restricted, as they "shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults."[80]

Second, the LITP 2018 and the Rulebook do not guarantee the right of asylum seekers to be informed in writing about the reasons for their detention in fact and law. Article 66(1) of the LITP 2018 states that the detained asylum seeker "has the right to be immediately informed about the right to appeal and exercising of the right to free legal assistance in a language the applicant can reasonably be presumed to understand." This is not in accordance with either Article 9(2) of the Reception Conditions Directive, which provides that the "detention of applicants shall be ordered in writing [stating the reasons in fact and in law on which it is based] by judicial or administrative authorities" or Article 9(4) of the Reception Conditions Directive, which provides that "detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention."

Third, the LITP 2018 and the Rulebook do not provide for the periodic review of the immigration detention of asylum seekers. Article 65(2-4) of the LITP 2018 only provides that an asylum seeker has the right to appeal before a competent court in an accelerated procedure within five days of the day of reception of the decision, which shall not postpone the execution of the decision.[81] In comparison, Article 9(5) of the Reception Conditions Directive prescribes that immigration detention of asylum seekers "shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention."

Lastly, UNHCR observed that neither article 63, paragraph 1, of the LITP 2018 nor the Rulebook lay down adequate alternatives for detention.[82] As observed by

[79] Reception Conditions Directive, art 11(2).

[80] Reception Conditions Directive, art 11(3).

[81] LITP 2018, art 65 paras 2-4.

[82] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the 2018 Law on International and Temporary Protection of the former Yugoslav Republic of Macedonia*, 31 January

UNHCR: "for the purpose of ensuring legal certainty, the authorities should clearly set forth alternatives to detention, available and provided with the national legislation such as, for example, deposition or surrender of documents, reporting conditions, directed residence, provision of a guarantor/surety and release on bail, community supervision or alternative care arrangements."[83]

CONCLUSION

In conclusion, the recent adoption of the Law on Foreigners 2018 and the Law on International and Temporary Protection 2018 should be considered a key step towards the gradual harmonization of the legislative framework in North Macedonia with the European Union legal framework on immigration detention.[84] Articles 63 to 66 of the LITP 2018 are almost identical to the provisions in the Reception Conditions Directive on immigration detention. Nonetheless, it should be observed that the LITP 2018 fails to adequately safeguard the legal and procedural rights of asylum seekers, especially for vulnerable persons.

The provisions of the Law on Asylum and Temporary Protection should therefore be further aligned with those of the Reception Conditions Directive. In particular, the Law on Asylum and Temporary Protection should provide for, amongst others, the following guarantees:

- The situation of vulnerable persons should be regularly monitored;
- Vulnerable persons should receive adequate support in detention by taking into account their particular situation, including their health;
- Families shall be provided with separate accommodation in detention;
- Women shall be detained separately from men (unless the latter are family members and all individuals concerned consent thereto);
- Children shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for children;

2018, available at: https://www.refworld.org/docid/5b066b172e.html, p. 4-5; UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the Adopted Rulebook on the Manner of Limitation of the Freedom of Movement of an Applicant for International Protection*, 9 April 2019, available at: https://www.refworld.org/docid/5d35bb394.html, p. 3.

[83] ibid p. 5.

[84] See e.g. http://myla.org.mk/mylas-position-adoption-law-international-temporary-protection/.

- Unaccompanied asylum-seeking children shall only be detained in exceptional circumstances, and never in a in prison accommodation or together with adults. All efforts shall be made to release the detained unaccompanied child as soon as possible;
- The detention of applicants shall be ordered in writing (i.e. stating the reasons in fact and in law on which it is based) by judicial or administrative authorities;
- The detention shall be reviewed by a judicial authority at reasonable intervals of time;
- Alternatives for detention will be provided.

THE SITUATION OF FOREIGNERS DETAINED FOR IMMIGRATION REASONS IN NORTH MACEDONIA

Anica Tomshikj Stojkovska

Foreigners detained for immigration reasons should be accommodated in conditions that reflect their status and needs, i.e. they must not be subject to a prison-like regime that treats them as convicted persons. The migrants should be detained in appropriate conditions in accordance with national and international standards, in specially designated accommodation centers that will correspond to their legal status. Substandard accommodation may constitute grounds for inhumane treatment under the ECHR.

This chapter provides an overview of the situation of foreigners detained for immigration reasons in North Macedonia, i.e. it describes the conditions of detention, the rights of detainees, the treatment by law enforcement officials and therefore seeks to provide an answer whether the detention is in accordance with domestic and international norms and standards.

Introduction

The Reception Center for Foreigners in Skopje is a facility for the detention of foreigners for immigration reasons. The center is difficult to access and in that regard the Ombudsman in 2013 already raised the alarm about the need for its relocation.[86] The civil society organizations also expressed concern that the facility, which is more than 50 years old, does not provide an opportunity for detainees to exercise their right to fresh air in the yard for fear of them fleeing.[87] In 2017, the Ministry of Interior announced that it would begin construction of a new facility that would meet the standards of detention. According to the latest information, the construction of the facility is in its project design phase and it would be located in Stenkovec.[88]

During 2018, the number of detainees has increased compared to 2017, and the average duration of detention is 12 days.[89] The Ombudsman – the National Preventive Mechanism noted that in 2018, 361 foreigners were detained, out of which 55 were unaccompanied children.[90] In addition, two asylum seekers

[85] Case De los Santos and de la Cruz v. Greece, applications no. 2134/12 and 2161/12, Case Ribitsch v. Austria, Application No 18896/91, Case Slemouni v. France Application no. 25803/94

[86] Ombudsman –NPM Report, 2013

[87] NGO Legis, source: www.slobodnaevropa.mk, 11.07.2019, text: A new Reception Center for Foreigners will be built

[88] Conversation with the Ombudsman- NPM team which visits the places where the migrants and asylum seekers are detained

[89] Annual Report on Immigration Detention in North Macedonia, MYLA 2018

[90] NPM Annual Report for 2018

were detained the same year.[91] Although the detention of asylum seekers is in accordance with the new Law on International and Temporary Protection, the Reception Center is not adequate to restrict the freedom of movement of these categories of persons.

The Reception Center for Foreigners, similar to the Reception-Transit Centers in Tabanovce and Gevgelija, has been a subject to public interest to both the domestic and international public ever since the beginning of the migrant crisis. In the meantime, the State has invested a lot of energy, resources and commitment in improving the conditions, but some of these facilities still do not meet the standards of humane detention.[92]

CONDITIONS IN THE RECEPTION CENTER FOR FOREIGNERS

The standards of the European Committee for the Prevention of Torture (CPT) require adequately furnished rooms, which should be clean and well maintained, with sufficient space for people residing there.[93] The centers should have adequate lighting, ventilation and heating. In the rooms where there is no permanent staff there is a need to set up a call system, i.e. alarm.

In the previous years, the NPM has responded to the inhumane conditions in which detained foreigners have resided, whilst in 2017 an improvement of the material conditions was noted. On several occasions, construction activities have been undertaken to renovate the accommodation premises. The women's part/wing of the Reception Center has been renovated with built-in air conditioning, new beds and kitchens for self-catering. During December 2017, it was noted that construction activities were being carried out to refurbish a quarantine room to accommodate persons arriving at the center, before being examined by a doctor.[94] Regarding the material conditions in the men's section, the NPM noted that in some rooms that were renovated in 2016 there was inventory damage, which according to police officers, is a consequence of the attempts of the detained migrants to flee.

According to the CPT standards, detained migrants should have free access to the outdoor walking area, which should be protected from bad weather and equipped with recreational facilities. At the same time, in the event of prolonged detention,

[91] Annual Report on Immigration Detention in North Macedonia, MYLA 2018

[92] Report "Rights of Refugees, Migrants and Asylum Seekers in the Republic of Macedonia", Trpe Stojanovski, Skopje, 2018

[93] https://www.coe.int/en/web/cpt/immigration-detention

[94] NPM Special Report for 2017, www.ombudsman.mk

a wide range of activities should be provided to migrants. However, the location of the Reception Center, as well as the insufficient number of police officers, lead to situations of detained migrants being permanently confined to the facility without the opportunity to use the yard for leisure activities.

These conditions were noted in the NPM Annual Report in 2014[95], as a result of which it recommended the dislocation of the Reception Center for Foreigners. In 2018, in addition to the lack of provision of the access to fresh air, there have been some complaints regarding the toilet and room hygiene, even though the conditions have been improved compared to previous years and no overcrowding was observed.[96]

Given that the Reception Center for Foreigners is a closed-type facility that does not provide regular fresh air walks, it can be concluded that the conditions of detention are similar to those of a prison, contrary to the guidelines of the UN Special Rapporteur on Human Rights of Migrants under which migration detention centers should not have equal or similar conditions to prisons,[97] and those of the UNHCR under which the conditions should be humane and dignified. [98]

The problem is the lack of a separate detention center for asylum seekers. Although detained asylum seekers are separated from the other detained foreigners for immigration reasons in the Reception Center, there are still no adequate conditions in accordance with national and international standards.[99]

RESPECT FOR THE RIGHTS OF THE MIGRANTS DETAINED FOR IMMIGRATION REASONS

The CPT emphasizes that during deprivation of liberty migrants have the right to a defense attorney, as well as to inform a family member or other close relative of their detention. It is especially important that they have information about their rights and current proceedings, as well as the effective legal remedies they can

[95] During the visit, NPM expressed concern about the consistent application of the right to fresh air walk twice a day for hour or two hours in total, because the facility itself is not securely enclosed and there is insufficient space to exercise this right to all persons accommodated in the Center. Although the Center Administration provided the information that the persons could exercise this right, in the conversation with the persons, NPM was informed that the walk, instead of the planned two hours, is shortened and lasts from 15 to 30 minutes, NPM Annual Report 2014

[96] Annual Report on Immigration Detention in North Macedonia, MYLA 2018

[97] Report of the Special Rapporteur on the human rights of migrants, 4.08.2010, para. 87

[98] UNHCR detention guidelines for asylum – seeker, p.29

[99] It has been emphasized in the interview with the NPM representatives

avail. According to the CPT, the detained migrants should enjoy the fundamental rights from the very beginning of their deprivation of liberty in the same way as other categories of detainees.

The right of everyone deprived of their liberty to be informed in writing of the principles of deprivation of liberty in a language which he or she understands is also guaranteed by the International Covenant on Civil and Political Rights. In practice, however, the migrants detained in the Reception Center complain of a lack of information regarding the length of detention and the reasons for detention.[100] In 2018, the NPM found that this practice continued, and detainees were not even informed of the forced return procedure and the destination where they would be returned.

The lack of information is partly due to a lack of interpreters, making the communication between police officers and detained migrants more difficult. During the visits in 2019, the migrants said that they were not informed of expulsion procedures and often asked when they could exit the center. The UN Working Group on Arbitrary Detention points out that every asylum seeker or migrant should be at least verbally informed about the basis of his or her detention in a language he or she understands.[101]

In 2019, according to the NPM data, detainees are allowed to maintain contact with families, even though this is limited to one call upon reception. However, upon the entry into the Reception Center for Foreigners, the migrants are deprived of their mobile phones, although the CPT's recommendation is for them to keep the mobile phones or to provide them with access to the mobile phones so they can communicate with their relatives or third parties of their own choice.

Although by 2019 the Macedonian Young Lawyers Association provided legal counseling at the center, they have not been allowed entry and presence at the Reception Center for Foreigners since the beginning of the year, which prevents the free legal aid and information.[102] Bearing this in mind, the question of how foreigners now being detained for immigration purposes receive legal aid remains open. The CPT emphasizes that in situations where irregular migrants are unable to choose and pay a defense attorney, they should exercise their right to legal aid.

In regard to the health care, the NPM in 2018 found that the Center lacked a daily presence of a doctor and a nurse. The doctor engaged by the Red Cross comes three times a week and is called upon as needed. The examinations are carried out in the doctor's office without the presence of the officials of the Center which

[100] NPM Special Report for 2017;

[101] Anyone arrested at the time of his/her arrest shall be informed about the reasons for his/her arrest, and any charges against him/her shall be communicated as soon as possible.

[102] Interview with MYLA representative

is in accordance with the medical standards. The NPM representatives confirmed that the situation remains the same also in 2019.

In 2017, detained foreigners complained about the food, meaning they received inadequate quantities and poor quality food, which was not adapted to their health status.[103] In 2018, the NPM found that the detained migrants did not have serious complaints and appeals about the food distributed at the Reception Center for Foreigners.

The Ombudsmen's representatives emphasize the employment of a psychologist in the Reception Center for Foreigners, who conducts daily conversations with the detainees and keeps official notes on each conversation individually as a positive example.[104]

Regarding the treatment by officials in 2017, the NPM did not record complaints of physical or psychological abuse.[105] The same was noticed by the civil society organizations, i.e. most of the detainees were satisfied with the attitude of the police, and only one person reported ill-treatment while being detained in the Reception Center.[106] There have been no complaints of ill-treatment by police officers in the last two years.

[103] MYLA Report of 2017

[104] The interview provided the information that the psychologist was employed two years ago

[105] NPM Special Report of 2017

[106] Annual Report on Immigration Detention in North Macedonia, MYLA, 2018.

CONCLUSION

The situation of foreigners detained for immigration reasons is changing and appropriate measures are being taken to improve the conditions at the Reception Center. However, the detained foreigners continue to be deprived of the right to walk in fresh air, and in this respect it is necessary to find ways to respect this right and to organize certain sports and recreational activities during their detention.

Regarding the respect for the rights of detained foreigners for immigration reasons, it can be concluded that the lack of information about the grounds of detention and the course of proceedings, as well as the availability of information in a language they understand has been identified as a problem in the past several years. For this reason, the provision of legal assistance, full information on the course of the proceedings, as well as timely and appropriate notification of their rights by providing information in a language they understand is necessary. It is particularly important for the detained foreigners to be familiar with the grounds for deprivation of liberty, as well as the possibility of using legal remedies. In order to protect the rights, the foreigners need to be informed about the three basic rights during their detention, i.e. the right to a Counsel /Attorney, the right to a doctor and the right to inform their family about the imposed measure.

At the same time, the question of the use of free legal aid remains open, thus it should be possible in case the irregular migrants are unable to choose and pay for a defense attorney.

Lastly, it should be borne in mind that the detention of foreigners for immigration reasons is of an administrative nature and cannot be equated with prison conditions, thus it requires providing for the appropriate treatment of migrants and asylum seekers according to their legal status.

IDENTIFICATION AND RESPONSE TO THE NEEDS OF THE VULNERABLE CATEGORIES OF PERSONS AT THE RECEPTION CENTER FOR FOREIGNERS

Irina Aceska

This chapter deals with the situation, manner of treatment and the degree of respect for the guaranteed rights of vulnerable categories of foreigners detained for immigration reasons in North Macedonia. The approach in this content is practical and derives from "field experiences", and the assessment of the treatment and degree of respect for the rights of vulnerable categories of foreigners resulting from a detailed analysis of the international and domestic legislation and the standards already established for the treatment of vulnerable categories of foreigners deprived of their liberty.

At the very beginning, the text contains a clarification of vulnerability, with an emphasis on the importance of recognizing and assessing the vulnerability of persons and further appropriate treatment of persons based on the identified vulnerability. Further, the text develops into practical knowledge acquired about the detention of vulnerable categories of foreigners in the country, in relation to the conditions for their detention, their treatment, their specific needs and the assessment of the degree of respect for and exercise of their rights.

Introduction

Every person deprived of his/her liberty, regardless of the reasons which led to his/her deprivation of liberty, is in a state of vulnerability. The very restriction of one's freedom is a factor of vulnerability. However, the risk of physical, mental or emotional injury is far greater for the vulnerable categories because they are more susceptible to attacks, injuries or manipulations.

Taking into consideration the traumas that refugees and migrants face on the road to seeking help and protection from third countries, in particular in terms of violence and abuse of their rights, they become vulnerable groups *per se*, even without being deprived of their liberty. The most common threats they face during their journey are: trafficking in human beings and human organs, extortion, rape, sex for the exchange of material goods and services, etc. However, among them there are individuals who are exposed at a higher risk of unwanted incidents and threats, and those are most usually children, especially unaccompanied, girls and women, pregnant women, a parent with a child, elderly persons, persons with physical or mental disabilities, victims of trafficking in human beings, persons belonging to marginalized groups, persons who have been subjected to torture or any form of violence ... In order to ensure a continuous individual approach to assessing the vulnerability of persons and their individual needs is particularly important not to close this list.

The Reception Center for Foreigners in Skopje is a facility for immigration detention of foreigners, including also persons from the vulnerable categories. So far, the practice has shown that various vulnerable categories of foreigners, mostly unaccompanied children, mothers with minors, girls and women, pregnant women and victims of trafficking in human beings are detained in the facility.

CONDITIONS FOR ACCOMODATION OF VULNERABLE CATEGORIES OF PERSONS AT THE RECEPTION CENTER FOR FOREIGNERS

The Reception Center for Foreigners operates within the Ministry of Interior, and the facility itself is located within the premises whose primary purpose was to accommodate the youngest children (kindergarten). The facility was converted in 2001 and it was supposed to be of a temporary nature. Ever since 2017, the facility has been undergoing constant renovation and upgrading, and the undertaken construction activities have had the purpose of improving the material conditions of accommodation in the facility and increasing the accommodation capacity. The accommodation capacity of the center prior to its expansion activities was about 85 persons, but since 2016 the facility has never been overcrowded. In 2017, the average number of people detained in the facility was about one-third of the total accommodation capacity, and this number has fallen in the last two years.[107]

However, although the facility has accommodation capacity for a sufficient number of persons and strives to improve the material conditions, the facility as an infrastructure, does not meet the international and domestic standards for the detention of vulnerable categories of persons, nor does it meet the standards regarding the availability of professional capacities when it comes to the specific needs of the vulnerable categories of foreigners. The standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stipulate that in cases where it is deemed necessary to deprive persons of their liberty for an extended period under the 'aliens legislation', they should be accommodated in centers specifically designed for that purpose, offering material conditions and a regime appropriate to the legal situation and staffed by suitably-qualified personnel.[108] Furthermore, with regards to the standards for such facilities, the CPT considers that the supervisory staff in these centers should be carefully selected and receiving appropriate training. The well-trained

[107] The data in this text refer to the period from January 2017 to October 2019

[108] Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Extract from the 7th General Report [CPT/Inf (97) 10], Foreign nationals deprived of freedom under aliens legislation, (B. Detention facilities, 29)

staff are particularly important, above all in identifying the vulnerability of persons. The Standard Operating Procedures for Vulnerable Categories of Persons are an important mechanism that will contribute to a better identification of their individual needs and their further provision.

Taking into consideration the vulnerability of certain groups of foreigners who are often detained at the Reception Center, especially unaccompanied children and women, it is of particular importance that the staff at the facility are trained to recognize the possible symptoms of stress reactions, whether post-traumatic or conditioned by socio-cultural changes and to be able to take appropriate action. In order to provide for their specific needs, the institution should provide a constant presence of psychologists and social workers,[109] who would continuously work with the vulnerable persons and would offer work programs, educational, constructive and recreational activities, outdoor exercises, etc. The detained children must be included in the educational process. Furthermore, the physical and mental well-being of a child is undoubtedly important to the further development of his/her personality. The Reception Center for Foreigners has one psychologist and one social worker, who are hired full time and provide the presence of the necessary professional staff in one shift only. Another shortcoming is the fact that apart from the initial conversation these professionals have with the vulnerable categories of foreigners, they do not undertake further appropriate professional, educational and recreational activities necessary to improve the situation of the vulnerable persons.

In terms of the material conditions, the institution has an obligation to provide adequate accommodation equipped with furnished and spacious premises in order to avoid, as much as possible, the impression of carceral environment. When detaining a child or a mother with a child, it is important that the premises are well-furnished and adapted to the child's age, access to clean water and ventilation is essential, room hygiene should be at a higher level, etc.

A part of the facility at the Reception Center for Foreigners is adapted for vulnerable categories of persons. The material conditions in this part of the facility have improved compared to the other parts of the facility in terms of spaciousness, brightness, furnishing, but there is still a need for additional furnishing[110] of the premises for their adaptation to the needs of the children (additional furniture, ventilation, greater hygiene, opportunities for recreational activities, etc.). To this

[109] Article 33 of the Rulebook on the Reception Standards for Asylum Seekers ("Official Gazette of the Republic of North Macedonia", no. 195/2019 as of 24.09.2019) "The service provider should hire full-time professionals to ensure their presence in two shifts, from the following educational profiles: social worker and psychologist."

[110] Article 14 paragraph 1 point 1 of the Rulebook on the Reception Standards for Asylum Seekers "the sleeping rooms should be equipped with one bed, one mattress, two pillows two sets of beddings and blankets, shelf for personal belongings, a locker for each user."

end, the excessive number of beds in the bedrooms[111] intended for the vulnerable categories of foreigners exceeds the domestic and international standards set for the surface area per person deprived of their liberty, more precisely, the surface area is less than 4m^2 per person accommodated in the room, thus impeding on the privacy of the persons.[112]

In addition to the need for substantially acceptable material conditions, the specific needs of certain vulnerable categories are also of particular importance in meeting the requirements for detention of a vulnerable category of persons. For example, if a person with a physical disability who uses a wheelchair is deprived of his/her liberty, he/she has the right to adequate accommodation, which means the compulsory construction of an access ramp.[113] Although no person with physical disabilities has been accommodated in the facility so far, no access ramp has been built in the center, which currently makes the facility unfit for detaining people with disabilities.

