LEGAL OPINIONS

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MACEDONIAN YOUNG LAWYERS ASSOCIATION

THE SAFE THIRD COUNTRY CONCEPT AND AMENDMENTS TO THE LAW ON ASYLUM AND TEMPORARY PROTECTION OF THE YEAR 11/04/2016

The Republic of Macedonia as an independent state since 18.01.1994 has been a signatory of the Convention on the Status of Refugees from 1951 and the Protocol to the Convention of 1967. In accordance with the obligations of the Convention and the Protocol but also facing repeatedly with a large influx of refugees due to wars in neighboring countries (Croatia 1991-95, Bosnia and Herzegovina and Kosovo 1992-95, 1999), in 2003 Republic of Macedonia has adopted the Law on Asylum and Temporary Protection which actually operationalized much of the provisions of the Convention and the Protocol, adding features distinctive to the Macedonian legal system.

The law on asylum and temporary protection from its adoption to date has undergone seven amendments, which were partly aimed at more efficient and effective implementation of the asylum procedures and the granting of protection. In April 2016 the Parliament was presented with a Draft Law amending the Law on Asylum and Temporary Protection proposed in a shortened procedure by a group of MPs. The proposed law was intended amending the conditions for obtaining refugee and asylum status for subsidiary protection that will additionally clarify the procedure for granting the right of asylum and in light of the increased volume entry and transit of people across territory of Macedonia. Thereby, the Draft Law stated that the main purpose which is to be accomplished by the proposed amendments to the law is defining of a clear criteria, procedures and conditions in which a person can exercise the right of asylum and subsidiary protection the Republic of Macedonia and reduce the possibility of abuse by keeping an open and humane approach to people who need help and protection.

The proposed amendments were aimed at amending the Law with a new Article 10-a "safe third country", a member state of the European Union, a member state of the North Atlantic Treaty Organization (NATO) or the state of the European Free Trade Association (EFTA) '. This article actually supplemented the Article 10 paragraph 2 and 3 of the Law on Asylum and Temporary Protection in a way that for the first time defines the notion of a safe third country. Article 10 stipulates that "As a safe third country shall be considered the state:
- In which there is no serious risk of persecution in the sense of Article 9 paragraph 1 of this Law;
- Who respects and implements the principle of non refoulement and;
- Who will accept the asylum seekers, will provide access to a procedure for asylum, which provides the basic procedural safeguards and will examine the application for asylum."
The asylum seeker during the procedure for asylum can prove that the third country is not safe for him.

The amendment of Article 10 with a new Article 10-a is aimed at determining which countries, the Republic of Macedonia considers safe third countries when conducting proceedings following an application for asylum of a person that does not come directly to the Republic of Macedonia from the country of origin. Namely, Paragraph 1 of Article 10-a defines that "A safe third country, a Member State of the European Union member state of the North Atlantic Treaty Organization (NATO) or the state of the European Free Trade Association (EFTA), is a

country that has ratified and applies the provisions of the Convention on the Status of Refugees of 1951 and the European Convention for the protection of human rights and fundamental freedoms, including standards for an effective remedy, and has established asylum procedure prescribed by law and in accordance with the Convention on the status of refugees of 1951. " Evident from the wording of the term safe third country it can be concluded that the legislator omitted several moments that do not correspond to the actual conditions already established by the international institutions and organizations, for which we will give a review further in the text. Primarily the legislator has not acted in accordance with NPAA because it has not harmonized the amendment to Directive 2013/32 / EU of the European Parliament and the Council of 26 June 2013 on the common procedures for granting and withdrawing international protection, in which Articles 38 and 39 stipulate the conditions under which the European Union decides whether a country can have the status of a safe third country.

Namely in accordance with Article 38 of the Directive it is provided that "A member State may apply the concept of a safe third country only in the states in which the competent authorities are satisfied whether a person seeking international protection will be treated in accordance with the following principles of a safe third country relating to: a) The life and liberty are not threatened at the expense of race, religion, nationality, membership of particular social group or political opinion; b) That there is no serious injury pursuant to Directive 2011/95 / EU of standards on qualifications of third-country nationals or persons without citizenship as beneficiaries of international protection, for uniformed status of refugees or for persons suitable for subsidiary protection and the content of granted protection; c) Respecting the principle of non refoulement under the Convention on refugees; d) Prohibition of removal, in violation of the right to freedom from torture and inhuman treatment; e) Existing the possibility for application for a refugee status and, if established that he is a refugee, to receive protection under the Convention on refugees."

If we consider the conditions foreseen by the Directive 2013/32 / EU, it is obvious that the legislator in an effort to standardize this issue did not took into consideration which conditions would be most appropriate to be met for a country to be considered a safe third country. Namely Article 10-a does not provide a clear opportunity to the applicant to oppose the implementation of the institute safe third country and prove that third country is not safe for him given his personal circumstances. Apparent from Article 39 paragraph 3 of the Directive clearly states that the applicant should have the opportunity to contest the implementation and state the reasons why the country is not safe for him personally. The applicant should be given the opportunity to contest the general presumption of security in the third country by showing that, given the facts of his case, the third country would have applied more restrictive criteria in examining an application for asylum from the country where the application is submitted (in this case Macedonia).

The Article does not underline how the Department for Asylum shall determine whether a country is safe, i.e. how to determine whether it applies the provisions of the said conventions and standards for effective remedy. In this respect, the Global Consultations on International Protection held on 31 May 2001, the UNHCR noted that the third safe country, not only should have a system for asylum according to the convention, but it must be applied appropriately and fairly.

In terms of countries as signatories to the Convention on Refugees and the European Convention on Human Rights, and the membership in the Council of Europe and NATO, given the example of the Republic of Turkey, in accordance with the amendment to Law on Asylum and Temporary Protection, the same can now be included in the group of safe third countries. But considering that Turkey is a signatory only to the Convention on refugees of 1951 but not the Protocol, then it should be known that it would provide an opportunity for requesting international protection only to persons coming from European countries, while for all others such a mechanism would not be provided. Additionally, if it is required that a safe third country should be part of the signatories to the European Convention on Human Rights in the case of Turkey, which after a failed military coup took the decision to suspend the Convention, the country also does not meet the requirement stipulated in the amendments of the Law on Asylum and Temporary Protection although it is a member of the Council of Europe and NATO.

These issues reappear for many other countries, including Greece, Bulgaria and Albania. Namely, in Greece the behavior towards refugees and asylum seekers in the current refugee crisis is alarming, the predicted conditions do not offer sufficient protection which is determined by verdict M.S.S. v. BELGIUM AND GREECE where it is clearly and precisely stated that Greece within the forms to treatment, treatment and behavior towards asylum seekers and persons granted the status does not apply in accordance with international standards or it is not fulfilling the requirements that anticipate these so that it can be considered as a safe third country.

For Bulgaria and Albania which are members of NATO and the Council of Europe, and additionally Bulgaria is a member of the European Union there are numerous reports and decisions from relevant international organizations and tribunals in which it is established that they have been treating asylum seekers contrary to international standards on human rights.
Finally it is interesting to note that the explanation of the Draft Law as an explanation stated that "This amendment to the Law on Asylum and Temporary Protection will contribute to specify the procedures with regard to the new situation with the increased volume entry and transit of migrants across the territory of the Republic of Macedonia".
The law was published in the Official Gazette of the Republic of Macedonia no. 71/2016 on 11.04.2016 and came into force on 19.04.2016.

