Macedonian Young Lawyers Association

REFUGEES AS A SECURITY CONCERN IN THE REPUBLIC OF MACEDONIA

Reality or misuse of law?

Martina Smilevska- Kcheva
Ivan Kochovski

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Authors
Martina Smilevska - Kcheva
Ivan Kochovski

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Bojana Bozhinovska

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Executive summary

1. General context

Macedonia has hosted refugees since its independence in 1991, with the arrival of refugees from Bosnia and Herzegovina (BiH) and Croatia. A further influx, of significant proportions, was experienced in 1999 as a result of the Kosovo conflict. In total, temporary humanitarian protection was granted to 400,000 refugees from the region, out of which 360,000 were from Kosovo. The majority of these have since returned; of the 408 individuals who remain, the majority belongs to the Roma, Ashkali and Egyptian (RAE) ethnic groups from Kosovo. Of the persons that remain in the country in 2017, 19 persons have refugee status and 357 persons enjoy a subsidiary protection status. All of these persons have been part of the integration programs and processes led by the Ministry of Labor and Social Policy and supported by UNHCR and its partners.

Since 2010, Macedonia has been receiving and hosting an increasing number of asylum-seekers from outside the region, primarily from Afghanistan, Pakistan, Somalia and more recently from the Syrian Arab Republic. In 2011, Macedonia received 744 asylum applications from individuals from outside the region, four times more than in 2010. Throughout the years, as the conflicts in the Middle East, particularly in Syria and Iraq, heightened the number of asylum applications has significant grown. For this reason, the number of asylum claims was the highest in 2015, when 1896 persons applied for asylum in Macedonia. With the strengthening of the border controls and increasing efforts by both EU and non-EU states along the so called 'Western Balkans Route' to reduce irregular and facilitated transit of refugees and migrants, the numbers of asylum seekers dropped significantly. In 2016, there were 762 persons who submitted an asylum application, while until November 2017, 142 persons submitted an asylum claim in Macedonia.

An increasing problem that has affected both refugees from Kosovo who have been residing in Macedonia under an international protection status since 1999 and all of the new asylum seekers, is the use of national security as an exclusion ground to either terminate or reject a request for international protection. UNHCR in 2015 noted

> *"Reference to national security concerns appears to be used excessively as a ground for rejection of applications for international protection, without adequate justification. These decisions are hence made regardless of whether the asylum-seeker otherwise meets the criteria to be granted international protection, and it is further noted that the reference to the exclusion clause in the Law on Asylum and Temporary Protection is not in line with the 1951 Convention. In 2014, 13 cases were rejected on grounds related to national security concerns."* [1]

[1] 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, Aug. 2015, available at http://www.refworld.org/pdfid/55c9c70e4.pdf

The same issue was raised by the Committee against Torture[2] and Amnesty International[3].

2. Methodology

In preparing this analysis, qualitative and quantitative methods for data collection and analysis were combined in order to ensure the reliability and validity of data- review of literature, review of MOI decisions and Administrative and Higher Administrative Court judgments from 2011 till 2017, relevant statistics and laws, as well as review of ECtHR judgments, which are later appropriately structured. The numbers and statistics included in this report have been obtained from the Macedonian Young Lawyers Association (MYLA) database. MYLA is the only organization that provides free legal aid to all asylum seekers, refugees and persons under subsidiary protection in Macedonia.

The overview of the literature was compiled, thus gathering information on the researched concept and context in which the analysis was conducted. This overview encompassed documents containing information about what does the concept of national security means, its scope and relation to refugee protection regimes, as well as government activities, strategies and current trends that reflect their implementation. Additionally, the review included significant literature and research on the topic, as well as relevant national and international legal solutions and practices.

In order to directly assess the situation of the "affected" refugees/ persons under subsidiary protection in Macedonia, as well as to obtain an objective picture of the current situation, two case studies have been prepared to investigate and demonstrate the experience of individual refugees in relation to Ministry of Interior decisions to cease their subsidiary protection. Case studies are particularly important for this research due to the fact that they provided an overview of the experiences of refugees in the national legal system.

State institutions targeted with the study were the Ministry of Interior, the Administrative Court and the Higher Administrative Court, which practices were examined through reviewing and analyzing their decision-making in the period 2011- 2017. The study also benefited from available reports and information obtained from UNHCR, ECtHR, EU and other relevant international organizations.

3. Legitimate security interests of the state and refugee protection

The growing security concerns of States, prior but more intensively during the 2015/2016 Europe's` refugee crisis, have largely affected how refugees are perceived by host countries and to large extent undermined the international regime for their protection. Security concerns and the fight against terrorism created division in Europe over how best to deal with the massive influx of people, have exacerbated restrictive asylum policies and rise of xenophobia. In some cases refugees have been

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[2]Committee against Torture, Concluding Observations: Macedonia, 2015, available at http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MKD/CAT_C_MKD_CO_3_20486_E.pdf

[3] Amnesty International, "Europe's Borderlands Violations against Refugees and Migrants in Macedonia, Serbia and Hungary", 2015 available at https://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf

perceived as threats to the security of states and even as potential terrorists based on their nationality, religion or country of origin.

Security is certainly a legitimate interest of States. The State has a right to protect itself and to adopt policies and measures to protect its population, including all residents under its jurisdiction, whether nationals or non-nationals. States, in good faith, have also undertaken international obligations in human rights, including the international protection of refugees. However, it is important to note that the legitimate interest of security is compatible with the international protection of refugees, and must be executed with respect for human rights. Indeed, security and the fight against terrorism are human rights issues equal to the international protection of refugees, and should not be viewed as antithetical or in conflict with one another. Refugees are often the first victims of a lack of security and terrorism. It is therefore important to discuss how the two rights complement each other and how the adoption of public policies, regulatory and institutional frameworks for the international protection of refugees can reaffirm and strengthen the security of States[4].

In a world in which security, as an expression of the legitimate interests of States, influences the definition and adoption of public policies, it is necessary for States to fairly balance their legitimate national security interests and their international obligations for the protection of human rights. Presently, States invoke national security interests in adopting restrictive policies on asylum, giving precedence to immigration controls, without establishing sufficient safeguards to identify and ensure protection to asylum seekers and refugees. While it is possible to suspend or restrict the enjoyment and exercise of certain rights and freedoms, such measures are limited by human rights instruments, among which the Convention relating to the Status of Refugees 1951 and its 1967 Protocol.