In addition, the part of the facility used for detaining vulnerable categories of foreigners is located on an elevated ground floor and it is accessible only by stairs. According to the Rulebook on Reception Standards for Asylum Seekers, at least one bedroom should be provided with equipment designed to accommodate persons with physical disabilities, or with equipment and furniture necessary for the care of infants and young children, such as child/baby beds, fences and other aids for young children.[114] So far, such a room to meet the specific needs of these categories of vulnerable persons has not been adapted in the facility. Or, if the detained person is blind, the institution should have a document specifying the rights and duties within the institution, available in Braille alphabet. Currently, the Reception Center for Foreigners also does not have the capacity to respond to this specific need, necessary for certain vulnerable categories of persons.

Despite the fact that the center does not meet the standards for detention of vulnerable categories of foreigners, the following vulnerable categories of persons have been detained in the institution in the last three years: children, women,

[111] Article 7 paragraph 3 of the Rulebook on Reception Standards for Asylum Seekers "The sleeping area should provide accommodation for a maximum of six persons in one room with a sufficient space for each person consisting of a bed and shelf for the personal belongings."

[112] Article 7 paragraph 1 of the Rulebook on the Reception Standards for Asylum Seekers "For the bedrooms a minimum of 4м2 per person shall be provided, ensuring a minimum of private space, with a minimum distance of 90 см between the beds."; the minimum standard set by the European Committee for Prevention of Torture (CPT) provides for at least 4м2 per person as the desired size for collective accommodation

[113] Article 5 paragraph 1 of the Rulebook on the Reception Standards for Asylum Seekers "The entrance to the reception facility shall be accessible, with a wide enough front door and a ramp for movement by wheelchair."

[114] Article 7 paragraph 4 of the Rulebook on the Reception Standards for Asylum Seekers

mothers with minor children, and one case of detained pregnant woman has also been registered. Regarding the immigration detention of children, during 2017, a total of 8 children, out of which 3 were unaccompanied, were accommodated at the Reception Center. During 2018, the number of detained children in the facility has increased to 55, of which 37 were unaccompanied. While in 2019 (until October) a total of 30 children were detained in the facility, and all were unaccompanied.[115] During 2017, a total of 14 women, in 2018, 18 women, including one pregnant woman, and during 2019 (until October), a total of 9 women were detained at the Reception Center for Foreigners for immigration reasons. In the last three years, not a single (potential) victim of trafficking in human beings has been detained at the Reception Center for Foreigners.

Regarding the duration of detention of vulnerable categories of foreigners, the institution strives to reduce the time of their detention. Although during 2016 the refugees and migrants were detained for several months (from 3 to 6 months), in 2019 the average duration of detention is maximum of 7 to 10 days. Thus, in the cases of detention of vulnerable categories of foreigners, especially children, the detention lasts no longer than 3 to 4 days.

SPECIFICS REGARDING THE TREATMENT OF CERTAIN VULNERABLE CATEGORIES OF FOREIGNERS

UNACCOMPANIED AND SEPARATED CHILDREN

A child is anyone up to 18 years of age. An unaccompanied child-foreigner is a person of foreign nationality or statelessness who is on the territory of the State and who is under 18 years of age, and he/she is not accompanied by a parent or guardian, or after the arrival in the State, he/she has remained without such accompaniment.[116]

The domestic and international regulations regarding the issue of child deprivation of liberty are unambiguous. The Parliamentary Assembly of the Council of Europe is particularly concerned that deprivation of liberty for children, even for very short periods of time and in relatively humane conditions, has severe negative short and long term effects on children's physical and mental health. The children deprived of their liberty for immigration reasons are particularly vulnerable to the negative effects of detention and can be severely traumatized. There is

[115] All data about the numbers of the vulnerable categories of persons detained in the institution have been received by the officials employed at the Reception Center for Foreigners

[116] Standard Operating Procedures for Treatment of Foreign Children, Government of the Republic of Macedonia National Committee for Combating Trafficking in Human Beings and Illegal Migration, September 2015

also a high risk of detained children being subjected to different forms of violence. Therefore, the Parliamentary Assembly of the Council of Europe recommends preventing the detention and deprivation of liberty of migrant children and finding alternative models to detention that meet the best interests of the child.[117]

According to the Convention on the Rights of the Child, child detention should be applied only as a measure of last resort and it should last as short as possible.[118] The CPT's recommendation is to avoid the deprivation of liberty of refugee and migrant children. According to the principle "in the best interest of the child" provided for in Article 3 of the United Nations Convention on the Rights of the Child, the detention of children, including unaccompanied and separated children, is rarely justified.[119] According to the CPT standards, every effort should be made to keep the duration of the deprivation of liberty for the shortest possible time, as well as the unaccompanied child should be released from the detention facility and provided with more appropriate care.[120]

For some years now, the Reception Center for Foreigners has not detained children and mothers with minor children, but they have been transferred to a facility for the accommodation of vulnerable categories of asylum seekers (the so-called "safe house") in the shortest possible time, which has been used in recent years as an alternative for accommodation and sheltered housing of the vulnerable categories of asylum seekers. In 2019, the safe house ceased to function as a place for alternative accommodation, making the child detention at the Reception Center for Foreigners more and more prevalent.

The practice indicates that the children are detained at the Reception Center for Foreigners for a short period of time, usually for 3 to 4 days, and most often the reason for their detention is because they are used as witnesses in criminal proceedings against migrant smugglers. Once the criminal proceedings are over, the children start an asylum procedure and as a result of it they are transferred to the Reception Center for Asylum Seekers.

[117] Alternatives for immigration detention of children, Resolution 2020 (2014) of the Parliamentary Assembly of the Council of Europe, as of 03.10.2014

[118] Article 37(b) of the Convention on the Rights of the Child, adopted by the United Nations General Assembly by the Resolution 44/25, as of 20 November 1989

[119] CPT standards, extract from the 19th General Report [CPT/Inf (2009) 27], Safeguards for illegal migrants deprived of liberty, Additional safeguards for children, 97

[120] CPT standards, extract from the 19th General Report [CPT/Inf (2009) 27], Safeguards for illegal migrants deprived of liberty, Additional safeguards children, 97. "When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible time; especially, all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, relatives or carers."

In addition to the appropriately and specifically adapted material conditions for the child's needs (spacious rooms, good ventilation, high hygiene, furnishing, etc.), a wide range of constructive activities, especially intellectual stimulation and involvement in the educational process, are also of particular importance for the children deprived of their liberty. The staff called upon to fulfil that task should be carefully selected, adequately trained and capable of coping with the challenges of safeguarding the welfare of children.[121]

Taking into consideration the material capacities of the institution, including the lack of skilled and adequate staff, the Reception Center for Foreigners has no capacity to respond to CPT standards and legal requirements for detention of children. The center is not even able to provide continuous supervision of children, continuous attention from experts and professionals, who will provide psychosocial support for the children through creative and educational activities appropriate to their age. Therefore, the detention of children at the Reception Center for Foreigners is a direct violation of the international and domestic legislation.

In the case of a child, the Standard Operating Procedures require the immediate appointment of a guardian. With regard to this issue, the Reception Center for Foreigners is currently facing a serious problem. Upon the arrival of the children at the institution, the representatives of the Reception Center for Foreigners immediately inform the social workers of the Center for Social Work about the reception of unaccompanied children, but apart from the initial contact, the next contact established between the child and his/her guardian is during the testimony of the child before the competent court. Therefore, it seems that the appointment of a guardian of unaccompanied children at the Reception Center for Foreigners is done in a purely formal manner. In the absence of a guardian, the children deprived of their liberty are not able to contact a lawyer, obtain access to legal aid, nor are they able to sign documents and certain confirmations that they have received the documents, which directly affects their inability to use legal protection in the procedure imposed on them. Practically, they are deprived of any legal protection since the moment of their deprivation of liberty. The question is posed on what basis are the children detained in the institution at all? The reason for this shortcoming is the poor inter-institutional cooperation, on the account of which the basic human rights of the most vulnerable category of persons, i.e. children, are violated.

[121] CPT standards, Extract from the 9th General Report [CPT/Inf (99) 12], Juveniles deprived of liberty, 33

WOMEN

Regarding the accommodation and deployment, the practice at the Reception Center for Foreigners indicates that the standards regarding the age and sex of the vulnerable categories of persons in the institution are the most often respected. Namely, children and women are accommodated in separate rooms,[122] which are separated from the other rooms in the institution where the adult males are accommodated, thus making impossible the mutual contact in order to prevent possible incidents.

Due to the specificity of certain needs, the women, as they are, represent a vulnerable category of persons. In times of refugee crisis, when as refugees and migrants, they travel alone unaccompanied, the women and girls face risks of different types of violence, particularly sexual and gender-based violence by smugglers, criminal groups and individuals in refugee route countries. The degree of vulnerability of women increases if they travel alone with children, if they are pregnant or they are younger girls.

In the last three years, at the Reception Center for Foreigners, there have been several cases of detention of girls, women, mothers with children, and one case of a detained pregnant woman has also been registered. The vulnerability is particularly pronounced for mothers with young children and pregnant women, due to the increased need for appropriate and nutritional-specific diets, better hygiene conditions, and regular and specific health examinations. The Standard Operating Procedures for the Treatment of Vulnerable Categories of Foreigners states that pregnant women or girls need increased medical care and additional assistance, such as supplementary dietary programs. A pregnant woman or girl diagnosed with a difficult pregnancy is at particular risk and needs special attention.[123]. According to the CPT standards, all the efforts should be made to meet the special dietary needs of pregnant women deprived of their liberty and they should be offered a high protein diet rich in fresh fruit and vegetables.[124] One of the CPT's recommendations also states that "the specific hygiene needs of women should be addressed in an appropriate manner. Of particular importance are the imme-

[122] CPT standards, Extract from the 19th General Report (2009) 27], Safeguards for illegal migrants deprived of liberty, Additional safeguards for children, 100. "In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interest not to do so. This would, for instance, be the case when the children are in the company of their parents or other close relatives. In that case, every effort should be made to avoid splitting up the family. Article 7 paragraph 2 of the Rulebook on the Reception Standards for Asylum Seekers "The bedrooms for children, women only, men only and families are separated by a separate entrance."

[123] Standard Operating Procedures for Treatment of Vulnerable Categories of Foreigners, Government of the Republic of North Macedonia, National Committee for Combating Trafficking in Human Beings and Illegal Migration, July 2016

[124] CPT standards, extract from the 10th General Report [CPT/Inf (2000) 13], Women deprived of liberty, Ante-natal and post-natal care

diate access to sanitary facilities, safe disposal arrangements for blood-stained articles, as well as the provision of hygiene items such as sanitary towels and tampons. The failure to provide such basic necessities can amount, in itself, to degrading treatment."[125]

The access to health care that is equivalent to protecting patients from the outside community is essential to the deprivation of liberty of women. It is also important not to neglect the needs of younger girls, especially if they are in the period of adolescence, for whom, in addition to the aforementioned basic health, nutrition and hygiene conditions, adequate psychosocial support would be necessary.

Taking into consideration the already unsatisfactory material and hygiene conditions at the Reception Center for Foreigners, limited access to quality food, also the limited conditions for access to primary health care and the already mentioned lack of psychosocial support work programs, it is evident that the institution does not have conditions for detention of foreign women.

THE DEGREE OF EXERCISE OF THE RIGHTS OF THE VULNERABLE CATEGORIES OF PERSONS AT THE RECEPTION CENTER FOR FOREIGNERS

During detention at the center, the vulnerable categories of foreigners are guaranteed the same rights as other detainees, as well as special rights recognized by numerous domestic and international tools for protection of the rights of vulnerable categories of persons.

RIGHT TO A LAWYER

The CPT's recommendation is that the persons deprived of their liberty should have access to a lawyer from the very outset of their detention. The right of access to legal assistance should be exercised throughout the period of detention and it should include the right of the person to speak with the lawyer in private, as well as the right of the lawyer to attend his/her examination.[126]

All foreigners, including the vulnerable categories, who are detained at the Reception Center for Foreigners for testimony in the criminal proceedings against third parties, are generally prevented from accessing the right to a lawyer by the end of their testimony. In addition, taking into consideration that decisions on all actions related to unaccompanied children are made by the appointed guardians

[125] Ibid

[126] CPT standards, extract from the 7th General Report [CPT/Inf (97) 10], Foreign nationals deprived of liberty under aliens legislation (C. Safeguards during deprivation of liberty, 30 and 31)

ex officio,[127] and taking into consideration the fact that during the short detention of children at the Reception Center for Foreigners, they are not in contact with their guardian at all, the unaccompanied children, during their detention at the institution, are deprived of the right to a lawyer.

RIGHT TO ACCESS TO INFORMATION

The persons deprived of their liberty should be informed immediately, in a language they understand, of their rights and of the procedure applicable to their case. For this purpose, the documents that would be given to them would be very useful. These documents should be available in the languages spoken by the persons and, if necessary, the services of an interpreter should also be used.[128]

Contrary to these standards, the Reception Center for Foreigners continues to face a problem in communicating with detainees. The institution has no interpreters, either in English or in any of the languages spoken by the detainees, making the communication with these detainees very difficult, thus people are often unaware of the reasons for their deprivation of liberty and detention. Although the Rulebook of the House Rules of the institution and the numerous posters and leaflets listing the rights of persons detained in the institution are a legitimate source of fundamental rights information, however, these contents that are also available in the center, are not available to the detainees in a sufficient number of languages. One of the major problems faced by the vulnerable categories of foreigners detained at the institution remains to be the lack of information on the length of their detention.

RIGHT TO HEALTH CARE

According to CPT standards, all newly arrived detainees should be promptly examined by a doctor.[129] As far as the specific needs of women deprived of liberty are concerned, the institution should be able to provide staff specifically trained in women's health issues, including gynecology.[130] It is also particularly important that the health care services offered to juveniles constitutes an integrated part of a multidisciplinary (medical-psychosocial) program of care. This implies, inter

[127] Article 3 of the Rulebook on the manner of accommodation and sheltered housing of unaccompanied minors and vulnerable categories of persons with a recognized right to asylum in the Republic of North Macedonia, ("Official Gazette of the Republic of North Macedonia", no. 195/2019 as of 24.09.2019)

[128] CPT standards, extract from the 7th General Report [CPT/Inf (97) 10], Foreign nationals deprived of liberty under aliens legislation (C. Safeguards during deprivation of liberty, 30)

[129] CPT standards, extract from the 19th General Report [CPT/Inf (2009) 27], Safeguards for illegal migrants deprived of liberty (Basic rights at the initial stages of deprivation of liberty, 82)

[130] Standards of the European Committee for the Prevention of Torture, extract from the 10th General Report [CPT/Inf (2000) 13], Women deprived of liberty, Hygiene and Health Issues, 32

alia, that there should be a close coordination between the work of the health care staff, the psychologist and the social worker at the institution.[131]

Upon the admission to the Reception Center for Foreigners, the vulnerable categories of persons are subject to a general medical examination, taking into consideration the data on the existence of any chronic or any current diseases. The examinations in the doctor's office are performed without the presence of officials. Given the time-limited presence of medical staff, the initial medical examination is not always performed within the first 24 hours of reception. It would also be important to perform a more detailed initial examination, especially as it involves a vulnerable category of persons, as well as the fact that the persons at the institution have been brought in by officials. Consequently, a detailed examination of the vulnerable categories of foreigners detained at the institution would also allow for the detection of possible injuries or ill-treatment by officials.

The health care at the Reception Center for Foreigners is provided by a medical doctor hired by the Red Cross, who provides only primary care and is present at the institution three times a week. Therefore, the institution is unable to respond to the health care needs necessary for the vulnerable categories of foreigners.

The vulnerable categories also need psychosocial support under the conditions of deprivation of liberty, which is why the institution has a full-time psychologist and social worker. Thus, upon arriving at the reception center, the persons establish contact with the psychologist and the social worker, who initially have the purpose of detecting the specific needs of the vulnerable persons. At the same time, the language barrier is the primary problem that is encountered, which makes it difficult to further more serious engagement in adequate work programs that would provide the vulnerable persons with the necessary psychosocial support.

RIGHT TO ACCESS TO ASYLUM PROCEDURE

A person who clearly and unambiguously wishes to apply for recognition of asylum should be enabled immediately to start an asylum procedure.[132]

[131] CPT standards, extract from the 9th General Report [CPT/Inf (99) 12], Juveniles deprived of liberty, 38

[132] According to the Law on International and Temporary Protection, "A foreigner may express the intention (hereinafter: "has expressed intention") for submission of an application for the recognition of the right to asylum, verbally or in writing, before a police officer of the Ministry of Interior at a border crossing point or within the territory of the Republic of North Macedonia. The police officer referred to in paragraph (1) of this Article shall note down the personal data of the foreigner who has expressed intention, shall issue a copy of the certificate for the expressed intention and shall refer him/her to submit an asylum application before an authorized official in the premises of the Sector for Asylum within 72 hours, located at the Reception Center for Asylum Seekers" (Article 25 of the Law on International and Temporary Protection ("Official Gazette", no. 64/2018)

However, despite the legal obligation, the vulnerable categories of foreigners detained at the Reception Center for Foreigners face daily difficulties in accessing the asylum procedure. The detainees are most likely to have been informed of the possibility of applying for asylum upon the admission to the institution, however, taking into consideration the reason for their deprivation of liberty, they have been given the opportunity to exercise this right only after their testimony before the competent court. Hence, the vulnerable categories of foreigners detained at the Reception Center are *de facto* prevented from applying for recognition of the right to asylum before making a statement in the court proceedings against third parties. When it comes to unaccompanied children, due to the absence of a guardian, they have no opportunity to take any action at all, including the actions related to the asylum procedure.

RIGHT TO CONTACT WITH THE OUTSIDE WORLD

The persons deprived of their liberty should have the right, from the very outset of their detention, to inform a person of their choice about their situation.[133] Thus, during their deprivation of liberty, they should be allowed to maintain contact with the outside world, in particular to have access to the telephone and receive visits by their relatives and the representatives of relevant organizations.[134]

The vulnerable categories of foreigners detained at the Reception Center for Foreigners are usually not prevented in regard to the right to contact with the outside world, i.e. they are allowed to make phone calls, receive shipments and, if needed, to also speak with the representatives of relevant organizations.

RIGHT TO ACCESS TO FRESH AIR

A serious problem for detainees at the Detention Center for Foreigners is the inability to walk in fresh air outside the facility. There are alarming cases of detention for an extended periods of time, without exercising the guaranteed right to walk for at least two hours, allocated for twice a day. The vulnerable categories of persons at the institution are allowed access to fresh air in the yard area of the facility, but this is rare, under limited circumstances, in the presence and under the supervision of officials and for a limited duration of the walk (shorter than the specified time). This approach to detention in closed premises also affects the mental state of individuals leading to development of depression, anxiety and

[133] CPT standards, extract from 7th General Report [CPT/Inf (97) 10], Foreign nationals deprived of liberty under aliens legislation (C. Safeguards during deprivation of liberty, 30)

[134] CPT standards, extract of the 7th General Report [CPT/Inf (97) 10], Foreign nationals deprived of liberty under aliens legislation (C. Safeguards during deprivation of liberty, 31)

impairment of their dignity.

The inadequate facility in which the Reception Center is located, including the problem that the yard of the facility is inadequately fenced, as well as the insufficient number of staff engaged to provide security, are the main reasons for the inability of the vulnerable categories of foreigners detained at the facility to adequately exercise the right to a walk in the fresh air. This situation directly points to a treatment contrary to Article 3 of the European Convention on Human Rights[135] which prohibits all inhumane, humiliating and degrading treatment of persons with restricted freedom of movement.

RIGHT TO ADEQUATE NUTRITION

According to the Rulebook on House Rules of the Reception Center for Foreigners, the center is organized to provide nutrition of three meals a day (of which at least one hot meal), which should be distributed at three different time intervals throughout the day. Besides the three meals, snacks are provided for the children. The medical staff should also play an active role in monitoring the quality of food provided to detainees. This is especially important for juveniles who may not have reached their full growth potential, as the consequences of inadequate nutrition may rapidly become evident and more serious.[136] Specific nutritional needs have also been mentioned in regard to the women, which are particularly pronounced in the case of a mother with a child or a pregnant woman.

However, contrary to the standards being set, the food that is distributed at the facility is usually canned and it is delivered once a day for all three meals, not excluding such treatment or the vulnerable categories of persons..

[135] Article 3 of ECHR "No one shall be subjected to torture or inhuman or degrading treatment or punishment."

[136] CPT standards, extract from the 9th General Report [CPT/Inf (99) 12], Juveniles deprived of liberty

CONCLUSION

It is undisputed that both international and domestic legislation allow the state to control the freedom of foreign nationals in regard to issues related to migration. However, under conditions of detaining vulnerable categories of persons, the competent authorities should be prepared and adequately trained to monitor the situation of the vulnerable persons, respond to their specific needs and adhere consistently to the Standard Operating Procedures for Treatment of Vulnerable Categories of Foreigners, thereby guaranteeing protection from inhumane and degrading treatment of detained foreigners.

The Reception Center for Foreigners meets neither domestic nor international standards for the detention of vulnerable categories of persons. The institution "fails" both in terms of space conditions and staffing capacities.

However, the detention of vulnerable categories of foreigners in the detention facilities should be an exception, not a practice, and reduced to the shortest possible period of time. Instead of detention, other alternatives for vulnerable groups, and especially for children, should be sought, since deprivation of liberty regardless of the conditions can never be in their best interest.

THE STATE'S COMBAT AGAINST THE SMUGGLING OF MIGRANTS VERSUS MIGRANTS' LIBERTY AS A FUNDAMENTAL HUMAN RIGHT

Dragan Godzo and Martina Drangovska Martinova

This chapter deals with the question of the legality of immigration detention in North Macedonia, i.e. it examines whether the measure of detention at the Reception Center for Foreigners is applied in accordance with the law. The response that the article seeks to offer is the result of a previous analysis of the status of migrants traveling with smugglers and the legal grounds for their detention for immigration reasons. There is also the inevitable need to analyze the smuggling of migrants as a criminal offense, especially with regard to the provision of evidence by the prosecution authorities. The latter is aimed at the testimony of migrants and providing opportunities for them to attend the hearings. In addition to the critical overview of the practice observed, this text provides guidance and proposes solutions that can be applied in order to adequately protect the migrants' right to liberty, while allowing the state to freely continue its combat against the smuggling of migrants..