CONCLUSION

Evident from the abovementioned, but also from numerous protections provided by international public law especially when it comes to international protection, Article 10-a is understated compared to the standards and requirements adopted by the European Union and by other international organizations and courts.
Actual membership in international organizations and treaties, does not guarantee the fulfillment of the minimum requirements for the purpose of protection of fundamental human rights and freedoms. This is evidenced in the case of Turkey in recent times, who is a signatory of all documents and is a member of NATO and the Council of Europe, but does not show the capacity of a democratic country that would provide an efficient and effective international protection for persons that require it.

The excessive formalism practiced by the Macedonian legislator represents a rigid framework and a permanent obstacle to the right to international protection, which is provided in Article 29 of the Constitution of the Republic of Macedonia, as well as its membership as a signatory of numerous international documents, especially the 1951 Convention and the 1967 Protocol. Bearing in mind what has already been said, and the intention with which the legislator attempts to restrict the possibility of providing transnational protection according the Law on Asylum and Temporary Protection, clearly indicates that this provision is contrary to the legislation of the European Union, the United Nations, the Council of Europe and the practice of the European Court of human rights.

If the Republic of Macedonia has a clear determination to join the European Union as well as in direction of respecting the already signed and ratified international treaties, it should soon proceed to amend the Law on Asylum and Temporary Protection in order to suspend the legal effect of Article 10-a or its complete reformulation, in order to prevent any possibility of adverse consequences of applying it.

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EXPULSION OF THE ASYLUM SEEKERS FROM REPUBLIC OF MACEDONIA

1. Introduction – The status "asylum seeker" in the international law and Macedonian legislation

The Convention relating to the status of refugees reached by UN in 1951, defines what would take for a person to be granted a protection as refugee: *a person outside the country of his nationality, who is unable or unwilling to return, due to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*[i]. Further developed in international law, this definition is treated as a basis for construing the definition for asylum seeker as a person who left his country and requested protection in another country, as per the provisions from the Convention relating to the status of refugees from 1951. Republic of Macedonia, as a signor to the Convention, has already accepted and incorporated this definition in Article 3, par. 1 from the Law on Asylum and temporary protection: *An asylum seeker shall be an alien who seeks protection from the Republic of Macedonia and has filed a request for recognition of the right to asylum, for which a final decision has not been reached, in the procedure for recognition of the right to asylum.*[ii]

Hence, we will conclude that both in Republic of Macedonia and in the international community, any person which has left its country and requested protection from another country, due to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, shall be treated as an asylum seeker. This person shall hold this status in Republic of Macedonia up until the moment of receiving the final Decision by which the Asylum Sector within the Ministry of Interior of Republic of Macedonia has decided upon his request for recognition of the right of asylum.
The asylum seeker status ceases with the moment of **validity** of the Decision reached by the Asylum sector, by which the destiny of the asylum seeker has been decided.[iii]As per law, the Decision shall become "valid"[iv], when there is no possibility to file a regular legal remedy against it.

Regarding the status of these persons as persons requesting protection which has not been recognized yet, we raise the question whether, and under which circumstances, the asylum seeker can be deported from Republic of Macedonia, as well as whether there are international instruments protecting the rights of the asylum seekers against forced expulsion and return to the country of origin, or to a third country.

2. Analysis of the international instruments and the domestic legislative

A. International protection of the asylum seekers against forced expulsion

The asylum seekers, as a separate category of people requiring international protection, have been protected against expulsion on grounds of the following provisions:
Article 33 from the Convention relating to the status of refugees from 1951, which introduces the **principle of non-refoulement –** as a principle of protecting the refugees from returning to a country in which their life or integrity would be threatened.[v]

Article 4 from the Protocol 4 to the European convention on human rights, by which **collective expulsion of aliens is forbidden.**[vi]

Article 1 from the Protocol 7 to the European Convention on Human Rights, which **forbids expulsion of an alien lawfully residing to the territory of a state,** except in case of executing a decision reached as per the law, in which case, such person is entitled to: a. state his reasons against such expulsion; b. to have his case reviewed; c. to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.[vii]

1.The non-refoulement principle is the ground for establishing protection to the refugees, which at the same time protects the asylum seekers who have not yet been recognized with the right to protection, from expulsion from one safe country to a country in which this person feels unsafe, i.e. a country in which there is a threat against his life or integrity.

This principal, which has been introduced to the international law by the Convention relating to the status of refugees, is the ground of the international protection of the refugees, and is already treated as customary international law.[viii]

Nowadays, this right does not belong only to the persons in Republic of Macedonia, but also to those that are at the border.[ix]This way, no person entering Republic of Macedonia shall be returned to another country prior to examining whether this country endangers the basic human rights of the asylum seeker that requested to enter Republic of Macedonia.

This right may not be limited in any case, except in case of a certain person being determined as a threat to the safety of the country in which he is settled, or, **if this person has been convicted with a final Verdict for a particularly grave crime which is a threat to the community of the country**[x]

1. The non-refoulement principle, as a nominal principle consisting the basis of the international protection of the asylum seekers, has been recognized with the case law on the European Court on Human Rights, and has additionally been recognized with Article 4 of the Protocol no. 4 and Article 1 of the Protocol no. 7 to the European Convention on Human rights.

In this manner, the Court recognizes the principle of non-refoulement as one type of securing the protection of the rights of the citizens by the country, due to the fact that **the non-refoulement of one person in a country in which there is a threat against breach of the basic rights, such as right to life or prohibition of torture, is an absolute obligation of the country, and the country may not digress from it.**[xi]

1.

By reaching Protocol no.4, the European Convention on Human Rights finally managed to directly and undoubtedly forbid the collective expulsion of aliens.

Any measure compelling aliens, as a group, to leave a country shall be treated as "collective expulsion", except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[xii]

By this, each country is **obliged** to individually assess each separate case of each individual, regardless of the fact that maybe all of them reached the country as a group. The idea behind such obligation is, to once again provide **assessment on the damage one person would suffer if expelled –** whether this person is expelled in a country where his absolutely guaranteed human rights are violated, is it a risk to return him to a country in which he would receive inappropriate treatment, in which he shall suffer discrimination, etc.