Security concerns amongst states have largely affected the protection of refugees[5], particularly in three specific areas:

Access to national territory- People in need of protection are now subject to the indiscriminate application of stricter immigration controls, which are increasingly applied in countries of origin, transit countries, and on the high seas. Persons are subject to scrutiny based on their nationality, religion, or country or region of origin. These situations represent additional limitations on a refugee's ability to enter a territory in search of protection[6]. Additionally, in some cases administrative detention is used with increasing frequency with those seeking asylum, including, in some countries, the application of automatic detention provisions based on the nationality, origin, or religion of the

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[4] Juan Carlos Murillo, "The Legitimate Security Interests of the State and International Refugee Protection", SUR-International Journal on Human Rights, June 2009, available at: http://www.scielo.br/scielo.php?pid=S1806-64452009000100007&script=sci_arttext&tlng=en (Accessed 01.12.2017)

[5] The protection of refugees is not incompatible with the legitimate security interests of States. For more on this, see UNHCR (2001).

[6] In November 2015, the Macedonian Border Police deported 40 refugees from the Reception Centre Vinojug to Greece, since they were not from Syria, Iraq, or Afghanistan. This practice came as a response to similar deportations conducted by the Serbian authorities the previous day, which were in turn a response to deportations by the Croatian authorities. The rationale behind such selective border closures was the idea that Syria, Iraq and Afghanistan are countries engulfed in
war, thus people coming from these countries are in need of international protection, while, by default, all others are considered to be 'economic migrants', not in need of international protection.

applicant, which violates the requirement that detention be exceptional in nature, the principle of non-discrimination (Article 3, Convention Relating to the Status of Refugees of 1951), and the requirement that no sanction be applied for illegal entry (Article 31 of the Convention Relating to the Status of Refugees of 1951).

The process for determining refugee status- Security considerations are also negatively impacting the interpretation and the definition of refugee status through the use of increasingly restrictive criteria of Inclusion Clauses. Refugees have not been defined by virtue of their nationality since the adoption of the Refugee Convention of 1951, which defines the key element to justify a person seeking refugee status as a "well-founded fear of persecution", in connection with one of the "protected grounds". However, some countries now take the refugee's manner of entry into the country, nationality, ethnic origin, and region of origin into account when determining refugee status. The Refugee Convention of 1951 establishes that some refugees may not benefit from international protection, because they either do not need it or do not deserve it (Exclusion Clauses). It is troubling that, in the interest of security, Exclusion Clauses are actually being applied before determining whether applicants meet the definitional requirements set forth in the 1951 Convention. Moreover, UNHCR reiterates that, in order to safeguard the right of asylum and the international protection regime for refugees, it is necessary to apply the Inclusion Clauses first and only afterwards analyze the possible application of the Exclusion Clauses. It is first necessary to establish whether a person meets all the elements set forth in the refugee definition, then to analyze whether the person needs or deserves international protection[7]. In certain circumstances, some people do not need or deserve international protection. While the Exclusion Clauses are absolute and restrictive in their interpretation, States that invoke "national security" to deny refugee status, as if it were a new "Exclusion Clause," are in fact violating the spirit and the provisions of the 1951 Convention. In the same vein, the UNHCR reiterates that the security exception to the prohibition of expulsion or return (principle of non-refoulement), set forth in the second paragraph of Article 33 of the Convention Relating to the Status of Refugees of 1951, is not an additional ground for exclusion, but rather an exception only to be invoked by the State in exceptional circumstances.

The exercise of rights and the search for durable solutions- It is clear that security considerations may affect the exercise of fundamental rights of refugees, such as the search for long term integration in the host country. An uninformed public opinion, or manipulation of information for populist ends, can generate xenophobia and discrimination against refugees from a certain nationality, a particular ethnicity or a specific religion. Security considerations also affect the local integration of refugees and the quotas established by States that regulate the number of resettled refugees they will accept.

Security is both a right of refugees and a legitimate interest of States. It is therefore important to understand that the security of States and the protection of refugees are complementary and mutually reinforcing. In this spirit, legislation regarding refugees and fair and effective operational procedures

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[7] Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to
the Status of Refugees, available at: http://www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html (Accessed 01.12.2017)

for the determination of refugee status can be utilized by States as useful tools to solidify and strengthen their own security. Coherent and consistent implementation of the refugee definition allows States to identify those who need and deserve international protection and those who do not. This is precisely why immigration controls should not be applied indiscriminately, but must have specific safeguards to permit the identification of those who need international protection as refugees[8].

3.1. The principle of "*non- refoulment*" and exceptions to this principle under Article 33 (2) of the 1951 Refugee Convention

The importance and the scope of the principle of non- refoulment is clearly seen in the UNHCR and its Executive Committee position, which have even argued that the principle itself is progressively acquiring the character of ius cogens9. International human rights law additionally provides forms and instruments of protection that supplement this principle. For example, Article 3 of the 1984 UN Convention against Torture10 stipulates that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture". Similar, Article 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where torture or persecution is feared11. In regional, European context, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a "real and substantiated" risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment12. While Article 33 (2) of the 1951 Convention foresees exceptions to the principle of non-refoulement, international human rights law and most of the regional refugee instruments set forth an absolute prohibition, without exceptions of any sort, thus demonstrating the strong international consensus in the respect of this principle.

The cornerstone of international refugee protection is the principle of non- refoulment, guaranteed with the Article 33 of the 1951 Convention and as such has become part of the customary international law. "*Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of*

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[8] Juan Carlos Murillo, "The Legitimate Security Interests of the State and International Refugee Protection", SUR- International Journal on Human Rights, June 2009, p.127

[9] See Executive Committee Conclusion No. 25 para. (b); UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5.