Introduction

The smuggling of migrants, as an antipode to safe and regular migration, poses a global challenge in managing migration and for the wellbeing of migrants. The migrants resort to smugglers' services when they are unable to travel on a regular basis. As a consequence, the smugglers of migrants have become an integral part of irregular migration, and the criminal groups have significantly profited from this serious form of crime. For these reasons, internationally, states have accepted the commitment to a "vigorous combat" against the smuggling of migrants in order to eliminate it.[137]

To this end, the RNM also pays serious attention to the combat against the smuggling of migrants by detecting and punishing the offenders. As a result of the work of the newly established National Unit for the Suppression of Migrant Smuggling and Trafficking in Human Beings within the Ministry of Interior, since 2018 there has been an increased identification of cases of smuggling of migrants by even up to 200%.[138] Throughout 2019, 34 cases of the smuggling of migrants have been discovered, which prevented the attempt to smuggle 1106 migrants.[139] This undoubtedly confirms the State's readiness to eliminate this criminality and prevent smugglers from the potential violation of migrants' human rights.

[137] Declaration for Refugees and Migrants adopted by the UN General Assembly in 2016 in New York

[138] Annual Report of the Ministry of Interior (2018), available on https://mvr.gov.mk/Upload/Editor_Upload//Godisen%20izvestaj%202018.pdf

[139] The data are received through the free access to public information tool and they refer to the period from 1 January 2019 to 30 September 2019.

However, the State faces some challenges in the manner of dealing with this offense. Hence, the RNM has been the target of harsh criticism of a great number of domestic and international organizations ever since 2015, when most migrants were deprived of liberty at the Reception Center for Foreigners in Skopje. The organizations alerted that the migrants were arbitrarily detained at the center in inhumane and degrading conditions, as witnesses in the proceedings against the smugglers of migrants.[140]

THE STATUS OF MIGRANTS TRAVELLING WITH SMUGGLERS

Generally speaking, the smuggling of migrants refers to the illegal movement of people across international borders for material gain. The public perception of trafficking in human beings, smuggling of migrants and the situation of migrants in general are all heavily influenced by media coverage and depend on the general political climate in one society.

The international law, in general, distinguishes between the smuggling of migrants and trafficking in human beings through the dichotomy of coercion and consent: while the persons being trafficked are considered as "victims" or "survivors", the individuals being smuggled are considered to have voluntarily become part of the crime. This dichotomous framework is particularly evident in the protection provided to each group in the two complementary protocols to the UN Convention against Transnational Organized Crime (Palermo Convention): the Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Protocol against the Smuggling of Migrants, by Land, Sea and Air. While the first talks about the need to safeguard the victims of human trafficking and provides for a wide range of safeguards, the Protocol against the Smuggling of Migrants by Land, Sea and Air contains minimum measures to safeguard the smuggled migrants. This is due to the fact that the migrants represent the demand side of illegal smuggling services and it is exactly that demand that +is considered to be the main driver for this branch of organized crime.

In our professional and academic circles, the status of smuggled migrants is also often discussed in terms of whether they can be treated as victims of a crime, whereby two basic aspects are taken into account. The proponents of the notion that the smuggling of migrants is a crime without a victim, base their arguments on the existence of an agreement between the migrants and smugglers regarding

[140] Amnesty International, Europe's Borderlands - Violations Against Refugees and Migrants in Macedonia, Serbia and Hungary, 2015, available on: https://www.amnesty.org/download/Documents/EUR7015792015ENGLISH.PDF

the illegal movement. The others justify the status of the victim by taking into account the position of vulnerability often encountered by migrants, i.e. the inability to otherwise escape serious violations of their rights when the State does not provide adequate protection.

The current legal situation, i.e. the international legal framework and legal provisions at national level, do not reflect the victimological reality of migration. The difference between trafficking in human beings and smuggling of migrants creates a significant division in the treatment of victims. The same applies to the public, political, and academic discourses that tend to neglect the reality of migration, which is characterized by the fact that not only the victims of human trafficking but also the migrants as a whole are explicitly vulnerable and exposed to many risks of victimization.

In addition to being subjected to unsafe conditions while traveling to their destinations, the migrants may be subjected to physical or sexual abuse or held hostage until they pay the smugglers. Others may face exploitation or be forced to engage in other criminal activities during their journey. Thus, only in 2019, the MoI reported seven cases of the smuggling of migrants in which three migrants lost their lives, twenty were seriously injured and 41 migrants suffered minor injuries.[141]

When it comes to the legal status, for the countries of transit and destination, the migrant is usually a foreigner who does not have a regulated status in the country, i.e. he/she does not fulfil the conditions for entry and stay in the country. The Law on Foreigners of the RNM treats the following situations as an illegal entry: crossing the state border outside the place, time or manner designated for crossing; avoidance of border control; the use of forged, someone else's, or invalid travel documents or other documents for crossing the state border; as well as the entry prior to the expiry of the country's entry ban. These situations are not considered to be relevant only if the foreigner is a victim of human trafficking.[142] Hence, the migrant who has entered the RNM, thanks to smugglers of migrants, is usually not allowed to reside in the country in accordance with the applicable regulations for foreigners and may therefore be subject to return and removal procedures. There is an exception in those situations when the person has applied for asylum in the country.

[141] These data are taken from the daily newsletters of MoI published on https://mvr.gov.mk/dnevni-bilteni

[142] Law on Foreigners ("Official Gazette of the Republic of Macedonia", no. 97/2018 and "Official Gazette of the Republic of North Macedonia", no. 108/2019).

ENSURING THE PRESENCE OF MIGRANTS-WITNESSES IN THE CRIMINAL PROCEEDINGS AS A BASIS FOR (UNLAWFUL) DEPRIVATION OF LIBERTY

Smuggling of migrants is a criminal offense stipulated in Chapter Thirty-Four of the Criminal Code of the RNM namely, the Crimes against Humanity and International Law. In a similar manner to the international documents, the CC criminalizes this offense by stipulating that it shall punish anyone who, by force or serious threat to attack the life or body, by kidnapping, by deceit, by covetousness, by abuse of his/her official position or by exploiting the weakness of somebody else, shall illegally transfer migrants across the state border, as well as anyone who makes, procures or holds a false passport for such purpose. The punishment is at least four-year imprisonment, and the qualification forms are more severely punishable, for example if the migrant's life or health is endangered, or the migrant is particularly humiliated or cruelly treated, or prevented from exercising his/her rights under international law; the offense is committed with a child or the offender is an official.[143]

The testimony as a means of evidence in criminal proceedings is extremely important for proving the relevant facts of the offense. The Criminal Procedure Code stipulates that any person who has knowledge of the crime or the facts from which the factual situation can be established may testify. In many cases, the witnesses are either an injured party or victims of a crime. According to the rules of the proceedings, one of the defendant's rights is to personally or through a lawyer examine the witnesses against him during the main hearing.[144]

When the migrants are witnesses in the proceedings against smuggling of migrants, the question of ensuring their presence at the main hearing arises. In most cases, the country is perceived by migrants as a transit country, meaning

[143] Criminal Code ("Official Gazette of the Republic of Macedonia", no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017 and 248/2018). Decisions of the Constitutional Court of the Republic of Macedonia: U. no. 220/2000 as of 30 May 2001, published in the "Official Gazette of the Republic of Macedonia", no. 48/2001; U. no. 210/2001 as of 6 February 2002, published in the "Official Gazette of the Republic of Macedonia", no. 16/2002; U. no. 206/2003 as of 9 June 2004, published in the "Official Gazette of the Republic of Macedonia", no. 40/2004; U. no. 228/2005 as of 5 April 2006, published in the "Official Gazette of the Republic of Macedonia", no. 50/2006, and U. no. 169/2016 as of 16 November 2017, published in the "Official Gazette of the Republic of Macedonia", no. 170/2017.

[144] Criminal Procedure Code ("Official Gazette of the Republic of Macedonia", no. 150/2010, 100/2012, 142/2016 and 198/2018). Decision of the Constitutional Court of the Republic of Macedonia U. no. 2/2016 as of 28 September 2016, published in the "Official Gazette of the Republic of Macedonia", no. 193/2016.

that they do not stay long on its territory. Hence, the prosecution authorities encounter the problem of ensuring the testimony of migrants at the main hearing, which may take place several months after the indictment has been filed.

Under these circumstances, the practice has shown that the State is resorting to imposing the measure of detention at the Reception Center for Foreigners on those migrants who are required as witnesses in the proceedings.[145] The criminal legislation of the RNM does not provide for deprivation of liberty as a measure of ensuring the presence of witnesses, regardless of whether they are nationals or foreigners. The measure of detention at the Reception Center for Foreigners is provided for in the procedures for the return and forced removal of foreigners; in cases where the identity of foreigners cannot be established; as well as for asylum seekers for whom there is a decision to restrict the freedom of movement. Even in the case where the migrants-witnesses fall into these categories of foreigners on grounds of detention in the Reception Center, the detention decision must still be made by the competent authority in accordance with the law. A decision made by an incompetent authority again means that it is an unlawful deprivation of liberty.

During its visits in 2017, the NPM team has pointed out, as one of the most serious problems, the reason why the persons were detained in the center, i.e. the fact that despite the grounds according to the detention decisions being made, the persons were detained for ensuring their presence as witnesses in criminal proceedings against third parties.[146] The practice of such an unlawful detention has been confirmed in other relevant reports.[147]

In addition, the NPM also notes that there is a practice of detaining persons at the

[145] The last Special Report on the situation in the Reception Centers for accommodation and detention of refugees/migrants of NPM notes: "Based on the inspection of the record keeping books it is notable that the juveniles are detained for a short period of time (most often 3 to 4 days) and most often they are detained as witnesses in proceedings". The report is available on: http://ombudsman.mk/upload/NPM-dokumenti/Izvestai/Poseben%20izvestaj-januari-avgust%202019.pdf

[146] Ombudsman of the Republic of Macedonia, Special Report on the situation in the Reception Center for Foreigners in Gazi Baba, available on: http://ombudsman.mk/upload/NPM-dokumenti/2017/Poseben%20izvestaj-Gazi%20Baba-26.12.2017.pdf

[147] Macedonian Young Lawyers Association, MYLA Annual Report on the practices of immigration detention of foreigners in Macedonia - 2017, available on: www.myla.org.mk
UNHCR, The former Yugoslav Republic of Macedonia as a Country of Asylum - Observations on the situation of
asylum-seekers and refugees in the former Yugoslav Republic of Macedonia, August 2015, available on: https://www.refworld.org/pdfid/55c9c70e4.pdf
Human Rights Watch, "As Though We Are Not Human Beings" - Police Brutality against Migrants and Asylum Seekers in Macedonia, September 2015, available on: *https://www.hrw.org/report/2015/09/21/though-we-are-not-human-beings/police-brutality-against-migrants-and-asylum*

center by MoI decisions to establish the identity, even though the only competent authority to make a decision on detention on this ground is the court.[148]

The international law does not prohibit deprivation of liberty for immigration reasons *per se*, nor is the right to liberty absolute. However, the international legal framework provides substantial safeguards against unlawful and arbitrary deprivation of liberty. Any deprivation of liberty must be in accordance with national legislation, otherwise it would be an unlawful deprivation of liberty under the national or international law.[149]

The prohibition of arbitrary deprivation of liberty is stipulated in all major international and regional instruments for the human rights promotion and protection. These include Articles 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and Article 5 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is necessary, in this sense, to stop the deprivation of liberty of migrants on illegal basis, while at the same time finding appropriate solutions to ensure that the evidentiary proceedings for the smuggling of migrants are conducted smoothly.

POSSIBLE ALTERNATIVE SOLUTIONS TO DEPRIVATION OF LIBERTY FOR ENSURING THE MIGRANTS' TESTIMONY AGANST SMUGGLERS

In order to ensure that the State does not violate the right to liberty of migrants through unlawful deprivation of liberty, first and foremost, it is necessary to change the practice of depriving migrants of their liberty as witnesses in criminal proceedings which must be terminated. However, in situations where there are other grounds for the detention of migrants at the Reception Center for Foreigners, it is necessary to comply with the legal rules, in particular with regard to the decision made by a competent authority. In addition, the decisions on deprivation of liberty should be based on a detailed and individualized assessment of the

Global Detention Project, Former Yugoslav Republic of Macedonia Immigration Detention Profile, June 2017, available on: https://www.globaldetentionproject.org/countries/europe/macedonia Amnesty International, Europe's Borderlands - Violations Against Refugees and Migrants in Macedonia, Serbia and Hungary, 2015, available on: https://www.amnesty.org/en/documents/eur70/1579/2015/en/

[148] Ombudsman of the Republic of Macedonia, Special Report on the situation in the Reception Center for Foreigners in Gazi Baba

[149] UNHCR, Detention Guidelines - Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, available on: https://www.refworld.org/docid/503489533b8.html

need for deprivation of liberty in accordance with the legitimate aim, and thereby the particular circumstances or needs of certain categories of migrants should be taken into account.[150]

The positive legal framework provides for two possibilities for ensuring testimony that will not involve deprivation of liberty and they should be resorted to whenever possible.

One of the alternatives to providing migrants' testimony is to hold an evidentiary hearing during the pre-trial procedure, rather than at the main hearing. However, the possibilities for one of the parties to the proceedings to request an evidentiary hearing under the law are limited: if it is probable that the witness due to illness or death will not be able to be examined at the main hearing; if there is a need for expert evidence and the evidence relates to a person, object or place whose condition is subject to inevitable change; or if there are specific circumstances indicating that the witness is exposed to violence, threats, a promise of money, or other benefits not to testify or to falsely testify. However, this means that in most cases the migrants will have to wait for the main hearing.

A solution already available under the procedural law is also the possibility of witnesses being examined by telephone or video conference when they are on the territory of another state. However, this does not appear to be an option for the state in a situation where the migrant is in a position of migrating and transiting from one country to another, making the communication difficult to establish and maintain.

A new Criminal Procedure Code is in the process of adoption. In November 2018, the Government announced the start of the process for the preparation of a draft of the Criminal Procedure Code and published the draft law on ENER.[151] The draft law provides for some extension of the cases where it may be required to hold an evidentiary hearing, i.e. in cases where the witness, not only for the reason of serious illness but also for other justifiable reasons, cannot be examined at the main hearing. However, the interpretation of the question of what reasons would be considered justified in this regard remains open. Another noteworthy novelty in the draft law is the examination of particularly vulnerable victims and witnesses. Unlike the current law, the draft law extends the list of particularly vulnerable victims and witnesses, among other categories, to those who are victims, i.e. witnesses of a crime against humanity and international law, such as smuggling of migrants. A year later, there is still no information available on the further drafting of the draft law, i.e. whether any changes have been made of the last version published on ENER. Hence, in addition to acknowledging the changes

[150] Ibid

[151] https://ener.gov.mk/default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=T-T7CpU7vsOTQUOB7mUvMCA==

made in the first draft law, the questions and possibilities for supplementations which will enable foreign nationals who do not have a residence or abode on the territory of the State to be able to testify during the pre-trial procedure remain open. Thus, it is necessary for the legal norms to be precisely formulated and clear, to meet the standards of legal certainty, thereby leaving no room for further arbitrary interpretation and application.

CONCLUSION

Deprivation of liberty, in every context, including the immigration one, should only be used as a last resort where the respect for legal rules and the international law is guaranteed. In this regard, in order to ensure the testimony of migrants in proceedings against crimes of smuggling of migrants, one must first examine whether some of the conditions are met to hold an evidentiary hearing in a pre-trial procedure or to resort to an examination of witnesses by telephone or video conference. When imposing a measure of detention at the Reception Center for Foreigners, special attention should be paid to carefully examine whether there are legal grounds for imposing this measure and, if so, the decision must be made by the competent authority in accordance with the law.

The opportunities to ensure testimony in these proceedings are limited, and under such circumstances, the combat against the smuggling of migrants is seriously questioned. For these reasons, it is necessary to invest in legislative changes that will open up new opportunities for the State in the combat against this crime, whereby the migrants' right to liberty will not be called into question.

ALTERNATIVES OF DEPRIVATION OF LIBERTIES: OPPORTUNITIES AND PERSPECTIVES

Radostina Pavlova

Alternatives to immigration detention have shown much promise in respecting the individuals' right to liberty and promoting their wellbeing, while helping to achieve the governments' legitimate objectives in migration management. A range of such less restrictive practices exists, from regular signing with police, submitting of documents or a money bond, to placement in semi-open centres and community-based case management programmes. North Macedonia's legislation has introduced the notion of applying less restrictive measures instead of placing asylum seekers or irregular migrants in detention facilities. The recommendations include further strengthening of the legislative framework to solidify a presumption of liberty, and testing on the ground different types of alternatives to detention.

Introduction

Like many European countries, in the past several years North Macedonia experienced a rapid and significant increase in the number of people entering the country to seek safety from the conflicts raging in Middle East and elsewhere, or escaping poverty or persecution. Unprepared to deal with the volume of arrivals and driven by an imperative to control migration and to prevent refugees and migrants from reaching, entering and remaining in their desired destination countries, many governments resorted to forceful methods to manage migration, increasingly relying on the use of immigration detention. However, detaining migrants is not only harmful to their well-being and infringes upon their rights, but it also does not seem to deliver on governments' policy objectives in the area of migration. There is, therefore, a need to examine the applicability of alternatives to detention (ATD) to the North Macedonian context and to explore ways to apply them that would benefit the state in accomplishing its legitimate objectives, the affected migrants and refugees, and the receiving society more generally.

DEFINITIONS AND TYPES OF ALTERNATIVES TO DETENTION

There is no legal definition of the term "alternatives to detention" in the migration context, nor a universally agreed upon notion of its meaning. The definitions and the understanding of what practices constitute an alternative along the "detention – full liberty" spectrum that different entities have adopted, vary. The United Nations High Commissioner for the Refugees (UNHCR), for example, describes al-

ternatives as: "Any legislation, policy or practice that allows asylum-seekers[152] to reside in the community subject to a number of conditions or restrictions on their freedom of movement."[153] The Council of Europe does not offer a definition *per se*, but supports the general consensus that alternatives to immigration detention are "non-custodial measures that respect fundamental human rights and allow individual options other than detention."[154] The International Detention Coalition (IDC) offers a definition that is quite expansive: "any law, policy or practice by which persons are not detained for reasons relating to their migration status."[155] This preponderance of the principle of liberty in the IDC's understanding of the notion of alternatives to detention reflects its positions that alternatives should not apply only to vulnerable individuals such as children or refugees and that they do not refer only to accommodation models, nor do they necessarily require the application of conditions such as bail/reporting, and nor do they refer to alternative forms of detention.[156]

Regarding the different types of alternatives to detention, in its Detention Guidelines,[157] the UNHCR lists the following possible forms of alternatives of detention: 1) deposit or surrender identity and/or travel documentation (such as passports); 2) periodic reporting to immigration or other authorities (such as signing at the police office at determined intervals of time), whereby the UNHCR warns specifically against reporting obligations that are too onerous and advises that the frequency of reporting be decreased over time; 3) directed residence, where the asylum seekers may be released on condition that they reside at a specific address or within a particular administrative region until their status has been determined; 4) residence at open or semi-open centers; 5) a surety or guarantor, who may be an individual (e.g. a family member), an NGO or community group, who would be responsible for ensuring the asylum seeker's attendance at official appointments and who would suffer a penalty (a sum of money) in case the asylum seeker fails to appear; 6) release on bail or bond, where the foreign national submits a sum of money to be held by the authorities and which sum is forfeited in case of failure to comply with the asylum procedure; and 7) community supervision, where individuals are released into the community with support arrangements (compulsory

[152] The limiting in UNHCR's definition to asylum seekers is explained by its specific mandate under the 1951 Convention on the Status of the Refugees.

[153] UN High Commissioner for Refugees (UNHCR), Options Paper 2: "Options for governments on open reception and alternatives to detention", 2015, p.1.

[154] Council of Europe 2018 (see note 2 above), p.10.

[155] International Detention Coalition (IDC), 2015, "There are alternatives. A handbook for preventing unnecessary immigration detention" (revised edition), p.2.

[156] Ibid.

[157] UN High Commissioner for Refugees (UNHCR), "Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention", 2012.

or optional) that can include support in finding local accommodation, schools, or work; the direct provision of goods, social security payments, or other services.

The Council of Europe mentions all of the above-listed forms of alternatives to detention, and several additional ones, some of which are on the more restrictive end of the spectrum – particularly, electronic monitoring (for example, through an electronic bracelet allowing the tracking of the person's movement through GPS technology), which is recognized as a particularly harsh restrictive measure.[158] The CoE includes also some variations of the basic forms enumerated above, such as open type return houses or centers for families who are in return proceedings; registration with authorities for persons who do not possess travel or ID documents (differentiated from reporting or submission of travel documents); alternative family-based accommodation (for children) and temporary resident permits.[159] Significantly, the CoE lists return counselling as a form of alternatives to detention, where individuals can either be released from detention or not be detained in the first place, in order to "explore voluntary return, usually with intensive support, including financial incentives, from State representatives or civil society organizations" where "advice and support around formal voluntary return programmes, such as those run by the International Organization for Migration" are provided.[160] It is necessary to underline here that while return, forced or voluntary, is one of the outcomes of a successful case resolution, return counselling cannot be, in itself, an alternative to detention, and the possible expectations on the part of state authorities that release on an alternative measure into a case management or community supervision programme, which would lead to a successful return, should be carefully managed.