The European Court on Human Rights has already established practice on recognizing breach of these provisions in many situations:

In one case in which many members of one group received **Decision for expulsion with identical content, regardless of the fact that the actual situation had been different for each person;**[xiii]

In the occasion that the Government of one country **did not undertake appropriate measures** by which it would guarantee that upon deciding for each individual case, the specific elements of the actual situation of each person were taken into consideration.[xiv]

This attitude of the European Court for Human Rights **undoubtedly shows that the Court expect that each country to consider the specific circumstances of each individual case, the reasons due to which the asylum seeker left the country, and the possible consequences of his return, during the process of deciding upon expulsing an asylum seeker.**

2. Article 1 from the Protocol 7 to the European Convention on Human Rights shows a new dimension on protection of the right of the asylum seeker **not to be returned to the country that he left due to certain reasons.**

This provision guarantees the right to a procedural protection regarding the expulsion of aliens, i.e. by this provision the minimum rights belonging to the person for which a Decision for expulsion was reached. By this provision, such person is granted a right to equality of arms during the procedure, i.e. right to give his opinion and defense, right to have his case examined by authorized bodies, as well as a right to be represented before the authorized bodies. **In Republic of Macedonia, this right is guaranteed by the right to filing a lawsuit before the Administrative Court of Republic of Macedonia against the Decision by which the asylum request has been denied**[xv]**.** As per the Summary to the Protocol 7, the idea of this provision is to provide **objectivity** during the examination of the circumstances and the reasons for reaching such Decision, as well as **equality of arms,** in a manner that the asylum seeker will be given a chance to state his own statements and evidence in his defense. This way, the said decision easily connects to the existing guaranteed rights to *effective legal remedy, fair and just trial,* as well as the already mentioned *equality of arms.* In addition to this, the person facing expulsion must be provided with access to appropriate documentation and information regarding the legal provisions, which shall follow in his case. If the person does not understand

the language, appropriate translation should be provided, altogether with effective legal aid, and appropriate counseling.[xvi]

It is recommended to also bear in mind that this provision protect only the persons that have either entered the country regularly, or have meanwhile regulated their stay. This provision does not protect the persons that entered illegally and failed to undertake measures for regulating their stay[xvii]. **Therefore, this provision guarantees protection only after the moment of acquiring the status of an asylum seeker, i.e. – after filing the request for receiving right of an asylum seeker in Republic of Macedonia.**
This provision is also quite restrictive regarding the occasion of **when is it allowed to reach such decision:** Only in case if *such expulsion is necessary in the interest of the public order or national safety.* The court practice stands on the opinion that the country is obliged to explain its standing that such expulsion is in the interest of the public order or national seciruty. The European Court of Human rights found breach of this provision in a situation in which the state **failed to explain that this exclusive measure has been really necessary in one specific case.**[xviii]

B. The procedure for forced expulsion in Republic of Macedonia

The reasons for expulsion from Republic of Macedonia, have been regulated by Article 101 from the Law on Aliens:[xix]

- With a legally valid decision he/she is sentenced to imprisonment of minimum one year,
- He/she poses a serious threat to the public order, national security or international relations of the Republic of Macedonia,
- There are serious reasons to believe that he/she committed serious crimes, especially crimes related to production and releasing narcotic drugs, psychotropic substances and precursors, or there is a solid evidence of his/her intention to commit such crimes on the territory of the Republic of Macedonia,
- Reasons for protection of the public health require so,
- He/she stays illegally in the Republic of Macedonia, or
- He/she commits several repeated or more serious violations of the provisions of this Law.

Article 107 has guaranteed the non-refoulement principle:
An alien cannot be forcibly returned to a country where:

- -his/her life or freedom would be threatened due to his/her race, religion, nationality, membership of a social group or political opinion, or
- he/she would be subjected to torture, inhuman or degrading treatment or punishment.

Aiming to provide implementation of the provisions from Article 4 from Protocol no. 4 and Article 1 from the Protocol no. 7 to the European Convention on Human Rights, this Law prescribes that the manner of proving the existence of any of these grounds shall be additionally elaborated in a Rulebook.[xx]

The Rulebook on aliens, as such, contains all of the elements required by the quoted provisions of the protocols to the European Convention on Human Rights[xxi], including the manner, which

objectively leads to finding the material truth whether there is an appropriate reason for expulsion of the alien from Republic of Macedonia.

The Rulebook also regulates the **procedural protection of the alien:** The alien shall be expulsed only in case such decision has been reached in a procedure prescribed by law/Before reaching the Decision, the official from the Ministry of Interior shall enable the alien to give a statement regarding each circumstance and to give facts which are important for reaching the Decision/If the alien gives his statement orally, the official shall prepare Official Note.[xxii]

With the provisions given in Article 59-65, the Rulebook anticipates the whole procedure for expulsion of an alien – initiation of a procedure, circumstances which the authorized body must have in mind while reaching the Decision, directions for determining the period of time during which the ban from entering shall be valid, form and content of the Decision for expulsion and obligation for advice for legal remedy, obligation that the text of the Decision to be both in Macedonian and English, procedure for handing the Decision and noting the expulsion and the ban to enter the country in the passport of the alien.[xxiii]

C. The position of the asylum seekers regarding the expulsion possibilities

In accordance with Article 25 from the Law on Asylum and Temporary Protection:

If the rejected person, asylum seeker, does not leave the territory of the Republic of Macedonia within the time foreseen in the decision of the Asylum Sector, he/she shall be expelled from the Republic of Macedonia in accordance with this Law and the provisions of the Law on Aliens.

In accordance with Article 31 par. 4 from the Law on Asylum and Temporary Protection:

The decision to reject the request for recognition of the right to asylum shall state the reasons, due to which the request has not been accepted, the advice on legal remedy and the time frame within which the person is obliged to leave the territory of Republic of Macedonia, which cannot be less than 15 days from the day on which the decision becomes effective.

As per Article 3 from the Law on aliens:

The provisions of this law shall apply to all aliens, except for aliens who:
- seek protection from the Republic of Macedonia in accordance with the Law on Asylum and Temporary Protection, unless otherwise determined by this Law,
- enjoy privileges and immunities under the international law, provided that the application of this Law is contrary to the international obligations undertaken as well as the principle of reciprocity.

In addition to this, it is necessary that one country is aware of respecting the non-refoulement principle.

The Law on Asylum and Temporary Protection **also contains the non-refoulement principle.** As per Article 7 of this law:

The asylum seeker, recognized refugee or person under subsidiary protection cannot be expelled, or in any manner whatsoever be forced to return to the frontiers of the state:
- in which his/her life or freedom would be threatened due to his/her race, religion, nationality, membership of a particular social group or political opinion; or
- where he/she would be subjected to torture, inhuman or degrading treatment or punishment.

The prohibition referred to in paragraph 1 line 1 of this Article shall not apply to an alien who is considered a danger to the safety of the Republic of Macedonia, or who, after having been convicted by a legally valid decision of a crime or especially of a serious crime, is considered a danger for the citizens of the Republic of Macedonia.

The alien referred to paragraph 1 line 2 of this Article, who for the reasons referred to in Article 6 of this Law cannot enjoy the right to asylum in the Republic of Macedonia, shall be allowed to remain within the territory of the Republic of Macedonia as long as in the state of his/her nationality or, if he/she has no nationality, in the state of his/her habitual residence, he/she would be subjected to torture, inhuman or degrading treatment or punishment.

With this provisions, and especially with the following facts:
Asylum seekers are not persons illegally staying in Republic of Macedonia;
An asylum seeker is a person that has not received a final decision containing a deadline for leaving Republic of Macedonia,
We can safely conclude that **there is no possibility for one person to be expulsed while possessing the status of an asylum seeker.**

There is only one procedure for expulsion - as described above:
A Decision has been reached by which the request for protection is denied;
The Decision contains a deadline within which the person shall voluntarily leave Republic of Macedonia;
The Decision is final, and the deadline for voluntary leave has ceased.