[10] Available at: http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html (Accessed 30.11.2017)

[11] For more details see M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993), Article 7 para. 21

12 For further information see UNHCR, 'The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons', European Series 2 (1996), No. 3. As regards recent jurisprudence, see Ahmed vs. Austria Judgement 71/1995/577/663 of 17 December 1996 and Chahal vs. the United Kingdom Judgement 70/1995/576/662 of 15 November 1996.

race, religion, nationality, membership of a particular social group, or political opinion"[13]. This principle applies to any person who is a refugee as anticipated in the 1951 Refugee Convention, which is anyone who meets the inclusion criteria of Article 1A (2) and does not come within the scope of one of its exclusion provisions[14]. This principle does not apply only to the country of origin, but as well to other countries where person has reasons to fear persecution (related to the grounds set in the 1951 Convention) and/ or from where risks to be sent back to the country of origin[15]. The only allowed exceptions from this principle, are the circumstances explicitly stated in Article 33 (2)[16] of the 1951 Convention. According this Article, the exception can happen only in two situations: first, where there are "*reasonable grounds for regarding (the refuge) as a danger to the security of the country in which he is*", and, second, where the refugee "*having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country*"[17]. When a person is "accused" for certain serious actions, these actions have to be in relation to the endangering the security of the country itself. Atle Grahl-Madsen, a leading refugee law scholar, summarized the discussions of the drafters of the 1951 Convention on this point as follows: "*Generally speaking, the 'security of the country' exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned".* Therefore, the first instance authority has to present valid facts and evidences and by all means to prove that with the removal of that person from its territory, the existing danger for the country will be removed as well. Meaning that the removal of a refugee in this context is lawful only if it is necessary and proportionate, as with any exception to a human rights guarantee- *first,* there must be a rational connection between the removal of the refugee and the elimination of the danger (resulting from his or her presence for the security of the host country); *second*, refoulement must be the last possible resort for eliminating the danger to the security or community of the host country and *third*, the danger for the host country must outweigh the risk of harm to the wanted person as a result of refoulement[18]. The burden of proof for establishing that the criteria as outlined above are met, rest on the State applying the provision. Above all, a right to appeal and legal representative has to be given.

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[13] Sir Elihu Lavterpacht and Daniel Bethlehem, Refugee Protection in International Law, Global Consultations, The scope and content of the principle of non-refoulement: Opinion, 2003, p.89

[14] See UNHCR, Advisory Opinion on the Extraterritorial Application of Non- Refoulment Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, at para. 6

[15] See Paul Weis, The Refugee Convention, 1951, at p.341, quoted in E.Lauterpacht and D. Bethlehem, footnote 32, at paragraph 124

[16] "*The benefit of (Article 33 (1) may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he (or she) is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*"

[17] Submission of the Office of the United Nation High Commissioner for Refugees in the case of Z.A v. Section for Asylum, Ministry of Interior of The Former Yugoslav Republic of Macedonia, June 2010, page 9, para. 5.2.3

[18] Submission of the Office of the United Nation High Commissioner for Refugees in the case of S.A v. Section for Asylum, Ministry of Interior of The Former Yugoslav Republic of Macedonia, June 2010, page 11, para. 5.2.9

3.2. Practice of the European Court of Human Rights in light of the *non refoulment* principle

Even though the European Convention on Human Rights (ECHR50) does not specifically address, nor explicitly deals with refoulement, Article 319 is widely used as a legal instrument in asylum cases. The European Court of Human Rights (ECtHR) interpreted this silence as an absolute prohibition of *refoulement* if there is a real risk that the concerned person will be subjected to torture, inhuman or degrading treatment or punishment. The ECtHR has made this clear back in 1989 in *Soering v. the United Kingdom*, a case concerning extradition to face charges of a brutal murder allegedly committed before admission to the territory of the respondent state. The ECtHR in this case held: *"It would hardly be compatible with the underlying values of the Convention … were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed"*[20]. Since *Soering* the ECtHR reiterated its position in numerous judgments that concerned failed asylum seekers[21], including those who fell within the ambit of one of the exclusions clauses in Article 1F 1951 Refugee Convention. In *Chahal v. the United Kingdom*[22], the Court made it clear that the prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases, and that it does not leave any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged. After 9/11 several Governments attempted to challenge the absolute protection against *refoulement* under Article 3 of ECHR50, again by introducing the balancing test, by raising the standard of proof placed on asylum seekers who resent a threat to national security, and by using diplomatic assurances from the authorities in asylum seekers' country of origin. However, the ECtHR refused to moderate its position and rejected all three abovementioned arguments, by reaffirming the absolute protection of Article 3 in *Saadi v. Italy*[23]. The Grand Chamber of the ECtHR stated that "*it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State*"[24], and held that increasing applicant's standard of proof is not compatible with the absolute nature of the protection afforded by Article 3 either, and made clear that "[diplomatic] *assurances* [given by the authorities of the country of origin], *in their practical application*, [must provide] *a sufficient guarantee that the*

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[19] Article 3, Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", European Convention of Human Rights, p. 6, available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf [accessed 01 September 2012]

[20] CASE OF SOERING v. THE UNITED KINGDOM *(Application no. 14038/88),p.28, paragraph 88,* available at:http://www.asylumlawdatabase.eu/en/content/soering-v-united-kingdom-application-no-1403888 (Accessed on 29.11.2017)

[21] Meaning asylum seekers who claimed asylum, but received a negative decision from the respective authority

[22] CASE OF CHAHAL v. THE UNITED KINGDOM (Application no. 70/1995/576/662), available at: http://www.unhcr.org/refworld/pdfid/3ae6b69920.pdf (Accessed on 29.11.2017)

[23] Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.unhcr.org/refworld/docid/47c6882e2.html (Accessed on 29.11.2017)

[24] Saadi v. Italy, Appl. No. 37201/06, page 32, paragraph 138, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.unhcr.org/refworld/docid/47c6882e2.html (Accessed on 29.11.2017)

applicant would be protected against the risk of treatment prohibited by the Convention"[25]. In conclusion, Article 3 from the ECHR50 as interpreted by the ECtHR provides absolute protection against *refoulement*. So does Article 2, the right to life from the ECHR.

Furthermore, there are no exclusion clauses in the ECHR and, hence, every individual within the jurisdiction of the High Contracting Parties of the ECHR, enjoys rights and freedoms defined in Section I of the ECHR. What is interesting to notice is that the absolute protection of *non- refoulment* silently provided in the ECHR and loudly confirmed by the ECtHR in its case law, in a way is in stark difference to the 1951 Refugee Convention. Namely, the 1951 Refugee Convention not only that stipulates limitations to the principle of *non-refoulement* in Articles 32 and 33, but also limits the personal scope of the 1951 Refugee Convention by exclusion clauses in Article 1F. Even though these two refugee law instruments are different in kind, meaning differences in their signatory states, their scopes of protection, the status of the beneficiaries they provide as well as the nature of the principle of *non-refoulemen,* yet the influence that the ECHR50 and its lively implementation by its Contracting State Parties, the ECtHR, as well as its placement in the overall legal system of the European Union makes it the most unique, powerful and non- discriminatory human rights mechanism for protection the rights of the individuals. Thus, making it impossible to be neglected in today's constellation of international law and world politics.