Finally, one of the alternatives to detention forms mentioned in most documents, case management, deserves some further comment. The Return Handbook states: "Tailored individual coaching, which empowers the returnee to take in hand his/her own return, early engagement and holistic case management focused on case resolution has proven to be successful."[161] Case management, according to the IDC, is "a social work approach which is designed to ensure support for, and a co-ordinated response to, the health and wellbeing of people with complex needs."[162] In practice, it involves each migrant "being assigned a 'case manager' who is responsible for their entire case, including providing clear and consistent information and advice about the asylum process (as well as other migration and/or return processes, as applicable), as well as about any conditions on their release

[158] Council of Europe 2018 (see note 2 above), p.73.

[159] Ibid., pp 63-73.

[160] Ibid., p.71.

[161] Return Handbook (see note 10 above), p.68.

[162] International Detention Coalition (IDC), 2015 (see note 23 above), p.47.

and the consequences of non-cooperation.[163] While some see it as a method of working with the target population that leads to increased effectiveness of the alternatives to a detention type being implemented, (see more below in the section on elements of effective alternatives to detention), in other cases it is seen as a stand-alone kind of alternative to detention. This distinction is important, especially in contexts where there is a real or perceived high frequency of absconding, where the authorities are unlikely to adopt and apply ATD without any restrictions whatsoever. In that case, it would be more reasonable to use case management as a supportive method for the effectiveness of different alternatives to detention, rather than design an alternative to detention based only on one in particular.

INTERNATIONAL AND EU LEGISLATIVE AND POLICY FRAMEWORKS APPLICABLE TO ALTERNATIVES TO DETENTION

The key legal principles governing the application of alternatives to detention can be summarized as follows: presumption in favor of liberty; choice of the least restrictive measure possible; establishment in law/regular review by an independent judicial or other competent authority; respect for the principles of proportionality and non-discrimination and ability to ensure human dignity and respect for fundamental human rights.[164]

The obligation of governments to consider and apply alternatives to detention unless a more restrictive measure is necessary and proportional, prescribed in law and not arbitrarily, is based on a number of international human rights treaties as well as EU directives and policy documents.

The basis of this obligation is the individual's right to liberty and security, enshrined in Article 3 of the Universal Declaration of Human Rights; Article 9 of the International Covenant on Civil and Political Rights; Article 5 of the European Convention on Human Rights and Fundamental Freedoms and Article 6 of the Charter of Fundamental Rights of the European Union.[165] The European Court of Human Rights (ECtHR), the judicial body responsible for the application of the European Convention on Human Rights and Fundamental Freedoms, as

[163] UNHCR Detention Guidelines (see note 25 above), p. 44.

[164] As summarized in presentation by Ioulietta Bisiouli, Lawyer, Department for the Execution of Judgments of the ECtHR, Council of Europe, at the International Roundtable "Applying Engagement-Based Alternatives to Detention (ATD) and Reducing Irregularity in the Migration Systems – an Exchange of Experience", 20 June 2019, Sofia, Bulgaria.

[165] Council of Europe, Steering Committee for Human Rights (CDDH), "Analysis of the legal and practical aspects of effective alternatives to detention in the context of migration", CDDH(2017)R88add2, 26/01/2018 p. 12.

well as other Council of Europe bodies, have consistent jurisprudence relating to a positive obligation to consider alternatives to detention when it comes to vulnerable individuals, such as, non-exhaustively: children; asylum seekers; persons with serious health conditions (including mental health); LGBTI persons; stateless persons; victims of human trafficking; pregnant women; victims of torture, ill-treatment and domestic violence; the elderly and persons with disabilities.[166] At a more general level and not limited to vulnerable individuals, the Committee of Ministers of the Council of Europe has underscored that there is an obligation to consider alternatives in each individual case and that detention, if permissible and in accordance with a procedure prescribed by law, should be applied only when "after a careful and individual examination of the necessity of deprivation of liberty, it has been established that less coercive measures cannot be applied effectively in each case".[167] The Parliamentary Assembly of the Council of Europe has also encouraged its member states to incorporate into law and practice a legal institutional framework to ensure that alternatives are considered first and that they are applied in accordance with the principles of respect for human rights, non-discrimination, necessity and proportionality, while taking into account any vulnerabilities of the persons affected and where the application of alternative measures is subject to regular review by an independent body.[168]

At the level of the legislative framework of the European Union, which must be transposed into their national law by all Member States and by the candidates for accession into the EU, the key directive that governs pre-removal detention, and, respectively, alternatives to pre-removal detention, is Directive 2008/115/EC (the Return Directive).[169] The Return Directive does not use specifically the term "alternatives to detention", however, the meaning of its Article 15 (1) contains a requirement to use detention in cases of individuals who are subject to return only of it is not possible to apply a less restrictive measure:

> *"Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*
>
> *(a) there is a risk of absconding or*
>
> *(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*

[166] Ibid., pp. 19-20.

[167] Ibid., p. 19.

[168] Ibid., p. 20.

[169] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008 (the "Return Directive").

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence."[170]

Thus, the Return Directive clearly stipulates that detention should be used as a measure of last resort (when either of the two exhaustive grounds for detention are present), implying an obligation to consider alternatives. This is confirmed by the European Court of Justice (ECJ) in the Case C-61/11 *El Dridi* where the ECJ, asked to interpret Art. 8(1) of the Return Directive that requires Member States to take "all necessary measures" in order to carry out return orders: "*a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialized facility*".[171] Incorporating the Return Directive into national legislation would thus require introducing a hierarchy where least restrictive measures come first and are considered with priority; this does not mean, however, that a less coercive measure needs to have been applied first, before resorting to detention.[172]

The Return Handbook,[173] a policy document published by the European Commission designed as guidance for Member States' authorities competent to carry out returns, provides further clarification on the application of alternatives to pre-removal detention. It is underscored in the Return Handbook that national legislation must provide for alternatives, as per *El Dridi*, mentioned above[174]. The Handbook further interprets the meaning of the terms "sufficient" and "effectively" in Art. 15(1) of the Return Directive, clarifying that the alternative measures taken that are less coercive than detention should be able to achieve the same goals that detention is meant to achieve, namely, to prevent absconding and hampering of the return on the part of the individual who is to be returned, and the national authority must assess in each individual case whether the alternatives that accord a greater degree of liberty are able to effectively achieve these goals.[175] As an overall recommendation, the Return Handbook advises the Member States to develop a range of different alternatives to pre-removal detention that can be tailored to each case.[176]

[170] Return Directive, Art. 15(1).

[171] As quoted in the Return Handbook (see note 10 below), p. 66.

[172] Return Handbook, (see note 10 below), p. 67.

[173] European Commission, Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Brussels, 27.9.2017 C(2017) 6505 (the "Return Handbook".

[174] Return Handbook, p. 67.

[175] Ibid., pp. 67-8.

[176] Return Handbook, p. 68.

Since the Return Directive applies specifically and exclusively to persons who are subject to a return order for reasons of irregular entry or stay, the above discussion excluded asylum seekers. It can be said that, in international law, there is a stronger presumption of liberty in regards to asylum seekers, since the exceptions to the right to liberty allowed in, for example the European Convention on Human Rights and Fundamental Freedoms (Art. 5(f)) to detain in order to effect deportation or prevent irregular entry, do not apply, due to the principle of *non-refoulement*. For this reason, discussing alternatives to the detention of asylum seekers should not be taken as sanctioning or normalizing such detention. Since, however, the practices of *de jure* and *de facto* detention of asylum seekers have been well-documented,[177] such discussion is necessary. Directive 2013/22/EU,[178] or the Reception Conditions Directive, lays out the standards and conditions for reception of asylum seekers during the procedure for examining their applications for international protection. Recital 20 of Reception Conditions Directive stipulates:

> *"In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants."*

The Reception Conditions Directive also sets out conditions regarding the lawfulness of detention that are stricter than those in the Return Directive: the stay in detention should be as short as possible and only as long as required to verify the grounds for asylum;[179] asylum seekers in detention who have specific needs are entitled to specifically designed reception conditions, and so on.[180]

[177] See, for example, Hungarian Helsinki Committee et al., "Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry", February 2019.

[178] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (the "Reception Conditions Directive).

[179] Reception Conditions Directive, Recital 16.

[180] Reception Conditions Directive, Recital 18.

Finally, the "Dublin Regulation"[181], which determines which Member State is responsible for examining an application for international protection, underscores the principles of necessity and proportionality[182] when detaining a person for the purpose of conducting the administrative procedure under the Regulation and carrying out a transfer to another member state. It refers to the Reception Conditions Directive for any other matters related to detention, including the human rights safeguards; thus, we can draw the conclusion that the obligation to consider alternatives to detention applies also to the persons in a "Dublin" procedure.

ALTERNATIVES TO DETENTION IN | THE NORTH MACEDONIAN CONTEXT

LEGISLATIVE PROVISIONS

The two main pieces of legislation in the legislative framework of North Macedonia that are directly relevant to detention for immigration-related reasons, and to its alternatives, are the Law on International and Temporary Protection and the Law on Foreigners,[183] both promulgated in 2018 and replacing the previous laws governing the matter. The relatively recent promulgation of the laws deserves a note of caution that it may be too early to observe their impact on detention practices, particularly since the majority of the available reports documenting the practices on the ground pre-date their adoption.

ASYLUM SEEKERS

The Law on International and Temporary Protection (LITP) applies to persons seeking international protection in North Macedonia and those who have obtained such protection. The LITP contains provisions of the limitation of freedom of movement of asylum seekers: its Article 63, para. 1 stipulates:

[181] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (the "Dublin Regulation").

[182] Dublin Regulation, Recital 20.

[183] This article uses unofficial translations into English of both laws, provided by the Macedonian Young Lawyers Association (MYLA). The author regrets any inaccuracies that may appear in the text as a result.

"The applicant may, by exception, have his freedom of movement limited, if other less coercive alternative measures in accordance with the national legislation (confiscation of an identification document, regular reporting) cannot be applied effectively."

An exhaustive list of these exceptions is provided in Article 63, para. 2, including establishing the person's identity; establishing the facts and circumstances on which the application for refugee protection is based, if this cannot be accomplished without imposing restrictive measures and especially in the presence of a risk of absconding (guidance on the assessment of which is offered in the following paragraph of the same article); protecting public order or national security; and irregular residence in the country where the application for international protection is deemed to be filed only for the purpose of avoiding deportation.

Article 64 of the LITP specifies further the forms which the limitation of freedom may take place, which is are worth quoting directly:

"- Prohibition of movement outside the Reception Centre for Asylum-Seekers or another place of accommodation determined by the Ministry of Labour and Social Policy; or

- Accommodation in a Reception Centre for Foreigners."

The legal provisions described above establish thus a regime for the placement of asylum seekers, in which the two options that contain restrictions equate full deprivation of liberty, as the choice between placement in a closed-type facility (the Reception Centre for Foreigners, which would mean the only such currently functioning facility in North Macedonia, the detention centre Gazi Baba), and an open-type centre that the foreign national is forbidden to leave, or another designated site to which he/she is confined, is no more than a choice for a site of detention. There is, therefore, a lack of a range of alternatives available in a gradation from the least restrictive to the most restrictive. It is certainly positive that Article 63 allows the detention of asylum seekers only as an exception – though not specifying that it should be a measure of last resort as per international standards – and if less coercive measures cannot be applied. There is no elaboration, however, on the two less coercive measures mentioned, confiscation of an ID document and regular reporting; no clarity of whether they can be applied in conjunction or alternatively; no specifics such as to the frequency of the reporting, and the authorities to which the asylum seekers should report, etc. All of this leads to the conjuncture that the mention of less coercive alternatives to detention in the law is a mere formality and the legislators did not envision their application but merely provided a premise with which to justify decisions to detain.

In addition, from the text of Article 62 – without the benefit of having insight into the actual practice – it appears that asylum seekers who are not considered to have had their freedom limited are placed in an open-type Reception Centre or another accommodation approved by the Ministry of Labour and Social Policy. Under this provision, the asylum seeker is "obliged to reside" at the centre or the approved accommodation, and may not leave it – to change residence – without permission. Thus, the first option for placement of asylum seekers is not full liberty, but is, in fact, tantamount to what is elsewhere described as one alternative to detention with conditions – designated/directed residence (see section Definitions and Types of ATD above).

PRE-REMOVAL DETENTION

The Law on Foreigners determines the detention regime for foreign nationals who are "illegally residing on the territory of the Republic of Macedonia", "subject to a return decision due to the risk of absconding", or "avoid or obstruct the return procedure" (Article 159). The possibility to apply less coercive measures in these situations is laid out in Article 162:

> *"If a foreigner who cannot be removed [...] has provided accommodation and means of subsistence in the Republic of Macedonia, and by the circumstances of the case, it can be assessed that he or she does not need accommodation in the Reception Centre, the Ministry of Interior may take a decision to limit the movement only in the place of residence and to determine an obligation for its regular appearance at certain time periods in the Ministry of Interior.*

This provision falls short of providing effectively for alternatives to detention in accordance with the accepted international standards in a number of ways. In the first place and very essentially, it reverses the presumption of liberty and imposes a presumption of detention. Only if detention (accommodation in the Reception Centre for Foreigners) is not assessed to be necessary, and accommodation and means of subsistence have been ensured, then a less coercive measure should be considered. Secondly, only one alternative is envisioned, imposing reporting obligations combined with "limiting the movement only to the place of residence", which is a very restrictive measure. In fact, the Law on Foreigners contains a range of alternatives – Article 152, para. 8 also allows for the possibilities of submitting a financial guarantee, submitting documents, or a designated residence, in addition to (alternatively) reporting to the police, but only for persons who have been granted a period for voluntary return. There is no reason why these options cannot also apply to other foreign nationals who are subject to return. Moreover, there is no guidance in Article 162 as to how to assess the appropriate-

ness of the alternative measure, nor a recourse mechanism if the foreign national should want to challenge the conditions, nor a mechanism for regular review and the possibility to amend the measure. There is also no provision regarding the consequences of a failure on the part of the foreign national to comply with the conditions.

Fortunately, Article 120 of the Law on Foreigners does allow for temporary residence to be granted on humanitarian grounds for a period of one year, for which time the return of the foreign national would be suspended. While not commonly considered a type of ATD, such a measure can effectively serve as an alternative to detention until there are no longer any impediments to carrying out the return, particularly when it is accompanied by a set of rights, such as access to the labour market and to basic services. There are examples of such practices, for instance, in Romania, where the legal definition of "tolerated status" serves exactly the purpose of keeping foreigners who cannot be removed for humanitarian reasons out of detention and able to provide for themselves, until the humanitarian reasons are no longer present. It should be taken into consideration that such schemes must have a path to permanent legal status in the country, such is the case in Poland, for instance. Otherwise, there is a risk of keeping people in limbo and living in uncertainty for a prolonged period of time.

PRACTICES

A review of national and international reports[184] on North Macedonia's reception conditions and practices regarding asylum seekers and migrants for the period 2014-18 paints a picture where, in the earlier stages of the so-called Balkan Route phenomenon, conditions were very poor overall and detention was widespread, prolonged and arbitrary, including detention of asylum seekers. The situation improved with legislative changes introduced around mid-2015, which allowed asylum seekers to register an intention to apply for asylum and to move freely on the territory of the country for 72 hours in order to reach a reception centre for asylum seekers. That change appears to have led to a decrease in the frequency and length of detention of asylum seekers. Other recurring problematic areas in the detention practices, some of which are reported to persist (e.g. failure to provide information on the grounds for detention and the right to appeal detention orders), and others have been resolved (e.g. overcrowding), include in addition to these two, prolonged detention of migrants as witnesses in people smuggling trials; obstructed access to asylum procedure for the same registrations of claims happening only after a court appearance; insufficient provision of legal aid, where this is left to a very small number of NGOs; abusive behavior on the part of the

[184] Including reports by Human Rights Watch, Amnesty International, the Belgrade Center for Human Rights, the Macedonian Young Lawyers Association (MYLA) and the National Preventive Mechanism of North Macedonia.

police in detention centres; little or no access to fresh air, and so on. Little or nothing is said in the reviewed reports on applying alternatives to detention, with the exception of recommendations in this direction made by the Macedonian Young Lawyers Association (MYLA), with respect to children and vulnerable individuals, and more generally. It is reasonable to deduce that this lack of information in the monitoring reports reflects an absence of a practice to apply alternatives on a systematic basis or at all. Thus, it would be a particularly apt moment for North Macedonia to test the application in practice of alternatives to detention through piloting such initiatives, several examples of which are given in the next section.

THE BENEFITS OF ALTERNATIVES TO DETENTION

Recent research shows[185] that detaining migrants does not deliver on the policy objectives of the state authorities: it is not effective as a deterrent for future incoming foreign nationals – it has no impact on the choice of destination country or transit route; it does not help to reach individual case resolution (departure or legal status and integration), as it destroys the person's trust in the system and discourages compliance with asylum or migration procedures. For the same reason, it also does not contribute to departure, voluntary or forced. Detention also infringes upon the human rights of the detained persons – notably, the right to liberty, but also the right to family life, private life, dignity, etc, and has a lasting harmful effect on their health and wellbeing. Detention is, additionally a very expensive practice, as it requires the maintenance of securitized facilities, providing for the sustenance of detained persons (who are not able to earn an income and support themselves while in detention), policing, medical costs, the legal costs of litigation for human rights violations and unlawful detention, and so on.[186] An additional negative impact to consider is that detention hampers the future integration prospects of those who may subsequently obtain legal residency, for example, asylum seekers granted international protection.

Alternatives to detention, conversely, have proven to bring significant benefits both from the point of view of the affected foreign nationals, and the receiving state. There seems to be a general consensus among international bodies involved in the matter and ATD advocates and practitioners regarding the main benefits of ATD over detention. The Council of Europe report[187] discusses three distinct areas in which ATD are advantageous: compliance with immigration procedures, cost-effectiveness, and respect for human rights and promotion of the migrants'

[185] E.g., International Detention Coalition (IDC), 2015 (see note 23 above).

[186] However, if ATD are introduced in law and used in parallel to detention, without decreasing the use of the latter then the potential of cost saving is not realized – Council of Europe 2018 (see note 2 above), p. 75.

[187] Council of Europe 2018 (see note 2 above).

wellbeing. With respect to the first benefit mentioned, promoting compliance, the CoE points out specifically the usefulness of ATD in "complex mixed migration contexts"[188] – which plausibly describes the situation in the Balkan countries in recent years – in that stabilizing individuals who are in a particularly vulnerable situation, meeting their basic needs in a community setting, and removing the threat of detention, promotes compliance. The findings of a regional evaluation of pilot projects on applying ATD in Bulgaria, Cyprus and Poland confirms this: 97% of the individuals remained engaged with case-management based ATD in the community or achieved case resolution; additionally, 93% saw an improvement in their well-being.[189] In addition to the areas in which the CoE finds ATD to be effective, compliance, cost effectiveness and the promotion of individuals' well-being and respect for their human rights, the IDC also identifies: reducing wrongful detention and litigation; reducing overcrowding and long-term detention; increasing voluntary or independent departure rates; helping to stabilize vulnerable individuals in transit; improving integration outcomes; improving local infrastructure and other migrant support systems.[190]

It must be mentioned that the Return Handbook, conversely to most of the documents produced by the non-governmental sector, list not only benefits, but also some risks associated with applying alternatives to detention namely, the higher probability of absconding, possible creation of "pull factors" where open-type facilities are perceived as attractive by "irregular migrants" and possible social tensions in the neighborhood of open centres.[191] It is evident that this contrasts with the arguments for alternatives made by migrant advocates and non-governmental organizations, mentioned earlier, that there is no evidence that detention is a deterrent and that, consequently, alternatives to detention could act as a "pull factor". The Return Handbook recognizes some benefits of ATD for the national authorities which are competent to implement the returns of foreign nationals, namely higher return rates, including voluntary return; improved co-operation with the migrants for obtaining necessary documentation to carry out the return; less cost for the national governments and less human cost.[192]

[188] Ibid., p.75.

[189] Eiri Ohtani,"Alternatives to detention from theory to practice - Evaluation of three engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland", 2018, available at: https://www.epim.info/wp-content/uploads/2018/10/ATD-Evaluation-Report_FINAL.pdf, p. 20.

[190] International Detention Coalition (IDC), 2015 (see note 23 above), p.9.

[191] Return Handbook (see note 10 above), p.68.

[192] Ibid.

TIPS AND ELEMENTS OF SUCCESSFUL ATD

THE IDC'S "CAP MODEL"

Most sources examining ATD also point to factors that have proven to have an impact on the success of ATDs, and offers different tips for their design and implementation to policy makers and practitioners. Among them, the International Detention Coalition (IDC) is perhaps the only one that offers a general model applicable to different contexts and specific types of alternatives. It is intended as a tool to assist governments and non-governmental stakeholders in developing "effective and humane systems for managing irregular migration."[193] Named the "Community Assessment and Placement Model (CAP)" (see Figure 1 below), the model is based on two overarching principles, *Liberty: Presumption against Detention* and *Minimum Standards*.

The *Liberty: Presumption against Detention* principle, which underpins all other elements of the model, provides the mandate to apply alternatives to detention, permits detention only when alternatives are not possible, and prohibits entirely the detention of vulnerable persons, including children. *Minimum Standards*, the second overarching principle, requires ensuring not only that the basic living needs of all persons are met, but also guaranteeing fundamental rights, paths to legal status and documentation, fair and timely case resolution, ensuring legal aid and interpretation and regular review of the placement decisions. In the CAP Model, the principle of *Minimum Standards* is not only serving as a way to ensure respecting fundamental rights, but also to attain the more practical aim of increasing the likelihood and ability of the person to comply with the procedures, exploring all legal options and accepting the outcome.