While reaching such Decision, the principle of non-refoulement should necessarily be taken into consideration, in a manner that, the person shall not be obliged to return to a country in which his life or freedom would be endangered due to his race, religion, nationality, membership of a certain social group or political opinion, or where he was subjected to torture, inhumane or degrading treatment or punishment.

CONCLUSION:
An asylum seeker may not be expulsed from Republic of Macedonia as long as he holds the status of an asylum seeker.
1. The procedure for expulsion of an alien, as per the Law on aliens, is harmonized to the rules for international protection arising from the Protocol no. 4 Article 4 and Protocol no. 7 Article 1 to the European Convention on Human Rights, as well as the non-refoulement principle, arising from the Convention relating to the status of refugees from 1951.
2.The Asylum seekers are protected by the Law on Asylum and Temporary Protection, as well as with international instruments.

3. A person protected by the Law on Asylum and Temporary Protection may not be expulsed from Republic of Macedonia, except in case of losing the rights granted to him by this law, and consequently, application of the provisions from the Law on Aliens.
4. Asylum seekers are entitled to international protection, which is especially granted to them by Protocol 4 Article 4 and Protocol 7 Article 1 to the European Convention on Human Rights, and the non-refoulement principle, arising from the Convention relating to the Status of Refugees from 1951.
5. The expulsion of a person – asylum seeker may be legal only after this person has been denied from protection as per the Law on Asylum and Temporary Protection, with a final Decision. At the moment the Decision becomes final, this person shall lose his status of an asylum seeker, and provisions from the Law on Aliens shall apply to him exclusively. Therefore, as per law, the person may be expulsed only after it has been decided that this person does not fulfill the criteria for receiving protection as per the Convention relating to the Status of Refugees and the Law on Asylum and Temporary Protection.

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July 2016

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[i] Convention relating to the Status of the Refugees, UN, 1951

[ii] Law on Asylum and Temporary Protection, Official Gazette of RM no. 66/2007...71/2016

[iii] As per the Law on Asylum and Temporary Protection, an asylum seeker may be granted with: recognized refugee status (Article 4), status of a person under subsidiary protection (Article 4-a), as well as status of a refugee or person under subsidiary protection sur place (Article 4-b). The request of the asylum seeker may be rejected due to: 1)there is no well-founded fear of persecution; 2) there are reasons for expulsion referred to in Article 6 of this Law; and 3) the persecution for the reasons referred to in Article 4 of this Law is limited only to a particular geographic area of the state of his/her nationality or, if he/she has no nationality, in the state of his/her habitual residence, and that there is a possibility for effective protection in another part of the state, unless in light of all circumstances it cannot be expected that the person shall seek protection there.

[iv] In order to summarize the process of reaching the state of **final Decision,** please see below the chronological summary of the legal procedures which shall be undertaken by an asylum seeker:
1. The person arrives to Republic of Macedonia and submits the request for granting protection;

2. The Asylum Sector within the Ministry of Interior of Republic of Macedonia, in a procedure as per the Law, decides whether there is an existence of the criteria for recognizing the right to asylum and reaches appropriate Decision;
3. The Decision is delivered to the Asylum seeker, who has 30 days after the receipt of the Decision to file a lawsuit to the Administrative Court of Republic of Macedonia, in case of dissatisfaction of the outcome with the Decision. If the asylum seeker fails to file the lawsuit within the given deadline, the Decision becomes final and it can be executed.
4. The Administrative court of Republic of Macedonia shall deliver its Decision to the Asylum seeker. The Administrative court may either accept the lawsuit and return the case to the Asylum Sector, or reject the lawsuit and confirm the Decision reached by the Asylum sector. The dissatisfied party is entitled to an Appeal within 15 days of the receipt of the Decision by the Administrative court. If none of the parties files an Appeal in a situation where the Administrative court confirmed the Decision of the Asylum sector, such decision shall become final.
5. Upon filed Appeal, the High Administrative Court of Republic of Macedonia shall reach a decision that is **final, i.e. against which one cannot file regular legal remedies.**

[v]Convention relating to the Status of Refugees, UN, 1951
[vi]European Convention on Human Rights, Protocol 4, Article 4,Council of Europe
[vii]European Convention on Human Rights, Protocol 7, Article 1, Council of Europe
[viii] Declaration of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/MMSP/2001/09 (16 January 2002), at para.4; UNHCR Executive Committee Conclusion No. 25 (XXXII) (1982).
[ix] Protecting migrants under the European convention on human rights and the European social charter, YannisKtisakis, Council of Europe, February 2013, page 80
[x]Convention relating to the Status of Refugees, Article 33 par. 2
[xi]ECtHR, Saadi v. Italy (GC), 28.02.2008, par.138, M.S.S. v. Belgium and Greece (GC), 21.01.2011, par. 223-224
[xii] Factsheet – Council of Europe, June 2016
[xiii]Khlaifia and Others v. Italy (CJ). Upon this case, per request of the Italian Government, on 22.06.2016, a hearing before the Grand Chamber(GC) was held
[xiv]Chonka v. Belgium (CJ)
[xv]Article 32, Law on Asylum and Temporary Protection
[xvi] Protecting migrants under the European convention on human rights and the European social charter, YannisKtisakis, Council of Europe, February 2013, page 104
[xvii] Explanatory report- ETS 117
[xviii] C.G. and Others v. Bulgaria, 2008; Nolan and K. v. Russia, 2009
[xix]Official Gazette of Republic of Macedonia no. 35/2006....217/2015
[xx]Article 145, Law on Aliens, Official Gazette of Republic of Macedonia no. 66/2007...71/2016
[xxi]Article 54-65 from the Rulebook on Aliens
[xxii]For detailed procedure, see: Article 58, Rulebook on Aliens
[xxiii] Procedure for expulsion of an alien, Rulebook on aliens, Article 54-65:

Article 54

Due to assessing the existence of the circumstance whether the alien has been convicted with a valid Verdict to prison in duration of at least one year, as a reason for his expulsion from Republic of Macedonia, as per Law, the authorized organizational units of the MOI shall cooperate whti the punishment -correctional institutions of Republic of Macedonia.
The punishment- correctional institutions, before the expiry of the conviction to prison shall in written notify the MOI for the date of the expiry of such punishment by the alien, the period during which this alien shall be banned from entering Republic of Macedonia in case the Decision for expulsion has been reached by an authorized court, for the duration of the time in prison, as well as for the day when the alien shall leave the punishment- correctional institution.

Article 55

The protection of the public health, as a reason for expulsion of an alien as per law, shall be assessed on grounds of previous notification of the health institution that accepted the alien for treatment.
The notification from par. 1 of this Article shall show determination that the illness of the alien represents danger to the public health and to determine the time frame when the alien got ill from the given illness.

Article 56

Multiple repetitions of breaches of the provisions of the Law on aliens as per this Rulebook shall be multiple breaches of the provisions of the law performed at the same time or multiple repetitions of the breaches of the provisions of the law, performed within at least one year.