4. Refugees and National Security – The Macedonian Context

4.1 Scope of Article 6, Law on Asylum and Temporary Protection of the Republic of Macedonia

The exception of the principle of "non- refoulment" in the Macedonian asylum legislation can be found in the Law on Asylum and Temporary Protection (LATP)[26]. Namely, Article 6 and Article 29 are used as a basic legal argument (condition) in cases where the first instance authority finds that a person (whether with granted refugee or subsidiary protection status or an asylum seeker) constitutes a danger to the security of the Republic of Macedonia. Article 6 from the Macedonian Law on Asylum and Temporary Protection titled "Reasons for Exclusion" in the first paragraph reads: *An alien cannot enjoy the right of asylum in RM if there is well-grounded suspicion that he has: committed a crime against peace, humanity or a war crime, according to the international acts in which such crimes are provided for; committed a serious (non-political) crime, outside the territory of the Republic of Macedonia prior to being admitted in it as a refugee; or, has been guilty of acts contrary to the purposes and principles of the United Nations*. Besides the reasons established in paragraph 1 of this Article, an alien shall not be granted subsidiary protection, that is cannot enjoy the right to asylum in the Republic of Macedonia, also if she or he constitutes a danger to the security of the Republic of Macedonia. An alien cannot enjoy the right to asylum if she or he instigates or in other manner participates in committing the crimes and acts mentioned in paragraphs 1 and 2 of this Article. In

[25] Saadi v. Italy, Appl. No. 37201/06, page 36, paragraph 148, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.unhcr.org/refworld/docid/47c6882e2.html (Accessed on 29.11.2017)

[26] Official Gazette of the Republic of Macedonia Number 19, Year: LXV, Friday, 13 February 2009

addition, Republic of Macedonia may exclude the right to subsidiary protection to an alien who prior to his or her admission in the Republic of Macedonia has committed one or more crimes outside the scope of paragraph 1 of this Article, which would be punishable by imprisonment, had they been committed in the Republic of Macedonia, and if she or he has left her/his country of origin in order to avoid sanctions for the crimes committed.

4.2. Current practice and Numbers

As the previous section highlights, exclusion on the grounds of national security is formally regulated by Article 6 of the LATP. However, neither this article nor the law in general provides further insight regarding the scope, use and limitations of this ground. For this, we turn to the practice. The Sector for Asylum within the Ministry of Interior is the administrative body which is the first instance decision maker in asylum related cases.

Practice shows that in the process of reviewing and assessing asylum applications the Sector for Asylum requests a security assessment for the particular applicant from the Office for Security and Counterintelligence at the MOI (Security Office). The Security Office then issues the assessment which indicates if the person is considered a threat to the security of the country. According to the LATP, the security assessment is neither binding nor a requirement in the asylum procedure. This means that the Sector for Asylum, when conducting the refugee status determination can, but is not obliged, to take into account the opinion and assessment of the Security Office.

If the person is not deemed as a threat, the Security Office informs the Sector for Asylum of their assessment in a short letter. The practice is different for persons who the Security Office considers to be a threat to national security. In such cases, the Security Office issues two documents, a confidential one and a non-confidential one. The non-confidential document shortly indicates that the Security Office, through their security assessment, considers the person concerned to be a threat to the security of the nation. The confidential document, on the other hand, contains the details of the assessment and the specific reasons of why that person is a threat. In order to access the confidential document, a security clearance issued by the Ministry of Interior is needed.[27] The Sector for Asylum as an administrative body does not have the necessary security clearance to access the confidential document which the Security Office issues.

For persons who have been considered a threat to the security of the country by the Security Office, the Sector for Asylum issues a short rejection or cessation decision stating the grounds for exclusion of international protection based Article 6 of the LATP have been met and that they pose a threat to the security of the country. These decisions do not provide any insight or details of the reasons for which the person concerned is considered a threat.

[27] Security Clearances in Macedonia are regulated by the Law on Classified Information. In order to obtain access to various levels of classified information, a security clearance certificate is needed. Such a certificate may be issued to a person, an administrative body or a legal entity, upon request to and with approval of the Directorate for Security of Classified Information.

Since 2010, there have been 199 persons whose asylum claims have been rejected or their protection statuses ceased based on the ground that they pose a threat to the security of the nation under Article 6 of the LATP. Of these, 84 were men, 54 were women and 61 were children. Of the total number, 30 persons are asylum seekers, 1 person had a recognized refugee status, and the other 168 persons had a subsidiary protection status. The persons who enjoyed a refugee or a subsidiary protection status received decisions ceasing their protection statuses, while the asylum seekers received decisions rejecting their claims.

Figure 1 - Persons in asylum related procedures considered to be a threat to national security by gender/age

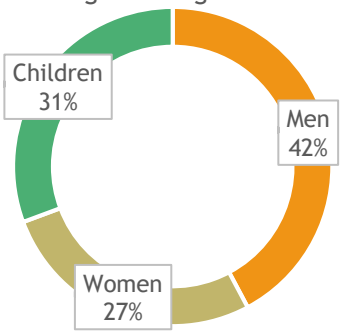
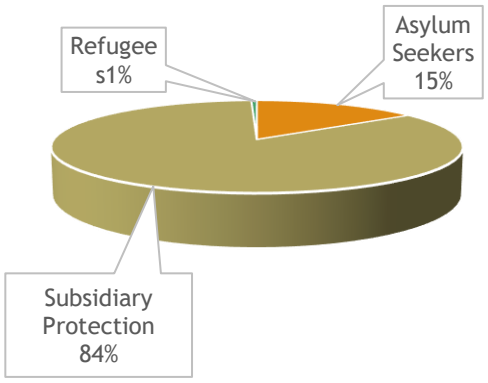