The first of the three more operative limbs of the CAP Model, *Identification and Decision Making* includes the activities of screening and assessment. The two need to be differentiated in their aim and result; both aim to assist the authorities in making the appropriate initial and ongoing choices regarding the placement of the individuals, but while the goal of screening is to obtain basic information for the purpose of initial placement and referrals. Whereas assessment involves in-depth evolution of the needs in order to undertake, or adjust, the course of action in the individual case. The second limb, *Placement Options*, includes three forms of placement: in community without conditions; in community with limited conditions or restrictions, with review; and detention. Since the different kinds of conditions commonly imposed as part of alternative measures were discussed at more length in an earlier section, it is sufficient to point out here that the CAP Model explic-

[193] International Detention Coalition (IDC), 2015 (see note 23 above).

itly includes the possibility of imposing no restrictions or conditions as a form of ATD, saying in this way that the first alternative to detention is full liberty. The final limb of the CAP Model, *Case Management*, including both ongoing support and case resolution, which was also already discussed above, is described here as a "comprehensive and systematic service delivery approach" to supporting and responding to individuals with complex needs.[194] Notable here is that case management is taken neither as a type of ATD, nor as one of the many approaches to the implementation of ATD, but as a method and necessary accompanying process.

FACTORS FOR SUCCESSFUL ATD

Different sources have offered advice on the design and implementation of ATD, which for the most part is already included in the CAP model. According to UNHCR's Options Paper on ATD, for alternatives to detention to "work", the refugees and migrants must be treated with respect throughout the entire duration of their immigration procedures; they must be provided with clear information about their rights and obligations related to the conditionals of the alternative measure and the consequences of non-compliance; have access to legal advice regarding the exploring of all options for legal stay; have access to adequate material reception conditions, including accommodation; and receive individualized "coaching" or case management services.[195] At a more practical level, the UNHCR provides the following recommendations: on case management – case managers are to be appointed at an early stage of the asylum or immigration process and will remain until case resolution; the information is to be shared actively; case managers may be social workers, with the awareness required of possible conflicts of interest in some situations; a code of conduct for the staff is to be adopted to avoid abuses.[196] Regarding placement options, the UNHCR recommends living in the community, in private accommodation, where the host state grants the right to work in order to promote independence and the individual's ability to cope, but social support is provided, if the migrant has no right to work.[197] The UNHCR also gives recommendations on the reporting conditions under an alternative measure: the reporting is not to be more frequent than needed and the frequency is to be reduced over time; different modalities, such as telephone reporting, are to be made available; the location of the reporting is to be convenient; there will be a possibility to report to an organization different to that of the police, e.g., a social worker; to show flexibility in case of there being a delay in reporting, where there are good reasons for the delay.[198]

[194] International Detention Coalition (IDC), 2015 (see note 23 above), p.47.

[195] UNHCR Options Paper (see note 21 above), p. 1.

[196] Ibid. p. 5

[197] Ibid. p. 6

[198] Ibid. p. 7.

Additional advice was provided by UK Home Office representatives at an international event that took place in Sofia in June 2019, on the basis of their experience running several pilot ATD projects, in cooperation with the non-governmental sector.[199] With a focus on the "pillars" that enable personal decision-making on the part of the migrant, the elements of successful ATD include basic human needs, and well as mental and physical health needs met and personal safety ensured; comprehensive information and legal counsel provided; the migrants have the opportunity to listen and be heard and can avail of community support, where they meet with "consistent and familiar faces"; engagement with the immigration procedure is encouraged through routine personal contact with a case manager and notification is given of upcoming (immigration procedure related) events and deadlines; preparation for "multiple possible futures" is made and the migrant is given an opportunity to pursue his/her own ambitions and immigration plan, within the legal and procedural limits.[200]

PILOTING ALTERNATIVES TO DETENTION – EXAMPLES

LITHUANIA: COMMUNITY-BASED PLACEMENT OF ASYLUM SEEKERS[201]

Lithuania launched a pilot project for placing asylum seekers in the community rather than in reception centres, driven by insufficient accommodation capacity and poor reception conditions, as well as its participation in the UNHCR Global Detention Strategy and the transposition of the Reception Conditions Directive. The project is implemented on the basis of a Memorandum of Understanding with the Lithuanian government, a partnership agreement among implementing NGOs and agreement between the UNHCR and the Lithuanian Red Cross. Funding is provided by the government, by UNHCR, by the EU through the Asylum, Migration and Integration Fund (AMIF), as well from NGO input. Through the pilot project, the asylum seekers are provided with a support package, which includes support for accommodation, food and other necessities; case management and

[199] As presented by Alison Wray and Joanne Thalassinou, Home Office, United Kingdom, at the International Roundtable "Applying Engagement-Based Alternatives to Detention (ATD) and Reducing Irregularity in the Migration Systems – an Exchange of Experience", 20 June 2019, Sofia, Bulgaria.

[200] Ibid. See more on the UK Home Office's experience supporting ATD pilots in the example described further below.

[201] As presented by Vladimiras Siniovas, UNHCR Regional Representation for Northern Europe Associate Legal Officer, at the International Roundtable "Applying Engagement-Based Alternatives to Detention (ATD) and Reducing Irregularity in the Migration Systems – an Exchange of Experience", 20 June 2019, Sofia, Bulgaria.

services, including legal assistance. A total of 67 participants had joined by June 2019 (31 joined in 2018 and 36 in 2019), of which only 2 had absconded. The plan is for the project to be expanded to include community-based placement as well, and case management for rejected asylum-seekers and irregular migrants.

BULGARIA, CYPRUS AND POLAND: CASE MANAGEMENT FOR PERSONS IN REMOVAL PROCEEDINGS[202]

Funded by the European Programme for Integration and Migration (EPIM), at around the same time in 2017, three EU countries, Bulgaria, Cyprus and Poland, embarked on the implementation of 24-month pilot projects aimed at decreasing the use of pre-removal detention of migrants and applying community-based ATD for a target group of foreign nationals in, or at risk of, detention. The three projects, while differing in their design and operational detail, as well as the number and exact profile of the participating migrants, had the shared aim of conducting evidence-based advocacy at a national and EU level. Together they formed the European ATD Network, coordinated by the International Detention Coalition (IDC) and the Platform for International Cooperation on Undocumented Migrants (PICUM) leading the EU-level advocacy. The interim independent evaluation[203] of the three projects showed that the vast majority (97%) of the migrants remained engaged and 3% absconded; all of them demonstrated an improved ability to cope with their situations and to comply with the immigration procedure. All three countries have continued to a second stage (2019-2021) of their ATD pilot projects, joined by new EPIM-funded ATD pilots in Italy and Greece.

UNITED KINGDOM – ALTERNATIVES TO DETENTION FOR VULNERABLE WOMEN[204]

The example from the UK is an ATD pilot project implemented as a result of a 2018 strategic decision of the Home Office to reform the detention system in the country. The UK government then started a partnership with the UNHCR for the design and delivery of pilot ATD projects that would test whether partnerships with local community and faith groups would lead to improved outcomes and faster case resolution for migrants. All designed pilots will use the case management approach and will include all kinds of "irregular migrants". The first such project, implemented by the Manchester-based Action Foundation, focuses on vulnerable women who are liable for detention or who are already detained, who do not have children in the UK and have, and at some point in their immigration

[202] As summarized in Ohtani 2018 (see note 36 above). See also D. Giteva, R. Pavlova, D. Radoslvova (2019) ""Applying Engagement-Based Alternatives to Detention of Migrants in Bulgaria: Opportunities and Challenges", available at http://detainedinbg.com/wp-content/uploads/2019/09/Doklad-June19-En.pdfand the website of the European ATD Network, www.atdnetwork.org.

[203] Ohtani 2018 (see note 36 above).

[204] Presentation at June 2019 international roundtable (see note 47 above).

journey filed an asylum claim. The two-year project will work with 21 women at any given time. The women meet with their case manager at least once a week and receive support such as registration for healthcare services, access to English language classes, access to legal services, interpretation, etc. This participation is designed to end with the cases being resolved (either obtaining status, or their departure from the UK).

CONCLUSION

At the time of writing this chapter, the numbers of incoming migrants and asylum seekers on the Eastern Mediterranean and Western Balkan routes has lowered significantly and those hosted in North Macedonia and its neighboring countries are in the tens or hundreds at most. At the same time, North Macedonia is preparing for the negotiations of its accession to the EU. The current lack of urgency and the impetus to harmonize its legislative framework is now a good basis for the country to put in place a migration and asylum system that is at the same time compliant with international human rights standards and EU norms, and also serves the interest of its society. Introducing and applying effective alternatives to immigration detention is an important element of such a system.

Having adopted some legislative provisions mentioning less coercive measures, which is a positive development, however, as discussed above, further legislative changes would be beneficial. Specifically, the presumption of liberty should be firmly established in law, so that imposing no restrictive measures of any kind and allowing full freedom of movement would be the "default" option. Then a range of alternative measures should be introduced, ordered from the least restrictive, to the most restrictive, where detention should be specifically defined as a measure of last resort. The options should be clear and specific and a mechanism for regular review and for recourse should be introduced. It would be beneficial, prior to expanding of the range of available ATD in North Macedonia's legislation, to conduct a feasibility study to determine which among the many existing types of ATD would be most adequate for the national context.

Finally, conducting pilot projects, especially ones testing community-based ATD and employing the Case Management method, such as the several examples given above, would also be very helpful at this point in time, as they have shown to deliver promising results in contexts similar to North Macedonia, including in so-called "transit" countries.

THE YOUNG LAWYERS VERSUS THE CONSTITUTIONAL COURT

Prof. Svetomir Skaric

The Law on International and Temporary Protection placed the young lawyers and the Constitutional Court in sharply opposing positions. The former consider that the aforementioned law is unconstitutional because it allows the Minister of the Interior, by a decision, to restrict the freedom of movement of asylum seekers and treat them as detainees, having only a virtual right to judicial protection. They consider that only the court, by its decision, can restrict freedom of movement, and not an administrative body, by a decision as an administrative act. In contrast, the Constitutional Court considers that the Law on International and Temporary Protection is constitutional and in line with EU law and that an administrative body may restrict the freedom of movement of refugees and migrants, not only the court by its decision. As a consequence, the conflict has radicalized the issue of human rights - whether they are a constitutional or a legal matter. The conflict also raises the issue of the right to asylum as an international right.

REASONABLE INITIATIVE AND TRUST IN THE LAW

The Macedonian Young Lawyers Association (MYLA), in May 2018, filed an Initiative for a procedure for assessing the constitutionality of Articles 63 and 65 of the 2018 Law on International and Temporary Protection, pursuant to Article 110, line 1 of the Constitution of the Republic of Macedonia and Article 12 of the Rules of Procedure of the Constitutional Court of the RNM. The purpose of the Initiative is for the Constitutional Court to annul the contested articles of the Law on International and Temporary Protection from the legal order, as they severely restrict the freedom of asylum seekers and can have severe consequences for their legal status as human beings. It is about protecting the human rights of refugees who have been entering our country in waves for a longer period of time on their way to the wealthier member states of the European Union.

The Initiative states that the contested articles are unconstitutional regarding the standpoint of Article 12, paragraphs 1, 2 and 4, Article 8, lines 1 and 3 and Article 118 of the Constitution of the RNM. It is a legal violation of the constitutional provisions guaranteeing the inviolability of human freedom and the rule of law as fundamental values of the constitutional order of the RNM, but also a violation of the right to freedom guaranteed by the European Convention on Human Rights. The primary law is violated by the secondary law.

It was not difficult for the young lawyers committed to the law (Iuventus cupida legum) to note the unconstitutionality of Article 63. The unconstitutionality is reflected in the very title of the article which reads: "Limitation of Freedom of Movement". It is clear to every lawyer that the freedoms and rights of the individual and citizen cannot be restricted by law, since they have constitutional value.

As a constitutional category, they have greater legal power than the laws, regardless if it is a law passed by a simple, absolute or qualified majority. If human rights and freedoms were to be replaced by laws, then there would be nothing left of them. They would be an easy prey to the political will of a parliamentary majority that varies from election to election. It often changes during the election period (change of the party coalitions).

This unconstitutionality is also reflected in the wording of Article 65, which reads: "Authority taking a Decision for Limitation of Freedom of Movement". Instead of having the judicial power to exercise the limitation, the contested article provides for the limitation to be exercised by the administrative authority, that is, the Ministry of the Interior. It is a severe devaluation of the freedom of movement of asylum seekers, i.e. a severe violation of the 'habeas corpus act' principle, explicitly guaranteed by the Constitution of the RNM (Article 12, paragraph 2) and practiced in the civilized world and the comparative constitutional law for many centuries, ever since 1679 when the 'habeas corpus act' was adopted in England during the struggle of the Parliament of England against the arbitrariness of the English crown.

The contested article provides for judicial protection of freedom of movement, when it is restricted by a decision of the Ministry of the Interior. The asylum seeker has the right to file a complaint with the Administrative Court against the first instance decision. But the initiators lucidly note that judicial protection through the Administrative Court is quasi-judicial protection, because the Administrative Court primarily values the legality of the decision. And it is always legal, because the decision is made on the basis of law (formal legality). The Administrative Courts do not, as a rule, decide on material lawfulness. Hence, such courts are not real courts, that is, they are courts that do not have the quality required by the Constitution of the RNM and the European Convention on Human Rights.

The Administrative Courts in our country are not a constitutional, but a legal matter, incidentally established by the 2006 Law on Courts. They are established spontaneously, without prior conception and structure. They have wide discretionary powers, similar to the public administration bodies. They are more sources of power than sources of justice. As a rule, the administrative procedure is conducted in a closed session and no decision is taken on the merits of the administrative dispute. The "General Principles" of the Law on General Administrative Procedure are rarely applied, such as the principle of proportionality, the principle of equality, impartiality and objectivity, the principle of determining material truth and the principle of hearing the parties. Those principles are applied even less, in the first instance administrative procedure, before the public administration bodies.

The provision of the Constitution that "No one shall be deprived of his/her liberty except by a court decision in cases and in a procedure provided by law" (Article 12, paragraph 2 of the Constitution of the Republic of Macedonia) in the initiative is interpreted by the young lawyers cumulatively, as it should be done, and not alternatively, as it is done by the Constitutional Court. According to them, the Constitution of RNM allows for restriction of human freedom only by a court decision, in cases and procedure provided by law. The law cannot restrict freedom, but can only prescribe the conditions under which such restriction is exercised. The initiators, in principle, stand for human and civil rights and freedoms being a constitutional, and not a legal matter.

The aforementioned view has been a generally accepted view in comparative constitutional law, ever since the time when the 1653 Instrument of Government was adopted as a result of the long Republican struggle against the monarchists during the Puritan Revolution in England (1642-1653). Oliver Cromwell knew that no person in his Republic could have legal certainty if the Parliament were to determine the human rights and freedoms by laws. Ever since then, human rights and freedoms have been treated as the basis and pinnacle of the legal system (funs et caput totius juris) which is seen in national, European and world constitutions.

Article 63 is also contested in regard to the standpoint of the rule of law as a fundamental value, provided for in the Constitution of the RNM (Article 8, paragraph 1, line 3). The rule of law, inter alia, presupposes and requires legal certainty. The legal certainty exists when the legal norms are predictable, clear and precise. And this is not the case with the provisions of Article 63 of the Law which provide for exceptional cases and other "less coercive alternative measures" as grounds for restricting the freedom of movement of asylum seekers ("confiscation of an identification document, regular reporting"). The article is confusing and incomprehensible to reasonable people in unreasonable times, as it is the case today.

The Articles 63 and 65 of the Law on International and Temporary Protection are also contested in regard to the standpoint of the European Convention on Human Rights and the case law of the European Court of Human Rights. The ECHR has been an integral part of the legal system of the RNM ever since 1997, and the ECtHR judgments have become sources of domestic case law through the 2006 Law on Courts. The Law on Courts explicitly states that "The Court, in the specific cases, directly applies the final and executive decisions of the European Court of Human Rights, the International Criminal Court or other court whose jurisdiction recognizes the Republic of North Macedonia. While deciding, the court is obliged to apply the views expressed in the final judgments of the European Court of Human Rights" (Article 18, paragraphs 5 and 6).

Article 5 of the ECHR, titled "The Right to Liberty and Security", provides for the deprivation of liberty of any person only in the precisely specified cases: the law-

ful detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Everyone who is arrested shall be informed promptly, in a language which they understand, of the reasons for their arrest and of any charges against them. Everyone who is arrested or detained shall be brought promptly before a judge or any other official authorized by law to exercise judicial power. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his deprivation of liberty shall be decided promptly by a court and his release ordered if the detention is not lawful.

The asylum seeker cannot be treated as an arrested or detained person; still less can the administrative authority decide to restrict his/her freedom. The provision of the Law on International and Temporary Protection according to which "The manner of limitation of the freedom of movement of an applicant shall be prescribed by the Minister of the Interior" (Article 64, paragraph 3) sounds unacceptable. It is a provision the constitutionality of which is contested neither in the Initiative nor by the Constitutional Court! And it should be contested, since Article 64 is created with respect to the contested Article 63 of the Law. If there was a genuine Constitutional Court in our country, as was envisioned by Hans Kelsen back in 1920, the contested article would be annulled upon an initiative of the Constitutional Court itself, which, according to the Rules of Procedure which it adopted in 1992, has a right and obligation upon its own initiative to repeal the unconstitutional laws and other regulations.

The young lawyers further refer to the standpoints and case law of the European Court of Human Rights in broader terms regarding the application of Article 5 of the Convention. The European Court considers that holding a person in a closed-type secured facility is a classic example of deprivation of liberty. And the "Reception Center" is a closed-type facility. The asylum seeker is not even allowed to go for a walk around the center without the presence of a police officer. In the presence of a police officer, he/she has the right to walk twice a day, in the morning and in the afternoon for half an hour. It is obvious that the asylum seeker is treated in the same way as a detained suspect or a convicted person in prison.

This is how the freedom of the asylum seeker looks behind the closed fence of the "Reception Center", something that the Constitutional Court, i.e. the guardian of the Constitution, agrees with.

The Initiative also relies on the Constitutional Court's Decision of 8 April 2009, annulling paragraphs 1 and 6 of Article 345 of the Criminal Procedure Code. Both clauses of the given article of the Criminal Procedure Code were repealed because the legislator has reserved for himself the right to decide (ex legem) on the detention of persons sentenced to five or more years of imprisonment, and it was not the court to decide on the detention. Detention can only be decided by the court, not the Assembly as a legislative body, by means of an imperative norm that no one can contest. By the given decision, the Constitutional Court makes a clear distinction between the judiciary and legislative power, not allowing the latter to decide on criminal law matters. That is the proper court that we need and the type of court that functions in most EU member states.[205]

In a public hearing, at the Constitutional Court, regarding this issue, the criminal law and criminal procedure professors unanimously opposed the annulment of the given provision of the Criminal Procedure Code (CPC), holding that the detention of the perpetrator of more serious crimes should not be decided by the court, but by the legislator. Contrary to them, one constitutional law professor supported the annulment of those provisions of the CPC, explaining that the imposition of a detention measure depends on the particular case and that only the court, not the Assembly, can decide on it based on the law. The detention measure does not always have to be imposed even for the most serious crimes. Conversely, the court may also impose such a measure for offenses for which there is a punishment of less than five-year imprisonment.

The decision to repeal the aforementioned provisions of the Criminal Procedure Code clearly shows the attitude of the judges of the previous composition of the Constitutional Court regarding detention as a measure of restriction of freedom and those that are competent to adopt such a measure. The decisions of the Constitutional Court have the nature of a constitutional law source, and therefore must be respected by the new composition of the Constitutional Court. They can be supplemented by new legal facts, but not derogated post festum, without explanation and new legal facts. The 2009 Decision is further derogated by the 2018 Decision of the Constitutional Court for not initiating a procedure for assessing the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection, although the aforementioned legal solutions, together with Article 64, legally restrict the freedom of movement through the decision of an administrative body, as a third instance body in the hierarchy of state power. The Assembly was then stripped of its right to restrict freedom of movement, and in 2018, the Constitutional Court agreed for it to be done by an administrative body,

[205] U.No.63/2008-1

that is three instances below the Assembly. What Cicero said about the state of spirit in the Roman Senate when it allowed Caligula to overthrow the Roman Republic, can also be said of the Constitutional Court when it allows an administrative act to restrict human freedom: "O tempora! O mores!".

At the end of the Initiative, the young lawyers proposed to the Constitutional Court to schedule a public hearing on the contested articles of the Law on International and Temporary Protection, so that they could present their arguments against the contested articles directly before the constitutional judges and thereby also inform the wider public on the discriminatory position of asylum seekers when it comes to their right to freedom. Aware of the harmful effects of the contested articles, they requested the Constitutional Court to make a decision on their annulment together with the consequences they had caused by their application in practice. In other words, they requested the Constitutional Court to make a decision with a retroactive effect on its decision (ex tunc effect) rather than a decision to annul the contested articles (ex nunc effect).[206].

POWER DEPRIVED OF WISDOM AND COMMITMENT TO THE LAW

The Constitutional Court did not pay any attention to the arguments of the young lawyers in the Initiative, strongly convinced that the contested articles would not violate the Constitution of the RNM and the European Convention on Human Rights when it comes to human freedom. While rejecting the initiative, the constitutional judges relied more on non-legal facts and less on legal facts, showing no readiness for public dialogue with the applicants, in assessing the constitutionality of the contested articles of the law. The decision not to initiate a procedure for assessing the constitutionality of the aforementioned articles can be regarded as one of the weakest acts ever adopted in the recent history of the constitutional judiciary in the RNM (1963-2018).