Article 57

Graver breaches of the provisions of the Law on aliens, as per this Rulebook shall be:
-Presenting false data by the alien for his identity per request of officials of the MOI
-The alien enclosed false or someone else's documents to the request for issuing visa, residence permit or travel document for alien, and
- He gave under pledge the document that confirms his identity, due to unpaid claims towards the state bodies, legal entities or natural persons, as well as due to realization of another benefit or right.

Article 58

The Alien shall be expulsed from Republic of Macedonia only in case of reaching a Decision for expulsion in a procedure prescribed by Law.
Prior to reaching the Decision from par.1 of this Article, an official from the MOI shall enable the alien to give a statement regarding all of the circumstances and facts which are important for reaching the Decision.
The alien shall normally give oral statement, but the statement can also be given in written.
If the Alien gives an oral statement, the official shall make official note.
In case of need for more exhaustive explanations, the official leading the procedure, may order the alien to give written statement within a given deadline.

Article 59

The authorized organization unit of the MOI where the alien lives or resides shall reach the Decision for expulsion of the alien from Republic of Macedonia.

Article 60

When determining the period of time in which the alien shall be banned from re-entering Republic of Macedonia, all of the relevant circumstances for the individual case shall be taken into consideration, especially:

- The type and gravity of the crime due to which the Decision for expulsion of the alien from Republic of Macedonia has been reached;
- The personal, economic and other ties of the alien with Republic of Macedonia, as well as the consequences which shall arise from this measure for him or a member of his closer family, legally residing in Republic of Macedonia;
- Whether this is the first Decision for expulsion of the alien from Republic of Macedonia;

- Whether there are already more than one Decisions reached for expulsion of the alien from Macedonia;
- Whether the alien entered Republic of Macedonia during previously given ban for entering Republic of Macedonia;
- The duration of the previously confirmed illegal stay in Republic of Macedonia, and
- Existence of a serious danger from the alien for the public order and national security of Republic of Macedonia.

Article 61

The alien who has been confirmed to illegally stay in Republic of Macedonia up until one month, shall receive ban for re-entering Republic of Macedonia in duration of two years.

The alien who has been confirmed to illegally stay in Republic of Macedonia for longer than one month, shall receive ban for re-entering Republic of Macedonia in duration of two to five years.

The ban for re-entering Republic of Macedonia in duration of five years shall be given to an alien who has been confirmed to illegally stay in Republic of Macedonia, who illegally entered Republic of Macedonia or has worked in Republic of Macedonia contrary to the employment provision.

Article 62

The Form for the Decision for expulsion of the alien from Republic of Macedonia shall be made from paper in white color, with dimensions 21 x 30 cm and two numerated pages (Form no. 12).

In the upper middle part of the first numerated page of the Form of Decision for expulsion of the alien from Republic of Macedonia, shall be the coat of arms of Republic of Macedonia, under which there is a text "REPUBLIC OF MACEDONIA" and "MINISTRY OF INTERIOR", under them data for the organizational unit shall be inserted; the number, place and date, under them printed is the legal ground for reaching this Decision, under it he text "DECISION FOR EXPULSION OF AN ALIEN FROM REPUBLIC OF MACEDONIA" is printed, under it shall be inserted data for the person which is expulsed: surname, name, name and surname of the parents, date and place of birth, gender, nationality, residence, type and number of the ID, place and date of issue of the ID; validity of the ID; deadline within which the person is obliged to leave Republic of Macedonia, and the legal ground for such expulsion.

The second numerated page of the Form of the Decision for expulsion of an alien from Republic of Macedonia contains space for summary, under it there is direction for legal remedy, and under it there is space for stamp and signature of the official.

The text of the Form of the Decision from par.1 of this Article is printed in Macedonian language and its Cyrillic letter, and in English language and its Latin letter.

Article 63

Upon handing down the Decision for expulsion of the alien from Republic of Macedonia, the officials from the MOI shall take a photo from the Alien as well as fingerprints, which shall be delivered to the authorized organizational unit of the MOI for keeping the dactylographic collections.

Article 64

The stamp of the Decision for expulsion (Form no. 13) shall be inserted in the travel document of the alien who is being expulsed.

The form of the stamp of the decision for expulsion shall be with dimensions 8 x 5,5 cm and contains date until which the alien shall leave Republic of Macedonia and period of time during which the alien is banned from re-entering Republic of Macedonia, as well as number of the decision for expulsion; the date of inserting the stamp; space for oval stamp and signature of the official.

In the travel document of the alien from par.1 of this Article, the stamp shall be inserted after the reaching of the Decision for expulsion of the alien from Republic of Macedonia, beside the Macedonian Visa, and if as per international agreement no visa is required, beside the stamp signaling the last entering of the alien in Republic of Macedonia.

Article 65

In case the alien who shall be expulsed from Republic of Macedonia does not possess foreign travel document, the officials from the MOI shall cooperate with the diplomatic-consular office in Republic of Macedonia of the country whose citizen the alien is, due to issuance of a travel document from the country whose citizen the alien is.

If the alien cannot be issued a travel document from the country whose citizen he is, the MOI shall issue passport for alien who shall be valid only for leaving Republic of Macedonia.

The author Maja Atanasova gained her education at the Faculty of Law of the Ss' Cyril and Methodius University in Skopje. In 2011, she passed the Bar Exam and since then she has been working as an Attorney at Law in the Law Firm Georgi Dimitrov Attorneys.

THE RIGHT TO FAMILY REUNIFICATION OF FORCED MIGRANTS

Preface

1. When addressing this question, one cannot escape from the fact that over the past years, the world, especially the European continent would be practically overrun by migrants. That is the aftermath of the crisis in the Middle east, which aftermath spans throughout the region, but also from the wars in former Yugoslavia, which have left many displaced persons, of which great numbers are left without properly addressed and settled status within territories and states where they have found refuge.

2. Traditionally, the western European nations have been the nest for migrants and immigrants in search of better opportunities. And, those countries have in all fairness had their share of absorbing immigrants into their territories, predominantly economic migrants and immigrants. Those in turn may form the basis for family reunification for other members of their families, *obiter*, in certain cases.

3. Persons who have left their home jurisdictions and have already established status in some other jurisdiction now serve as a catalyst for such new form of migration-forceful migration and the rights of such persons to be reunited with their families and next of kin. The question is-do those forced migrants now have a valid claim or not to be reunited with their families, within the existing international legal instruments and practice.

4. By now, there is a clear distinction between economic migration, which is not so uncommon even within the borders of the European union and European continent as a whole, and the forceful migration, stemming from military armed conflicts and hostilities. The latter has brought the European continent, but also the rest of the world into a debate, whether the existing rules and regulation are sufficiently clear to cover this type of migration, in light of the sheer numbers of migrants at the doorsteps of the European Union.

5. The existent legal framework was probably not designed for such big number of cases that require attention, but rather used to cover legislatively this area of the law, for the sake of having a framework. However, enforcement of this framework now conflicts with the politics that escalates the problem even further.