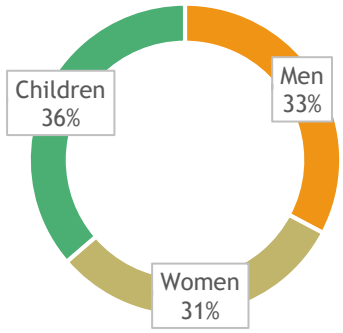
Figure 2 - Persons in asylum related procedures considered to be a threat to national security by status type



4.2.1. Subsidiary Protection and Recognized Refugees

An overwhelming majority, or 84.5%, of all national security cases concern persons who have been under subsidiary protection and the national security ground has been used as the primary argument in the cessation of their protection status (Figure 2). These 168 persons all belong to the ethnic Roma, Ashkali and Egyptian (hereinafter Roma) communities who fled the violence in Kosovo in 1999 and have been residing in Macedonia since. Within this group, there are 34 families encompassing 131 individuals. Of the total number of Roma under subsidiary protection who have had their status ceased, 55 are men, 52 are women and 61 are children. This means that over a third of all Roma whose subsidiary protection statuses have been ceased have been children below the age of 18 (Figure 3). In terms of the cessation of the recognized refugee status, since 2010 there has only been one case of a Palestinian man whose refugee status was revoked based on national security grounds.

Figure 3 - Roma whose subsidiary protection status has been ceased on national security grounds by gender/age



The decisions for the termination of the subsidiary protection status are brief and do not provide any insight into the reasons of why the person is considered a threat to national security. Namely, they indicate that the grounds for exclusions under Article 6 of the LATP have been met as the person is considered to be a threat to the national security. If the person concerned has dependents (ex. children), they are also listed in the decision and their protection statuses are revoked on the same grounds. Some of these decisions include a sentence stating that the Sector for Asylum has acted in accordance with an official MOI note, indicating the reference number and date of that note. This note is a reference to the security assessment documents by the Intelligence Agency.

A step forward in this matter was taken by the European Court of Human Rights in the case of *Ljatifi v. Macedonia*[28]. The Court found violation of Article 1 of Protocol 7 referring to the procedural safeguards relating to expulsion of aliens. The facts of the case are as follows: In 1999, the applicant (at that time eight years old) and her family (parents and three brothers and sisters) fled Kosovo and settled in Macedonia, where she has been living since. In 2005 she received asylum and permission for stay. She is in an extramarital union with a Macedonian citizen, with whom she has three young children (children also have Macedonian nationality). Her residence permit was extended every year until February 3, 2014. On 03 February 2014, the Ministry of Internal Affairs adopted a negative decision to terminate the protection of the applicant, considering it is "a risk to [national] security".[29] The domestic courts upheld that decision, noting that it was based on a classified document obtained from the Intelligence Agency. They considered irrelevant the applicant's argument that the document had never been disclosed to her.[30]

The Court based its decision upon the following general principles: A) The expulsion decision must be in accordance with the law, is clear, precise and provides an opportunity to predict the consequences that would arise from the adoption of such a decision; B) Even when it comes to national security, the concepts of legality and the rule of law in a democratic society require measures for deportation affecting fundamental human rights to be subject to appropriate procedure before an independent authority or a court competent for the effective examination of the reasons for them to consider the relevant evidence, if necessary with appropriate procedural restrictions on the use of classified information; C) Every person must have the opportunity to challenge the relevance of the evidence on the basis of which it is determined that that person is a threat to national security; and D) While the

[28] The case was supported by the lawyers engaged in the "Advocacy, providing information on the asylum procedure, legal assistance and representation of UNHCR persons of concern" project implemented by MYLA.
[29] https://bit.ly/2GEzWsL page 45
[30] https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5afd64e64

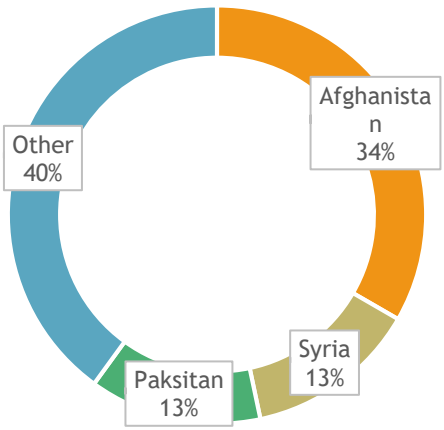
executive's assessment of what constitutes a threat to national security is of great importance, the independent authority or court must react in cases where the reference to this concept does not have a reasonable basis in the facts or reveals the interpretation of "national security" that is illegal or contrary to common sense and is arbitrary.

In accordance with the factual situation and the general principles explained above, the Court found violation determining the following: a)The decision of the Ministry contained a general statement that the applicant is a threat to the national security with no real evidence and facts to support these claims; b)The only evidence was the classified document adopted by the Intelligence Agency that the applicant and the Court did not have the chance to assess it and challenge it; c)Having that in mind, the Court determines that the national courts restricted themselves to purely formal examination of the impugned decision and did not explain the importance at all to preserve the confidentiality of that document or the degree of review it has carried out.[31]

4.2.2. Asylum seekers

Since 2010, there have been 30 asylum seekers in Macedonia whose claims were rejected based on national security grounds, of which 2 were women and 28 were men. The ethnicities and countries of origin of these persons vary however more than half of these persons (Figure 2) are from three countries Afghanistan (10), Pakistan (4) and Syria (4).[32]

Figure 4 - Asylum Seekers Rejected on National Security Grounds by Country of Origin



The decisions rejecting asylum claims on the national security ground are not different than the ones which terminate the protection status. These decisions indicate that upon reviewing the asylum seekers claims and evidence, the Sector for Asylum concludes that the grounds for exclusion under Article 6 of the LATP have been met as the person concerned is considered as a threat to the national security. This means that the Exclusion Clauses were actually being applied before determining whether the applicants meet the definitional requirements set forth in the LATP and the 1951 Convention.

[31] Ljatifi v THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA No. 19017/16 Council of Europe: European Court of Human Rights, 17 May 2018, available at https://www.refworld.org/pdfid/5afd648f4.pdf

[32] The other countries of origin of asylum seekers who have been rejected at the first instance based on national security are as follows: Algeria (1), Bulgaria (1), Comoros Islands (2), Guinea (2), Iran (1), Iraq (1), Kosovo - Roma (1), Serbia (1), and Somalia (2).