The key argument for not initiating the procedure for assessing the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection is the Constitutional Court's interpretation of the provision of the Constitution of the Republic of Macedonia that "No one shall be deprived of his/her liberty except by a court decision and in cases and in a procedure prescribed by law" (Article 12, paragraph 2). The Constitutional Court interprets this provision alternatively. This means that the freedom of a person can be restricted by both a court decision and by the law. The Court relies on the linguistic construction of the given provision which in nuce can also be interpreted alternatively, neglecting the constitutional

[206] Intiative for initiating a procedure for assessing the constitutionality of the Law on International and Temporary Protection, MYLA, 17 May 2018, Skopje, pp.1-9

nature of human freedoms and rights and their fundamental value in the constitutional order of the RNM.

According to the majority of constitutional judges, in addition to the fact that the court may by its own decision restrict the freedom of a person, the freedom may also be restricted by law, in cases and in the procedure provided by law. By such an interpretation of the given provision, the Constitutional Court unequivocally considers that the freedoms and rights of the individual and citizen can also be a legal matter (15aterial egis) and not merely a constitutional matter (materia constitutionis) as considered by the young lawyers. It does not mind if the limitation of the freedom is exercised by administrative bodies as well – if it is written in the law, and if the Assembly expresses such a will. Nor does it mind that the judicial protection of the freedom is exercised in an administrative procedure by the administrative courts, as they are today. It is not bound by the previously made decisions by which it had declared that the Assembly cannot restrict human rights and freedoms by law, as the MPs believe.

The Constitutional Court's changing attitude towards human freedom is more a result of social and political factors than the constitutional judges' ignorance of the law. The strongest factor which negatively affects its attitude towards the inviolability of human freedom is the wave of migrants seeking asylum in the European Union member states, especially in the richer and more powerful countries. And the number of asylum seekers is not small. In the period from January 2015 to March 2016, their number was 1.3 million people. And Macedonia is a country of passage of a large number of those people, and the number of those who are temporarily detained on its territory is not small as well. Fleeing wars within their countries, they seek international protection, that is, solidarity and hospitality in the countries they pass through or in countries they wish to live.[207]

In order to defend itself from the asylum seekers, the EU has adopted numerous directives to protect its member states from the migrant wave, and it also exerts strong pressure on the states which are on their path to becoming members. It requires them to stop the refugees at their state border at all costs and not to allow them to reach the territory of EU member states through their territory. It also requires them to adapt the national legislation to the European directives, irrespective of the constitutional provisions in force in their countries. Within this context, the 2018 Law on International and Temporary Protection was adopted in the RNM, repealing the 2003 Law on Asylum and Temporary Protection (amended seven times in the period 2007 to 2016). The word "asylum" has disappeared from the title of the new law in order to cover up the right to asylum as an international institution, guaranteed by the UN Universal Declaration of Human

[207] Mirjana Trajkovska Lazarova, The Rights of Asylum Seekers and Migrants, MYLA, Skopje,2016, p. 7

Rights of 1948 (Article 14).

The Constitutional Court, without any reservation, also favors that trend, having a commanding tone - to stop the wave of asylum seekers at all costs, not taking into account the international law and the Macedonian positive legislation. To that end, the Constitutional Court presents itself as a positive legislator, not as a protector of constitutionality (a negative legislator). This can be noted by its position presented in the Decision not to initiate a procedure for assessing the constitutionality of Article 65 of the Law on International and Temporary Protection. Supporting the legal decision to restrict the freedom of movement of asylum seekers by the Ministry of the Interior, the Constitutional Court amends Article 65 with a new addition (paragraph 4), worded as follows: "European Union integration is a clearly and unambiguously expressed strategic interest and priority goal of the Republic of Macedonia, until its full membership in the European Union."[208]

The Constitutional Court also has a favorable attitude towards the EU Directives. It finds that the alignment of the national legislation with the European law is important, regardless of what is written in the Constitution of the RNM. It acknowledges that the Law on International and Temporary Protection "aligns partially with the European Directives in the field of asylum", but does not state what the derogation from those directives is and what the alignment of European Directives with the constitutions of EU member states is. The Constitutional Court does not comment on these issues, nor does it open a debate and support by the legal thought. It is even less concerned about the non-compliance of the Constitution of the RNM with the EU primary law. It does not notice that EU secondary legislation actually changes the Constitution of the RNM (Verfasungwanderlung) without its prior formal amendment (Verfasunganderung). In this context, it acts more as a political than a legal institution. It demonstrates power deprived of wisdom.

The Constitutional Court is satisfied with the fact that the measures for limitation of freedom of movement of an asylum seeker (Article 64) in the Law on International and Temporary Protection are "regulated identically" as in the national legislation of the Republic of Croatia and the Republic of Slovenia, which are EU member states and the Republic of Montenegro, which has already begun the negotiations for EU membership. It is concerned only with the comparative national law, but not with the international law and the Macedonian constitutional law. In principle, the comparison does not and cannot have any legal significance when assessing the constitutionality of laws as general legal acts of a national effective law. The comparison can only have a political meaning.

The negligence is also visible in regard to the European Convention on Human Rights. For example, it mixes up Protocol 1 and Protocol 4 both in terms of time

[208] Decision, U. No.53/2018, p. 7

and their contents. It refers to Protocol 1, yet lists the contents of Protocol 4 when it comes to "freedom of movement". This shows the imprudence of the Constitutional Court in regard to the submitted initiative. There are also legal and technical errors evident in other decisions taken by the previous compositions of the Constitutional Court. The responsibility lies not only with the expert advisors in the Constitutional Court, but also with the Judges-Rapporteurs, together with the President of the Constitutional Court who signs decisions and rulings.[209]

STRONG LEGAL REGIME OF FREEDOM OF MOVEMENT

The constitutional value of freedoms and rights of the individual and citizen means constitutional regulation of freedoms and rights without the right of the representative body to interfere in this field by laws. Through this constitutional principle, which has a universal meaning, in fact, the primary nature of human freedoms and rights and their immediate realization in practice come to light. In other words, this constitutional principle advocates a constitutional rather than a legal nature of human freedoms and rights. Thus, the position of the individual and citizen becomes a constitutional category that cannot be derogated by legislative acts or by-laws such as government decrees and ministerial decisions.

The constitutional nature of freedoms and rights means nothing but a solid legal regime of these highest legal values, untouchable by the legislative and executive-administrative power of government. In this context, the freedoms and rights appear to be a limiting factor for state power in the same way as the Common Law system appears to be a restrictive framework for state power in the Anglo-Saxon system of law. The freedoms and rights ensure the autonomy of the person in the society in relation to power. They have been the boundary between the government (gubernaculum) and the private sphere (jurisdictio) ever since the time of Magna Carta Libertatum and judge Henry de Bracton.

As a constitutional category, the freedoms and rights of the individual and citizen are exercised directly by the force of the Constitution, not by the force of the law. The law can only regulate the manner of their realization, but not their content determination. The law can impose certain restrictions on certain freedoms only on the basis of the Constitution, but not independently. In this context, the freedoms and rights not only have the function of limiting state power but they are also the basis for determining the course of action of state authorities, of separating the public from the private sphere. The role of the freedoms and rights of the individual and citizen as the basis, boundary and direction of the state power, has been originally expressed in the 1974 Constitution of the SRM. That role must be respected today and in the future.

[209] *Ibid,* p. 11

The inviolability of freedom as a human right has a broader meaning and greater weight. It was not broadly perceived by the Constitutional Court when assessing the constitutionality of the general legal acts (an abstract dispute). The right to liberty means the right of the person to freedom of movement, to act freely and to behave freely. This right is one of the fundamental rights since it is a condition for the overall activity of the person and a condition for the exercise of his other freedoms and rights. This right has the same value as the right to life, the right to dignity and the right to inviolability and integrity to the person. Historically, the value of human freedom is not in its limitation, but in its infinite expansion, independent of the refugee and migrant wave, today and in the future (Aestimatio libertatis ad infinitum extendur).

Freedom is the highest law. It can be restricted by a higher freedom only. Its limitation must be approached with caution, and since it is a universal human value, it belongs to all living human beings, including asylum seekers. Freedom of movement can be restricted only by a court decision, in three cases: first, where it is necessary for the protection of the security of the RNM; second, if it is of interest of criminal proceedings, and third, if it is necessary for the protection of people's health (Article 27). The Constitution allows only for judicial restriction on freedom of movement. It does not allow for it to be done by another body, which functions within the system of separation of power.

The restrictions on freedom of movement for asylum seekers should also be structured on the given restrictions, taking into account the Convention relating to the Status of Refugees of 28 July 1951 and the Protocol relating to the Status of Refugees of 31 January 1967, as well as the Law on Foreigners. The Law on Foreigners is more favorable to asylum seekers than the Law on International and Temporary Protection when it comes to restrictions on freedom of movement and judicial protection of their rights. The asylum seeker is a foreigner, i.e. a person who is not a citizen of RNM. A refugee is also a foreigner entitled to international and temporary protection. Instead of the two laws being united into one law, the two laws were adopted one after another in a short period of time, having a different approach to the constitutional provisions on human freedom. The Law on International and Temporary Protection was enacted in early April 2018 and the Law on Foreigners by the end of May 2018. To that end, the former is more restrictive than the latter, which is inadmissible regarding the standpoint of the international law and the Constitution of the RNM (Article 8, paragraph 1, paragraph 11).

The adoption of the Law on International and Temporary Protection did not take into account the freedom of movement of refugees set out in the Convention relating to the Status of Refugees of 28 July 1951. The Convention states that refugees must have the same freedom of movement as the foreigners: "Each Contracting State shall accord to refugees lawfully residing in its territory the right to choose their place of residence here and to move freely within its territory subject to regulations applicable to aliens generally in the same circumstances" (Article 26).

The term "freedom" is broader than the term "right". In principle, the freedom is associated with the individual, as a value that belongs to every human being by the nature of the things. The right, in essence, is associated with the citizen as a national. The freedom is natural, and the right is a state category. Therefore, there should be a cautious approach to these terms, especially when "rivers of migrants" flow from poor to rich countries, and when there is no moral balance between starving people and people having storehouses stocked with food supplies.

The asylum seekers have not been approached cautiously in recent times. On the contrary, they are treated rudely as unwanted guests. They are subject to intolerance and even hatred. They are left to the mercy of the state bodies which grant asylum, without any legal protection. Such behavior is a consequence of egoism as the greatest and deepest sin in today's world. Egoism forces an individual to be both against society and against nature. To heal the world from that great evil is to heal it from its root. Egoism is the source of the "collective selfishness" of nations and states.[210]

Egoism and selfishness make it impossible to balance the activities of EU member states in the reception of displaced persons and the provision of temporary protection. High fences - barbed wire walls - are erected to block the entry of refugees and migrants into the EU territory (Bulgaria, Slovenia, Hungary). These are the new walls in Europe after the fall of the Berlin Wall thirty years ago. If the Berlin Wall was a symbol of divided Europe in the middle of the 20th century for three decades, the walls against refugees and migrants in the second decade of the 21st century are a symbol of selfishness and hostility of the European states. The International Detention Coalition - a global network of organizations and individuals working together to end immigration detention of asylum seekers, refugees and migrants - struggles against such walls.

Rabindranath Tagore, on the eve of World War I, called for a moral balance to be established: "There can be no storehouses stocked with food supplies on one side, and starving humanity on the other. There will be a fire in the world that will devour the accumulated wealth and turn it into dust."[211]

Khaled Hosseini, UNHCR's Goodwill Ambassador, writes about the 40-year-old fire in his country, Afghanistan. From this country alone, there are eight million refugees, two million of whom are in Pakistan. There are over 20 million refugees from many countries around the world. Lately, most of them have come from Syria - the homeland of the ancestors of Steve Jobs, founder of Apple and Apple II. There are numerous migrants who have indebted mankind with their inventions and creations. They include Mihajlo Pupin, Nikola Tesla, Albert Einstein and Thomas Mann. The latter two, fleeing Nazi persecution, were first granted asylum and then US citizenship. Thomas Mann was the most prominent member of the society "Writers in Exile" which on US territory was fighting for a "Free Germany" for many years.[212]

[210] Rabindranath Tagore, "Nationalism", Alfa, Belgrade, Agency Draganic, Zemun, 1990, p.22

[211] Ibid, p. 31

[212] Thomas Mann, Continuation of "Doctor Faustus", Slovo Ljubve, Belgrade, 1976, pp. 54-55

Mariam and Laila - residents of Herat and Kabul, described in Khaled Hosseini's "A Thousand Splendid Suns", failed to find shelter from the torture of the Mujahideen and the Taliban in their country. They found shelter in Pakistan with Tariq and his parents. Based on personal experience, Khaled considers the UNHCR as "the most prominent humanitarian organization in the world" in which he has worked for many years as an officer: "UNHCR's work related to refugee assistance is one of the most grateful and most significant experiences in my life." [213]

CONCLUSION

The world cannot exist without hospitality and friendship. They are also imperatives in today's world, even more so now than before. The "right to hospitality" as Immanuel Kant denotes is not a right to be received as a guest, but an entitlement to a visit which belongs to all people, irrespective of their nationality. All human beings share the earth together, and none of them originally has more rights than the others to be in one place. The division of people into indigenous people and settlers (colonists) is unacceptable, a division that is also made today by the Macedonian nationalists. With such a division the human race cannot move "towards the state of civil constitutionality"[214].

Kant's words on civil constitutionality and the right to hospitality cannot be recognized in the Constitutional Court's decision not to initiate a procedure for assessing the constitutionality of Articles 63 and 65. On the contrary, they recognize the "collective selfishness" evident in the provisions of the Egyptian-Hittite treaty of 1258 BC, concluded between Ramses II, the Pharaoh of Egypt, and Hattusili III, the King of the Hittites. Both sovereigns had agreed to mutually return the refugees to their home country and not allow them to move from one kingdom to another at any cost, as the EU member states do today. Due to the inhospitable provisions, the given treaty, inscribed on the stone tablets at the "Karnak Temple" in Luxor (Egypt), does not deserve the attention of those visitors who, as individuals, are on the side of asylum seekers, refugees and migrants - people in search of a peaceful and better life, and who demonstrate human values in times of calamity (calamitas virtutis occasio est).[215]

[213] Khaled Hosseini, "Thousand Splendid Suns", Laguna, Belgrade, 2010, p. 363

[214] Immanuel Kant, "Perpetual Peace", The Gutenberg Galaxy, Belgrade - Valjevo, 1995, pp. 51-52

[215] Lucius Annaeus Seneca, "Dialogues", Mono-Manana, Belgrade, 2002, p. 5

ANNEX 1

ANNEX I

otection

To: Constitutional Court of the Republic of Macedonia
Applicant: Macedonian Young Lawyers Association (MYLA)
ul. "Donbas" br. 14/1-6, 1000 Skopje, Republic of Macedonia
EMBS (Unique Company Identification Number) 5944201

Based on Article 110 line 1 of the Constitution of the Republic of Macedonia and Article 12 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia, the Macedonian Young Lawyers Association submits to the Constitutional Court of the Republic of Macedonia the following:

INITIATIVE

for initiating a procedure for assessing the constitutionality of
the Law on International and Temporary Protection
(in two copies)

By this initiative, we urge the Constitutional Court of the Republic of Macedonia to initiate a procedure for assessing the constitutionality of Articles 63 and 65 of *the Law on International and Temporary Protection* published in the "Official Gazette of RM" No. 64 of 11.04.2018 (hereinafter: the Law).

The contested articles violate in particular the provision of Article 12 paragraphs 1, 2 and 4, but also Article 8 lines 1 and 3 and Article 118 of the Constitution of the Republic of Macedonia.

EXPLANATION OF THE INITIATIVE

1. The Assembly of RM in April 2018 adopted a *Law on International and Temporary Protection*. The law was published in the Official Gazette of RM No. 64/18 of 11.04.2018, and entered into force on 19.04.2018. By the entry into force of this Law, the *Law on Asylum and Temporary Protection* ("Official Gazette of the Republic of Macedonia", No. 49/2003, 66/2007, 142/2008, 146/2009, 146/2009, 166/12, 101/15, 152/15, 55/16 and 71/16) has ceased to be in force. This Law regulates the conditions and procedure for obtaining the right to international

protection (right to asylum), as well as the cessation, cancellation and revocation of the right to asylum of a foreigner or stateless person, the rights and obligations of asylum seekers and persons who have been granted asylum in the Republic of Macedonia.

2. Chapter 5 (Legal status), Part 1 of the Law regulating the rights and obligations of asylum seekers incorporates the contested Articles 63 and 65 which read as follows:

Article 63
(Limitation of freedom of movement)

(1) The applicant may, by exception, have his freedom of movement limited, if other less coercive alternative measures in accordance with the national legislation (confiscation of an identification document, regular reporting) cannot be applied effectively.

(2) The exceptions referred to in paragraph (1) of this Article shall include only:

- establishing and check of identity and nationality,

- establishing the facts and circumstances on grounds of which the asylum application has been submitted, which cannot be established without limitation of the freedom of movement, especially if it is estimated that there is a risk of absconding,

- protection of public order or national security or

- detention of the foreigner for the purpose of a procedure in accordance with the regulations on foreigners on return of foreigners who reside in the country illegally, in order to prepare the return or to implement the process of removal, when he/she has already had access to the asylum procedure, and there is reasonable ground to believe that he/she has submitted an application for international protection in order to postpone or obstruct the execution of the decision for return.

(3) The risk of absconding of the applicant shall be assessed on the basis of facts and circumstances for an individual case, especially taking into consideration previous attempts to voluntarily leave the Republic of Macedonia, refusal to have their identity checked and established, presenting of false data about his/her identity and nationality.

Article 65
(Authority taking a decision for limitation of freedom of movement)

(1) The Ministry of Interior shall take a decision imposing a measure for limitation of freedom of movement for an applicant, determining the validity period of the measure.

(2) Against the decision referred to in paragraph (1) of this Article, the applicant has the right to appeal before a competent court within five days of the day of reception of the decision.

(3) The appeal shall not postpone the execution of the decision.

(4) The procedure before the competent court shall be accelerated.

3. The contested provisions, as elaborated in this initiative, are contrary to the constitutional order of the Republic of Macedonia, Article 12 which protects human freedom and Article 8 lines 1 and 3 by which the fundamental freedoms and rights of the person and citizen recognized by the international law and stipulated by the Constitution and the rule of law are envisaged as fundamental values of the constitutional order. Violations of the Constitution are committed by:

I. Granting the authority to the Ministry of the Interior, as a state administration body, to decide on limiting the freedom of movement of persons seeking asylum (regulated by Article 65 of the Law), rather than it being done exclusively by a court, thereby violating the provision of Article 12 paragraph 2 of the Constitution of the RM which states "No one shall be deprived of his liberty except by a court decision in cases and in the procedure established by law".

I. Non-compliance with the principles of the European Court of Human Rights interpreting the European Convention on Human Rights and Freedoms as an international treaty ratified in accordance with the Constitution of the RM, thus violating Article 118 of the Constitution of the RM.

II. Imprecise regulation of cases in which the freedom of movement of asylum seekers may be restricted (Article 63 paragraph 1 of the Law) which violates the fundamental value of the constitutional order of the RM: the rule of law provided for in Article 8 line 3.

I Granting the authority to the Ministry of Interior to decide on restricting the freedom of movement of asylum seekers by the contested Article 65 of the Law constitutes a violation of Article 12 paragraph 4 of the Constitution of the RM

4. Article 12 paragraph 2 of the Constitution of the RM which protects human freedom envisages that *"No one shall be deprived of his liberty except by a court decision and in cases and in a procedure provided by law."* Paragraph 4 of this Article reads: "The person deprived of liberty must be brought immediately before the court, within 24 hours from the moment of his/her deprivation of liberty, that shall immediately decide on the lawfulness of the deprivation of liberty." Paragraph 2 envisages in a very clear and unambiguous manner that no one (whether a citizen of the RM or a foreigner) may be deprived of his/her liberty except by

a court decision, under the conditions and procedure provided by law (Skaric S. Scientific Interpretation - Constitution of the RM, p. 168).

5. "Limitation of freedom of movement" in the contested provisions of the Law constitutes a *de facto* deprivation of liberty within the meaning of Article 12 of the Constitution of the RM and therefore must fulfill the guarantees established by this Article. While using the term "limitation of freedom of movement", nevertheless taking into account the grounds, the type of measures, the manner of their implementation and duration, the legislator, by the provisions of Articles 63-66 of the Law, substantially "deprives the asylum seekers of liberty" within the meaning of Article 12 of the Constitution of the Republic of Macedonia. According to Skaric S. *"The right to liberty means the right of a person to free movement, free action and free behavior."*

In applying the European Convention for the Protection of Human Rights and Fundamental Freedoms, an international treaty ratified in the RM, the European Court of Human Rights (ECtHR) has developed a case law establishing criteria for assessing whether a person has been deprived of liberty or not. According to this Court, the starting point must be the specific situation and account must be taken of a whole range of criteria, such as the **type, duration, consequences and manner of implementation of the respective measure.**[216]

The types of measures for "limitation of freedom of movement" according to Article 64 of the Law are: *(1) prohibition of movement outside the Reception Center for asylum seekers or another place of accommodation determined by the Ministry of Labour and Social Policy and (2) accommodation in a Reception Center for Foreigners.* The type of measures envisaged indicates that the "limitation of freedom of movement" of asylum seekers will be implemented by "accommodating" these persons in a facility which they will not be able to leave freely, that is, by *closing* them. Holding a person in a secured facility of a closed type is considered by the ECtHR as a classic example of deprivation of liberty.[217] If one considers the measures envisaged in the light of this Court's position, it becomes clear that these are measures of deprivation of liberty. For example, when determining the measure of *"accommodation in the Reception Center for Asylum Seekers or another place of accommodation determined by the Ministry of Labor and Social Policy"*, the legislator made it clear that "the asylum seeker to whom this measure of limitation of freedom of movement has been imposed" shall be *prohibited from movement*

216 Case-law information note of the Court No. 150, March 2012, Austin and others v the United Kingdom (Application no. *39692/09*), *<https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Austin%20and%20others%20v%20the%20United%20Kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-123357%22]}>* accessed on 15.05.2018

217 D. J. Harris, M. O'Boyle, E. P. Bates & C. M. Buckley. Law of the European Convention on Human Rights. Oxford: Oxford University Press, 2014 (Harris, O'Boyle, Bates & Buckley. Law of the European Convention on Human Rights), p. 290

outside the center. As for *"accommodation in a Reception Center for Foreigners"*, here the legislator does not emphasize the prohibition on movement outside this center, for the simple reason that the center is a closed center in accordance with applicable legal norms. The manner of implementation of this measure should be interpreted in the spirit of the Law on Foreigners[218] which in Article 108 envisages the establishment of a Reception Center for Foreigners and further on in paragraph 3 of Article 109 states that *"a foreigner must not leave the Reception Center* unless there are particularly justified reasons and consent having been given by the competent authority." In this regard, the Rulebook on House Rules in the Reception Center for Foreigners[219] envisages that a foreigner accommodated in the Reception Center may go for a walk around the center in the presence of a police officer twice a day, in the morning and in the afternoon for half an hour[220]. The foreigner's belongings are also kept in a room outside the foreigner's reach, as well as travel documents and other personal identification documents, which further illustrates the fact that accommodation in this center is a classic example of deprivation of liberty.