6. Western countries have probably not been prepared for such an influx of forceful migrants knocking on their doorsteps in both, search of a new home and try to reunite themselves with next of kin already with validated and regulated status in some third country.

7. It would be fair to say that the concept of family reunification and the laws governing this concept, are in constant tension with the particular country's right to control immigration. So, a fair balance needs to be struck. But that does not mean that this right should be impaired on that ground alone. Some authors and scholars call this debate –a as forgotten human right. And that is also true, as it does not really fall under the general peremptory norms of international law., but rather it is a nested right –stemming predominantly by the right to family life, as already enshrined by the ECHR and other international documents. And there are ample documents that carry the notion of family reunification within their texts. Some are more general like the ICCPR, UDHL, European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), others are more specific such as the Convention Relating to the Status of Refugees 1951 entered into force on 22 April 1954, International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1 July 2003 of the 1990 United Nations (UN).[xxiii], European Social Charter, European Union Council Directive on the Right to Family Reunification 27 February 2003 etc.

8. The **Council Directive 2003/86/EC of 22 September also establishes the legal framework on the right to family reunification. The Preamble of this Directive *inter alia* provides that**

"Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favorable conditions should therefore be laid down for the exercise of their right to family reunification. **"**

This legal instrument also has a separate chapter on family reunification of refugees, which really emphasizes the fact that this group of persons has a separate and unique legal status-requiring unique attention and legislation[xxiii]

9. Lastly, as far as legislation is concerned, almost every nation has its own laws and regulation in regard to the instant issue. But, more importantly is that, in terms of doctrine and practice forms the basis for family reunification

10. Therefore, It is within those parameters that this paper will try and address the current state of affairs with this issue in relation to the Republic of Macedonia.

Basis for family ties, relevant to the concept and the right to family reunification.

11. Essentially, the ties that form the basis of the right for family reunification are marriage, Biological ties and Dependency. I will just briefly turn attention to each three.

Marriage

12. Although pretty straightforward, in reality marriage is not so easy to define. In several jurisdictions, not only a unity between a single woman and a single man is considered marriage, but also polygamy exists, and same sex marriages. Stricto sensu, if one is legally married in one jurisdiction, then his or her marriage is legally recognized elsewhere. It may produce difficulties in countries that follow the contemporary man/woman definition for marriage.

Genetic and Biological Ties

13. The significance of genetic ties is also opaque. Should there be distinctions between "real" children and adopted children in relation to family reunification? Western formalized adoption does not exist *per se* in Islamic law, where the closest equivalent is a type of permanent fostering called *kafala,* which does not entail rights of inheritance and other rights that "real" children have (UNICEF 2007: 99). By emphasizing genetic ties or their equivalent we may delegitimize important social relationships such as these, and prioritize relatives who have no emotional bond over those who do. [xxiii]

Dependency

14. The third and potentially more flexible basis for family ties is dependency. Defining family for reunification on the basis of dependency may permit accommodation of different types of family relationships. It would be difficult to define dependency in the context of an international legal point, as national jurisdictions have their own individual definitions for dependency. UNHCR operates with the following working definition: "a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration".

European Court of Human Rights

15. One instrument that is easily referred to when addressing this issue is the EctHR. It has over its several decades of existence produced several opinions in its jurisprudence when interpreting the ECHR in individual cases. Some notable sentences by this court include the notion that:

a. ..... not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered";[xxiii]\

16. Which in term leads to a conclusion that each case pleading for family reunification must be viewed within the confines of the facts that surround it, and that there is no universaly availkable formula when dispensing with those cases.

17. Also, in another case, the EctHR stated that

a. "the Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."[xxiii]

18. Which also brings the discussion back to square one, i.e. to the notion of Margin of appreciation.

19. However, is appears that where a migrant already residing on the territory of a Council of Europe which by definition may fall under the jurisdiction of the EctHR-a member state faces a quite big obstacle to develop his family life in his country of origin.[xxiii] The EctHR has reasoned as follows:

a. "the applicant's wife was born in Grozny and spent all her life in Chechnya until she left for Austria with her husband. The couple's children are still of an adaptable age. The applicant's wife, who has resident status in Austria for herself and the children based on their asylum status, might have a considerable interest in not returning to Chechnya. But although the Court does not underestimate the difficulties of a relocation of the family, there is no indication that there are any insurmountable obstacles in the way of the applicant's wife and the children following the applicant to Chechnya and developing a family life there".[xxiii]

b. *"[a] Although the Court appreciates that the applicants would now prefer to maintain and intensify their family life in the Netherlands, Article 8, as noted above, does not guarantee a right to choose the most suitable place to develop family life. Moreover, the Court has found no indication of any insurmountable objective obstacle for the applicants to develop this family life in Morocco. In this connection the Court considers that it has not been established that it would be impossible for the mother and her present husband, both being Moroccan nationals, to return to Morocco to settle with the children."*[xxiii]

c. *"in principle, the Court does not consider unreasonable a requirement that an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought. As to the question whether such a requirement was reasonable in the instant case, the Court considers that it has not been demonstrated that the applicant has in fact actively sought gainful employment after 10 October 2000 when she became entitled to work in the Netherlands. Although it is true that her Netherlands language and sewing courses may have been helpful in this respect, there is no indication in the case-file that she has in fact applied for any jobs."*[xxiii]

20. As far as the EctHR and the rights of the refugees are concerned, we will review two cases from which one could observe the Court's reasoning.

Abdulazis, Cabales, and Balkandali v. the United Kingdom[xxiii]

a. ...For a violation of Article 8 to exist where reunification is denied, (1) there needs to be an existing or intended family life; and (2) there must be obstacles preventing establishment of family life in another country.

The Court also noted that Article 8's non-interference language may include "positive obligations inherent in an effective 'respect' for family life" although nations are given a "wide margin of appreciation" in putting the article into effect, such that the state's obligation varies from case to case."..."The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country."

Gil v. Switzerland [xxiii]

In this case, the concept of the margin of appreciation came to its light. It was not an issue on whether the states have an obligation to see that the family life is observed, but that such an obligation falls within the ambit of the margin of appreciation, awarded to the states. In this case the applicant failed to show that he was a political refugee and that medical care could be obtained in their own country of origin-both issues with a wide margin of appreciation awarded by the state when deciding on civil rights and obligations.

21. A provisional conclusion draws would be difficult to achieve. However, it appears that the EctHR is careful in awarding and advocating family reunification, simply because the margin of appreciation is too wide and that each case must be pleaded on its own merits.In cases of refugees, the bar set by the EctHR appears to be set high, but not impossible to reach.

Macedonia[xxiii]

22. The right to family reunification is prescribed in the domestic legislation as well. The latest amendments of the Law on Asylum and Temporary Protection of 2016, prescribe that this right can be obtained towards any immediate family member of recognized refugee or person under subsidiary protection after three years of obtaining the right to asylum.

23. However, this legal norm operates with the term immediate family member (*член на потесно семејство*). This legal norm could potentially lead to problems in interpretation what exactly falls under immediate family member. Having due regard to the already stated principles in paras.

24. It would not be easy to draw a pattern and establish one in regard to the present and future requests for family reunification. Due to the fact that there are ample reasons and criteria that a migrant must demonstrate in order to enjoy this right, which –all things being equal, must be viewed on a case-by-case basis.