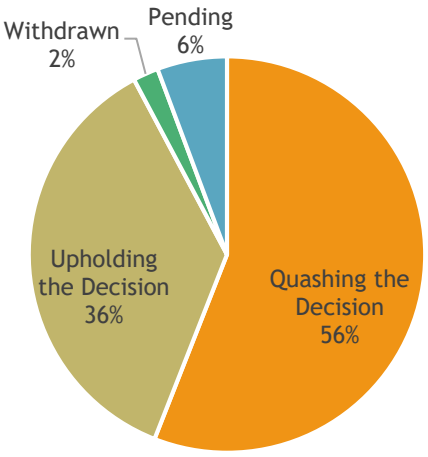
4.3. Challenging asylum decisions related to national security

A remedy against the decision of the Sector for Asylum in Macedonia is the Administrative Court, as a second instance. However, challenging asylum cases which are related to national security has proven to be a daunting task. The primary reason for this is the use of confidential documents as the key piece of evidence in the proceedings. As previously noted, the Sector for Asylum does not have the necessary security clearances in order to access the reasoning of the security assessments conducted by the Security Office. For this reason, the administrative decisions in these cases are very brief and only make a reference to the exclusion ground and relevant article of the LATP without detailing reasons for which the person is considered a threat.

This means that the Sector for Asylum bases their decisions on evidence which they cannot access and assess in full. The same applies to the asylum seeker or person under subsidiary protection, including their lawyers, who also cannot access a piece of evidence that is crucial in their asylum procedure. This raises number of issues pertaining to the fairness of the administrative procedure and the equality of arms, which will be further discussed later on.

Of the total of 199 persons who had their asylum claims rejected or international protection statuses terminated, 193 persons challenged these decisions before the Administrative Court of Macedonia (AC). The case law and practice of the AC shows that in the majority of cases the Administrative Court has ruled in favor of the applicant. Namely, in judgments concerning 108 persons the Court ruled in favor of the applicant, quashed the administrative decision and instructed the Sector for Asylum to re-examine the case concerned. In general, in these decisions the Court reasons that there is no sufficient evidence to show that the national security exclusion ground in Article 6 has been fulfilled due to lack of evidence and that the material truth in the case has been erroneously established in violation of both the LATP and the Law on General Administrative Procedure. All of the judgments where the Court rules in favor of the applicant, refer the case back to the Sector for Asylum for re-examination. The Administrative Court has not in any of its judgments relating to asylum and national security ruled on the material question, i.e. the rejection of the asylum claim or the termination of the protection status.

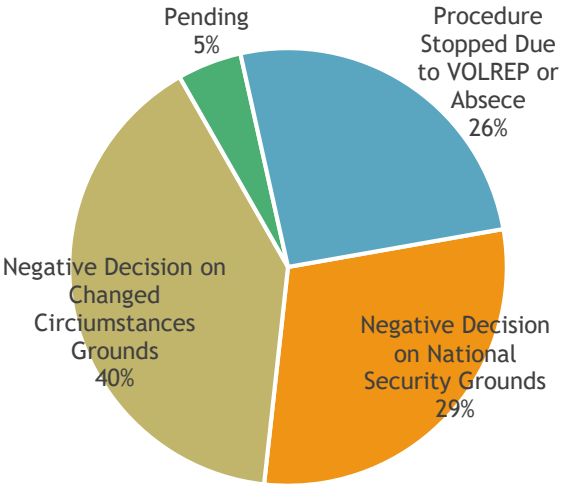
Figure 4 - Verdicts of the AC Related to Asylum and National Security by Outcome



Furthermore, the Administrative Court has upheld the rejection or termination decision of the Sector for Asylum in relation to 70 persons, while the lawsuits for 4 persons were withdrawn due to absence or death and the cases for 11 applicants are still pending review.

In the judgments with which the decisions of the Sector for Asylum were upheld, the Court indicates that the administrative procedure has been conducted lawfully, the facts of the case have been well established, and that Sector for Asylum was right to reject or terminate the protection status of the applicant, as there exists an official note indicating that the person is a threat to the security of the country.

Figure 5 - Decisions by the Sector for Asylum following a judgement in favour of the applicant

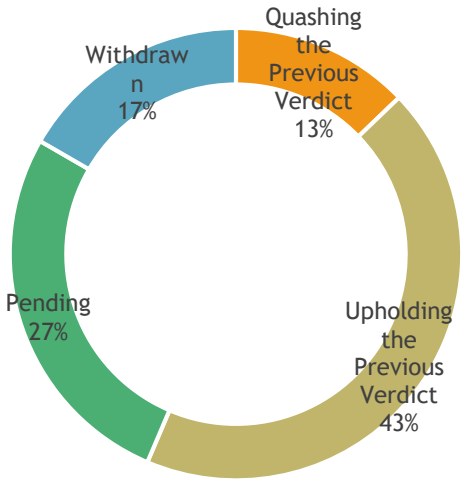


It is important to highlight that there are no cases where the Sector for Asylum has granted an asylum status or has decided not to terminate an international protection status following a judgment in favor of the applicant. Namely, for 31 persons whose cases were referred back for reevaluation the Sector for Asylum brought a second decision rejecting the asylum claim or terminating the protection status with nearly identical reasoning and again without disclosing the evidence or reasons for considering the person as a threat to national security. For 27 persons the asylum and protection procedures were stopped due to absence or voluntary repatriation, while 5 cases are still pending reexamination at the Sector for Asylum. An important practice to highlight is the fact that in relation to 42 persons who received a judgment in their favor, the Sector for Asylum has issued a second decision terminating their subsidiary protection status based on the ground that the circumstances in the country of origin for which the protection was granted to the applicant have changed.[33]

[33] Law on Asylum and Temporary Protection, Art. 38.1-5.

On the other hand, the case law of the Higher Administrative Court (HAC) shows a different practice. Of the 91 applicants which have filed an appeal against the decision of the AC, the HAC ruled in favor of the applicant in the cases regarding 10 persons, quashed the decision of the AC and referred the case to the Sector for Asylum for reevaluation. In cases regarding 34 persons the HAC upheld the verdict of the AC to terminate or reject the protection status of the applicant. The cases for 21 persons are still pending review at the HAC, while the appeals of 13 persons were withdrawn due to absence, death or voluntary repatriation.