In regard to the duration of these two measures, in paragraph 2 of Article 64, the Law envisages that they are executed *for a maximum period of three months*, from the day of delivery of the decision imposing the measure. This provision also envisages that in exceptional circumstances, provided that the reasons for imposing the measures still exist, they *may be extended for a maximum of three months*. This corresponds to the duration of detention in accordance with Amendment III of the Constitution of the RM, which guarantees that it can last up to 180 days from the day of detention. According to the case law of the European Court of Human Rights, even a short period of restriction, such as a few hours, could constitute deprivation of liberty if other elements are present, such as if the facility is closed, if there is an element of coercion or the situation has certain consequences on the individual, including physical discomfort or mental pain.[221] Through its practice, as deprivation of liberty the court has considered: 24-hour house arrest for a day[222], spending 20 days in the international transit zone at the airport[223], taking the persons to the police station by force, and an interrogation

[218] Law on Foreigners ("Official Gazette of the Republic of Macedonia" No. 35/2006, 66/2007, 117/2008, 92/2009, 156/2010, 158/2011, 84/2012, 13/2013, 147/2013, 148/2015 and 217/2015)

[219] Rulebook on House Rules in the Reception Center for Foreigners ("Official Gazette of the Republic of Macedonia" No. 35/2006, 53/2009 and 75/2013)

[220] As comparison, in accordance with the Rulebook on House Rules for Execution of the Measure of Detention in the Detention in the Detention Units in the Prisons ("Official Gazette of the Republic of Macedonia" No. 2/06 and 57/10), the detainees are enabled to stay outside with fresh air for at least two hours every day.

[221] Council of Europe. Handbook on European law relating to asylum, borders and immigration. Luxembourg: Publications Office of the European Union, 2014, p. 144

[222] Case of NC v Italy (Application no. *24952/94*)

[223] Case of Amuur v France (Application no. *19776/92*)

of 45 minutes[224] or several hours[225].

In this regard, we consider that despite the fact that the contested provisions of the Law on International and Temporary Protection use the term "limitation of freedom of movement", they refer to deprivation of liberty within the meaning of Article 12 of the Constitution of the RM. Bearing in mind the type, duration and manner of implementation of the measures, they are compatible with other measures of deprivation of liberty under the Macedonian legislation and international law, and are therefore subject to the guarantees of Article 12 of the Constitution.

6. Human freedom can be restricted only by a court decision, under the conditions and procedure provided by law (Skaric S. Scientific Interpretation - Constitution of the RM, p. 168). Paragraph 2 of Article 12 of the Constitution of the RM stipulates that *"no one shall be deprived of his/her liberty* ***except by a court decision*** *in cases and in a procedure provided by law"*. As already stated, this right protects everyone equally: the citizens of the RM, foreigners and stateless persons, which means that the Constitution guarantees this right to asylum seekers as well. Consequently, in order for a person to be deprived of his/her liberty, two conditions must be cumulatively fulfilled: (1) there should be a court decision and (2) grounds for deprivation of liberty and the procedure should be stipulated by law. This is clear because the Constitution uses the conjunction "and" between the two conditions. The nomotechnical rules for writing regulations stipulate that the conjunction "and" is always used cumulatively, and the conjunction "or" is used alternatively, and if the two situations are to be covered, the conjunction "and/or" is used[226].

That the court decision is mandatory in cases of deprivation of liberty is also confirmed by previous decisions of the Constitutional Court, which deciding upon an initiative for assessment of constitutionality and legality No. 63/2008-1 in Decision No. 63/2008[227] states:

"In view of the substance of the provision of Article 12 and Amendment III of the Constitution it follows that the Constitution, by proclaiming the inviolability of human liberty as its fundamental right, at the same time establishes also the basic

[224] Case of Shimovolos v Russia (Application no. 30194/09)

[225] Case of Foka v Turkey (Application no. 28940/95)

[226] Government of the Republic of Macedonia, Secreteriate for Legislation Manual of nomotechnical rules", 2007, available on: http://www.sz.gov.mk/application/themes/priracnik_nom/index.html#p=4, accessed on 15.05.2018, p. 38

[227] Decision of the Constitutional Court No.63/2008 of 08 April 2009 http://ustavensud.mk/?p=9859

conditions and the manner of its restriction, thereby establishing that no one can be deprived of freedom ***except by a court decision*** *in cases and in a procedure established by law. Accordingly, its restriction must be strictly done in accordance with the statutory, i.e. conditions and procedure prescribed by law, thereby excluding any arbitrariness of any body.* ***A special guarantee is the jurisdiction of the court as an independent and autonomous body that decides on its restriction****".*

7. Contrary to the provision of Article 12 of the Constitution of the RM, already interpreted and applied by the Constitutional Court, the contested Article 65 in paragraph 1 titled ***"Authority taking a decision for limitation of freedom of movement"*** envisages that *"The Ministry of Interior shall take a decision imposing a measure for limitation of freedom of movement of an asylum seeker, determining the validity period of the measure."*

Such a decision, a body of state administration, rather than a court, to decide to restrict the movement of the asylum seeker with a duration of up to three months and the possibility of extension for another three months is a flagrant and serious violation of Article 12 paragraph 2 of the Constitution of the RM. By providing the right to file a lawsuit against the first instance decision of the Ministry of Interior, envisaged in paragraph 2 of the same Article, in no case can it be interpreted that the guarantee under Article 12 paragraph 2 of the Constitution of the RM has been fulfilled. Moreover, taking into account the fact that the Administrative Court has legal limitations in the scope of decision-making, as it only holds a public hearing in cases specified by the law[228] and has a legal obligation to rule on a merits only under certain circumstances[229], such a legal solution cannot be considered to show that the constitutional guarantee of Article 12 is respected, which does not provide for the possibility of "judicial review" upon a request of the person deprived of liberty, but in a clear and unambiguous manner, the court, by virtue of the Constitution, decides whether a person shall be deprived of his/her liberty.

The restriction of the right to liberty by a court decision has been raised to the level of a constitutional guarantee in order to emphasize the importance of human freedom as an inviolable right and at the same time to provide protection for every person from arbitrary treatment by state authorities. Protection against arbitrary treatment cannot be provided if the Ministry of the Interior is the body that decides to restrict the freedom of movement, since only the court in each individual case can independently and impartially determine whether the limitation of freedom of movement is justified; whether it is necessary to achieve

[228] Article 30 a paragraph 2 of the Law on Administrative Disputes ("Official Gazette of the Republic of Macedonia" No. 62/2006 and 150/2010)

[229] Article 40 of the Law on Administrative Disputes ("Official Gazette of the Republic of Macedonia" No. 62/2006 and 150/2010)

the goal; whether it is proportional with the goal that should be achieved and accordingly to also determine the duration of the measure restricting freedom of movement. Deprivation of liberty without a court decision would in any case mean approving and encouraging arbitrary action by state authorities.

8. The constitutional guarantee of only a court deciding on restriction of liberty has been elaborated in several laws which regulate the conditions and the procedure in which a certain person may be deprived of his/her liberty. For example, the ***Criminal Procedure Code***[230] provides that all measures of precaution, including the prohibition on visiting a particular place or area, are ordered by the court (Art. 145). The law also stipulates that detention is possible only by an order issued by a court, if a decision on detention has already been reached (Art. 157). The measure of house arrest is subject to a court decision (Art. 163), as is pre-trial detention, i.e. detention after the judgment has been announced. (Art. 166 and Art. 174). The ***Law on Non-Contentious Procedure***[231] in the procedure of detention in a public health institution for the treatment of mental illnesses provides that the court decides when the mentally ill person should have their freedom of movement or contact with the outside world restricted (Art. 58). Pursuant to the ***Law on Mental Health***[232] a person may not be placed in a health care institution without his/her consent or without a decision of the competent court, which shall make a decision within 48 hours.

II The non-compliance with the European Convention on Human Rights and Fundamental Freedoms violates the Article 118 of the Constitution of RM

9. Pursuant to Article 118 of the Constitution of the RM, the international treaties ratified in accordance with the Constitution are part of the internal order and **cannot be changed by law**. The ratified international treaties have a stronger effect than the laws (Skaric S. Scientific Interpretation - Constitution of RM, p. 424). The European Convention for the Protection of Human Rights is an international treaty ratified in accordance with the Constitution of the RM on 10.04.1997[233]. Article 5 of the Convention guarantees the Right to liberty and security as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived

[230] Criminal Procedure Code (Official Gazette of the Republic of Macedonia" No. 150/2010, No. 100/2012, 142/2016 and 193/2016)

[231] Law on Non-Contentious Procedure ("Official Gazette of the Republic of Macedonia" No. 9/2008). Decision of the Constitutional Court of the Republic of Macedonia U. No. 146/2017 of 18 April 2018, published in "Official Gazette of the Republic of Macedonia" No. 77/2018.

[232] Law on Mental Health ("Official Gazette of the Republic of Macedonia" No. 71/2006 and 150/2015)

[233] Law on Ratification of the European Convention on Human Rights ("Official Gazette of the Republic of Macedonia" No.11/1997)

of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands of the reasons for his arrest and of any charges against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

10. The meaning of this Article is elaborated in detail by the extensive practice of the European Court of Human Rights which elaborates criteria for the proper interpretation of whether the requirements of this Article have been met in an individual case. The Court emphasizes that **when it comes to restricting freedom it is crucial that the principle of legal certainty is fulfilled**.[234] Consequently, it is of the utmost importance in **national law to precisely regulate**

[234] Case of Creangă v. Romania (Application no. 29226/03)

the grounds and procedure when freedom may be restricted in order to fulfill the standard and principle of legality. In addition, the Court emphasizes that there may be a violation of paragraph 1 of Article 5 of the Convention even when the Court finds that the deprivation of liberty does not have sufficient legal basis in domestic law. **Imprecise regulation of the provisions** and inaccessibility of judicial protection means the arbitrary and unlawful deprivation of liberty[235]. According to the Court, deprivation of liberty violates the provision of Article 5 paragraph 1 of the Convention **if the legal provision permitting deprivation is unclear/imprecise to the extent of causing confusion as to its proper application**[236]. Due to these criteria, any legal provision in the RM regulating the deprivation of liberty must meet these criteria.

11. Article 63 paragraph 1 of the Law violates these principles and also Article 5 of the European Convention on Human Rights, thereby violating Article 118 of the Constitution of the RM. The condition contained in this provision under which asylum seekers may in exceptional cases have their freedom of movement restricted states: **"if other less coercive alternative measures in accordance with the national law (confiscation of an identification document, regular registration) cannot be effectively applied."** This condition is imprecise and unclear. The law does not provide any direction nor does it specify which laws regulate the so-called less coercive alternative measures. To apply this provision in an individual case, it is first necessary to identify less coercive alternative measures in the national law. The measures of securing a presence in accordance with the **Criminal Procedure Code** due to the nature of this procedure can in no way be applied by analogy in this case.

The **Law on Foreigners** in Article 110 provides for the possibility of a **foreigner who cannot be forcibly removed**, as well as the foreigner referred to in Article 108 paragraph 4 of this Law (a foreigner for whom a deportation decision has been made and does not possess a valid and recognized travel document, for which the Ministry will issue a decision on his/her temporary detention), **if he/she has accommodation and means of subsistence in the Republic of Macedonia provided that,** based on the circumstances of the case, it may be assessed that the foreigner is not required to be accommodated in the Reception Center, the Ministry of Interior may issue a decision restricting his/her movement to the place of residence only and order his regular reporting at certain times at the nearest police station. However, the very circumstances that the purpose of this is regularly and primarily related to, is a foreigner who should, but cannot be forcibly removed, or a foreigner who should be deported, but does not possess a valid and recognized travel document, which indicates that this measure may by

[235] Case of Amuur v France (Application no. 19776/92)

[236] Case of Jecius v, Lithuania (Application no. 34578/97)

no means apply to persons seeking asylum.
Since this Article refers to the existence of alternative measures in accordance with the national law and does not indicate which measures and which laws regulate them, it is unclear, imprecise and does not meet the above criteria set by the European Court of Human Rights.

III The imprecise and unclear wording of the conditions in which freedom of movement may be restricted, which are provided for in the contested Article 63 of the Law, violates the rule of law as a fundamental value of the constitutional order of the Republic of Macedonia.

11. The rule of law is a fundamental value of the constitutional order in the Republic of Macedonia. The rule of law is based on several postulates, one of which is "the legal certainty of the person and the citizen" (Skaric S. Scientific Interpretation – Constitution of the RM p. 150). The legal certainty exists if the laws are clear, precise, and sufficiently specific to avoid arbitrary interpretation and application.
Taking into account the arguments outlined and elaborated in paragraph 11 of the explanation of this initiative, we consider that Article 63 paragraph 1 of the Law, due to its ambiguity and imprecision, violates this constitutionally guaranteed principle of the rule of law.

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Consequently, taking into account the above, which has been stated in the explanation of this initiative, we propose to the Constitutional Court of the Republic of Macedonia to initiate a procedure for assessing the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection and to annul them after conducting a procedure and public hearing.

Skopje, May 17, 2018 Respectfully,

For the Macedonian Young Lawyers Association

Zoran Drangovski, President

Annex:

- Photocopy of the current state of the Association

ANNEX 2

ANNEX II

Decision of the Constitutional Court U. no. 53/2018

U. No. 53/2018

10 JULY 2019

LAWS, ASSOCIATIONS OF CITIZENS, A PROCEDURE IS NOT INITIATED, ASSESS-MENT OF THE CONSTITUTIONALITY AND LEGALITY OF GENERAL ACTS, DECI-SIONS

The Constitutional Court of the Republic of North Macedonia, pursuant to Article 110 of the Con-stitution of the Republic of North Macedonia and Article 71 of the Rules of Procedure of the Con-stitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" No. 70/1992), at its session held on 10 July 2019, made

D E C I S I O N

1. A procedure for assessing the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/18) IS NOT INTIATED.

2. "Macedonian Young Lawyers Association" - MYLA from Skopje submitted an initiative to the Constitutional Court of the Republic of North Macedonia to assess the constitutionality of the pro-visions of the Law referred to in item 1 of this Decision.

The initiative states that a procedure for assessing the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection was to be initiated because the contested Articles violate the provision of Article 12 paragraphs 1, 2 and 4, Article 8 lines 1 and 3 and Article 118 of the Constitution.

The aforementioned contested provisions, as explained in the initiative, are contrary to the constitu-tional order of the Republic of Macedonia, i.e. Article 12 which protects human freedom and Arti-cle 8 lines 1 and 3, by which the fundamental freedoms and rights of the person and the citizen recognized by the international law and stipulated in the Constitution and the rule of law are envis-aged as fundamental values of the constitutional order.

According to the allegations in this initiative, in regard to the duration of both measures, in paragraph 2 of Article 64, the Law envisages that they are executed for up to three months from the date of delivery of the decision imposing the measure. This provision also envisages that, in exceptional circumstances, provided that the reasons for imposing the measures still exist, they may be extended

for a maximum of three months. This corresponds to the duration of detention in accordance with Amendment III of the Constitution, which guarantees that it can last up to 180 days from the day of detention. According to the case law of the European Court of Human Rights, even a short period of restriction, such as a few hours, could constitute deprivation of liberty if other elements are present, such as if the facility is closed, if there is an element of coercion, or the situation has certain consequences on the individual, including physical discomfort or mental pain. For the practice of deprivation of liberty, the court has considered: 24-hour house arrest for a day, spending 20 days in the international transit zone at the airport, taking the persons to the police station by force, and an interrogation of 45 minutes or several hours.

In this regard, the applicants of the initiative consider that despite the fact that the contested provisions of the Law on International and Temporary Protection use the term limitation of freedom of movement, they refer to deprivation of liberty within the meaning of Article 12 of the Constitution. Bearing in mind the type, duration and manner of implementation of the measures, they are compatible with other measures of deprivation of liberty under the legislation of the Republic of North Macedonia and international law and are therefore subject to the guarantees of Article 12 of the Constitution.

According to the allegations in the initiative, human freedom could be restricted only by a court decision, under the conditions and procedure provided by law. Paragraph 2 of Article 12 of the Constitution stipulates that no one shall be deprived of his/her liberty except by a court decision and in cases and in a procedure provided by law and that this right shall equally protect all: citizens of the Republic of North Macedonia, foreigners and stateless persons, which means that the Constitution guaranteed this right to asylum seekers as well. Therefore, in order for a person to be deprived of his/her liberty, two conditions must be cumulatively fulfilled: 1. there should be a court decision and 2. grounds for deprivation of liberty and the procedure stipulated by law. This is clear because the Constitution uses the conjunction "and" between the two conditions, i.e. the nomotechnical rules for writing regulations stipulate that the conjunction "and" is always used cumulatively, and the conjunction "or" is used alternatively, if both situations are to be covered the conjunction "and/or" is used.

The initiative further states that the court decision is mandatory in cases of deprivation of liberty which was also confirmed by previous decisions of the Constitutional Court, which deciding upon an initiative for assessment of constitutionality and legality in the case of U. No. 63/2008-1, established that in view of the substance of the provision of Article 12 and Amendment III of the Constitution, it follows that the Constitution, by proclaiming the inviolability of human liberty as its fundamental right, at the same time also establishes the basic conditions and the manner of its restriction, thereby establishing that no one can be de-

prived of freedom except by a court decision in cases and procedures established by law. Accordingly, its restriction must be strictly done in accordance with the statutes, i.e. conditions and procedures prescribed by law, thereby excluding any arbitrariness of any body. A special guarantee is the jurisdiction of the court as an independent and autonomous body that decides on its restriction.

The initiative also states that contrary to the provision of Article 12 of the Constitution already interpreted and applied by the Constitutional Court, the contested Article 65 in paragraph 1 titled "Authority taking a decision for limitation of freedom of movement" envisages that the Ministry of Interior shall take a decision imposing a measure for limitation of freedom of movement of the asylum seeker, determining the validity period of the measure. Such a decision, a state administration body, rather than a court, to decide to restrict the movement of the asylum seeker with a duration of up to three months and the possibility of extension for another three months is a flagrant and serious violation of Article 12 paragraph 2 of the Constitution.

According to the allegations in the initiative, by providing the right to file a lawsuit against the first instance decision of the Ministry of Interior envisaged in paragraph 2 of the same Article, in no case could it be interpreted that the guarantee under Article 12 paragraph 2 of the Constitution has been fulfilled. Moreover, taking into account the fact that the Administrative Court has legal limitation in the scope of decision-making, holds a public hearing only in cases specified by the law, and has a legal obligation to rule on a merits only under certain circumstances, as such, a legal solution cannot be considered to have the constitutional guarantee of Article 12 being respected, which does not provide for the possibility of judicial review upon a request of the person deprived of liberty, but in a clear and unambiguous manner, the court, by virtue of the Constitution, does decide on whether a person shall be deprived of his/her liberty.

The restriction of the right to liberty by a court decision has been raised to the level of a constitutional guarantee in order to emphasize the importance of human freedom as an inviolable right and at the same time to provide protection for every person from arbitrary treatment by state authorities. Protection against arbitrary treatment cannot be provided if the Ministry of the Interior is the body that decides to restrict the freedom of movement, since only the court in each individual case can independently and impartially determine whether the limitation of freedom of movement is justified; whether it is necessary to achieve the goal; whether it is proportional with the goal that should be achieved and accordingly to also determine the duration of the measure restricting freedom of movement. Deprivation of liberty without a court decision would in any case mean approving and encouraging arbitrary action by state authorities.

According to the allegations in the initiative the constitutional guarantee of only a court deciding on restriction of liberty has been elaborated in several laws which regulate the conditions and the procedure in which a certain person may be deprived of his/her liberty. For example, the Criminal Procedure Code provides that all measures of precaution, including the prohibition on visiting a particular place or area, are ordered by the court (Art. 145). The law also stipulates that detention is possible only by an order issued by a court, if a decision on detention has already been reached (Art. 157). The measure of house arrest is subject to a court decision (Art. 163), as is pre-trial detention, i.e. detention after the judgment has been announced. (Art. 166 and Art. 174). The Law on non-contentious procedure in the procedure of detention in a public health institution for the treatment of mental illnesses, provides that the court decides when the mentally ill person should have their freedom of movement or contact with the outside world restricted (Art. 58). Pursuant to the Law on Mental Health, a person may not be placed in a health care institution without his/her consent or without a decision of the competent court, which shall make a decision within 48 hours.