CONCLUSION

25. Although international instruments exist, each case is left to be dispensed with the national jurisdictions, which legislation has been or should be in conformity with the international legal standards.

26. However, no single formula exists when it comes to family reunification for forced migrants, due to the fact that the sovereign states enjoy what appears to be pretty wide margin of appreciation.

27. Due to the following restraints, or conditions, each case for family reunification especially for forced migrants needs to be evaluated separately, and is predicated upon the facts underpinning that particular case.The major drawback is that one particular case needs to exhaust all domestic legal remedies before putting their facts case to be tested before international fora (EctHR), which may appear to be a quite lenghty process, again depending on circumstances under which this legal norm should operate having in mind the recent developements in the area of forceful migration.

01.07.2016 Alekdandar Godzo,

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DEPRIVATION OF LIBERTY OF REFUGEES/MIGRANTS

Detention of refugees, asylum seekers and other migrants are measures that are often used not only in Republic of Macedonia, but also in many other European countries. However, lately there is an increased supervision and criticism for this kind of detention, first of all, by the international organizations concerned about this issue.

Unlike the other types of deprivation of liberty, where the legal grounds are found in the criminal law regulations, in the case when a refugee is detained, or a migrant, we are talking about an administrative detention. Unlike the detention or imprisonment in the criminal procedure, that are of repressive character, detention of refugees is deprived of repressive purpose. That means that the state has the obligation to secure guarantees that the treatment and conditions for detention are in accordance to the obligations for respect of the person's dignity and status of the detained persons. Therefore, "In order not to violate the right to liberty and security of person and to protect against arbitrariness, detention of migrants must be prescribed by law and necessary, reasonable and proportional to the objectives to be achieved" [xxiii]

Talking about deprivation of liberty of refugees, or migrants, the first subjects of analysis must be the following: the legal grounds for their deprivation of liberty, the procedure in which they were deprived of liberty, the duration of this deprivation and the conditions of the accommodation related to the duration of the deprivation of liberty. Analyzing this issue one should start from the international standards, applicable in Republic of Macedonia, one of the most important sources for this standards for us being the European Convention on Human Rights, as well as the jurisprudence of the European Court of Human Rights.

Therefore, in this legal opinion, the decisions of this Court will be subject to analysis in the first place, the standards which they set up and the manner of acting of the national authorities and application (or the lack of application) of this standards during these actions. Additionally, European documents regulating this issue are: The Council Directive 2004/83/EC of 27.01.2003 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, The Council Directive 2005/85/EC of 01.12.2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status and the 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. The most important national laws enclosing provisions regulating this matter are *The Law on Aliens*, *The Law on Criminal Procedure*, *The Law on Border Control*, *The Law on Police*, *The Law on Misdemeanors,* etc.

The European Convention provisions that every deprivation of liberty is allowed only if law provisions it. In this manner, the Convention in Article 5 guarantees the right to liberty and security and provides that no one shall be deprived of his liberty save in an exhaustive list of cases prescribed by law: One of these exceptions is "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". This means that the

Convention allows deprivation of liberty of refugees and migrants, but the national law must determine material and procedural rules provisioning when and under which circumstances a person can be detained. This obligation refers to the quality of the law as well, and seeks for it to be compatible with the rule of law, a concept inherent to all ECHR Articles.

In line with the lawfulness principle is that restriction of the right to free movement of any kind, including detention, can be imposed only in cases provisioned by law and in a procedure determined by law. Therefore, every immigration detention that is not concretely provisioned in the national legislation of the states would necessarily be unlawful and impermissible. When assessing whether a certain deprivation of liberty is in line with Article 5 of the Convention, one should start from examining the lawfulness of the detention; if there is no legal ground, the examination ends and it is clear that there is a violation of Article 5 of the Convention.

In that line, in the case of Shansa v. Poland[xxiii] the Court determined that the detention of two brothers from Lebanon of duration of several days that wasn't determined by a court, a judge or other authority given judicial prerogatives, couldn't be considered "lawful" in the sense of Article 5, paragraph 1 of the Convention. Starting from the fact that the detention of the applicants between 25th of August and 3rd of October 1997 was not "provisioned by law" or "lawful", the Court determined that there is a violation of Article 5, paragraph 1 of the Convention.

Additionally, the deprivation of liberty cannot be arbitrary. Every deprivation of liberty must be in line with the goals of Article 5, in order to protect the person from arbitrariness. The term "arbitrariness" reaches further from the compatibility with the national legislation; deprivation of liberty can be legal in terms of national legislation, but arbitrary nonetheless, and by that, contrary to the Convention. The ban on arbitrary detention requires a number of additional protective measures in order to ensure righteousness and nondiscrimination. First of all, the measure detention must be imposed in accordance with the legitimate cause. "Legitimate causes" in the context of immigration detention are the same for asylum seekers and migrants as for any other person: risk of fleeing from future legal or administrative procedures or danger to the personal or the public security. Criminalization of the illegal entrance of asylum seekers and migrants always surpasses the legitimate interest of the states and therefore in all of these cases the imposing of the measure detention will be arbitrary.

In the case of Nolan and K. v. Russia[xxiii], the applicant, US citizen appealed to the Court because on the 2nd of June, 2002, following his return in Russia, he was kept in a locked room for nine hours at the Shermtjevo Airport in Moscow and although he had a valid Russian visa, he was not allowed reentrance to Russia. The Court finds that the conditions the applicant was held at the room in the transit part of the airport can be treated as deprivation of liberty, for which the Russian authorities were responsible. Having in mind the lack of availability and predictability of the Rules for crossing the border, based on which the applicant was held, the Court concluded that the national authorities did not protect the applicant from arbitrary deprivation of liberty, and therefore determined violation of Article 5, paragraph 1 of the Convention.

Furthermore, the place, regime and conditions of the detention must be appropriate, in contrary; they may represent a violation of Articles 3, 5 or 8 of the ECHR. When deciding if the conditions under which the persons are detained fulfill the needed standards, the Court will evaluate the individual characteristics of the conditions where the persons are accommodated and their cumulative effect. While deciding, The Court will take into consideration first of all, the place where the person is detained (airport, police cell, prison), whether there is a possibility for using another object, the size of the detention space, how many persons use the space, availability and access to laundry and hygienic services, ventilation and access to open space, access to the outside world and if the detainees have access to medical facilities. The specific circumstances of an individual are of particular importance, therefore in the case of a child, a victim of torture, pregnant woman, a victim of human trafficking, elderly person, or developmentally impaired person a special attention must be paid to the space and conditions to be in accordance with their individual characteristics.

In the case of Muskhadzhiyeva and Others v. Belgium[xxiii], the applicants, Aina Muskhadzhiyeva and her four children (aged seven months, three and a half years, five years and seven years) on 22nd of December 2006, were detained in a transit center near the airport, which was under the authority of the Belgian Bureau for Foreigners, waiting for their deportation to Poland. They were held at this center for more than a month. Preceding their accommodation at this center, several independent reports were composed, emphasizing that in the center there are no conditions for accommodation of children. Taking this into consideration, the Court determined violation of Article 5, paragraph 1 of the Convention although the children were accommodated with their mother, and precisely because the center where they were accommodated was planned for accommodation of adults and lacked the necessary conditions for accommodation of children.