Figure 6 - Verdicts of the HAC Related to Asylum and National Security by Outcome



5. CONCLUSIONS

Security is an individual`s right, but as well a right of the State itself. The State has an obligation to protect its citizens and all persons under its jurisdiction. Absolute security is never going to be attained. The sacrifices any given state and its citizens would have to make to attain this would be too great. Thus, what does a successful security policy means? When do the ends justify the means? While this concept may seem to be obvious, it is far from being such. Security is a delicate concept, one that everyone takes seriously. Therefore, it is not surprising that we find ourselves amongst security policy where the ends might not justify the means, or rather where the road and repercussions of these policies do not justify the means. The issue of policy is one that is highly complex and adds the variant of the perceptions of the governmental elites into the mix along with the different levels and sectors of security[34].

The right to effective remedy and access to information which led to the termination of the subsidiary protection status- Security is crucial for the respect and enjoyment of other human rights and for strengthening the rule of law, but whether it (public security) can be above the rule of law? Whether security of the state, people and society is even possible when there is no effective and stable legal system? Until the security frame of the policy practicing is supplanted, the existence and the practice of a human rights- based asylum system in the country will not be possible. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that the "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective

[34] Buzan Barry, "Security According to Buzan: A Comprehensive Security Analysis", Marianne STONE, page 8

remedy before a national authority […]"[35]. The ECtHR has established extensive case law on the question of effective remedies. According to the Court, "rigorous scrutiny" of an arguable claim is required because of the irreversible nature of the harm that might occur, in case of a risk of refoulement contrary to Article 3 of the ECHR[36]. The remedy must be effective in practice as well as in law. It must take the form of a guarantee. The judicial practices of the Administrative and Higher Administrative Court show that even though the court's reasoning in the majority of the cases is aimed at correcting the practices of the administrative authority, the judgments, even in cases where the procedure is repeating for second, even third time, the court does not show courage to decide the case in the merit with bringing final decision on the ceased right to asylum. This clearly shows that in practice it is highly arguable that the provided remedy is effective.

Moreover, the right to an effective remedy must include sufficient procedural safeguards also in case of matters related to national security[37]. Procedural guarantees include the right of the applicant to have access to the information based upon which the decision was taken. The current administrative and judicial practice in the country shows that none of the 199 persons whose right to subsidiary protection was ceased (from 2011 till 2017), persons where not informed on the basis of which evidence the decision was taken. Moreover, in the majority of the cases, nor the administrative authority, nor the court had any clear idea on the assessment issued by the Office for Security and Counterintelligence at the MOI, which indicates if the person is considered a threat to the security of the country. This clearly demonstrates that the authorities do not support and base their decisions on acquiring all relevant evidences and thus establishing well founded factual situation. In the case C.G. and Others v. Bulgaria[38], the Court clearly states "*that the domestic courts which dealt with the decision to expel the first applicant did not properly scrutinise whether it had been made on genuine national security grounds and whether the executive was able to demonstrate the factual basis for its assessment that he presented a risk in that regard. Secondly, the applicant was initially given no information concerning the facts which had led the executive to make such an assessment, and was later not given a fair and reasonable opportunity of refuting those facts […]. It follows that these proceedings cannot be considered as an effective remedy for the applicants' complaint under Article 8 of the Convention*".

Individualization of the use of the "threat to national security" concept - A decision that a refugee/ subsidiary protection status is terminated due to the fact that the concerned individual constitutes a risk to the security of the host country, would not be consistent with the conceptual legal framework of the international protection regime. Revocation of refugee status and, by analogy subsidiary protection status, can only occur if s/he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of

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[35] European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf, p.12
[36] Jabari v. Turkey, Appl. No. 40035/98, ECtHR, 11 July 2000, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-jabari-v-turkey-application-no-4003598-11-july-2000 (Accessed on 11.12.2017)
[37] Chahal v. The United Kingdom, Application no. 70/1995/576/662, available at: http://www.unhcr.org/refworld/pdfid/3ae6b69920.pdf (Accessed on 11.12.2017)
[38] C.G. and Others v. Bulgaria, Appl. no. 1365/07, ECtHR, 24 April 2008, http://www.asylumlawdatabase.eu/en/content/ecthr-cg-and-others-v-bulgaria-application-no-136507-24-july-2008 (Accessed on 11.12.2017)

such crimes; s/he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee and s/he has been guilty of acts contrary to the purposes and principles of the United Nations[39]. In light of this, it is very important to emphasise that the application of Article 33 (2) of the 1951 Refugee Convention, does not result in termination of the refugee status, rather it means that it is a sole estimation of the state whether that person will be deprived from the right not to be returned to his/hers country of origin, meaning that no longer can enjoy the protection against refoulment as provided under Article 33 (1). This means that Article 33 (2) does not form a part of the refugee definition, thus does not constitute a ground for termination of the international protection[40]. This position is as well taken by the Administrative Court, namely the court states "*the defendant authority in the contested decision wrongly relied on Article 38 of the mentioned law* (meaning LATP), *because in this article there are no prescribed conditions for termination of the right of asylum for reasons stated in the contested decision* (that the person constitutes a danger to the security of the Republic of Macedonia)[41]". We have to have in mind that revocation of the refugee status and, by analogy subsidiary protection status, can only occur on the basis of Article 1F (a) or (c) of the Convention. Individuals granted subsidiary protection, who are determined to be a "danger to the security of the host country", are nevertheless subject to the host country`s criminal law, and, by analogy, in certain cases to expulsion procedures in accordance with Article 32 of the 1951 Convention (which allow some persons who would otherwise be refugees to be excluded on the grounds of acts of terrorism, war crimes or serious crimes)[42] , and/or exceptionally to refoulment under Article 33 (2)[43]. At the same time in order "security of the country" exception to apply, there must be individualized finding that the refugee as such poses a current or future danger to the host country. Article 33 (2) articulates on the appreciation of a future threat from the person concerned, rather than on the commission of an act in the past. The exception is thus concerned with the danger to the security of the country in the future, not in the past.[44] The analysis of the current caseload of 199 persons whose right to subsidiary protection was ceased (from 2011 till 2017), shows that there was no criminal proceeding initiated against the concerned persons, nor police examination

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[39] On the basis of Article 1F of the Refugee Convention, detailed explanation available at: http://www.unhcr.org/4ca34be29.pdf (Accessed on 15.12.2017)