The initiative states that the non-compliance with the European Convention on Human Rights and Fundamental Freedoms violates the Article 118 of the Constitution. Pursuant to Article 118 of the Constitution of the Republic of Macedonia, the international treaties ratified in accordance with the Constitution are part of the internal order and cannot be changed by law. The ratified international treaties have a stronger effect than the laws. The European Convention for the Protection of Human Rights is an international treaty ratified in accordance with the Constitution on 10 April 1997. The initiative sates Article 5 of the Convention, which guarantees the Right to liberty and security, as follows: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a.) the lawful detention of a person after conviction by a competent court; b.) the lawful arrest or detention of a person for non-compliance with the lawful order of a court, or in order to secure the fulfilment of any obligation prescribed by law; c.) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence, or fleeing after having done so; d.) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e.) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f.) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with

a view to deportation or extradition. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charges against him. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released pending trial. Release may be conditioned by guarantees to appear for a trial. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The initiative states that the meaning of this Article is elaborated in detail by the extensive practice of the European Court of Human Rights which elaborates criteria for the proper interpretation of whether the requirements of this Article have been met in an individual case. The Court emphasizes that when it comes to restricting freedom it is crucial that the principle of legal certainty is fulfilled. Consequently, it is of the utmost importance in national law to precisely regulate the grounds and procedure when freedom may be restricted in order to fulfill the standard and principle of legality. In addition, the Court emphasizes that there may be a violation of paragraph 1 of Article 5 of the Convention, even when the Court finds that the deprivation of liberty does not have sufficient legal basis in domestic law. Imprecise regulation of the provisions and inaccessibility of judicial protection means arbitrary and unlawful deprivation of liberty. According to the Court, deprivation of liberty violates the provision of Article 5 paragraph 1 of the Convention if the legal provision permitting deprivation is unclear/imprecise to the extent of causing confusion as to its proper application. Due to these criteria, any legal provision in the Republic of Macedonia regulating the deprivation of liberty must meet these criteria.

According to the allegations in the initiative, the provisions of Article 63 paragraph 1 of the Law violate these principles as well as Article 5 of the European Convention on Human Rights, thereby violating Article 118 of the Constitution.

The initiative further states that the condition contained in this provision, under which asylum seekers may in exceptional cases be restricted the freedom of movement, states: "if other less coercive alternative measures in accordance with the national law (confiscation of an identification document, regular registration)

cannot be effectively applied." This condition is imprecise and unclear. The law does not provide any direction, nor does it specify which laws regulate the so-called less coercive alternative measures. To apply this provision in an individual case, it is first necessary to identify less coercive alternative measures in the national law. The measures of securing a presence in accordance with the Criminal Procedure Code due to the nature of this procedure can in no way be applied by analogy in this case. The Law on Foreigners in Article 110 provides for the possibility of a foreigner who cannot be forcibly removed, as well as the foreigner referred to in Article 108 paragraph 4 of this Law (a foreigner for whom a deportation decision has been made and does not possess a valid and recognized travel document, for which the Ministry will issue a decision on his temporary detention), if he/she has accommodation and means of subsistence in the Republic of Macedonia, provided and based on the circumstances of the case, where it may be assessed that the foreigner is not required to be accommodated in the Reception Center, the Ministry of Interior may issue a decision restricting his/her movement to the place of residence only, and order his regular reporting at certain times at the nearest police station. However, the very circumstances that the purpose of this is regularly and primarily related to, is a foreigner who should, but cannot be forcibly removed, or a foreigner who should be deported but does not possess a valid and recognized travel document indicates that this measure may by no means may apply to persons seeking asylum.

According to the allegations in the initiative, this Article refers to the existence of alternative measures in accordance with the national law, and does not indicate which measures and which laws regulate them, it is unclear, imprecise and does not meet the above criteria by the European Court of Human Rights.

The imprecise and unclear wording of the conditions in which freedom of movement may be restricted, provided for in the contested Article 63 of the Law, violates the rule of law as a fundamental value of the constitutional order of the Republic of Macedonia. The rule of law is a fundamental value of the constitutional order in the Republic of Macedonia. The rule of law is based on several postulates, one of which is "the legal certainty of the person and the citizen" The legal certainty exists if the laws are clear, precise, and sufficiently specific to the extent of avoiding arbitrary interpretation and application. Article 63 paragraph 1 of the Law, due to its ambiguity and imprecision, violates this constitutionally guaranteed principle of the rule of law, and for those reasons the contested Articles 63 and 65 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/2018) should be annulled.

3. At its session, the Court has determined that the contested provisions of Article 63 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/2018) titled "Limitation of freedom of movement" regulates that the applicant may, by exception, have his freedom of movement limited, if other less coercive alternative measures in accordance with the national legislation (confiscation of an identification document, regular reporting) cannot be applied effectively. (Article 1). The exceptions referred to in paragraph (1) of this Article shall include only: establishing and check of identity and nationality, establishing the facts and circumstances on grounds of which the asylum application has been submitted, which cannot be established without limitation of the freedom of movement, especially if it is estimated that there is a risk of absconding, protection of public order or national security or detention of the foreigner for the purpose of a procedure in accordance with the Regulations on Foreigners on the return of foreigners who reside in the country illegally, in order to prepare the return or to implement the process of removal, when he/she has already had access to the asylum procedure, and there is reasonable ground to believe that he/she has submitted an application for international protection in order to postpone or obstruct the execution of the decision for return (Article 2). The risk of absconding of the applicant shall be assessed on the basis of facts and circumstances for an individual case, especially taking into consideration previous attempts to voluntarily leave the Republic of Macedonia, refusal to have their identity checked and established, or the presenting of false data about his/her identity and nationality (Article 3).

In regard to Article 65 of this Law titled "Authority taking a decision for limitation of freedom of movement" it is envisaged that the Ministry of Interior shall take a decision imposing a measure for limitation of freedom of movement for an applicant, determining the validity period of the measure (Article 1). Against the decision referred to in paragraph (1) of this Article, the applicant has the right to appeal before a competent court within five days of the day of reception of the decision (Article 2). The appeal shall not postpone the execution of the decision (Article 3). The procedure before the competent court shall be accelerated. European Union integration is a clearly and unambiguously expressed strategic interest and priority goal of the Republic of Macedonia, until its full membership of the European Union (Article 4).

4. Pursuant to Article 110 line 1 of the Constitution of the Republic of North Macedonia, the Constitutional Court of the Republic of North Macedonia decides on the compliance of the laws with the Constitution.

Pursuant to Article 8 paragraph 1 lines 1, 3, 4 and 11 of the Constitution, the fundamental freedoms and rights of the person and the citizen recognized in the international law and established by the Constitution; the rule of law; the division of state power into the legislative, executive and judicial branches, as well as the compliance with the generally accepted norms of international law, are fundamental values of the constitutional order of the Republic of North Macedonia.

Pursuant to Article 12 paragraph 1 of the Constitution of the Republic of North Macedonia human freedom is inviolable, and paragraph 2 of this Article stipulates that no one shall be deprived of his/her liberty except by a court decision and in cases and in a procedure established by law.

Pursuant to Article 13 paragraph 1 of the Constitution, a person convicted of a criminal offense shall be presumed innocent until proved guilty by a final court decision.

Pursuant to Amendment XXI point 1 paragraph 1 of the Constitution of the Republic of North Macedonia, the right to appeal against decisions made in first instance proceedings before a court is guaranteed.

Pursuant to Article 118 of the Constitution of the Republic of North Macedonia, the international treaties ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law.

The Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe has been ratified by Law published in ("Official Gazette of the Republic of Macedonia" No. 11/1997).

Pursuant to Article 5 paragraph 1 item b.) of the Convention everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in the procedure prescribed by law, inter alia, and if he is arrested or detained for the purpose of bringing him before the competent legal authority under reasonable suspicion of having committed an offence, or it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Pursuant to Article 5 paragraph 3 of the Convention, everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Pursuant to Article 6 paragraph 2 of the Convention, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The constitution guaranteeing the freedom of the person and the citizen goes as far as to specify the duration of detention, which may last up to 180 days, to pressing charges for the prosecution, and after pressing charges the detention can only be determined or extended by a decision of a competent court, in the case and in a procedure established by law, which means its duration is not constitutionally limited.

In view of the substance of the provision of Article 12 and Amendment III of the Constitution it follows that the Constitution, by proclaiming the inviolability of human liberty as its fundamental right, at the same time also establishes the basic conditions and the manner of its restriction, thereby establishing that no one can be deprived of freedom except by a court decision in cases and procedures established by law. Accordingly, its restriction must be strictly done in accordance with the statute, i.e. conditions and procedure prescribed by law, thereby excluding any arbitrariness of any body. A special guarantee is the jurisdiction of the court as an independent and autonomous body that decides on its restriction.

According to this, the citizen may be deprived of liberty when such a case is prescribed by law and when there is a court decision for his/her deprivation of liberty.

Based on the content of Article 13 of the Constitution and Article 6 of the given Convention, it is clear that the meaning of the presumption of innocence, inter alia, is that the accused person may not suffer any legal consequence before the final judgment is rendered, nor can they be considered as guilty or convicted. Taking into consideration that detention restricts the personal liberty of the person, the Criminal Procedure Code, based on the Constitution, precisely regulates the term of detention as the most severe measure for securing the presence of the accused person in the proceedings. Namely, Article 184 of the Criminal Procedure Code sets forth precisely the grounds that must be met in order to establish detention for the accused person. Article 185 of the Law states that pre-trial detention is determined by the investigating judge by a decision which, in addition to the personal data of the accused person, can determine the offense for which he is charged, the legal basis for pre-trial detention and can advise the right to appeal in relation to the detention having also been established. Paragraph 5 of Article 185 stipulates that a detainee may appeal against the detention order to the Council (Article 22, paragraph 6) within 24 hours of the delivery of the detention order. The Council that decides on the appeal for detention is obliged to make a decision within 48 hours. The provision that prescribes the rules for limiting its duration to the shortest necessary time obliges the authorities and the

participants in the procedure to act with extreme urgency if the accused person is detained.

The applicant of the initiative challenges the constitutionality of Articles 63 and 65 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/2018), finding that the provisions of Article 12 paragraphs 1, 2 and 4 are violated, but also Article 8 lines 1 and 3 and Article 118 of the Constitution of the Republic of Macedonia. The allegations in the initiative relate to a collision of Articles 63 and 65 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/2018) with the aforementioned constitutional provisions, and have been found by the Court to be unfounded for the following reasons:

One of the basic requirements for the integration of the Republic of North Macedonia into the European Union is the harmonization of national legislation with the legislation of the European Union. In this context, the Court notes that the new Law on International and Temporary Protection has brought a high degree of alignment with the European acquis, i.e. asylum or international protection legislation, which is also stated in the European Union Progress Report on the Republic of Macedonia for 2018.

The Assembly of the Republic of Macedonia in April 2018 adopted the Law on International and Temporary Protection published in ("Official Gazette of the Republic of Macedonia" No. 64/2018 of 11 April 2018) and it entered into force on 19 April 2018. With the entry into force of this Law, the Law on Asylum and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 49/2003, 66/2007, 142/2008, 146/2009, 166/2012, 101/2015, 152/2015, 55/2016 and 71/2016) is repealed. This law regulates the conditions and procedure for obtaining the right to international protection (right to asylum), as well as the cessation, cancellation and revocation of the right to asylum of a foreigner or stateless person, the rights and obligations of asylum seekers and persons who have been granted asylum in the Republic of Macedonia. This law was adopted as a consequence of the massive wave of migration towards Europe.

The Law on International and Temporary Protection partially aligns with the European directives in the field of asylum, i.e. international protection: 1.) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards to be met by the persons who are third-country nationals or stateless persons in order to qualify as beneficiaries of international protec-

tion, for equal status for refugees or persons entitled to subsidiary protection and the content of the protection granted; 2.) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on a common procedure for the granting and withdrawal of international protection; 3.) Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on determining the standards for the admission of applicants for international protection, and 4.) Directive 2001/55 of the European Parliament and of the Council of 20 July 2001 on minimum standards to provide temporary protection in the event of a mass influx of displaced persons who are unable to return to their home country and to strike a balance between the activities of the Member States on the reception of displaced persons and bearing the consequences of such activities.

One of the key innovations in the Law is to regulate the possibility of limiting the freedom of movement of asylum seekers (from Article 63 to Article 66) in exceptional cases, thus harmonizing Articles 8, 9, 10 and 11 of the Directive of EU 2013/33/EU of 26 June 2013 laying down standards for the admission of applicants for international protection. The exceptional cases in which asylum seekers may be deprived of their freedom of movement are precisely defined in Article 63 of the text of the Law on International and Temporary Protection, and they are in accordance with EU Directive 2013/33/EU. Article 64 stipulates the measures to restrict freedom of movement, Article 65 stipulates the authority to take a decision to limit the freedom of movement, as well as the rights of the asylum seeker in Article 66 of the present law. The Law on International and Temporary Protection, during the phase of its drafting, was submitted to the European Commission in Brussels, as well as through the UNHCR Office in Skopje to the UNHCR Headquarters in Geneva, and their observations were appropriately analyzed and incorporated within the LITP.

In regard to the allegations of applicants of the initiative that Article 63 violates Article 12 and Article 8 lines 1 and 3, i.e. that the fundamental human rights and freedoms recognized by international law and established by the Constitution are violated, the Court holds that they are unfounded for the reason that Article 12, paragraph 2 of the Constitution of the Republic of North Macedonia explicitly states: “No one shall be deprived of his liberty save by a court decision and in cases and procedure provided by law”, which implies that the restriction of his freedom may be in the case and in procedures established by law that are complied with in the contested articles of the Law on International and Temporary Protection.

Within this context, analyzing Article 63 of the Law on International and Temporary Protection, the cases where the asylum seeker may have their freedom of movement limited solely for the purposes of the administrative procedure, are explicitly listed in detail as follows: – establishing and checking identity and nationality, – establishing the facts and circumstances on grounds of which the asylum application has been submitted, which cannot be established without the limitation of the freedom of movement, especially if it is estimated that there is a risk of absconding, – protection of public order or national security or – detention of the foreigner for the purpose of a procedure in accordance with the regulations on foreigners on return who reside in the country illegally, in order to prepare the return or to implement the process of removal, when he/she has already had access to the asylum procedure, and there is reasonable ground to believe that he/she has submitted an application for international protection in order to postpone or obstruct the execution of the decision for return. By specifying in detail in which cases only a measure of limiting the freedom of movement can be imposed, the concept of discretion in decision-making is abandoned.

At the same time, the Law on International and Temporary Protection explicitly and unambiguously defines the Ministry of Interior as the body that can pronounce the measure, due to the fact that the procedure is administrative and refers to cases that are at the first stage of first instance decision-making. The Law also normatively stipulates the possibility of a lawsuit before an administrative court, thereby respecting the constitutionally guaranteed right to a lawsuit, i.e. an effective legal remedy.

Pursuant to Article 66 of the Law on International and Temporary Protection titled "Rights of the applicant regarding limitation of freedom of movement", paragraph 1 regulates that the applicant that has had a measure of limitation of freedom of movement imposed has the right to be immediately informed about the right to appeal and exercising of the right to free legal assistance in a language the applicant can reasonably be presumed to understand. For vulnerable persons and unaccompanied minors, the measure of accommodation in a Reception Center for Foreigners shall be applied only on the basis of an individual assessment, as well as prior consent from the parent, i.e. the legally determined guardian, that such accommodation is suitable to their personal and special circumstances and needs, taking into consideration their health condition (Article 2). The accommodation of unaccompanied minors and vulnerable persons in a Reception Center for Foreigners shall be prescribed with an act of the Reception Center for Foreigners (Article 3)."

In the aforementioned Article of the Law on International and Temporary Protection, the Court concludes that there are procedurally guaranteed prescriptions

in relation to the right of the applicant to be immediately informed about the right to appeal and exercising of right to free legal assistance in a language the applicant can reasonably be presumed to understand; for vulnerable persons the measure of limitation of freedom of movement applies only on the basis of an individual assessment, as well as prior consent of the parent, i.e. legally determined guardian, that such accommodation is suitable to their personal and special circumstances and needs, taking into consideration their health condition.

In light of the analysis of the contested Articles of the Law on International and Temporary Protection, and in relation to the Articles of the Constitution and international documents regulating the limitation of freedom of movement, the Court holds that the cases of limitation are specifically set forth in the Law on International and Temporary Protection. Freedom of movement is solely for the purpose of administrative proceedings, and effective remedies are guaranteed with respect to the Ministry's decision imposing a limitation on freedom of movement, as well as procedural guarantees for the asylum seeker to whom the imposed measure relates.

At the same time, comparatively, the Court finds that in the national legislation regulating the field of asylum, i.e. international protection in the countries in the region (Republic of Croatia and Republic of Slovenia which are EU member states), but also in the Law on International Protection of Montenegro, which has already begun accession negotiations with the European Union, the measure limiting the asylum seeker's freedom of movement is identically regulated.

Since the applicant of the initiative also refers to violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, reference is made to Article 2 of "Protocol No. 4" to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those in the Convention and "Protocol No.1" to the Convention from Strasbourg of 16 September 1963 which sets forth: "Freedom of movement", Article 2 "1.) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2.) Everyone shall be free to leave any country, including his own. 3.) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security, public safety, for the maintenance of 'ordre public', for prevention of crime, for protection of health or morals, or for protection of the rights and freedoms of others 4.) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

Based on the analysis of Article 2 paragraph 3 of "Protocol No. 4" to the European Convention on Human Rights and Freedoms, the Court finds that the limitation

of freedom of movement regulated in the new Law on International and Temporary Protection is in accordance with the Constitution of the Republic of North Macedonia, thereby complying with the provisions of Article 2, paragraph 3 of the European Convention on Human Rights and Freedoms.

Taking into consideration the aforementioned, the Court finds that the contested provisions of Articles 63 and 65 of the Law on International and Temporary Protection ("Official Gazette of the Republic of Macedonia" No. 64/2018) are in accordance with Article 12 paragraphs 1, 2 and 4, Article 8 lines 1 and 3 and Article 118 of the Constitution.

5. In light of the aforementioned, the Court has decided as in point 1 of this decision.

6. This decision was adopted by majority votes by the Court comprised of the President of the Court, Nikola Ivanovski and the judges: Naser Ajdari, Elena Gosheva, Jovan Josifovski, Dr. Osman Kadriu, Dr. Darko Kostadinovski, Vangelina Markudova and Sali Murati.

U.No.53/2018
10.07.2019
S k o p j e

PRESIDENT
of the Constitutional Court of the Republic of North Macedonia
Nikola Ivanovski

AUTHORS

Svetomir Skaric is a professor of constitutional law. He was born in Dojran in 1941. He completed his law studies in Skopje and his master's and doctorate degrees in Belgrade. He has participated in several congresses of the International Association of Constitutional Law (L'AIDC), the International Political Science Association (IPSA) and the International Peace Research Association (IPRA). The submitted papers are published in the book "Macedonia on All Continents" (2000). To the public, prof. Skaric is known as one of the best connoisseurs of constitutional law, and in general, as one of the most brilliant legal minds in the country and the region.

Ivana Roagna is a practicing criminal defense attorney and immigration lawyer and has been working in the area of human rights for the last 22 years. Currently based in Italy, she is regularly advising international organizations (EU, CoE, UN), NGOs and Governments on issues related to fundamental freedoms, also conducting training for legal, justice and law enforcement professionals.

Flip Schüller is an immigration and asylum lawyer at Prakken d'Oliveira Human Rights Lawyers specializing in international litigation. In addition to practising as a lawyer, Flip regularly gives specialist courses to fellow lawyers, both in the Netherlands and internationally. He is a speaker at international conferences and has published articles and explanatory notes in specialist literature.

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Dragan Godzo is the founder, partner and one of the Principal Counsels at *Godzo, Kicheec and Novakovski LLP*, based in Ohrid, since 1994. He is an authorised representative in the protection of industrial property proceedings as well as a defense counsel before the International Criminal Tribunal for the former Yugoslavia in the Hague. Dragan is also an authorised trainer on legal skills in accordance with the new Law on Criminal Procedure (LCP) and conducts trainings provided to young lawyers through the OSCE Mission in Skopje. He is the author of numerous articles in specialist legal journals on various subjects in the area of human rights protection.

Martina Drangovska Martinova is an immigration and asylum lawyer at the Macedonian Young Lawyers' Association (MYLA), since 2014. During her working experience to date, she has placed focus in particular on the protection of refugee, migrant and asylum-seeker's rights through the provision of legal aid, representation and research. Deprivation of liberty for immigration reasons has been of particular interest to her work. She obtained her law degree from the Faculty of Law within the Saints Cyril and Methodius University in Skopje, from which she further acquired the title of Master of Criminal Law (LLM) in 2014.

Radostina Pavlova is a legal expert, researcher and activist in the areas of migration and human rights. Since 2014, she has been involved with the Sofia-based NGO, Center for Legal Aid – Voice in Bulgaria. Radostina has previously worked as a Policy Analyst and Programme Advisor in the areas of immigration, integration and multiculturalism for the Canadian federal government. She also has worked as a counsellor at legal aid clinics in Toronto, Canada, in the areas of refugee and immigration law and injured workers' compensation rights. She holds Master's degrees in Immigration and Settlement Studies, and Russian and Eastern European Studies (Political Science stream), and a Juris Doctor (J.D.) from the Faculty of Law at the University of Toronto. Radostina has authored or co-authored a number of articles and research papers on migration-related topics.

Macedonian Young Lawyers Association

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