Court finds that there is no violation of Article 5, paragraph 1 of the Convention concerning the mother, because she was “lawfully detained”, having in mind her upcoming deportation from Belgium. At the same time the Court determined violation of Article 3, paragraph 1 of the Convention, concerning the children, because their “extreme vulnerability”, confirmed by several medical reports, was more important than their status of a person waiting for deportation. Concerning their mother, the Court again determined that there is no violation of article 3 of the Convention. The need of individual approach of the state towards every detained migrant and the responsibility for adjusting the detention according to the personal characteristics is illustrated in the best manner through this case.

The case Kanagaratnam and others v. Belgium[xxiii] is very similar. The applicant and her three minor children were accommodated at a transit center that was not equipped for detention of children and they were kept there for more than two months. Like in the previous case, Muskhadzhiyeva and Others v. Belgium, the Court therefore found violation of Article 3 and Article 5 of the Convention concerning the children, but in this case, differing the one previously referred to, the Court found violation of Article 5, paragraph 1 concerning the mother, as well, with the explanation that “detaining the applicant from 23rd of March to 4th of May 2009 was arbitrary and contrary to Article 5 paragraph 1 of the Convention, because of the fact that she was held in a facility that was not suitable for families”.

According to the rules of the Committee for prevention of torture of the UN[xxiii], the detained migrants, as well as every other persons deprived from liberty, as soon as after they are detained, must be provided three basic rights. First is the right to legal aid, meaning the detainees must immediately be provided contact with a lawyer, whom they will consult about the deprivation of liberty as well as about the provisions for seeking asylum, deportation, etc. If the detainee has no financial means to pay for a lawyer, the state is obliged to provide free legal aid to the person. Second right is the right to necessary medical aid, this being the right of the person to be examined by a doctor. This right includes the right the person to be examined by a doctor of her/his choice, if the person is able to bear the costs of this examination by himself. The third right is the right immediately after the detention to be able to inform the family or a third person by his choice, about the deprivation of liberty.

Furthermore, in order the deprivation of liberty to be in accordance with the standards of Article 5 of the Convention, the facility where the person is accommodated is needed to provide specific conditions. In the case Dougoz v. Greece[xxiii], the applicant, a Syrian national, was deprived of liberty and held in police detention, while awaiting his return to Syria. He was held several months in the center for detention at the police station in Drapecona, Greece, where he was detained in overcrowded and dirty room, without basic sanitary conditions, without a bed, there was rarely any hot water. At the prison there was no fresh air, no natural daylight, nor a yard for walks. Later, in April 1998, he was transferred at the central police station, where the conditions were very similar to the ones before. The difference was that there was hot water and natural daylight. He was held there until December 1998, when he was transferred to Syria. The Court took a stance that the conditions under which the applicant was held during the time he was deprived of liberty at the center for detention, as well as at the police station itself, especially the over crowdedness of the rooms, lack of sleeping beds, combined with the unusually long duration of this detention, can be treated as degrading treatment in the sense of Article 3 of the Convention. Additionally, the Court in this case determined violation of Article 5, paragraph 1 and 4 from the Convention.

Taking in consideration the aforementioned standards, it seems that very few of them are taken into consideration when depriving of liberty of migrants as well as when establishing conditions at the facilities where they are detained in Republic of Macedonia. Which are the main problems when determining detention and accommodation of migrants at facilities where they are kept until their expulsion from Republic of Macedonia? A number of interviews were held with the migrants detained at the reception center in Gazi Baba in the period from 05.04 until 10.05. 2016 and the following groups of problems, or actions contrary to the international standards and national legislation, were located.

The first problem is that the persons deprived from liberty are not given a document that would contain the legal ground for deprivation of liberty, the authority that reached this decision and legal instructions for the possibility of contesting this decision. The only document they are given is a confirmation for temporary seized items, for their personal items seized during the deprivation of liberty. The persons are not taken in front of a court or another authority with judicial prerogatives at all before the detention; some of them are taken in front of a court at the moment when they are giving a statement as witnesses – victims in a criminal procedure against suspects for smuggling migrants. There are cases where

the persons complain being beaten by the police at the moments of deprivation of liberty. Several persons during the interviews state that one person suffered serious arm injuries, inflicted by the police authorities at the moment of the arrest. None of the persons is notified for how long he will be detained.

When detained, the persons usually are not provided the right to a consultation with a lawyer, or the right to a free legal aid or this right is provided totally ineffectively. There are situations when the persons are allowed to talk to lawyers, but the conversation takes place in the presence of the police officials. In general, when deprived of liberty, they are not informed about their rights. In some cases, the right to free legal aid is provided for them in a language they don't understand at all. The right to medical examinations is provided in some cases, but there is a problem with the persons in need of specific medical attention, or who are under a specific therapy. There are certain detainees complaining that a doctor has not examined them at all, even though they asked for that. The right to contact family or third close persons is provided in a way that the persons have access to phone once a week or once in five days.

The biggest problems are the conditions at the facility where the detainees are accommodated, that is the reception center for foreigners in Gazi Baba. All of the persons complain of the over crowdedness in the rooms where they are accommodated. Almost all of the persons point out the problem with the food at the detention facility, some of them say that they receive food once a day, all of them complain about the quality of the food they receive. Almost all of them state that they manage to find food, by paying the police officers to buy them additional food. Almost all of the detainees complain on the hygiene, some of them say they are not given basic personal hygiene supplies, such as soap or toilet paper. There are complaints about the hygiene of the rooms where they are accommodated, the rooms and toilets being very dirty and are rarely cleaned. Usually there are no complaints on the treatment by the police officers and the staff at the facility.

By the rules, man and women are accommodated at separate rooms; there are cases where men are accommodated at rooms intended for women. In some cases, members of one family are accommodated separately; the biggest problem is that there are cases where children are accommodated separately, at different facilities from the adult members of their families.
Analyzing the findings from the interviews with the migrants deprived from liberty, a general conclusion can be reached that the aforementioned international standards are very rarely fully implemented. In most of the cases we can detect actions that violate Article 5, paragraphs 1 and 4 of the Convention, in separate cases there are elements of inhuman and degrading treatment, contrary to Article 3 of the Convention.

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[1].Special Rapporteur on the Human Rights of Migrants. A/HRC/20/24, §9, April 2012. [2].ECtHR, Shamsa v. Poland, No. 45355/99 and 45357/99, 27 November 2003
[3]. ECtHR, Nolan and K. Russia, No. 2512/04, 12 May 2009
[4]ECtHR, Muskhadzhiyeva and Others v. Belgium, No. 41442/07, 19 January 2010
[5]ECtHR, Kanagaratnam and Others v. Belgium, No. 15297/09, 13 December 2011
[6]CPT Standards, CPT/Inf(2002)1 rev. 2015, Section IV (Immigration detention) [7]ECtHR, Dougoz v. Greece, 40907/98 , 6 March 2001

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