[40] Submission of the Office of the United Nation High Commissioner for Refugees in the case of Z.A v. Section for Asylum, Ministry of Interior of The Former Yugoslav Republic of Macedonia, June 2010, page 12, para. 5.3.2

[41] Administrative Court of the Republic of Macedonia, verdict number U-6 br.863/2011, available at: http://www.usskopje.mk (Accessed 12.12.2017)

[42] Article 32 of the 1951 Convention provides: "**1**.The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order**. 2.** The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. **3.** The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary." Available at: http://www2.ohchr.org/english/law/refugees.htm

[43] Submission of the Office of the United Nation High Commissioner for Refugees in the case of S.A v. Section for Asylum, Ministry of Interior of The Former Yugoslav Republic of Macedonia, June 2010, page 12, para. 5.3.3

[44] Submission of the Office of the United Nation High Commissioner for Refugees in the case of Z.A v. Section for Asylum, Ministry of Interior of The Former Yugoslav Republic of Macedonia, June 2010, page 9, para. 5.2.4

was conducted, which means that there were no criminal charges that preceded before deciding or re-deciding on the asylum, let alone on grounds clearly stated in the Refugee Convention. Moreover, 61 of them are children. The factual situation clearly shows that the administrative authority does not fully understands the concept of "threat to national security", nor the fact that the same must be brought in clear and undoubted connection to the "accused" individual, who above all must be subjected to the country`s criminal laws.

Ethnicity and the role of security in the search for lasting solutions for refugees – The use of national security as an exclusion ground in asylum related cases has particularly affected the community of Roma refugees who fled Kosovo in 1999. Of the total number of persons who have been considered as a threat to the national security in asylum related cases, an overwhelming majority (84.5%) are ethnic Roma, as shown above. Most of the Roma refugees from Kosovo have enjoyed a subsidiary protection status[45], have continuously resided in Macedonia for over 17 years, have established strong family and private ties and have been part of the integration processes in the country. Despite their long term residence in the country none of these Roma have been able to acquire Macedonian citizenship. The inability to acquire Macedonian nationality is closely linked to the considerations that they pose a threat to the security of the country. Namely, while the security assessment is not a mandatory requirement in the asylum procedure, it is in the procedure for acquiring nationality. This means that all the Roma refugees who have been labeled as a threat to the national security by the Security Office will not be able to obtain a nationality even if they fulfill all other requirements. This fact becomes particularly alarming when considering that nearly a third of these persons are children. These 61 children that have had their statuses revoked based on the national security threat exclusion clause face a real risk of living a life of destitution, without access to Macedonian citizenship and reasonable prospects of integration into the Macedonian society, despite the fact that they have been born in the country. The aforementioned numbers and the consequences of the termination of the international protection status point to the fact that the exclusion ground 'threat to national security' has been systematically used against Roma refugees from Kosovo.

Subsequently, the sole existence of asylum policies and legislative that offer fair and efficient system for examining the asylum application in the country, does not mean that full protection can be offered, especially not if inconsistencies and pitfalls on the way of its implementation are occurring. It is as well important in this direction to raise awareness of the fact that refugees are victims of insecurity and terrorism, not their causes, and States can count on an international regime of refugee protection that takes into account their legitimate security concerns. In this securitization game the issue on securitizing or potential securitizing of asylum can be perceived as well from another perspective- whether there is a greater moral imperative on states to securitize their own citizens, before taking on responsibilities to protect foreign nationals remains? Professor Zetter suggests that the former

[45] Until 2003 most refugees from Kosovo, including ethnic Roma enjoyed a humanitarian protection status.

responsibility is not prior to the later[46]-"*The fact that all the EU countries voluntarily and willingly signed up to the 1951 Convention indicated that the intrinsic values of Europeans was not concerned exclusively or primarily with self- interest, but also with values of humanitarianism and justice".* This perhaps as well can be said for the Republic of Macedonia, not just as State party to the 1951 Convention since 18 January 1994, but as well as supporter of the many internationally recognized instruments for protection of human rights. After all, the 1951 Convention adequately balances the legitimate security interests of states and the humanitarian considerations relating to refugee protection. The analysis of the contemporary Macedonian asylum policy and practices clearly shows that until the country`s security frame is fully developed, the relevant legal provisions fully respected and efficiency in the performance of the state institutions increased, Macedonia won`t be able to have adequate and sufficient tools to ensure fair and just asylum system, properly balanced with the national security interest.

[46] Prof. Roger Zetter, University of Oxford, "Changing identities, declining protection: securitization of asylum and refugee policy in Europe", Refugee Law Initiative, jointly with the British Refugee Council "New challenges in Refugee Integration Seminar", London 26.01.2012

ABOUT THE ORGANIZATION

Macedonian Young Lawyers Association (MYLA) was founded in 2004. Through initiatives and determination, MYLA took the role of being a transformative agent in the young legal professionals segment, in a time of already initiated reforms in the judicial system in Republic of Macedonia. MYLA's members then considered that there would be no alternative nor can there be any reforms without the participation of youth through coordinated joint activities toward an effective and efficient implementation of judicial reforms and the rule of law in the country.

To accomplish this vision, MYLA actively supports young lawyers in their professional development through different projects and activities always aiming to achieve a higher level of expertise. MYLA also provides citizens and other persons with qualitative and easy access to pro bono legal aid related to the protection of human rights and liberties, and supports marginalized groups in the society. MYLA provides expertise and support in strategic advocacy of human rights in certain areas and issues.

The extent of our advocacy is in front of national and international human rights bodies where MYLA generally represent persons in need of legal aid. MYLA`s primary focus is promoting the principles and rights of the European Convention on Human Rights with tendency of advocacy of selected cases before the European Court of Human Rights in order to comply with the generally accepted international standards for promotion and protection of basic human rights and liberties. The association also implements projects related to the protection of the human rights, such as nondiscrimination, free access to information, free legal aid, asylum, stateless, migration etc. All MYLA activities are integrated into the basic maxim of MYLA Iuventus cupida legume (youth eager for rights).

Macedonian Young Lawyers Association

CONTACT US

Str. Donbas 14/1-6, 1000 Skopje
Tel: +389 2 3220 870
Email: contact@myla.org.mk
Visit us on our website: www.myla.org.mk